

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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TUNICA-BILOXI TRIBE OF LOUISIANA; RAMAH NAVAJO SCHOOL BOARD, INC.,	)	
	)	
Plaintiffs,	)	Case No. 1:02CV02413
	)	Judge Reggie B. Walton
v.	)	Magistrate Judge Deborah A. Robinson
	)	
UNITED STATES of AMERICA; MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services; DIRK KEMPTHORNE, Secretary of the United States Department of the Interior,	)	
	)	
Defendants.	)	
	)	

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**DEFENDANTS' OPPOSITION TO**  
**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION AND SUMMARY OF ARGUMENTS

Plaintiffs have moved for partial summary judgment in this putative class action. They assert that the Secretary of Health and Human Services (HHS) has violated the Indian Self Determination Act (ISDA) in numerous ways. Before addressing the merits of these claims, the jurisdictional prerequisites of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 et seq., and the ISDA, 25 U.S.C. § 450m-1(a), (d), necessarily preclude review of most of their theories of relief. As this Court previously held, this Court lacks subject matter jurisdiction over any theories or amounts not previously presented administratively under the CDA. Accordingly, this Court lacks jurisdiction to review Plaintiffs' newly minted claims and newly calculated amounts.

For those claims over which the Court has jurisdiction, summary judgment is not warranted. These claims lack merit because, at bottom, this is a contract case. Defendants' threshold contract defenses, including the application of waiver and estoppel, lack of breach, and lack of damages, all serve to prevent Plaintiffs from prevailing on their flawed claims. The "contract price" is found within the four corners of Plaintiffs' contracts with the Indian Health Service (IHS). These contracts reflect set amounts which IHS offered and Plaintiffs accepted. IHS paid these amounts. The contracts authorize no other award.

Even if the Court reaches the merits of Plaintiffs' various claims, they still fail because they violate fundamental tenets of appropriations law and cost principles. Under Plaintiffs' "rate dilution" theory, IHS would have to foot the bill for the costs of non-IHS programs incurred by Plaintiffs. In fact, IHS programs comprise less than half of each of Plaintiffs' portfolio of programs; if the Court ruled as Plaintiffs desire, tribal contractors could assume 90% non-IHS contracts, but shift the entirety of the indirect costs associated with those contracts to IHS.

Shifting costs from one agency to another is contrary to appropriations law, but the Plaintiffs' logic would accomplish precisely that perverse outcome.

Plaintiffs hope to evade scrutiny of the dubious merits of their cost-shifting theory by invoking the judicial doctrine of collateral estoppel or issue preclusion. Specifically, Plaintiffs rely upon a Tenth Circuit decision involving a different contracting agency: the Department of the Interior (Interior or DOI). That case concerned ISDA contracts with the Bureau of Indian Affairs (BIA), a component of Interior. The BIA contracts at stake in that litigation were funded by Interior's appropriations, formed under Interior's regulations and contracting policies, and involved Interior's programs. Here, in contrast, Interior is merely an incidental party, because Plaintiffs challenge IHS contracts funded by IHS appropriations, formed under IHS regulations and contracting policies, and involve IHS programs.

Plaintiffs have also failed to show mutuality of parties, because HHS and Interior do not stand in privity with each other: Congress has not authorized Interior to represent HHS's interests in litigation or elsewhere. Because evidence of IHS contracting policy would have been irrelevant to BIA contracting policy, the issues are not legally identical. Neither HHS nor IHS was a named defendant in the BIA contract litigation. Plaintiffs, who were members of that class, chose not to challenge IHS' contracts, appropriations, regulations, contracting policies, or programs in that court – plainly saving their challenge for another day. By failing to take any steps to bring HHS into that case, Plaintiffs evinced their own intent to treat IHS contracts separately from BIA contracts, and thus binding IHS would be fundamentally unfair. Absent mutuality, a legally identical issue, and fairness, collateral estoppel cannot apply.

Even were this Court to agree that the preconditions for collateral estoppel exist here, this Court should nevertheless exercise its discretion and decline to apply the doctrine. First, a well-

established exception applies: a change in legal climate. Since the Tenth Circuit’s ruling, the legal landscape surrounding Plaintiffs’ claims for additional indirect CSC has changed legislatively and judicially, triggering the relevant exception to collateral estoppel. Reacting to the Tenth Circuit’s ruling, Congress promptly clarified the ISDA to forbid the cost shifting urged here, and the Supreme Court recently resolved a longstanding dispute on the nature of ISDA contracts. Second, Plaintiffs are themselves estopped from asserting that HHS is bound by the prior case against Interior.

Plaintiffs newly fabricated carry-forward claims are also meritless. The ISDA mandates neither a sum certain nor a rate methodology other than the one used by the National Business Center (NBC) to calculate fixed-with-carry-forward rates. NBC’s methodology is entirely consistent with the ISDA, Office of Management and Budget (OMB) Circulars, and generally accepted cost allocation principles. Finally, by filing only a motion for partial summary judgment in response to the Court’s Order mandating the filing of all dispositive motions, Plaintiffs have conceded their damage claims to years after 1997.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendants’ Memorandum<sup>1</sup> fully describes the statutory and regulatory background of this action. Def. Mem. at 3-10. In particular, it outlines how Congress provided Tribal contractors with a powerful vehicle – the declination action – for immediate federal court review of the Secretary of HHS’s decision to decline to fund an ISDA contract at the level or under the terms proposed by the Tribal contractor, id. at 3-5, and how the CDA strictly governs disputes

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<sup>1</sup> For purposes of this Opposition, Defendants’ Memorandum in Support of Motion for Summary Judgment (Dkt. #111) will be referred to as “Defendants’ Memorandum” or “Def. Mem.” Plaintiffs’ Motion for Partial Summary Judgment (Dkt. #110) will be referred to as “Plaintiffs’ Motion” or “Pl. Mot.” and Plaintiffs’ Memorandum in Support of Motion for Partial Summary Judgment (Dkt. #110) will be referred to as “Plaintiffs’ Memorandum” or “Pl. Mem.”

following contract formation, id. at 5-6. It also explains how IHS contracting policy permits, but does not require, Tribal contractors to submit as a starting point for indirect cost funding negotiations indirect cost rates. Id. at 6-10. These rates are independently negotiated by a Tribal contractor and its cognizant agency, and if a Tribal contractor is dissatisfied with the agreed-upon rate, the relevant regulation provides for an administrative appeal process to challenge the rate administratively. Id.

(i) The Plaintiffs. Tunica-Biloxi Tribe of Louisiana (Tunica) is a federally-recognized Tribe in the State of Louisiana. 2d Supp. Am. Compl. ¶ 8. Since before 1995, Tunica has had a self-determination contract with the Secretary of HHS to run a comprehensive health service program for its members. See id. Ramah Navajo School Board (RNSB), is a New Mexico non-profit corporation established by the Ramah Navajo Chapter of the Navajo Nation. 2d Supp. Am. Compl. ¶ 9. Since 1975, RNSB has had a self-determination contract to run a health clinic. Id. At issue in this case are Tunica's contracts covering fiscal years 1995-2001, and RNSB's contracts covering fiscal years 1995-2003. Tunica IHS Contracts (Def. Ex. 6-8); RNSB IHS Contracts (Def. Ex. 9-12).

Both Plaintiffs negotiate indirect cost rates with DOI/NBC. Moberly Dec. ¶ 40 (Def. Ex. 3). Tunica proposed and negotiated fixed-with-carry-forward rates with NBC for 1995 (53.23%) and 1996 (54.78%), Tunica Agrs. (Def. Ex. 13-14), but has not obtained an indirect cost rate for any year after 1996, Moberly Dec. ¶ 41 (Def. Ex. 3). RNSB proposed and negotiated fixed-with-carry-forward rate agreements with DOI for 1995 (25.8%), 1996 (21.3%), 1997 (17.2%), 1998 (20.49%), 1999 (19.33%), 2000 (18.40%), 2001 (17.30%), 2002 (17.04%), 2003 (15.55%), 2004 (17.5%), 2005 (14.49%), and 2006 (16.30%). RNSB Agrs. (Def. Ex. 15-20, 56).

(ii) Tunica's Administrative Claims. On April 2 and September 27, 2001, Tunica submitted contract dispute (CDA) claims to IHS related to its 1995 through 2001 contracts and AFAs. Tunica CDA Claims (Def. Exs. 21-22). Tunica raised three legal theories to support its claims. The first was that IHS had underfunded indirect CSC generated by its indirect cost rate ("Claim One" or "the underfunding claim"). Id. The second challenged the calculation of its indirect cost rate, relying on Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) ("Claim Two" or "the RNC" claim). The third challenged the rate methodology as not making adjustments for shortfalls in the carry-forward ("Claim Three" or "the carry-forward shortfall claim"). Id. Claim Three's specific theory applied the RNC claim to the carry-forward calculation, alleging that none of the tribal contractor's "actual under-recoveries" from agencies "whose programs were not included in the direct cost base" were carried forward, but that all of the tribal contractor's actual over-recoveries were carried forward, thereby depressing the rate. Id. Tunica's 1995-2001 CDA claims raise no other theory as a basis for challenging the carry-forward calculation.

(iii) RNSB's Administrative Claims. On August 31, 2001, RNSB submitted contract dispute claims to IHS related to its 1993-1996 contracts. RNSB 1993-1996 CDA Claims (Def. Ex. 24). RNSB raised only Claims One and Two.<sup>2</sup> Id. To date, RNSB has not submitted any claims related to its 1997 contract. On December 30, 2003, RNSB submitted an additional contract dispute for 1998, which likewise raised only Claims One and Two. RNSB 1998 CDA Claims (Def. Ex. 25). On September 21, 2005, RNSB submitted a third claim letter related to its contracts in effect between 1999-2003. RNSB 1999-2003 CDA Claims (Def. Ex. 26). In this letter, RNSB raised Claims One, Two, and Three. RNSB's CDA claims – including its 1999-

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<sup>2</sup> RNSB has dismissed its claims for 1993 and 1994, and thus they are not included.

2003 CDA claims challenging the carrying-forward for reflecting over-recoveries, but not under-recoveries – raise no other theory as a basis for challenging the carry-forward calculation.

(iv) The Procedural History of This Case. Defendants’ Memorandum describes the procedural history of this case at 10-15, and is therefore only summarized here. Plaintiffs filed their complaint several years after Congress clarified the ISDA to correct what it perceived to be an “erroneous decision” in the BIA contractor litigation, Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (RNC). The operative complaint is the Second Amended Complaint, filed February 26, 2003, as supplemented by Plaintiffs’ Supplemental Complaint, filed July 5, 2006. In January 2004, the Court dismissed many of Plaintiffs’ claims for lack of subject matter jurisdiction due to lack of presentment under the CDA. See Tunica-Biloxi v. United States, No. 02-2413, slip op. at 8-15 (D.D.C. 2004) (Dkt. 48) (hereinafter referred to as “Tunica 2004 Mem. Op.”). The case was thereafter stayed pending the Supreme Court’s decision in a related matter. The Supreme Court issued its decision in March 2005, addressing, inter alia, the fundamental nature of an ISDA contract. See Cherokee Nation v. United States, 543 U.S. 631, 638-39, 125 S. Ct. 1172, 1178-79 (2005). On December 12, 2005, the Court ordered Defendants to file any appropriate dismissal motions. On January 12, 2006, Defendants filed a Renewed Motion to Dismiss and on January 13, 2006, Plaintiffs filed a Motion for Partial Summary Judgment. After taking 56(f) discovery, Defendants opposed Plaintiffs Motion, and on May 27, 2006, a Cross-Motion for Summary Judgment. On June 5, 2006, the Court dismissed all motions without prejudice to permit 56(f) discovery on them, and later, directed re-filing of dispositive motions by December 21, 2006. On that date, Defendants moved to dismiss, or in the alternative, for summary judgment, and Plaintiffs moved for partial summary judgment (Dkts. 111, 110).

(v) Plaintiffs' (Renewed) Motion for Partial Summary Judgment. Plaintiffs have moved for partial summary judgment. Pl. Mot. at 1-2. Specifically, they seek money damages for “underpayment of indirect costs on [ISDA] contracts” for 1995-1997, and as well as equitable reformation of those contracts, and declaratory relief that the “current system for computing” indirect CSC does not conform with the ISDA. Id. at 1-2. Plaintiffs also seek injunctive relief “for all years and future years” relating to what they call “manipulations” of the rate system. Id.

Plaintiffs raise two sets of arguments. First, with respect to their claims relating the inclusion of non-paying agencies in the base, Plaintiffs argue that collateral estoppel precludes this Court from reaching the merits of their legal contention that IHS' use of the OMB A-87 methodology to calculate indirect costs violates the ISDA. Plaintiffs argue that (i) RNC, the Tenth Circuit's pre-Cherokee decision in the BIA contractor litigation, applies to IHS, Pl. Mem. at 8-13, and (ii) on the merits, IHS's practices violate the ISDA. Id. at 13-16. Second, raising many theories of relief for the first time in this five year litigation, Plaintiffs argue that Defendants have improperly applied carry-forward calculations in Plaintiffs' rates. Id. at 17-24.

## ARGUMENT

### **I. STANDARD OF REVIEW**

Under Rule 56(c), a court may only grant a motion for summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). On a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party, Bayer v. United States Dep't of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992), drawing all reasonable inferences in the nonmoving party's favor, without making credibility determinations

or weighing the evidence, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 135, 150, 120 S. Ct. 2097, 2010 (2000).

**II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER MANY NEWLY ASSERTED CLAIMS AND AMOUNTS IN PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.**

This Court has already held that the CDA's limited waiver of sovereign immunity for suits against the United States depends upon an ISDA contractor's compliance with administrative filing requirements. Tunica 2004 Mem. Op. at 8-11; 41 U.S.C. § 605(a) ("All claims by a contractor against the government relating to a contract *shall be in writing and shall be submitted to the contracting officer for a decision.*" (emphasis added)). Accordingly, in 2004, this Court dismissed all of Plaintiffs' new and different claims that should have been presented to the contracting officer in the first instance. Tunica 2004 Mem. Op. at 13-15; see Johnson Controls World Servs. v. United States, 43 Fed. Cl. 589, 592 (Fed. Cl. 1999) ("A valid claim must give adequate notice by specifying the *basis and amount* of liability.") (citation omitted) (emphasis added).

In its 2004 Opinion, the Court also rejected the application of the "enlarged claim doctrine," which permits the Court to exercise jurisdiction over "an increase in the amount of the claim [that had been presented to the contracting officer] if (1) the party requesting the increase neither knew nor reasonably should have known of the factors justifying the increase prior to issuance of the final decision, and (2) the increase is based on the same operative facts." Tunica 2004 Mem. Op. at 14-15; Johnson Controls, 43 Fed. Cl. at 594; SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (Cl. Ct. 1990). See also Tunica 2004 Mem. Op. at 16 (declining to dismiss claims asserting "alternate theory to obtain recovery of the amounts they sought from the contracting officers" as plaintiffs "did not seek any additional sums of money").

**A. This Court Lacks Jurisdiction Over Many of Plaintiffs' Claims.**

RNSB has not presented the IHS contracting officer with any CDA claims for Fiscal Year 1997. Zuni Dec. ¶ 6 (Def. Ex. 2). Thus this Court lacks jurisdiction over any of RNSB's claims relating to 1997. RNSB presented its sole theory relating to the carry forward for fiscal years 1999-2001. (Def. Ex. 26). Thus, RNSB did not present any carry-forward theory for the years in which RNSB seeks money damages in its Motion. This Court therefore only has jurisdiction over RNSB's damage claims for 1995-1996, and even in those two years, lacks jurisdiction over any damages claim relating to the carry-forward. Ripeness and standing doctrines also prevent Tunica from challenging rates for years in which it lacks a rate. Def. Mem. at 58-60.

**B. Plaintiffs Impermissibly Attempt To Enlarge Their Presented Claims.**

In its 2004 Opinion, the Court recognized its limited jurisdiction over certain of Plaintiffs' claims that had been administratively presented under the CDA. Tunica 2004 Mem. Op. at 8-19. In their Motion for Partial Summary Judgment, however, Plaintiffs attempt to shoehorn more damages into those presented theories. Plaintiffs improperly attempt to evade the CDA's narrow waiver of sovereign immunity, id. at 10, by employing brand new mathematical calculations to enlarge their claimed damages even beyond what they claimed was owed in their initially presented CDA claims. Compare, e.g., Burke Dec. ¶¶ 25-27 (Pl. Ex. 2) (calculating \$15,331 as Tunica's claimed damages for the "[RNC] miscalculation" in 1995), with Tunica CDA Claim for FY 1995 (Def. Ex. 22 at 2-3) (calculating \$13,938 as Tunica's claimed damages under RNC theory in 1995 with different methodology). These new calculations constitute new "operative facts" that were never presented. Tunica 2004 Mem. Op. at 14-15 (explaining parameters of "enlarged claim doctrine" (quoting Johnson Controls, 43 Fed. Cl. at 594).

Furthermore, because nothing about the 1995 rate calculations has changed in the five years since Plaintiffs first filed their complaint, Plaintiffs obviously knew or reasonably should have known of the factors justifying these creative new increases before their presented claims were adjudicated administratively. Id. See also id. at 16 (characterizing certain new claims as alternative theories because plaintiffs “did not seek any additional sums of money”(emphasis added)). Accordingly, this Court lacks jurisdiction over these recently expanded sums.<sup>3</sup>

**C. Plaintiffs’ Newly Minted Carry Forward Claims Were Never Presented.**

In an apparent effort to avoid the force of Defendants’ defenses against Plaintiffs’ RNC theory of “rate dilution” (defenses previewed by Plaintiffs in Dkt. #95), Plaintiffs now steer the Court in a decidedly different direction. Plaintiffs have manufactured entirely new theories of relief. These new claims center on the use and application of “carry-forwards” in the development of the particular indirect cost rates that Plaintiffs submitted to IHS as part of the IDC negotiation process. As Plaintiffs never presented the bulk of these newly-minted theories in their CDA claims, this Court lacks jurisdiction over most of them.

In their administrative filings, Plaintiffs asserted one – and only one – theory of relief relating to the carry-forward calculation. In fact, RNSB only presented that lone carry-forward theory for years outside the scope of the damage claims sought in their Motion. RNSB 1999-2003 CDA Claims (Def. Ex. 26); Tunica 1995-2001 CDA Claims (Def. Exs. 21, 22). This presented carry-forward theory was simple: “[N]one of the actual-under recoveries experienced in the years FY 1996 forward were carried forward by [OIG], but all of the actual over-recoveries of the Tribe were carried forward.” Def. Ex. 21 at 6; Def. Ex. 22 at 3. See also Def. Ex. 26 at 1-

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<sup>3</sup> Thus, even were this Court to award relief to Plaintiffs, the sums and calculations presented in Plaintiffs CDA filings limit their available damages.

2 (“NBC does not carry forward under-recoveries from other federal agencies whose programs are included in the denominator of the indirect cost rate, but does carry forward over-recoveries from other federal agencies . . . In addition, NBC uses theoretical over-recoveries in computing carry forward adjustments.”). Plaintiffs’ presented carry-forward theory complained of a particular kind of calculation: namely, the decision to carry-forward all over-recoveries but not under-recoveries. Compare Pl. (First) Motion for Partial Summary Judgment, Mem. at 27-28 (Dkt. # 81) (mentioning specific carry forward theory presented in administrative filings).

Plaintiffs now add to that single theory of relief with six new and different theories. These six newly invented bases of relief relating to the carry-forwards are: (1) the carry-forward calculation should consider “contract price,” Pl. Mem. at 19-20; (2) “double dipping,” id. at 21-22; (3) diversion of program monies, id. at 22-23; (4) diversion of tribal monies, id. at 23; (5) inclusion of Public Law 100-297 grant monies, id.; and (6) the vaguely stated “other manipulations,” including “rounding up” errors, id. Neither these new theories nor the corresponding amounts of liability that Plaintiffs assert as owed under their IHS contracts were presented pursuant to the CDA. Thus, this Court lacks jurisdiction to review them. Tunica 2004 Mem. Op. at 14-15; Johnson Controls, 43 Fed. Cl. at 592.

Unlike their originally presented carry-forward theory, each of Plaintiffs’ newly fabricated theories depends on different operative facts than the originally alleged failure to carry forward all over-recoveries, but not under-recoveries. Each new theory challenges wholly different features of the carry-forward calculation, and thus application of each theory requires varying mathematical calculations. Tunica 2004 Mem. Op. at 14. Both the newly asserted “double dipping” and “rounding up” theories, for example, complain of particular mathematical calculations unseen in the original CDA filings. Pl. Mem. at 21-22, 23. The new challenges to

the treatment of tribal monies, program monies, and Public Law 100-297 grants (which are DOI grants to Tribal contractors for education) each relate to the treatment of specific categories of costs as indirect cost recoveries in the first instance, id. at 22-23, where the originally presented carry-forward theory did not challenge how particular categories of costs were classified. The complex maze of new calculations outlined in Plaintiffs’ supporting declarations further illustrates how these claims – neither theories nor amounts – were never presented in the administrative process. Compare Burke Dec. ¶¶ 20-35 (Pl. Ex. 2); Kerkmans Dec. ¶¶ 20-38, especially Ex. 2 (Pl. Ex. 4); Donham Draft Dec. ¶ 18 (Def. Ex. 64), with Plaintiffs’ CDA Claims (Def. Exs. 21, 22, 26).

Testimony by Plaintiffs’ declarants highlight this blatant attempt to circumvent the CDA’s jurisdictional prerequisite, showing how at least one of the new theories – “double dipping” – was not even identified until after April 2006 (and no later than early August 2006), well after the complaint had been filed (Dkt. #1), amended twice (Dkt. ##8, 11), and further “supplemented” (Dkt. #102). Donham Dep. at 221:3-24, 229:25-232:11 (Def. Ex. 59); id. at 108:13-109:9 (discussing presence of double dipping theory in Aug. 10, 2006 draft declaration); Kerkmans Dep. at 59:1-60:16, 68:23-70:19 (Def. Ex. 58).<sup>4</sup> Contrary to Plaintiffs’ assertion that they only “learned” of the theory “through litigation in this case and [RNC],” Pl.

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<sup>4</sup> In its Order of June 5, 2006, this Court dismissed without prejudice fully and partially briefed dispositive motions for the purpose of permitting the parties to complete 56(f) discovery relating to the parties’ original motions for summary judgment (Dkts. ## 81, 99). It is highly unlikely that this Court intended to grant Plaintiffs permission to use such limited 56(f) discovery as a fishing expedition to support brand new theories of relief never *once* raised before in the course of a 5 year litigation and prior administrative proceedings. Compare Tr. of Jan. 12, 2007 Status Conf. at 5:23-6:4 (Def. Ex. 63) (asserting Defendants were on notice of Plaintiffs’ new carry forward theories, inter alia, due to Kerkmans’ April 2006 “deposition testimony . . . on the subject”), with Kerkmans Dep. at 59:1-60:16, 68:23-70:19 (Def. Ex. 58) (admitting genesis of “double dipping” theory *after* April 2006 deposition, thus subject *not* present in prior deposition).

Mem. at 17, Plaintiffs were fully aware of the existence of many of the adjustments they challenge for the first time in their Motion. Plaintiff's declarant, John Donham, acknowledged that one challenged calculation (denominated "double-dipping") is plainly visible on the carry-forward template used widely by tribal contractors and NBC/OIG since the early 1990s. Donham Dep. at 230:6-232:11 (Def. Ex. 59) (Q: "[W]ere you aware that this adjustment was made in the past?" A: "Sure. It's on the template. It is right on there."). But despite its presence on the template for over fifteen years – and despite Donham's active involvement in ISDA litigation for about as long – when asked why he had been unaware of the "double dipping" adjustment before, Donham said: "I missed it." *Id.* at 221:3-24. Plaintiffs can point to no new facts that they have since "discovered." Plaintiffs cannot bypass the CDA to slip in new theories based on old facts.

### **III. THIS COURT SHOULD DECLINE TO GRANT LEAVE TO AMEND THE COMPLAINT A FOURTH TIME AS FUTILE.**

By positing new claims for the first time in their Motion, Plaintiffs are deemed to "have initiated the process of amendment" of their already Amended (then later Supplemented) Complaint. *See Nat'l Wildlife Fed'n v. Costle*, 629 F.2d 118, 133 n.45 (D.C. Cir. 1980). This Court should exercise its discretion and deny Plaintiffs' de facto motion for leave to amend as futile. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962) (Describing improper circumstances warranting denial, such as "undue delay, bad faith or dilatory motive on the part of the movant, [or] repeated failure to cure deficiencies by amendments previously allowed").

As noted, Plaintiffs now craft a new basis of relief upon information available to Plaintiffs for well over a decade, long after the Complaint was already amended and later supplemented, and after motions for summary judgment were already filed and opposed. *Cf. Mississippi Ass'n of Cooperatives v. Farmers Home Admin.*, 139 F.R.D. 542, 544 (D.D.C. 1991) ("The concern in *Foman*, as in subsequent lower court cases, was that leave to amend should be

granted liberally in order to ensure that litigants have their day in court. By contrast, plaintiffs in the instant case would have the sun never set on their's . . . ."). Plaintiffs should not be allowed to circumvent pleading requirements at this late date, where, as discussed below, the proposed amendment would be futile.<sup>5</sup>

“While leave to amend ‘shall be freely given when justice so requires,’ Fed. R. Civ. P. 15(a), a district court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss.” Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 945 (D.C. Cir. 2004) (citing James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)). As explained supra, this Court lacks jurisdiction over the six newly fabricated theories of relief relating to the carry-forward, because Plaintiffs failed to present these claims administratively. Accordingly, amending the Complaint again to add these theories of relief would be futile, because for both the jurisdictional reasons described supra, and other defenses infra, the new allegations do not survive a motion to dismiss. See Nat’l Wrestling Coaches, 366 F.3d. at 945 (new allegations insufficient to create Article III standing); James Madison, 82 F.3d at 1099 (new allegations did not plead cognizable Due Process violation).

#### **IV. THIS COURT IS ENTITLED TO REACH DEFENDANTS’ THRESHOLD CONTRACT DEFENSES.**

As the Supreme Court held in Cherokee, the promises in an ISDA contract are binding like the ordinary promises in a procurement contract. 543 U.S. 631, 639, 125 S. Ct. 1172, 1178-79. IHS is thus bound by its promises - but so are Plaintiffs. Logically, therefore, contractual

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<sup>5</sup> Defendants have shown the recent vintage of these claims (likely between April and early August 2006). Thus, the reference to the carry-forward in the Complaint cannot satisfy “the purpose” of notice pleading here, which is simply to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Atchinson v. Dist. of Columbia, 73 F.3d 418, 421 (D.C. Cir. 1996).

defenses are fully available to Defendants. These defenses apply to both the RNC “rate dilution” theory, as well as to the newly fashioned carry-forward theories. Because Defendants’ Memorandum sets forth these defenses in depth, they are only briefly summarized here: (1) IHS fully performed under Plaintiffs’ contracts, Def. Mem. at 19-22; (2) by accepting the contract and continuing contract performance, without protest (among other actions), Plaintiffs waived any claim to additional funding from IHS, Def. Mem. at 49-53; see Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997); (3) because the Secretary relied to his detriment on the funding levels agreed upon and accepted by Plaintiffs in their agreements, Plaintiffs are estopped from claiming any additional funding from IHS, Def. Mem. at 53-55; see E. Walters & Co. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978); (4) by not challenging the rate administratively, Plaintiffs failed to exhaust their administrative remedies, Def. Mem. at 55-56; see Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004); and (5) Plaintiffs affirmatively waived claims related to the validity of the rates, Def. Mem. at 57; see Whittaker, 124 F.3d at 1446. Finally, Plaintiffs cannot show they are damaged, because they over-recovered for the relevant years, Def. Mem. at n.8; Moberly Dec. ¶¶ 58-71 (Def. Ex. 3); 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57).<sup>6</sup>

Plaintiffs repeatedly use the term “contract price” in relation to the ISDA. Notably, the term “contract price” appears nowhere in the ISDA itself. This specific application of that term appears to have been devised by Plaintiffs purely for purposes of this litigation. Kerkmans Dep. at 68:14-22 (Def. Ex. 58). The “price” of an ISDA contract is the amount upon which both parties agreed, not the amount that Plaintiffs simply hoped for. In fact, embedded in Plaintiffs’ challenge to IHS’s use of OMB A-87 rates is a false assumption: that IHS’s “use” of the rates is

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<sup>6</sup> NBC has obtained new information and has determined that RNSB had significant over-recoveries for 2003. 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57). Although NBC has not verified the data, Tunica admits to massive over-recoveries from IHS in 1996-2001. Id.

equivalent to a contractual promise by IHS to pay a rate-generated sum. This is incorrect. When Plaintiffs submit an indirect cost rate to IHS, it is nothing more than a *starting point* for negotiation for indirect cost funding of IHS contracts. Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2). IHS must take into account other factors, such as the need to equitably distribute limited appropriations to *all* Tribal contractors seeking CSC funding – not just Plaintiffs.

Indeed, Plaintiffs fail to point to any provision of their contracts reflecting any contractual promise by IHS to pay “rate times base” or a “rate generated amount.” Instead, as the four corners of Plaintiffs’ own contracts reflect, Def. Exs. 6-13, IHS promised each Plaintiff specific, set amounts of indirect funding.<sup>7</sup> Plaintiffs agreed to and accepted these amounts.<sup>8</sup> Furthermore, because “the proper time for [Plaintiffs] to have raised the issues that it now presents was at the time of contract negotiation, when effective remedy was available” through the declination process, Plaintiffs have waived their claim to reformation. See AT&T v. United States, 307 F.3d 1374, 1380-81 (Fed Cir. 2002), *reh’g en banc denied* (2003). In sum, the “contract price” is the amount actually promised in each contract – nothing more, nothing less.

**V. PLAINTIFFS’ “RATE DILUTION” ARGUMENTS BASED ON RNC ARE MERITLESS.**

**A. Plaintiffs Have Not Established Threshold Criteria for Collateral Estoppel**

Plaintiffs cannot depend upon collateral estoppel to evade legal scrutiny of their “rate dilution” claim. The Tenth Circuit’s holding in RNC, that the BIA’s use of the OMB A-87 methodology violates the ISDA under a specific and unique set of facts, does not control this

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<sup>7</sup> Donham Dep. at 224:24-225:10 (Def. Ex. 59) (“I think as a general rule what they state they are going to pay, they pay.”).

<sup>8</sup> It is axiomatic that a “grumbling acceptance” binds a party into an enforceable contract. See Arthur L. Corbin, 1 *Corbin on Contracts* § 3.30 at 473-75 (1993).

case. The RNC litigation involves a different contracting agency (BIA rather than IHS), operating under different contracting and funding policies, regulations and appropriations; different contracts for different programs; and a different, albeit overlapping, class of tribal contractors (BIA contractors rather than IHS contractors). Neither HHS nor IHS stands in privity with Interior, the BIA or NBC. Because evidence relating to IHS contracting policies would have been irrelevant in the BIA contractor litigation, the issue is not legally identical. And because Plaintiffs engaged in strategic behavior evincing their intent to pursue claims against IHS separately, binding IHS to the Tenth Circuit's decision would work a fundamental unfairness. Plaintiffs have thus failed to satisfy threshold criteria for offensive collateral estoppel.

As discussed further infra, even if this Court agrees that the preconditions for collateral estoppel have been met, this Court should nevertheless exercise its discretion and decline to apply the doctrine because (i) the well-settled exception to the doctrine applies: a changed legal climate, and (ii) Plaintiffs are themselves estopped from asserting that HHS is bound.

1. *The BIA Contractor Litigation: Ramah Navajo Chapter (RNC)*

The RNC class action was brought “on behalf of all Indian Tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA].”<sup>9</sup> RNC v. Babbitt, No. 90-0957, Mem. Op. at 1 (D.N.M. Nov. 4, 1998) (Def. Ex. 29), rev'd 112 F.3d at 1463-64; see RNC v. Lujan, No. 90-0957, Compl. ¶ 19 (Def. Ex. 28). BIA is Interior's ISDA contracting component, and thus, the challenged ISDA contracts were BIA contracts. See RNC, 112 F.3d at

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<sup>9</sup> In addition to naming the United States generally as a defendant, the complaint named as defendants agencies within the Department of the Interior: the Secretary of the Interior, the Assistant Secretary of the Interior for the Bureau of Indian Affairs (BIA), and the Chief of Interior's Office of the Inspector General (OIG). RNC Compl. ¶¶ 2-4 (Def. Ex. 28).

1458. The plaintiff, Ramah Navajo Chapter (RNC),<sup>10</sup> challenged the BIA's use of indirect cost rates, as negotiated by RNC and the OIG pursuant to OMB A-87, in the BIA's ISDA contracts. RNC, 50 F. Supp. 2d 1091, 1097 (D.N.M. 1999). The factual underpinning to the Tenth Circuit's opinion are RNC's five BIA contracts from FY1989. RNC, 112 F.3d at 1458. These contracts comprised 92% of RNC's program base, but the two state programs comprised only 8%.<sup>11</sup> RNC proposed to OIG (predecessor in function to NBC) an indirect cost rate for total administrative expenses, in which the denominator consisted only of the BIA's direct costs, while the numerator consisted of the entirety of their anticipated administrative expenses (\$364,021/\$755,770), yielding a proposed indirect cost rate of 48.1%. RNC, 112 F.3d at 1459. OIG disagreed with RNC's proposal, and offered a rate including the two state grants in the numerator, yielding an indirect cost rate of 44.5%. Id. Under this rate, RNC would receive \$336,318 in indirect costs for FY 1989, id., about \$28,000 less than the figure that the district court had found was required to run the entirety of its BIA contracts. See RNC, Mem. Op. at 4 (Def. Ex. 29). RNC agreed to use OIG's rate, but administratively challenged BIA's use of that rate in the BIA's ISDA contracts. See RNC, 112 F.3d at 1459.

Ultimately filing suit, RNC claimed that the BIA failed to provide statutorily mandated indirect costs in accordance with Section 450j-1 of the ISDA. RNC, Mem. Op. at 1 (Def. Ex. 29). Specifically, RNC challenged how its direct cost base included the costs of programs that

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<sup>10</sup> RNC is not the same entity as Plaintiff RNSB, though a close relationship exists between them. Cohoe Dec. ¶ 37 (Pl. Ex. 6).

<sup>11</sup> RNC's BIA direct contract funding totaled \$755,770. 112 F.3d at 1458. RNC also had two 1989 state contracts funded by the Department of Justice totaling \$62,927. Id. at 1459. The district court found that the indirect costs for administering the five BIA contracts were \$364,021, RNC, Mem. Op. at 3 (Def. Ex. 29), but the record was devoid of "the dollar amount of any indirect costs associated with the state contracts." Id.

did not pay indirect contract costs, thereby producing a rate that yielded a smaller indirect cost recovery for BIA programs. RNC, 112 F.3d at 1459. As a result of including the two state programs in the direct cost base, RNC contended that the BIA underfunded the indirect costs associated with the BIA contracts, and that the ISDA obligated the BIA to pay all of the indirect costs associated with administering the two state contracts. RNC, Mem. Op. at 3 (Def. Ex. 29). Finding the statute clear and unambiguous, the district court rejected RNC's claim and held that the BIA was required only to fund those indirect costs "as allocated to and associated with the BIA programs." Id. at 4, 9-10.

On appeal, the Tenth Circuit reversed, holding that the indirect cost rates used in RNC's BIA contracts violated the ISDA. RNC, 112 F.3d at 1463. Pivotal to the court's analysis was its determination that the ISDA provisions mandating payment of indirect CSC were ambiguous. Id. at 1460-61 (analyzing 25 U.S.C. §§ 450j-1(a)(2) and 450j-1(d)). The court emphasized the ISDA provision that at that time stated "[n]othing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract." Id. at 1461 (quoting 25 U.S.C. § 450j-1(d)), as well as the provision mandating payment of the "reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." Id. (quoting 25 U.S.C. § 450j-1(a)(2)). These two provisions, the court determined, were ambiguous on the question of the "extent to which indirect costs are to be funded by defendants." Id. The court emphasized the absence of statutory definitions for such terms as "reasonable costs" and "associated with." Id.

In light of the perceived ambiguity, the court relied on the canon of statutory construction interpreting ambiguous provisions to the benefit of Native Americans. Id. The court agreed with

the tribal contractors that the ISDA provisions “mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts.” Id. at 1463. By including in the direct costs base the funds RNC had received from the two state grants, the court held that, “[D]efendants unreasonably interpreted the Act by applying the pre-amendment indirect costs formula to determine the amount of indirect costs funding plaintiff would receive for fiscal year 1989.”<sup>12</sup> Id. By including the state funds in the direct costs base, “[D]efendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.” Id. The court noted that the indirect cost formula could continue to be used in compliance with Congressional directives, “with only slight modification.” Id. at 1464. The Court acknowledged, however, that “nothing in the Act entitles a tribe to a windfall.” Id.

2. *Congressional Response to the Tenth Circuit’s “Erroneous Decision”.*

Congress swiftly responded to the Tenth Circuit’s decision. As part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105-277, October 21, 1998, 112 Stat. 2681, Congress amended the ISDA to clarify that IHS funds may only be expended for indirect CSC directly attributable to IHS programs. See 25 U.S.C. § 450j-2, Pub. L. 105-277, Div. A, § 101(e) [Title II], Oct. 21, 1998, 112 Stat. 2681- 280; H.R. Rep. No. 105-609, at 57 (1998) (Def. Ex. 48) (stating that the Tenth Circuit made an “erroneous decision”).

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<sup>12</sup> The Tenth Circuit stated that although inclusion of the funds in the direct costs base “would have been proper if those programs included funding for their apportioned share of the indirect costs pool, the uncontroverted facts indicate they did not.” Id.

3. *Subsequent Proceedings and Settlement in the BIA Contractor Litigation.*

On remand, Interior and the RNC plaintiffs entered into settlement negotiations, filing a First Partial Settlement Agreement (PSA) on August 31, 1998. PSA (Pl. Ex. 20). The PSA reserved, or “carved out” claims that the plaintiffs’ release did not cover, including: “ any and all claims against IHS for underpayments of indirect costs or contract support under [ISDA] except those claims arising for FY 1989 - FY 1993 that are based on the indirect cost method . . . developed by BIA and the Department of Interior Office of the Inspector General (DOI-OIG) and used by IHS for those years[.]” Id. at 11 (PSA at 4 ¶ 3(a)(iv)(3)). Following the monetary settlement, the RNC plaintiffs and OIG (NBC’s predecessor) conducted negotiations on their equitable claims regarding the method OIG used to compute indirect cost rates. RNC and OIG agreed to conduct a two-year trial, called “bench-marking,” in which BIA contractors could obtain a special indirect cost rate devised under cost allocation procedures created under the settlement. Moberly Dec. ¶ 50 (Def. Ex. 3). These cost allocation procedures are different from the normal cost allocation procedures mandated by the Circulars. Id. The “bench-marked” trial rate was to be applied only to the contractors’ BIA programs. Id. For all other programs, including IHS, the contractors still obtained a rate or rates calculated under the OMB circulars. Id. Other than affecting the final rates negotiated for fiscal years 2001 and 2002, no adjustments have been made to either the contractors’ BIA rates or rates calculated under the Circulars for any other years.<sup>13</sup> Id.

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<sup>13</sup> On December 6, 2002, the district court approved a second partial settlement agreement settling claims for “indirect costs” for years up to and including 1994, settling claims for “direct CSC” for years up to and including 1995. RNC, 250 F. Supp. 2d 1303, 1317 (D.N.M. 2002). On August 31, 2006, the district court granted summary judgment to Interior on the BIA contractors’ claims to CSC for fiscal years 1994 and forward, years in which Congress “capped” BIA appropriations available for CSC. RNC, No. 90-957, Mem. Op. at 14-15 (D.N.M. Aug. 31, 2006) (Def. Ex. 30). Following its “cap” years decision, the district court set a schedule for the

4. *Collateral Estoppel, Generally.*

“Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” United States v. Mendoza, 464 U.S. 154, 158, 104 S. Ct. 568, 571 (1984). Collateral estoppel (or issue preclusion),<sup>14</sup> “serves ‘to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’” Id. (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411 (1980)). However, “[t]he doctrine is detailed, difficult, and potentially dangerous.” Jack Faucett Assoc., Inc. v. AT&T Co., 744 F.2d 118, 124, 133 (D.C. Cir. 1984) (holding court abused its discretion in applying offensive collateral estoppel due to, inter alia, fundamental unfairness to the defendants in class action).

Collateral estoppel may be used either offensively or defensively. Offensive collateral estoppel occurs when the plaintiff “seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 571. In contrast, “[d]efensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.” Id. (citation omitted). As discussed infra, offensive uses of collateral estoppel –

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briefing of any remaining issues, but the parties are currently engaged in settlement negotiations.

<sup>14</sup> The related doctrine, *res judicata* or claim preclusion, provides that “a final judgment on the merits bars further claims by parties or their privies on the same cause of action.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 571. Plaintiffs do not suggest that *res judicata* applies.

particularly in the D.C. Circuit – raise special equitable concerns. See Jack Faucett, 744 F.2d at 125-26. Plaintiffs seek to wield collateral estoppel offensively.

In cases of offensive collateral estoppel against United States federal agencies, an initial condition must be established, namely that both parties must be the same in each proceeding, otherwise known as the “mutuality” requirement. Compare Mendoza, 464 U.S. at 163, 104 S. Ct. at 574 (“We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government . . . .”), with United States v. Stauffer Chem. Co., 464 U.S. 165, 104 S. Ct. 575 (1984) (approving defensive use of collateral estoppel against the EPA, where the EPA and the opposing party were litigants in both proceedings). In addition to mutuality, a party must satisfy three other threshold conditions before it may invoke collateral estoppel: (1) the “issue must have been actually litigated, that is contested by the parties and submitted for determination by the court,” (2) the issue must have been “actually and necessarily determined by a court of competent jurisdiction” in the first proceeding, and (3) preclusion in the second proceeding “must not work an unfairness.” Jack Faucett, 744 F.2d at 125. Plaintiffs fail to establish three of these four criteria: mutuality, identity of the litigated issue, and fairness.

5. *Plaintiffs Cannot Show Mutuality Between HHS and Interior.*

(i) The Mutuality Requirement. The Supreme Court has “long recognized that the Government is not in a position identical to that of a private litigant,” because of the “geographic breadth of governmental litigation,” and particularly “the nature of the issues the government litigates.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 572 (quotation marks and citation omitted). “[T]he government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.” Id. at 160, 104 S. Ct. at 572.

Accordingly, the Court has observed that litigation conduct by the government is “apt to differ from that of a private litigant.” Id. at 161, 104 S. Ct. at 573.<sup>15</sup>

The unique problems faced by the government as a litigant led to the landmark decision of United States v. Mendoza, in which the Supreme Court established the mutuality requirement for offensive collateral estoppel as applied against the United States. Mendoza, a Filipino national, had sued the government for naturalization under a defunct statute. Id. at 155, 104 S. Ct. at 570. An earlier lawsuit, involving a different group of Filipino petitioners, had decided the pertinent issue against the government and, based upon that previous decision, the lower courts in Mendoza’s case had precluded the government from relitigating the question. Id. at 156-57, 104 S. Ct. at 570-71. The Supreme Court reversed, holding that “nonmutual offensive collateral estoppel simply does not apply against the government.” Id. at 162, 104 S. Ct. at 573.

The heart of the Mendoza Court’s analysis was the practical concern that “[a] rule allowing nonmutual collateral estoppel against the government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” Id. at 160, 104 S. Ct. at 572. Routine application of nonmutual collateral estoppel would force the Court to revise its practice of awaiting a Circuit split to develop before granting the government’s petition for certiorari. Id. “Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.” Id. In contrast, establishing a

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<sup>15</sup> For example, while a private litigant might forego an appeal out of a belief that he or she might lose, “the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal.” Mendoza, 464 U.S. at 161, 104 S. Ct. at 573. Because “policy choices are made by one Administration, and often reevaluated by another Administration, courts should be careful when they seek to apply expanding rules of collateral estoppel to government litigation.” Id.

threshold requirement of mutuality of parties “will better allow thorough development of legal doctrine by allowing litigation in multiple forums.” Id. at 163, 104 S. Ct. at 574.

Mendoza’s companion case, United States v. Stauffer, illustrates the restricted availability of collateral estoppel against federal agencies in the case of identical litigants in the two proceedings. In Stauffer, the Environmental Protection Agency (EPA), seeking to enforce the Clean Air Act, litigated against Stauffer Chemical Company the issue of whether the EPA could use private contractors to inspect Stauffer’s Tennessee plants. 464 U.S. at 166-67, 104 S. Ct. at 576. However, the EPA had already litigated that question against Stauffer in a prior proceeding involving one of Stauffer’s Wyoming plants. Id. at 173, 104 S. Ct. at 580. Invoking collateral estoppel defensively, Stauffer sought to preclude the EPA from relitigating the issue. Id. The Supreme Court observed that the presence of identical parties reduced concerns that “the application of collateral estoppel in government litigation involving recurring issues of public importance will freeze the development of the law.” Id. at 173, 104 S. Ct. at 580. Under these circumstances, the Stauffer Court agreed that “the doctrine of mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts.” Id. at 169, 104 S. Ct. at 578.

(ii) HHS and Interior, Generally. HHS (IHS) and Interior (BIA) are different federal executive branch agencies operating in different spheres of statutory authority. E.g. Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 *et seq.* (health program authorization for IHS); Transfer Act, 42 U.S.C. § 2001 (transferring authority to provide health services benefitting Indian Tribes from Interior to HHS). IHS and BIA operate under agency-specific CSC policies

and guidance.<sup>16</sup> Compare Cherokee Nation, 311 F.3d 1054, 1058 (10th Cir. 2002) (describing IHS' CSC distribution policy), rev'd by 543 U.S. 631, 125 S. Ct. 1172 (2005), with Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1348-49 (D.C. Cir. 1996) (explaining pro rata CSC distribution policy later implemented by BIA). Congress separately appropriates funding for IHS and BIA in different amounts, and subject to different requirements.<sup>17</sup>

(iii) The Secretary of HHS Was Not a Party to the RNC Litigation. Plaintiffs levy two arguments to support their contention that the Secretary of HHS was somehow a party to the BIA contractor litigation, even though RNC was a class action brought “on behalf of all Indian Tribes and organizations who have contracted with the *Secretary of the Interior* under the [ISDA].” RNC, Mem. Op. at 1 (emphasis added) (Def. Ex. 29). Plaintiffs argue that (i) the United States is the “real party in interest for contract damage claims under ISDA,” Pl. Mem. at 10, and (ii) IHS was purportedly a background participant in RNC, id. at 11-12.<sup>18</sup> Each argument fails.<sup>19</sup>

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<sup>16</sup> When Plaintiffs' own purported expert was questioned whether the contracting policies of IHS and BIA differed, his response was “absolutely.” Donham Dep. at 235:10-25 (Def. Ex. 59); see also Barbry Dec. ¶¶ 17, 23 (Pl. Ex. 5) (differentiating between BIA and IHS contracting and funding policies). Differences in contracting and funding policies are reflected Interior and IHS' individual administrative dispute processes, which track the ISDA's demarcation between the contract negotiation period (disputes may lead to declination review) and the post-formation period (disputes governed by CDA). *Pre*-formation administrative disputes are resolved within each relevant Department. Compare 25 C.F.R. § 900.165(b) (ISDA contract declination appeals involving IHS must be appealed to Secretary of HHS), with id. at § 900.165(c) (declination appeals involving Interior must be appealed to Board of Indian Appeals). In contrast, *post*-formation contract disputes are administratively resolved consistent with other procurement contracts. As of January 2007, the Civilian Board of Contract Appeals (CBCA), formed under the CDA, resolves administrative appeals of ISDA contract disputes. See [www.cbca.gsa.gov/mission.htm](http://www.cbca.gsa.gov/mission.htm), last visited, Mar. 28, 2007; 41 U.S.C. §§ 601-613.

<sup>17</sup> Compare e.g., Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (IHS) with Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1389-90 (1993) (BIA).

<sup>18</sup> It is unclear whether Plaintiffs are asserting that (1) IHS is in privity with NBC (the agency negotiating indirect cost rates under OMB A-87), (2) IHS is in privity with BIA (the

(iv) Contrary to Plaintiffs’ Assertion, There is No Rule of Strict Privity Between Representatives of the United States. Plaintiffs contend “[t]hat the agency here is HHS instead of Interior does not matter,” and that “[t]he United States, not the agency or official sued, is the real party in interest for contract damage claims under ISDA.” Pl. Mem. at 10. Because they cannot rely on statutory language to support these assertions,<sup>20</sup> Plaintiffs mainly rely upon Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907 (1940) and Mervin v. Federal Trade Commission, 591 F.2d 821 (D.C. Cir. 1978), for the proposition that “[t]here is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.” Sunshine Anthracite, 310 U.S. at 402-03, 60 S. Ct. at 917.

In Sunshine Anthracite, a coal producer had unsuccessfully challenged an administrative commission’s classification of its coal. 310 U.S. at 390-91, 60 S. Ct. at 911. The coal

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agency negotiating and forming ISDA contracts on behalf of Interior), (3) IHS is in privity with both BIA and NBC, (4) IHS is in privity with the United States generally, or (5) the Secretary of HHS is in privity with the Secretary of the Interior. Pl. Mem. at 8-14.

<sup>19</sup> Secretary Kempthorne’s role in this litigation markedly differs from his role in the BIA contractor litigation. Interior wore two hats in RNC: (1) through the BIA, it negotiated, formed and funded ISDA contracts under Interior’s applicable statutory and regulatory authority, policies, and appropriations, and (2) through NBC (and its predecessor OIG), it negotiated indirect cost rates. In contrast, the present action challenging IHS contract funding does not threaten a single cent of *Interior’s* appropriations. NBC’s role (as Plaintiffs’ cognizant agency for OMB A-87 rate negotiations) is therefore incidental to this action, and thus Plaintiffs cannot name Secretary Kempthorne in this action as a mechanism to preclude Secretary *Leavitt* from litigating the legality of IHS using OMB A-87 rates in the indirect CSC negotiation process.

<sup>20</sup> The ISDA defines “self-determination contract” to mean “a contract . . . between a tribal organization and *the appropriate Secretary*,” 25 U.S.C. § 450b(j) (emphasis added). Plaintiffs would have this Court believe this definition read as “a contract . . . between a tribal organization and *the United States*.” Compare also id. at § 450m-1(a) (describing court’s jurisdiction “over any civil action or claim *against the appropriate Secretary* arising under this subchapter and, subject to [the CDA] . . . over any civil action or claim *against the Secretary for money damages* arising under contracts authorized by this subchapter.” (emphasis added)).

commission was empowered to categorize different coal types under the Bituminous Coal Act, and specific coal categories were subject to different taxation levels. Id. at 401-02, 60 S. Ct. at 916. The classification yielded a high tax rate, the coal producer attempted to relitigate the classification's propriety directly with the Commissioner of Internal Revenue. Id. Holding privity existed between the commission and the Internal Revenue Commissioner as officials of the United States, the Court held that "[i]dentity of parties is not a mere a matter of form, but of substance. Parties nominally the same, may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same." 310 U.S. at 402, 60 S. Ct. at 917 (quotation marks and citation omitted). "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." Id. at 403, 60 S. Ct. at 917.

Many courts and commentators, however, have rejected a reading of Sunshine Anthracite that would yield a rule of strict privity *between* representatives of the federal government. Instead, they focus on the Supreme Court's qualification that "[t]he crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." Sunshine Anthracite, 310 U.S. at 403, 60 S. Ct. at 917; See Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 211 (3d Cir. 1993) (noting that Sunshine Anthracite had qualified its statement about privity between governmental officers, and concluding that "we are therefore directed [by Sunshine Anthracite] to look to the authority Congress delegated to both administrative agencies to bind the government in a final adjudication."); FTC v. Texaco, Inc., 555 F.2d 862, 866-81 (D.C. Cir. 1977) (en banc) (without reaching question of whether one agency's review of gas data collaterally estopped another agency's investigation into same data, expressing skepticism that

collateral estoppel would apply in this “era of overlapping agency jurisdiction under different statutory mandates”). See also United States v. Alky Ents., 969 F.2d 1309, 1314-15 (1st Cir. 1992) (citing Sunshine Anthracite as mandating inquiry into whether the representative agency has authority to “represent [the United States’] interest in a final adjudication of the issue in controversy”); Headley v. Bacon, 828 F.2d 1272, 1276 (8th Cir. 1987) (rejecting that Sunshine Anthracite stated “a rule that a government and its officers are always in privity”, instead scrutinizing identity of interests between government entity and employees); Wright & Miller, Fed. Prac. & Proc. § 4458 (2005)<sup>21</sup> (“As the Sunshine Coal opinion warns, however, *preclusion may be defeated* by finding such an important difference in the functions of different agencies that one does not have authority to represent all parts of the government.” (emphasis added)).

Thus, the cases relied upon by Plaintiffs reflect examples of agencies that, in the prior proceeding, have the authority to represent the United States’ specific interests at issue in the subsequent proceeding. In Sunshine Anthracite itself, the subsequent proceeding’s issue was the propriety of the coal classification for taxation purposes; in the prior administrative proceeding, the coal commission was authorized (indeed, it was statutorily created for this very purpose) to represent the United States’ interests in classifying coal. Indeed, the Coal Act’s implementation

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<sup>21</sup> Accord, Restatement (2d) of Judgments § 36 Cmt. (f) (2005) (“In some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. The problem is analogous to that in determining the capacity in which the underlying transactions were conducted . . . . If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.”).

depended on vesting the classification role exclusively in one administrative entity. 310 U.S. at 388, 60 S. Ct. at 909-10.<sup>22</sup>

In Facchiano Construction, in contrast, the Third Circuit distinguished the statutory and regulatory authority vested in the Secretary of HUD with the authority vested in the Secretary of Labor. 987 F.2d at 212. The court compared “[t]he plain language of the statute and regulatory scheme limit[ing] HUD’s debarment authority to participation in HUD programs,” with DOL’s “broad delegated authority” to debar contractors from all federal contracts. Id. at 212; see also id. (“HUD had no authority to debar participation from other federal contracting programs.”). Because of the limitations on the scope of HUD’s enforcement authority, “HUD, even though it acted as a representative of the United States, did not have ‘authority to represent [the United States’] interests in a final adjudication of the issue in controversy.’” Id. (quoting Sunshine Anthracite, 310 U.S. at 403, 60 S. Ct. at 917).

(v) The ISDA Does Not Authorize Interior to Represent The Interests of HHS. Nowhere in the ISDA does Congress authorize Interior to represent HHS (or IHS) interests – or vice versa. Plaintiffs conflate the BIA and IHS’ distinct statutory authority by pointing to the ISDA alone. See, e.g., Pl. Mem. at 11. Certainly, the ISDA authorizes each Secretary to enter into self-determination contracts. But the very nature of ISDA contracts – in which tribal contractors *assume control* of programs and services from the agencies – requires a more complex analysis. The authority to contract for particular programs and services under the ISDA derives from each agency’s statutory arena of control. If a federal court declares an ISDA contract invalid, or if a tribal contractor retrocedes the contract, then the source agency must resume control of the

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<sup>22</sup> Compare also Mervin, 591 F.2d at 830 (describing statutorily created “forum for administrative appeals by terminated government employees” authorized to represent the United States’ interests in adjudicating such claims).

program that was the subject of the contract. Ketcher Dec. ¶¶ 30-31; Zuni Dec. ¶¶ 70, 74 (Def. Exs. 1, 2). Thus, challenges to an agency’s ISDA contracting policies and practices *directly* implicate that agency’s statutory authority and policies pertaining to its underlying programs. Cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 568, 112 S. Ct. 2130, 2140 (1992) (holding party lacked Article III standing for want of redressability, “[s]ince the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary [named in the action]”).

The BIA lacks statutory authority to administer health services, authority expressly delegated to the Secretary of HHS. See 25 U.S.C. §§ 1601 *et seq.*; 42 U.S.C. § 2001. IHS similarly, lacks authority to administer schools or to provide social services programs. Though the BIA defended the RNC litigation over BIA contracts, the BIA lacked the ‘authority to represent [the United States’] interests in a final adjudication’ of the issue of IHS’ use of indirect cost rates in the IHS’ ISDA contracts. Facchiano Constr., 987 F.2d at 212 (quoting Sunshine Anthracite, 310 U.S. at 403, 60 S. Ct. at 917). Absent delegated authority to represent the United States’ interests in the administration of health services, a decision against BIA is insufficient to bind IHS. See id. at 212; see also United States v. Alky Ents., 969 F.2d 1309, 1314-15 (1st Cir. 1992) (Holding that, “despite the fact that both actions pertained to the same violations,” “[b]ecause the ICC did not have statutory authority to represent the United States’ interest in collecting civil penalties, we hold that, for purposes of the present case, *the ICC and the United States were not in privity.*”(emphases added)).

(vi) IHS Is Not in Privity with NBC Because Tribal Contractors Need Not Obtain an Indirect Cost Rate At All. Plaintiffs also appear to argue that IHS is in privity with NBC, by virtue of NBC’s role as rate negotiator. Pl. Mem. at 9, 13-14. Sunshine Anthracite and Mervin

are distinguishable, however, because they both depend upon regulatory schemes vastly different from the flexible regulatory scheme at issue here. While both cases involve coordinating agencies, these agencies were in a lock-step relationship, where the scope of one agency's actions relied entirely upon the decision of the other. The coal commission in Sunshine Anthracite classified coal in an adversarial administrative proceeding, and the Revenue Service passively collected the taxes based on that classification.<sup>23</sup> See Sunshine Anthracite, 310 U.S. at 401, 60 S. Ct. at 916 (“the [coal] Commission determines the scope of the provisions of the [Coal] Act and their applicability to various producers. The Commissioner is given no administrative functions whatsoever except tax collection.”).

The relationship between IHS and NBC is different. NBC negotiates indirect cost rates with tribal contractors under OMB A-87 *at the tribal contractor's election*. Ketcher Dec. ¶ 35; Zuni Dec. ¶ 75 (Def. Exs. 1, 2). The ISDA and IHS contracting policy permit, but do not require, use of those indirect cost rates. Id.; see also Moberly Dec. ¶¶ 4, 56 (Def. Ex. 3). IHS has no role in how tribal contractors negotiate their rates with NBC, nor does IHS pressure tribal contractors into using a single rate, rather than special or multiple rates to reflect a given tribal contractor's unique mix of programs. Ketcher Dec. ¶¶ 34- 35; Zuni Dec. ¶¶ 74-75 (Def. Exs. 1, 2). Additionally, IHS does not require tribal contractors to use A-87 indirect cost rates *at all*, whether single, multiple, or special; instead they can negotiate directly with IHS regarding the agency's indirect CSC funds. Id.<sup>24</sup> Other tribal contractors have opted to take advantage of these

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<sup>23</sup> Similarly, in Mervin, the Civil Service Commission was the statutorily created “forum for administrative appeals by terminated government employees,” 591 F.2d at 830, thereby requiring Mervin to pursue administrative remedies before that administrative body.

<sup>24</sup> Tunica, in fact, has negotiated indirect-type cost agreements directly with IHS in years not relevant to this suit. Ketcher Dep. at 17-18 (Def. Ex. 60).

various indirect cost determination options. Ketcher Dec. ¶ 35 (Def. Ex. 1). IHS' implementation of the ISDA with a flexible contracting policy, which permits tribal contractors to submit their OMB A-87 rates as a starting point for indirect CSC funding negotiation - but does mandate the use of those rates – is a far cry from the rigid regulatory regimes of Sunshine Anthracite and Mervin, where one agency was *compelled* to use the other's determination.

(vi) Plaintiffs Have No Basis For Asserting that IHS Participated in the RNC Litigation.

Plaintiffs offer yet another theory as to why IHS should be considered in privity with BIA or NBC for the purposes of establishing mutuality of parties: that “IHS was an observer of and an active informal participant in the RNC v. Lujan litigation, especially on remand.” Pl. Mem. at 11. They assert that IHS was “represented by counsel and participated in settlement of RNC v. Babbitt in 1998,” emphasizing how the 1998 settlement agreement “specifically referred to IHS.” Id. at 11-12. Plaintiffs argue, in sum, that IHS was a *de facto* party because IHS was “expressly made subject to and benefitted from the judgment accompanying the [RNC] settlement.” Id. at 12. This argument fails as a red herring, and in fact, underscores the impropriety of Plaintiffs' strategic behavior by asserting collateral estoppel here.

First, Plaintiffs have no basis for suggesting that IHS was an “active informal participant” in the RNC litigation. All they have shown is that the previously negotiated original settlement agreement between Interior and the RNC plaintiffs made reference to reserving future claims against IHS, and that changes were made to render even more explicit that future plaintiffs needed to pursue claims against IHS separately. The unremarkable fact that HHS reviewed and agreed to that language, Pl. Mem. at 12, does not in itself transform IHS into a *de facto* party

operating in the background of the RNC litigation.<sup>25</sup> The United States agreed pay over \$73 million to settle any and all of the RNC plaintiffs' claims arising from fiscal years 1989-1993, and the plaintiffs agreed to release against all federal agencies, including IHS, for those years. See PSA at 11 (4 ¶ 3(a)(iv)(3)); Release at 1 (Pl. Ex. 20). Plaintiffs reserved the right to pursue certain claims against IHS separately. Id. Indeed, the reasonable inference drawn from the changes to the settlement agreement only serves to demonstrate that IHS was *never* a party to the case.<sup>26</sup> See Reeves, 530 U.S. at 150, 120 S. Ct. at 2110 (requiring reviewing court to draw all reasonable inferences in nonmoving party's favor, without making credibility determinations, or weighing the evidence). Nor, for that matter, did *Plaintiffs* consider that IHS was so bound, as evidenced by this very lawsuit.

By not challenging IHS' contracts and policies in the prior action, the RNC plaintiffs evinced their own understanding and intent that IHS' contracting practices and policies stood separate and apart from BIA's. The settlement language underscores that understanding by expressly reserving claims against IHS for another day. Cf. Daskalea v. Dist. of Columbia, 227 F.3d 433, 447-50 (D.C. Cir. 2000) (rejecting plaintiff's attempt to hold official personally liable after official capacity trial, where "the course of proceedings" neither put the official "on notice"

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<sup>25</sup> Plaintiffs have not submitted a scrap of evidence to support its assertion that "IHS demanded release from certain claims." Pl. Mem. at 12 (emphasis added). Cf. Montana v. United States, 440 U.S. 147, 155, 99 S. Ct. 970, 974 (1979) (finding mutuality between a party to a state litigation and the nonparty United States where the United States (1) required the suit to be filed (2) reviewed and approved the complaint (3) paid for the attorney's fees and cost, (4) directed the state appeal (5) appeared and submitted a brief as amicus (6) directed the petition for certiorari, and (7) controlled the legal strategy).

<sup>26</sup> While Defendants disagree with the many self-serving statements, RNC's co-counsel admits in a memorandum that IHS is not a party to that suit: "[I]t does not seem appropriate to us to include in the settlement a waiver of potential claims which were not raised in the case (no claim was made against IHS)[.]" Mem. from Hobbs Strauss (Def. Ex. 62).

that official was being sued in her individual capacity, “nor evidenced her understanding that her personal liability was at stake”). Instead, the RNC plaintiffs challenged only the BIA’s contracts, programs, appropriations, contracting policies, and statutory authority. See RNC, Mem. Op. at 1 (noting class is brought “on behalf of all Indian Tribes and organizations who have contracted with the *Secretary of the Interior* under the [ISDA]” (emphasis added)) (Def. Ex. 29); see also RNC Compl. ¶¶ 2-4, 7 (Def. Ex. 28). To the extent that the RNC plaintiffs sought relief under the CDA, only Interior’s appropriations were threatened, as only Interior would have been responsible for reimbursing the Judgment Fund out of its appropriations. See 41 U.S.C. § 612(c). See Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (discussing substantive unfairness when party lacks incentive to litigate issue in initial proceeding, “but the stakes of the second trial are of a vastly greater magnitude”).

Plaintiffs should not now be permitted to have it both ways. If they truly thought IHS was a necessary party for complete relief, then they should have exercised their rights to force IHS involvement in the case. As a “closely related” entity to RNC, plaintiff RNSB was clearly in a position to police its rights.<sup>27</sup> At most, all Plaintiffs have shown is the unremarkable fact that HHS was *aware* of the BIA litigation, and that when Interior and the BIA contractors reached an agreement that referred to future cases against IHS, HHS may have approved language requiring future plaintiffs to pursue IHS separately.<sup>28</sup> Plaintiffs’ arguments are nothing more than a

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<sup>27</sup> In fact, RNSB was uniquely situated to insist that HHS be brought into RNC: one of Plaintiffs’ declarants notes that RNC and RNSB are “closely related” entities, with members of both organization “often exchanging roles or serving on both bodies at the same time.” Cohoe Dec. ¶ 37 (Pl. Ex. 6). According to Mr. Cohoe, RNSB “was closely watching the progress of [RNC’s] suit.” Id.

<sup>28</sup> Plaintiffs did not provide evidence of what language was actually provided to HHS for its review, undermining their assertions further.

distraction from the fact that these Plaintiffs at best failed to police their *own* interests in the RNC litigation, or at worst, tried to sneak one past IHS by avoiding the inclusion of IHS in the RNC litigation or any allegations regarding IHS contracts.<sup>29</sup>

6. *IHS Use of OMB A-87 Rates in IHS Contracts is a Legally Different Issue than BIA's Use of Rates in BIA contracts.*

This is indisputably a contract case. Therefore, any relevant evidence relating to IHS contracts, and IHS policies and practices with respect to funding negotiation would be in IHS' control. Evidence relating to BIA contracts – at issue in RNC – is wholly irrelevant.<sup>30</sup> See Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1117-18 (9th Cir. 1999) (rejecting collateral estoppel where defendant was charged identically with fraud as to savings and loan institutions, but evidence relating to each institution was unique); Builders Assoc. of Greater Chicago v. City of Chicago, No. 96 C 1122, 2001 WL 664453, at \*6 (N.D. Ill. June 12, 2001) (holding issue not identical in subsequent case involving entities that “have geographically different territories, and

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<sup>29</sup> Plaintiffs also stress IHS' putative role – without offering any evidentiary support as to IHS involvement – in a nationwide task force, formed by the National Congress of American Indians (NCAI) during the 1998 settlement negotiations. Pl. Mem. at 12. Plaintiffs characterize the task force as having “monitored the case including the settlement.” Id. Defendants respectfully refer the Court to how the district court in RNC described the task force. See RNC, 50 F. Supp. 2d at 1099 (“NCAI also participated actively in the negotiations. In addition, it has created a Task Force . . . to review the indirect cost system for ISDA as it exists in the BIA and Indian Health Service (IHS) systems. . . . The aim of the Task Force is to produce a recommendation to Congress and to the agencies . . .”). As described by the court, the Task Force was aimed at policy recommendations, and says nothing about whether the task force monitored the litigation, only that *NCAI* did so. Id. Defendants dispute that IHS even played any role in the task force, but note that the scope of IHS' role is not a material fact as the existence of a policy-focused task force is irrelevant to the question of privity in litigation.

<sup>30</sup> Plaintiffs' purported expert, John Donham, testified that the two agencies' contracting policies are “absolutely” different. Donham Dep. at 235:10-25 (Def. Ex. 59). He also expressed ignorance of contracting policies and programs unique to IHS, including the “base budget” program, pilot programs, and the direct negotiation of indirect-type costs. Id. at 236:1-22, 53:18-54:17. See Barbry Dec. ¶¶ 17, 23 (Pl. Ex. 5) (noting differences between IHS and BIA policies).

are concerned with different public construction projects, and thus the contracts may attract potentially different general contractors and subcontractors” because the evidence relating to the two entities would differ). Thus, while there is undoubtedly close similarity between the claims raised in the RNC litigation and the claims relating to “non-paying agencies in the base” before the Court in this action, the issues are not legally identical. See Jack Faucett, 744 F.2d at 125 (requiring issue to “have been actually litigated, that is contested by the parties and submitted for determination by the court.” (citation and internal quotation marks omitted)).<sup>31</sup>

7. *Offensive Collateral Estoppel Here Would Work a Fundamental Unfairness Because Plaintiffs Took No Steps to Join IHS to the RNC Litigation*

Even were the Court to agree that (i) IHS stood in privity with the BIA (or NBC) in a suit where IHS was not named, and (ii) that the issue of BIA’s negotiation and funding of ISDA contracts is legally identical IHS’s negotiation of ISDA contracts, Plaintiffs have failed to satisfy a third threshold requirement of collateral estoppel: that preclusion “in the second trial must not work an unfairness.” Jack Faucett, 744 F.2d at 125 (citations and quotation marks omitted). The D.C. Circuit has warned that “[w]here offensive estoppel is involved, the element of ‘fairness’ gains special importance.” Id. This case illustrates the continuing viability of distinguishing offensive from defensive collateral estoppel. Plaintiffs’ behavior in each proceeding demonstrates how “defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the

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<sup>31</sup> Plaintiffs contest IHS’ use of OMB A-87 indirect cost rates in negotiating indirect CSC funding for IHS contracts, see Pl. Mem. at 13 – a claim that directly implicates IHS’ specific contracting authority and policies, as well as a whole host of contract defenses relevant to this action. Accordingly, the “issue” in this case is simply not the same as the “issue” in the RNC litigation, where the issue was whether the *BIA*’s use of OMB A-87 indirect cost rates in *BIA*’s contracts complied with the ISDA.

other hand, creates precisely the opposite incentive.” Parklane Hosiery, 439 U.S. at 329-30, 99 S. Ct. at 651.

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645 (1979), the Supreme Court warned of the grave dangers associated with offensive collateral estoppel. “[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does.” Parklane Hosiery, 439 U.S. at 330, 99 S. Ct. at 650-51. The Court warned reviewing courts against permitting offensive collateral estoppel when “it may be unfair to a defendant,” such as when “a defendant in the first action is sued for small or nominal damages” as that defendant “may have little incentive to defend vigorously, particularly if future suits are not foreseeable.” Parklane Hosiery, 439 U.S. at 330, 99 S. Ct. at 651. While declining to preclude the use of offensive collateral estoppel, the Court granted “broad discretion to determine when it should be applied.” Id. at 331, 99 S. Ct. at 651. “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, for [reasons such as unfairness to the defendant], a trial judge *should not allow* the use of offensive collateral estoppel.” Id. at 331, 99 S. Ct. at 651-52 (emphasis added).

The D.C. Circuit has held that, under the teachings of Parklane Hosiery, “fairness to the defendant thus is a *critical finding* necessary for the application of offensive estoppel.” Jack Faucett, 744 F.2d at 125 (citation and quotation marks omitted) (emphasis added). “This notion of fairness reflects the equitable nature of issue preclusion. . . . Offensive collateral estoppel is even a cut above that in the scale of equitable values.” Id. (citation and quotation marks omitted). The D.C. Circuit discerned examples from Parklane Hosiery in which offensive collateral estoppel should not be applied, including “where the party against whom it is to be applied had no incentive to defend vigorously the first action.” Id. at 125. See also Milton S.

Kronheim & Co. v. Dist. of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (citing with approval distinction between offensive and defensive collateral estoppel).

Plaintiffs have argued that, because they are members of the RNC class, they themselves would have been precluded from suing IHS had they lost, and thus IHS should be equally bound. Pl. Mem. at 10. But this assertion underscores how Plaintiffs engaged in strategic behavior reflecting a lack of incentive to take steps to “join all potential defendants in the first action if possible.” Id. at 329-30, 99 S. Ct. at 651. As noted supra, Plaintiff RNSB was uniquely suited to police its own rights in the RNC action, as it “was closely watching the progress of [RNC’s] suit,” and even shared leadership members in common. Cohoe Dec. ¶ 37 (Pl. Ex. 6). RNSB was likely intimately aware of RNC’s litigation strategy (and indeed, is represented by the same counsel here), but instead, chose to hold itself back. After all, the lead plaintiff in RNC had *only* BIA programs in its direct cost base; RNC itself would have lacked standing to challenge IHS contracts and contracting policies permitting use of the OMB A-87 methodology. Therefore, it was up to another tribal organization to insist on bringing IHS into that action.

Yet Plaintiffs agreed to participate in a class comprised exclusively of BIA contractors. They agreed to a lead plaintiff whose factual situation dramatically differed from their own.<sup>32</sup> Plaintiffs could have stood on their rights to have a different class certified in that litigation, a class of contractors that had ISDA contracts with *both* BIA and IHS. At the very least, they could have insisted that IHS be joined as a necessary party under their purported theory of the

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<sup>32</sup> RNC had more than 92% BIA contracts in its direct cost base, but no IHS contracts at all. In contrast, in fiscal years 1995-1997, IHS programs comprised only 38-46% only 15-23% of RNSB’s direct cost base. Tunica’s newly submitted IDC proposals, while unverified, demonstrates Tunica’s own belief that in 1995-1997, its IHS programs consisted of only 19% to 27% of its direct cost base, and in 1998-2001 dropped even more dramatically to 19% -13% of its direct cost base. 2d Moberly Dec. ¶ 38 (Def. Ex. 57).

case. Instead, they elected to take a “wait and see” attitude with respect to IHS. Plaintiffs simply cannot have it both ways. By failing to join IHS in the first suit, plaintiffs evinced an intent to pursue IHS separately, an intent confirmed by the language reserving claims in the BIA settlement agreement. By choosing not to challenge IHS, Plaintiffs themselves eliminated any incentive IHS had to participate in the litigation against Interior. Cf. Daskalea, 227 F.3d at 447-50 (explaining how plaintiff’s behavior failed in “the course of proceedings” to put defendant on notice of a particular theory of liability). Plaintiffs’ laxity in joining “all defendants possible,” and the corresponding reduction in IHS’ incentive to litigate in that action, is precisely why the Supreme Court – and later the D.C. Circuit – urged district courts to be skeptical of offensive collateral estoppel. See Parklane Hosiery, 439 U.S. at 329-30, 99 S. Ct. at 650-51; Jack Faucett, 744 F.2d at 133 (rejecting application of offensive collateral estoppel in class action). “[H]owever strong may be the concerns with judicial expediency, a court cannot ignore the relevant legal principles which, in the context of offensive estoppel, establish certain parameters within which the district court must exercise its discretion.” Jack Faucett, 733 F.2d at 133.

**B. Even if the Preconditions for Application of Collateral Estoppel Have Been Met, This Court Should Exercise Its Discretion and Decline to Apply the Doctrine**

Collateral estoppel is a discretionary doctrine. See Western Oil & Gas Assoc. v. U.S. Environmental Protection Agency, 633 F.2d 803, 809 (9th Cir. 1980) (warning that “[c]ollateral estoppel is not to be applied mechanically”). Even if the Court determines that all of the criteria of collateral estoppel have been met, this Court should nevertheless exercise its discretion and decline to apply the doctrine. First, a well-settled exception to the doctrine applies here: a change in legal climate. Second, Plaintiffs themselves are estopped from claiming IHS participation in the RNC litigation, where Plaintiffs’ own conduct suggested otherwise.

1. *An Exception to Collateral Estoppel Applies: A Change in Legal Climate.*

This Court should decline to apply collateral estoppel here because a well-settled exception applies: a change in legal climate. Comm’r of Internal Revenue v. Sunnen, 333 U.S. 591, 606, 68 S. Ct. 715, 723 (1948)); see Fed. Labor Relations Auth. v. U.S. Dep’t of the Treasury, 884 F.2d 1446, 1456 (D.C. Cir. 1989); see also Graphic Comms. Intern. Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1493 (D.C. Cir. 1988) (“Issue preclusion does not apply when there has been an intervening change in legal principles”). Since the Tenth Circuit’s RNC decision, the relevant “legal atmosphere” relating to indirect costs and ISDA contracts has altered in two key respects: legislatively and judicially. See Bingaman v. Dep’t of the Treasury, 127 F.3d 1431, 1438 (Fed. Cir. 1997). Thus, even if this Court determines that the threshold requirements have been met, this Court should nonetheless decline to apply collateral estoppel. E.g., Fed. Labor Relations Auth., 884 F.2d at 1456 (refusing to apply collateral estoppel against federal agency because of recent Supreme Court decision); Graphic Comms., 843 F.2d at 1493 (refusing to apply collateral estoppel against federal agency because of an intervening administrative ruling).

(i) Legislative Change to Legal Climate. After the Tenth Circuit ruled against the BIA’s use of the OMB A-87 methodology in 1997, but prior to Plaintiffs’ filing of this suit against IHS, Congress clarified the statutory ambiguity discerned by the Tenth Circuit. Within approximately a year of the Tenth Circuit’s decision, Congress enacted a new ISDA provision:

**Before, on, and after October 21, 1998**, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended **only for costs directly attributable to** contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C.A. § 450f et seq.] **and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement**

**entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.**

25 U.S.C. § 450j-2 (emphases added). There is no longer any ambiguity (if there ever was any) that ISDA programs shoulder their own indirect CSC, but, contrary to the Tenth Circuit's flawed logic, may not foot the bill for other programs that benefit from, but do not contribute to the indirect contract costs. This clarification forecloses any argument that the ISDA has ever allowed IHS to pay indirect costs attributable to non-IHS programs. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 1801-02 (1969) (explaining how later legislation declaring earlier statute's intent is entitled to great weight in statutory construction); Liquilux Gas Corp. v. Martin Gas Sales, Inc., 979 F.2d 887, 890 (1st Cir. 1992) (same); McCreary v. Offner, 1 F. Supp. 2d 32, 37 (D.D.C. 1998) (same), aff'd, 172 F.3d 76 (D.C. Cir. 1999).

Moreover, 25 U.S.C. § 450j-2 *clarifies* the ISDA and is not a substantive amendment. Shortly before its enactment, the Tenth Circuit had found an express ambiguity in the ISDA's funding provisions. RNC, 112 F.3d at 1460-61. Under these circumstances, courts generally interpret such enactments as clarifications and not as substantive amendments. See Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1266 (9th Cir. 1997) (construing later enactment as a clarification in light of, *inter alia*, a split of authority in the courts as to the original provision's meaning); Liquilux, 979 F.2d at 890 (explaining that when a new enactment follows the discovery of an ambiguity, the enactment is construed as a clarification and not a substantive amendment); Porter v. Comm'r, 856 F.2d 1205, 1210 (8th Cir. 1988) (same); Barnes v. Cohen, 749 F.2d 1009, 1015 (3d Cir. 1984) (when there is a dispute about ambiguity, subsequent amendment generally construed as clarification); Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 615 (7th Cir. 1982) (citing 2A Sutherland Statutory Constr. § 49.11, at 265-66 (4th ed. 1973), explaining that enactment's statutory construction to determine if it is a clarification or a

subsequent amendment involves reviewing the state of the law at the time of the enactment); see also United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985) (“Statutes may be passed purely to make what was intended all along even more unmistakably clear.”).

Sec. 450j-2 is plain and unambiguous and, therefore, resort to legislative history is unnecessary. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 495 (D.C. Cir. 2004). But even if, *arguendo*, the Court were to conclude that the legislation is unclear on its face, legislative history plainly supports Defendants’ position. The relevant House Report describes the provision as “specifying that Indian Health Service funding may not be used to pay contract support costs for any entity other than the Indian Health Service.” H.R. Rep. No. 105-609, at 110 (1998) (Def. Ex. 48); see also id. at 108 (same). In the same report, the Appropriations Committee referred to “the Ramah Navajo Chapter v. Lujan settlement concerning contract support costs” and its belief “that the [Tenth Circuit] made an erroneous decision and that the Administration erred by failing to appeal.” Id. at 57.

Congressional intent to prevent another decision like the Tenth Circuit’s could not be more transparent. See Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004) (“In determining whether an amendment clarifies or changes an existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment.”); Piamba, 177 F.3d at 1284 (“[C]ourts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment.”). This legislation alone created a change in legal atmosphere sufficient to trigger the relevant exception to the application of collateral estoppel for a change in law.

Indeed, when Congress enacted the clarification, rejecting the Tenth Circuit’s analysis, all pending cases were affected.<sup>33</sup> Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (“It is the obligation of the last court in the hierarchy [of the judicial department] that rules on the case to give effect to Congress’s latest enactment, even when that has the effect of overturning the judgment of an inferior court . . .” (quotations omitted)). To apply collateral estoppel would perpetuate an established error in legal reasoning to a new class of cases, thereby flouting Congress’s judgment.

(ii) Judicial Change to Legal Climate. In addition to legislative changes in the legal landscape rendering collateral estoppel inapplicable, “a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.” Sunnen, 333 U.S. at 600, 68 S. Ct. 715, 720 (footnote omitted). The judicial decision need not be precisely on point to render collateral estoppel improper, but need only alter a method of viewing a legal or factual category. For example, Fed. Labor Relations Auth. was a Privacy Act case regarding the applicability of an exception for disclosures

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<sup>33</sup> This is the law in effect at the time Plaintiffs filed this case, and thus governs the Court’s analysis. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Because 25 U.S.C. § 450j-2 was a clarification and not a substantive amendment, there are no retroactivity concerns attendant to the Court’s application of the ISDA, as clarified by § 450j-2, to Plaintiffs’ contracts in effect before § 450j-2’s enactment. See Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999); Beverly, 132 F.3d at 1265; Montgomery County, 761 F.2d at 1003; McCreary, 1 F. Supp. 2d at 36. The Tenth Circuit’s decision rests upon an express holding of statutory ambiguity. RNC, 112 F.3d at 1461-62; see Landsgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (noting retroactivity concerns centering upon when “statute in question is unambiguous”). Plaintiffs did not file their complaint until years after Congress amended § 450j-2, and thus Congress could not have been deliberately seeking to repudiate their rights.

Furthermore, Congress later enacted a similar provision that applies to BIA CSC, but unlike § 450j-2 which applies [b]efore, on, and after October 21, 1998,” the new § 450j-3 applies strictly “on and after November 29, 1999,” 25 U.S.C. § 450j-3 suggesting Congressional recognition of the ongoing RNC lawsuit. Plaintiffs do not suggest (nor can they), that collateral estoppel could apply for the years following this enactment.

mandated by the Freedom of Information Act (FOIA). 884 F.2d at 1448. The D.C. Circuit held that a recent Supreme Court FOIA decision had so redefined the legal nature of a disclosure interest that the court refused to apply collateral estoppel against a federal agency that had lost a similar Privacy Act claim in the Second Circuit. See id. at 1451-52, 1456. Similarly, in Faulkner v. Nat'l Geographic Enterprises, Inc., the Second Circuit refused to apply offensive collateral estoppel against a defendant who had previously lost on the same type of claim in another Circuit, because a recent Supreme Court decision had altered the relevant approach to considering when the Copyright Act protected certain materials from reproduction. 409 F.3d 26, 37 (2d Cir. 2005). “In our view, the [Supreme Court’s] approach so substantially departs from the [Eleventh Circuit’s] analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate.” Id.

Since the filing of this suit, the Supreme Court has unanimously clarified the nature of an ISDA contract: they are ordinary promises as enforceable as those in a procurement contract. Cherokee, 543 U.S. at 638-40, 125 S. Ct. at 1178-79. Prior to Cherokee, however, the essential character of the promises in an ISDA contract was unclear. In fact, this case was stayed pending the outcome of Cherokee for the very reason that the Supreme Court’s mode of analysis – and not only its ultimate holding – would impact how courts across the country would view ISDA contracts going forward. By effectively settling a longstanding dispute about ISDA contracts’ intrinsic nature, the Cherokee changed the legal climate.<sup>34</sup>

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<sup>34</sup> RNC and later settlements only cover BIA contracts from fiscal year 1989-1994. The FY1995-2003 IHS contracts are thus “fresh” contracts for the purposes of the exception. Compare Morgan v. Dep’t of Energy, 424 F.3d 1271 (Fed. Cir. 2005), with Bingaman, 127 F.3d at 1434-38.

2. *Plaintiffs Are Themselves Estopped from Claiming IHS Participation in the BIA Litigation, and This Court Should Strictly Construe that Class Certification*

As discussed supra in relation to mutuality and fairness, Plaintiffs agreed to participate in a class of BIA contractors, even though they themselves had IHS contracts as well. They did not object to a lead Plaintiff that lacked standing to challenge IHS contracts, attempt to join the Secretary of HHS as a necessary party pursuant to Fed. R. Civ. P. 19, or to assert that a different class be certified, such that IHS contractors would be afforded relief in that litigation. Because of their own conduct – or lack thereof – Plaintiffs themselves should be estopped from asserting that HHS is bound by the BIA contractor litigation. Accordingly, this Court should strictly construe the class certification in that action to its terms: namely to those contractors contracting with the Secretary of Interior, and thereby permit conflict to develop in the Circuits. Mendoza, 464 U.S. at 164, 104 S. Ct. at 573-74 (reviving mutuality expressly to address “the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party”).

Plaintiffs urge a “consistency for consistency’s sake” sort of argument, asserting that “the meaning of a federal statute, administered by more than one federal agency, cannot change depending upon which agency is administering it.” Pl. Mem. at 11. The cases Plaintiffs rely upon, however, undermine this argument. In Rapaport v. U.S. Dep’t of the Treasury, for example, the D.C. Circuit pointed out that if deference were owed to a single agency’s interpretation of a statute administered by several agencies, “either the same statute [would be] interpreted differently by several agencies or the one agency that happened to reach the courthouse first [would be] allowed to fix the meaning of the text for all.” 59 F.3d 212, 216-17 (D.C. Cir. 1995); id. at (observing outcome was not “unthinkable” but requiring evidence of “congressional delegation of administrative authority contemplates such peculiar corollaries”).

Logically, the same “peculiar” corollary would occur if the first litigant to reach the courthouse first, to challenge one agency’s implementation of the statute – such as RNC – would be allowed to fix the meaning of the text for all other agencies, even where other agencies might have different arguments to avail themselves of. Furthermore, Congress hardly intended the ISDA to be administered uniformly *incorrectly*, such as by violating fundamental tenets of appropriations law. Compare H.R. Rep. No. 105-609, at 57 (1998) (Def. Ex. 48) (stating that the Tenth Circuit made an “erroneous decision” in RNC).

**B. Plaintiffs’ “Rate Dilution” Claim Fails On the Merits For All Years**

Because Plaintiffs cannot invoke collateral estoppel to evade scrutiny of their contentions regarding the “inclusion of non-paying agencies in the base,” this Court is fully empowered to assess the merits of Plaintiffs’ flawed arguments. Defendants’ Memorandum discusses in depth how (1) Plaintiffs’ contracts do not violate the ISDA because the ISDA does not mandate the payment of a specific amount of indirect CSC to Plaintiffs, or that a specific formula to be included in the contract, Def. Mem. at 22-26; (2) for all contract years after 1997, Congress has limited the amount of CSC available for award, Def. Mem. at 26-27; (3) Plaintiffs’ indirect cost rates do not violate the ISDA; indeed, recent legislation reveals that Congress intended IHS to abide by the challenged OMB A-87 methodology and expressly rejected the rationale of the RNC decision, Def. Mem. at 28-46; (4) unlike the plaintiff in RNC, Plaintiffs’ costs are demonstrably *not* fixed, and thus adding programs to Plaintiffs direct cost base would increase the indirect

costs Plaintiffs incur,<sup>35</sup> Def. Mem. at 43-45, and (5) how Plaintiffs' theory would actually violate the ISDA, Def. Mem. at 46-48.

## **VI. THE NEWLY MINTED "CARRY-FORWARD" CLAIMS FAIL FOR ALL YEARS<sup>36</sup>**

Plaintiffs' seven (six new plus one old) challenges to the carry-forward schedule are meritless. In each instance, Plaintiffs had an option to obtain a different type of rate, e.g., a provisional/final rate, and they also had the option of not obtaining an indirect cost rate at all. In other words, none of Plaintiffs carry-forward claims are actionable, because Plaintiffs were not required to obtain a fixed-with-carry-forward rate. Their alleged injury was, in factm self-inflicted. See Pennsylvania v. New Jersey, 426 U.S. 660, 664, 96 S.Ct. 2333, 2335 (1976) (*per curiam*); see also Petro-Chem Processing, Inc. v. EPA, 866 F.2d 433, 438 (D.C. Cir. 1989); Bhd. of Locomotive Eng'rs & Trainmen, 457 F.3d 24, 28-29 (D.C. Cir. 2006). In addition, the ISDA does not require that IHS or NBC make any of the adjustments urged by Plaintiffs. For these reasons, as well as the jurisdictional and other threshold defenses explained above, Plaintiffs are not entitled to judgment on these claims.

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<sup>35</sup> Plaintiffs rely on putative expert John Donham to support, among other assertions, that Plaintiffs' costs are fixed. Donham Dec. ¶ 10 (Pl. Ex. 42). But compare Donham Dep. at 123-138 (rejecting application of the terms "fixed" and "variable" to tribal organizations) (Def. Ex. 59) with Pl. Mem. at 12 (relying upon "fixed" and "variable" terminology). His assertions were also inconsistent. Compare Donham Dep. at 206:10-16 (positing impossibility of negotiating rates with cognizant agency) with 195:15-23 (explaining how he was able to obtain increased rates to correct relief sought under RNC theory through negotiation), 209:12-20 (explaining how he successfully used multiple rate proposals as negotiating tactic to obtain more dollars for his clients); 201:24-202-25 (referring to "real" definition of multiple rates), with 205:6-15 (revealing that assertions about "true multiple rates" derived from his recollection of unidentified regional guidelines from 1981).

<sup>36</sup> RNC did not adjudicate any challenges relating to carry-forwards. Compare Pl. Mem. at 1-2, 8 (improperly implying that RNC is relevant to all issues in motion). Plaintiffs cannot invoke that doctrine here with respect to their carry-forward arguments.

Running through all seven of Plaintiffs' claims is an attempt, without support, to conflate two entirely separate processes: the process of identifying and allocating indirect costs (performed by NBC) with negotiating the amount of indirect cost funding for the ISDA contract (performed by IHS). Pl. Mem. at 19. Each process, however, must be analyzed under its governing law and principles and cannot be conflated with the other. The primary reason that Plaintiffs' conflation attempt is unfounded is because the ISDA does not require contractors to obtain indirect cost rates at all. This is the key legal fact that should dispose of Plaintiffs' arguments regarding rate methodologies, including those regarding the carry-forward calculation.

(i) The ISDA and Its Mandates. The ISDA requires only that reasonable indirect costs incurred in connection with an IHS program under contract may be added to the contract, subject to the availability of appropriations. See 25 U.S.C. §§ 450j-1(a)(2), (b), (g), § 450j(c), § 450j(c)(b)(4). There is no specific amount of specific formula to be included in the contract. See id.; see also Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (explaining that the funding provisions of the ISDA do not curtail the Secretary's discretion to pay funds, do not have clear standards for the payment of funds, do not specify precise amounts to be paid, and do not compel the payment of funds). IHS, consistent with the ISDA, also does not require the use of an indirect cost rate. Ketcher Dec. ¶ 35; Zuni Dec. ¶ 75 (Def. Exs. 1, 2); see, e.g., IHS CSC Circular 2004-03 (Def. Ex. 33). IHS policy directs that a tribal contractor may use any type of indirect cost rate, negotiated with its cognizant agency, as a basis for indirect cost funding or it may negotiate directly with IHS to obtain indirect costs. Id. If a contractor decides to submit to IHS an indirect cost rate negotiated with its cognizant agency as a basis for indirect cost funding, IHS will accept the rate and will not make any adjustments. Ketcher Dec. ¶ 34; Zuni Dec. ¶ 74 (Def. Exs. 1, 2); see also Kerkmans Dep. at 36 (Def. Ex. 58)

(discussing how IHS accepts indirect cost rates negotiated elsewhere). There is absolutely nothing in the ISDA that requires IHS to adjust indirect cost rates, provided by the contractor and negotiated with another agency, before IHS uses the rate as a starting point for negotiating indirect CSC funding.

The ISDA does, however, endorse the use of the long-standing methodology in the OMB Circulars for developing indirect cost rates, if a contractor decides to negotiate an indirect cost rate. Congress' intention was made clear from the very first time it addressed indirect costs directly in the ISDA. Congress defined "indirect costs" for purposes of the ISDA in the same manner as indirect costs were defined under the pre-existing OMB Circulars. See id. § 103(f) (codified at 25 U.S.C. § 450b(f)); 35 Fed. Reg. 18797, 18799 (1970). Congress defined "indirect cost rate" in the 1988 amendments as "the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency[.]" Id. § 103(g) (codified as 25 U.S.C. § 450b(g)). Congress also added a requirement that IHS report to it on shortfalls in the funding of CSC. See id. § 205(c) (codified as 25 U.S.C. § 450j-1(c)). This report was to identify "the indirect cost rate and the type of rate for each tribal organization." Id. In another provision, Congress directly cited OMB A-87, recognizing the fact that IHS used indirect cost rates developed under these principles in making indirect CSC awards. Id. § 205(e) (codified as 25 U.S.C. § 450j-1(e)). The ISDA regulations also contemplate that a contractor may negotiate and agree to the use of provisions of OMB Circulars in its ISDA contract. See 25 C.F.R. § 900.37.

The legislative history of the 1988 and 1994 amendments supports this interpretation. Congress was aware of the indirect cost rate methodology in the OMB Circulars and approved of its use. See, e.g., S. Rep. No. 100-274, 1988 U.S.C.C.A.N. 2620, at 2627-32, 2636-37 (1988) (Def. Ex. 47); 140 Cong. Rec. H11140, H11144, 103rd Cong., 2d Sess., 1994 WL 553621 (Oct.

6, 1994) (explaining that “[t]he amendment does not alter the process employed by many tribal contractors for negotiating indirect cost agreements with the appropriate cognizant agency for purposes of cost-recovery accounting under the Act”). With these references to the long-standing OMB A-87 methodology, Congress evinced knowledge and approval of IHS’ use of indirect cost rates in the funding negotiation process, and demonstrate how Congress fully intended IHS to accept an unadjusted indirect cost rate as a starting point for negotiating indirect cost funding.

The three provisions to which Plaintiffs cite as support for the adjustments that they seek are: (1) 25 U.S.C. §§ 450j-1(a)(2), (3), 450j-1(g), (2) 25 U.S.C. § 450j-1(d)(1), (3) 25 U.S.C. §450j-1(a)(4). Already discussed above is § 450j-1(a)(2), (3) and 450j-1(g), which do not provide any specific formula for calculating indirect costs, let alone require that an OMB A-87 fixed-with-carry-forward rate needs to be adjusted in any way.

The next provision cited by Plaintiffs, 25 U.S.C. § 450j-1(d)(1), provides that “theoretical over-recoveries” are prohibited. NBC/OIG determined that it would implement this provision in 1990 by changing the carry-forward calculation to consider the amount of indirect costs actually recovered from each funding agency. Mem. from OIG Ass’t Sec’y of Audits (Pl. Ex. 20). Prior to that time, NBC compared the amount estimated to be spent for indirect costs and the amount actually spent for indirect costs. Id. Since 1995, in instances where the estimated amount is more than the incurred amount, but where the collections are less than the estimated amount, the theoretical, but not actual, over-recovery is not carried forward. Moberly Dec. ¶¶ 20-23 (Def. Ex. 3). NBC’s implementation of § 450j-1(d)(1) ensures that there is no theoretical over-recovery or adverse adjustment due to shortfalls in collections. None of the adjustments urged by Plaintiff, which are explained below address an adverse adjustment that assumes a tribal contractor recovered more funding than it did, i.e., a “theoretical over-recovery.”

Finally, the third provision cited by Plaintiffs, 25 U.S.C. § 450j-1(a)(4), has no bearing on the rate methodology at all. It merely clarifies that if a contractor has funds remaining at the end of the year, it need not return them to IHS. It does not preclude the reduction (or increase) of a rate in a future year because the reduction or increase of a rate in a future year reflects what was actually spent in that year. If the contractor has extra funds to spend in a future year, it may do so, but it is not permitted to obtain additional funds from IHS. The ISDA does not permit a contractor to obtain a windfall. See Samish, 419 F.3d at 1367; RNC, 112 F.3d at 1464.

Plaintiffs' claims, therefore, seeking an adjustment to their indirect cost rates for all years must fail. To dismiss these claims on the merits, the Court need only determine that the ISDA does not address the adjustments raised by Plaintiffs. In addition to consistency with the ISDA, the carry-forward calculation is consistent with federal cost principles and appropriations law.

(ii) Cost Allocation Principles. OMB A-87, and the other applicable circulars that establish cost allocation procedures, are aimed at identifying as accurately as possible the reasonable and necessary indirect costs that were expended in any one year to support a specific set of programs or functions. See 2 C.F.R. 225.10 (“This part establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments[.]”); 2 C.F.R. Pt. 225 App. A, § C; Moberly Dec. ¶¶ 4-6 (Def. Ex. 3). It is necessary to identify, as accurately as possible, the indirect costs associated with each program because federal appropriations law dictates that appropriations be expended for the stated purpose, time and amount specified. See 31 U.S.C. § 1301(a); 2 C.F.R. Pt. 225, App. A, §§ C.3.c., § F.1.b, F.3.b; see also Alabama v. Shalala, 124 F. Supp. 2d 1250, 1269 (M.D. Ala. 2000) (“A general principle of federal appropriations law provides that federal

funds may be used only for authorized purposes.”); Dep’t of Soc. Serv. v. Sullivan, 904 F.2d 710, 1990 WL 81840, at \*3 (9th Cir. June 18, 1990) (unpublished mem.) (explaining that when California received funds from HHS and USDA and used shared administrative services to run programs, California could not charge costs to HHS that were allocable to USDA without violating 31 U.S.C. § 1301(a)); Maine v. Shalala, 81 F. Supp. 2d 91, 98 (D. Me. 1999) (explaining that federal law forbids cost shifting). The entire purpose is to accurately and efficiently identify and allocate indirect costs. That is why different methodologies and different mechanisms exist by which indirect costs can be identified for any particular contractor. See 2 C.F.R. Pt. 225, App. E, § C; Moberly Dec. ¶¶ 12-36 (Def. Ex. 3). These principles, and the rate process, are fully explained in Defendants’ Memorandum at 28-35.

A fixed-with-carry-forward rate, the rate Plaintiffs chose, allows a contractor to negotiate an indirect cost rate for a particular year at the beginning of that year before the actual expenditures are known. See 2 C.F.R. Pt. 225, App. E, § B.6; 2d Moberly Dec. ¶¶ 8-16 (Def. Ex. 57). Because actual costs are not known, estimates are used. Id. Because estimates are used, a reconciliation sometime in the future, between what was estimated would be expended and what was actually expended, must occur. Id. As a general matter, this reconciliation, called a carry-forward, occurs two years later, when all actual costs are known. Id. A carry-forward makes adjustments to estimates for a new time period to account for differences between estimated costs and the actual expenditures for an that earlier period. See 2 C.F.R. Pt. 225, App. E, § B.6; 2d Moberly Dec. ¶¶ 8-9, 16 (Def. Ex. 57). This adjustment is meant to identify, with as much accuracy as possible, the actual amount of indirect costs incurred for a particular period.

(iii) The Reconciliation Process. Plaintiffs challenge this reconciliation process, Pl. Mem. at 21-22,<sup>37</sup> notwithstanding the fact that they proposed the reconciliation in many of their indirect cost rate proposals which were submitted to NBC, 2d Moberly Dec. ¶¶ 25-26 (Def. Ex. 57). The reconciliation process, however, is meant to account for differences between estimated costs from an earlier period and the actual expenditures for that period. Moberly Dec. ¶¶ 16-23 (Def. Ex. 57). The first part of this reconciliation process is to adjust an estimated pool by a prior year's carry-forward. Id. ¶ 16. Two years later, the estimated pool (with the prior year's carry-forward) is compared with the actual costs (+/- the prior year's carry-forward). Id. It is the second adjustment that completes the reconciliation. Id. An example, from the Second Declaration of Deborah Moberly, is below and involves the following hypothetical information:

Indirect Costs	Estimates	Actuals
Year One	50,000	60,000
Year Three	60,000	60,000

In Year 1, a contractor estimates that it will spend \$50,000 on indirect costs. By year 3, when the contractor's audited financial statements are prepared and submitted, it is determined that the contractor actually spent \$60,000. Because the contractor has an under-recovery of \$10,000, some adjustment must be made. This is why the carry-forward necessary.

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<sup>37</sup> Plaintiffs and their witnesses prepared hypothetical carry-forward schedules in which they adjusted estimated costs, but did not make the corresponding adjustments to actual costs. Kerkmans Dec. Ex. 2 (Pl. Ex. 4). Mr. Kerkmans' calculations are problematic because they rely on a flawed assumption and reflect errors. 2d Moberly Dec. ¶ 27 (Def. Ex. 57). First, in each year, while he changes the rate methodology to yield a higher indirect cost rate, he does not change the amount of yearly funding that RNSB received. Id. This is wrong. If RNSB's indirect cost rate went up, it almost assuredly would have had higher collectibles; any shortfall would therefore be less than that shown in Mr. Kerkmans' calculations. Id. In Exhibit 2, he wrongly labels Column C as "1997 actuals" when it should be "1995 actuals." Id. Moreover, the carry-forward numbers are off for 1994 and 1995 by \$28 and \$175. Id.

In Year 3, the \$10,000 under-recovery from Year 1 is used to increase the Year 3 rate as follows. The contractor estimates indirect costs for Year 3 as \$60,000. The estimated indirect costs (\$60,000) is increased by the under-recovery of \$10,000, for a total of \$70,000. The rate in Year 3 is therefore higher, and the contractor could recover additional funding.

In Year 5, when the actual costs for Year 3 are known, it is necessary to compare the estimated Year 3 costs (\$70,000, which already includes the Year 1 carry-forward) and the actual Year 3 costs (\$60,000). In order for the \$10,000 under-recovery from Year 3 to be effectuated, it is necessary to adjust the actual Year 3 costs (\$60,000) by adding the Year 1 carry-forward (\$10,000). This would result in comparing the estimated Year 3 costs (\$70,000) with the actual Year 3 costs (\$60,000+\$10,000=\$70,000). This comparison identifies that the \$10,000 has been recovered. And there is no carry-forward for Year 5. If this adjustment was not made, the estimated costs (\$70,000) would be compared with the actual costs (\$60,000), and the result would be a \$10,000 over-recovery (assuming that collections were \$70,000). Plaintiffs' methodology would lower the rate in Year 5, a result not warranted by cost allocation principles.

Additional examples of how this reconciliation process works are provided in the Second Declaration of Deborah Moberly (Def. Ex. 57). It is also explained in guidance prepared by HHS. Id. ¶ 24. The reconciliation process is not “double-dipping” or adjusting the same rate twice. It is a necessary process by which the same adjustment made to an estimated indirect cost pool for a particular year is also made to that same year's actual costs.<sup>38</sup>

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<sup>38</sup> Plaintiffs state that an IHS employee admitted that this reconciliation adjustment was adverse. Pl. Mem. at 22. This is not accurate, but regardless, he is not an employee of NBC and, as should be obvious, is not competent to testify about NBC's rate methodology. Ms. Moberly, on the other hand, testified about the reconciliation process and in no way suggested that it was an adverse adjustment. Moberly Dep. at 156-159 (Def. Ex. 61).

(iv) Characterizing the Indirect Cost Recovery and Rounding. Four additional objections raised by Plaintiffs also fail because the challenged practices are consistent with the ISDA and cost allocation principles. Plaintiffs' first allegation is that the carry-forward calculation should consider "contract price" and that what was needed by a contractor is not the same as what was expended by that contractor. Pl. Mem. at 19. As explained, the term "contract price" does not appear anywhere in the ISDA and appears to have been crafted by Plaintiffs. The "price" of an ISDA contract is the amount to which the parties agreed.<sup>39</sup> In this instance, IHS did not breach any promises to pay indirect costs and thus the "contract price" was paid. Def. Mem. at 20-22. The amounts owed by IHS under ISDA contracts have no bearing on NBC's carry-forward calculations, see Plaintiffs' ISDA Contracts (Def. Exs. 6-12), which do not discuss the rate methodology, and conversely, the negotiation of an indirect cost rate, or the use of one, does not create any expectation or right to recovery, see 2 C.F.R. § 225.20; 2 C.F.R. Pt. 225, App. A, § A.1. Contrary to Plaintiffs' argument, neither the ISDA nor Plaintiffs' contracts specify that IHS must pay them the amount equal to their direct cost base times their indirect cost rate.

Under the rate methodology, costs not expended are considered over-recoveries, i.e., costs not needed for a particular year. Both Plaintiffs had significant over-recoveries in each year at issue in this case. As such, regardless of whether it is true that "[i]f the contractor does not collect the rate-generated amount and lacks independent resources to spend at the rate-generated amount, it will be penalized by the substitution of the "spent" amount for the true contract obligation[.]" such a proposition has no bearing on these two Plaintiffs, both of which had significant over-recoveries.

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<sup>39</sup> IHS does not wait until after contract performance to award indirect costs, Ketcher Dec. ¶ 29; Zuni Dec. ¶ 68 (Def. Exs. 1, 2), as Plaintiffs' suggest, Pl. Mem. at 20.

Plaintiffs next complain about NBC's use of a shortfall column in the carry-forward calculation. Pl. Mem. at 20-21. Defendants' Memorandum at 34-35 and 46-48 explains why NBC chose to use a shortfall column to ensure that it did not shift costs from one agency to another and to ensure that appropriations law were not violated. Notably, however, Tunica's indirect cost rate proposals for 1998-2001 included "shortfalls" in funding in a separate column and did not include them in the carry-forward. 2d Moberly Dec. n.1 (Def. Ex. 57). Similarly, RNSB's indirect cost rate proposals for 1998-2003 included "shortfalls" in funding in a separate column and did not include them in the carry-forward. Id. Not only did Plaintiffs fail to raise any disputes they may have had with the carry-forward schedule, discussed supra, but they actually proposed the carry-forward schedule that they now challenge. This should not be countenanced.

Third, Plaintiffs complain about how NBC considers program funding used to cover indirect costs. Pl. Mem. at 22-23. If a contractor receives funds for a program, but uses the funds instead to pay for indirect costs, then NBC considers those funds to be part of the indirect cost recovery. 2d Moberly Dec. ¶ 28 (Def. Ex. 57). There is nothing in the cost principles or general accounting which specifies that these funds should not be treated in this manner. Id.

Fourth, Tunica and RNSB also challenge the fact that NBC rounds certain percentages in the carry-forward schedule. Pl. Mem. at 23. It is standard practice in business and government to use rounded numbers. 2d Moberly Dec. ¶ 30 (Def. Ex. 57). See generally 31 U.S.C. § 3717 (rounding to the nearest whole percentage point); 49 U.S.C. § 47107(o) (same). The reason rounding is commonly used is that it avoids using cumbersome numbers without making any significant difference in the final calculation. 2d Moberly Dec. ¶ 30 (Def. Ex. 57); see id. Ex. C to Moberly Dec. (illustrating how rounding makes no difference in Plaintiffs' own example).

(v) Two of Plaintiffs' Arguments Misunderstand the Carry-Forward. With respect to two of Plaintiffs' challenges, they are founded on incorrect facts. NBC does not require the inclusion of either tribal funds or DOI education grants (Public Law 100-297) to over and under-recoveries in the carry-forward computation. Id. ¶¶ 29, 31. NBC does not require, and in fact advises against, including tribal funds in the carry-forward. Id. ¶ 29. In addition, NBC does not include Public Law 100-297 funds in the carry-forward. Id. ¶ 31. It does appear that these funds were included in RNSB's carry-forward for 1995-1997, but NBC does not know why this was done. Id. It is notable that in its indirect cost rate proposal for 1997, RNSB included Public Law 100-297 over-recoveries in the carry-forward. Id. For all of these reasons, NBC's cost allocation principles attendant to fixed-with-carry-forward rates are consistent with the ISDA.<sup>40</sup>

## **VII. PLAINTIFFS HAVE CONCEDED THEIR "CAP YEARS" CLAIMS (1998 TO PRESENT)**

On October 3, 2006 this Court Ordered the parties to file "all dispositive motions" in this action. Notwithstanding the Court's Order, Plaintiffs elected to file only a motion for partial summary judgment for damage claims relating to their ISDA contracts from 1995-1997. Pl. Mot. at 1. While Plaintiffs purport to "reserve" their contract damage claims for years 1998 forward, Pl. Mot. at 3; Pl. Mem. at 2, it is unclear upon what legal basis Plaintiffs can prolong this five-year-old litigation by "reserv[ing]" their damage claims for other years. In any event, Plaintiffs'

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<sup>40</sup> Because Plaintiffs' rates, and all other rates, were properly negotiated, there is no basis for Plaintiffs' allegation, Pl. Mem. at 18, that Congress is unaware of the amount of the indirect cost shortfall. In fact, the opposite is true. Def. Supp. Resp. to Interrog. 13 (Def. Ex. 65). For the same reason, the Court need not even consider whether Plaintiffs' rate agreements could be subject to reopening. On this point, the weak regulatory construction suggested by Plaintiffs, namely, that OMB A-87 authorizes the reopening of rate agreements at any time, Pl. Mem. at 24, is also illogical, as it would permit a regulation (OMB A-87) to amend effectively a statute (the ISDA), thereby permitting a contractor to evade jurisdictional requirements, statutes of limitations, and the CDA. The ISDA depends upon a stable contracting system, and Congress directed that all disputes concerning executed contracts be channeled to the administrative process established by the CDA. Thus Plaintiffs' regulatory construction necessarily fails.

claims for later, capped years cannot survive, because Courts examining the issue have unanimously held that the “ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations.” RNC, Mem. Op. at 14 (Def. Ex. 30); accord Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999) (caps to Interior appropriations); Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F3d 1338 (D.C. Cir. 1996).

Plaintiffs appear to try to keep their case alive by simultaneously moving for injunctive relief for “all years and future years.” Pl. Mot. at 2-3. However, as contemplated by Congress, the type of relief sought by Plaintiffs for “all years and future years” is only available through a declination action *prior* to contract formation. The availability of the generous judicial review provisions in the ISDA demonstrates Congressional intent that if a dispute arises between the parties regarding the funding levels or funding terms, the Tribal Contractor must take advantage of the judicial review procedures and challenge the funding levels proposed by the Secretary *before contract execution*, rather than accepting the funding amount offered, accepted by the Tribal contractor, and subsequently provided by the Secretary. Once the ISDA contracts are formed, however, Congress intended that the CDA governs those contracts. Thus, all relief under executed ISDA contracts is necessarily based on the contracts themselves, whether those contracts were breached, and whether any breach caused damages. In sum, once ISDA contracts are formed – either through a tribal contractor’s acceptance or a judicial order following a declination action, there is no independent statutory right to relief under the ISDA separate from contract claims for money damages. See Pueblo of Zuni v. United States, No. 01-1046, slip op. at 1-4 (D.N.M. Nov. 14, 2006) (Def. Ex. 32) (rejecting plaintiffs’ efforts to distinguish between statutory ISDA claims and contract claims under the CDA).

**CONCLUSION**

Plaintiffs should not be permitted to bypass both the CDA's jurisdictional prerequisites and this Court's 2004 Order dismissing claims and amounts that were never administratively presented. Thus, Plaintiffs' new theories of relief and newly calculated sums cannot be reviewed here. Moreover, application of Defendants' threshold contract defenses, ranging from no breach to waiver doctrines, disposes of this case in its entirety. The additional bases for relief argued by Plaintiffs are meritless. For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be denied.

Respectfully submitted,

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Dated: March 29, 2007

Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

TUNICA-BILOXI TRIBE OF LOUISIANA;	)	
RAMAH NAVAJO SCHOOL BOARD, INC.,	)	
	)	
Plaintiffs,	)	Case No. 1:02CV02413
	)	Judge Reggie B. Walton
v.	)	Magistrate Judge Deborah A. Robinson
	)	
UNITED STATES of AMERICA;	)	
MICHAEL O. LEAVITT, Secretary of the	)	
United States Department of Health and Human	)	
Services; DIRK KEMPTHORNE, Secretary	)	
of the United States Department of the Interior,	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF MATERIAL FACT**

Pursuant to Local Civil Rules 7.1(h) and 56.1, Defendants, by and through undersigned counsel, submit the following Response to Plaintiffs’ Statement of Material Facts (Dkt #110).

For purposes of this Response, the following abbreviations are used:

RNSB	The Ramah Navajo School Board
Tunica	The Tunica-Biloxi Tribe of Louisiana
HHS	The Department of Health and Human Services
DOI	The Department of the Interior
IHS	The Indian Health Service within HHS
BIA	The Bureau of Indian Affairs within DOI
NBC	The National Business Center within DOI
ISDA	The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 <i>et seq.</i>
OMB A-87	Circulars developed by the Office of Management and Budget (“OMB”), OMB A-87, 2 C.F.R. Pt. 225

CDA	Contract Disputes Act
CSC	Contract support costs
AFA	The annual funding agreement component of an ISDA contract
Plaintiffs' Motion	Plaintiffs' Motion and Memorandum for Partial Summary Judgment, filed December 21, 2006
Defendants' Memorandum	Defendants Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed March 29, 2007

1. The first sentence is undisputed for purposes of this litigation, except to the extent that the phrase “have contracted with the United States” (emphasis added) is not a material fact, but a characterization of the ISDA to which no response is required. It is undisputed that the two Plaintiffs have contracted with the Secretary of HHS to provide health services to Plaintiffs’ members for the years relevant to this lawsuit. Tunica’s contracts at issue in this case cover fiscal years 1995-2001 (a 1995 Contract, a 1996 Contract in effect until 2000, and a 2000 Contract, in effect throughout 2001, with accompanying AFAs). Tunica’s Contracts (Def. Ex. 6-8). RNSB’s contracts at issue in this case cover fiscal years 1995-2003 (a 1995 Contract in effect in 1995 and 1996, a 1997 Contract in effect in 1997-1999, a 2000 Contract in effect in 2000-2002, and a 2003 Contract in effect in 2003, with accompanying AFAs). RNSB’s Contracts (Def. Ex. 9-12). The second sentence is not a material fact but a characterization of the ISDA, as well as other statutes delineating the legal obligations of the Indian Health Service (“IHS”), thus no response is required. It is also disputed in Defendants’ Memorandum.
2. This paragraph is not a statement of material fact; it is a characterization of the ISDA, and thus no response is required. It is also disputed in Defendants’ Memorandum.

3. This paragraph is immaterial for purposes of Plaintiffs' Motion. It is undisputed for purposes of this litigation that Tunica and RNSB receive monies from other federal and state agencies to administer different programs and grants. This paragraph uses the phrase "governmental services," however, which is a legal characterization of the operative statutes permitting other agencies and states to provide funds to Tribes, and to which no response is required.
4. This paragraph is immaterial for purposes of Plaintiffs' Motion. The first sentence of this paragraph is undisputed for purposes of this litigation. The second sentence of this paragraph is disputed. See Moberly Dec. ¶¶ 74-76 (Def. Ex. 3).
5. This paragraph is not a statement of material fact but a legal characterization of the ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed. See Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2).
6. This paragraph is not a statement of material fact but a legal characterization of the ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed. See Moberly Dec. ¶¶ 4, 56 (Def. Ex. 3); Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2).
7. This paragraph is not a statement of material fact but a legal characterization of the ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed. See Moberly Dec. ¶¶ 4, 56, 73, 76 (Def. Ex. 3).
8. The first sentence of this paragraph is disputed. See 2d Moberly Dec. ¶¶ 16-23 (Def. Ex. 57). The second statement of this paragraph is not a statement of material fact but a legal characterization of the ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is

- required. It is also disputed. Id.; see also Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2); IHS Circular No. 2004-03/Contract Support Costs (Def. Ex. 33).
9. This paragraph is not a statement of material fact but a legal characterization of the ISDA and 25 C.F.R. part 900 to which no response is required. It is also disputed.
  10. This paragraph is immaterial to for purposes of Plaintiffs' Motion. It is also disputed. See [www.cbca.gsa.gov/mission.htm](http://www.cbca.gsa.gov/mission.htm) (last visited, Mar. 28, 2007).
  11. This paragraph is disputed, except that it is undisputed that Tunica and RNSB's cognizant agency has been OIG and now NBC since 1995. It is also undisputed that Tunica does not have an indirect cost rate for any year after 1996 and RNSB does not have an indirect cost rate for any year after 2006. See Moberly Dec. ¶¶ 41-42 (Def. Ex. 3); 2d Moberly Dec. ¶ 36 (Def. Ex. 57). The statement that DOI's OIG or its successor the DOI's NBC has been the cognizant agency for "most contractors" is immaterial to Plaintiffs' Motion, and is disputed. See Moberly Dec. ¶ 39 (Def. Ex. 3).
  12. This paragraph is immaterial to Plaintiffs' Motion. In addition, this paragraph relies upon legal conclusions and characterizations of the ISDA to which no response is required. It is also disputed. See Moberly Dec. ¶ 50 (Def. Ex. 3); IHS Circular No. 2004-03/Contract Support Costs (Def. Ex. 33).
  13. It is undisputed for purposes of this litigation that Plaintiffs were and are class members in the BIA contractor litigation, currently captioned RNC v. Kempthorne, No. 90-957 (D.N.M). To the extent that the first sentence of this paragraph characterizes a Tenth Circuit decision, it is not a statement of a material fact to which a response is required. It is also undisputed that the plaintiffs in the BIA contractor litigation named the United States, the Secretary of the Interior, an Assistant Secretary of the Interior, and the Chief of

the Office of the Inspector General as defendants in that litigation. See RNC First Am. Compl. (Def. Ex. 28).

14. The first clause of the first sentence is immaterial to Plaintiffs' Motion, is disputed, and has not been factually supported by Plaintiffs. The second substantive clause of the first sentence is disputed, and is immaterial to Plaintiffs' Motion. See RNC, 50 F. Supp. 2d at 1099. Defendants also dispute participation in the task force. The second sentence is disputed, and Plaintiffs have not provided any factual support for the assertion that IHS made a "demand." To the extent that this paragraph characterizes the language of the settlement agreement, such characterizations are not material facts to which a response is required. It is undisputed that when Interior and the BIA contractors drafted an agreement requiring the BIA contractors to pursue claims against IHS in a separate lawsuit, HHS (not IHS) was made aware of and approved this language.
15. This paragraph is disputed. See Ketcher Dec. ¶¶ 28- 35 (Def. Ex. 1); Zuni ¶¶ 67-75 (Def. Ex. 2); IHS Circular No. 2004-03/Contract Support Costs (Def. Ex. 33).
16. This paragraph is immaterial to Plaintiffs' Motion, and Plaintiffs have not factually supported this statement. It is also disputed. See Wilkins Expert Report (Def. Ex. 5); Moberly Dec. (Def. Ex. 3).
17. This paragraph is disputed except that it is undisputed for purposes of this litigation that Tunica and RNSB negotiated indirect cost rates with OIG or NBC under OMB A-87 and other agency guidance. It is also undisputed for the purposes of this litigation that IHS permitted Plaintiffs to use their indirect cost rates negotiated with OIG or NBC for purposes of negotiating with IHS indirect contract support cost funding for Plaintiff's ISDA contracts with IHS in 1995-1997. See Moberly Dec. ¶¶ 4, 56 (Def. Ex. 3); Ketcher

Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2); Kerkmans Dep. at 68:14-22 (Def. Ex. 58). To the extent that the first sentence utilizes legal conclusions, they are not statements of material fact to which a response is required. To the extent that Plaintiffs seek to assert years beyond 2003, these statements are immaterial to Plaintiffs' Motion. The second sentence is a quotation from OMB A-87, and is not a material fact to which a response is required. The third sentence is not a statement of material fact but a legal characterization of the ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is required.

18. This paragraph is not a statement of material fact. It is a characterization of OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed in Defendants' Memorandum.
19. To the extent that this paragraph refers to "most ISDA contractors", it is irrelevant to Plaintiffs' Motion, and is not a material fact. With respect to Tunica and RNSB, the first sentence of this paragraph is disputed. See Wilkins Expert Report (Def. Ex. 5). The second sentence is not a statement of material fact. It is a characterization of OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed in Defendants' Memorandum.
20. This paragraph is disputed. See Moberly Dec. ¶¶ 7-13, 73-76 (Def. Ex. 3).
21. This paragraph is disputed. See Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3).
22. The first sentence of this paragraph is a characterization of OMB A-87 to which no response is required. It is also disputed. See Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75. (Def. Ex. 2). See also Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex.

- 3). The second sentence of this paragraph is a characterization of the ISDA, to which no response is required. It is also disputed in Defendants' Memorandum.
23. The paragraph is disputed. See Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3). The second sentence of this paragraph is immaterial to Plaintiffs' Motion, is not a statement of material fact because it relies on legal characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, and thus no response is required. It is also disputed in Defendants' Memorandum. The third sentence of this paragraph is immaterial to Plaintiffs' Motion, and is also a characterization of OMB A-87 (2 C.F.R. Pt. 225) and is therefore not a statement of material fact to which a response is required, and is not disputed for purposes of this litigation.
24. It is undisputed for purposes of this litigation that Tunica and RNSB negotiated fixed-with-carry-forward indirect cost rates with OIG or NBC under OMB A-87 and other agency guidance, and that Tunica lacks an indirect cost rate for any year after 1996, and RNSB lacks an indirect cost rate for any year after 2006. See Ketcher Dec. ¶ 35 (Def. Ex. 1); Zuni Dec ¶ 75 (Def. Ex. 2); Moberly Dep. ¶ 27 (Def. Ex. 3); Donham Dep. at 228:12-20 (Def. Ex. 59). The rates elected for use in the indirect cost negotiations by "most other ISDA" contractors are immaterial to Plaintiffs' Motion. To the extent the phrase "fixed with carryforward system" is a legal characterization of OMB A-87 (2 C.F.R. Pt. 225), it is not a statement of material fact requiring a response.
25. This paragraph is disputed, except for purposes of this litigation, it is undisputed that: A tribe may elect to propose a "fixed-with-carry-forward" rate to NBC (or its predecessor OIG), which is a rate that is based both on an estimate of the costs to be incurred for the applicable period and on an adjustment (called a carry-forward) that takes into account

the difference between the estimated and actual (audited) costs from an earlier period. The purpose of the carry-forward is to “finalize” or “close-out” a prior year’s rate by accounting for the difference between a contractor’s actual (audited) expenses and over- or under-recoveries from an earlier period. See Moberly Dec. ¶ 18 (Def. Ex. 3). As used here, the term “contract price” is a characterization of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required, and is disputed. See Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2).

26. This paragraph is immaterial for purposes of Plaintiffs’ Motion. It is undisputed for purposes of this litigation, however, that for years before 2004, IHS permitted ISDA contractors to use their most recent prior year indirect cost rate negotiated with their cognizant agency. Permitting contractors to use the contractor’s most recent prior year indirect cost rate for purposes of indirect cost funding negotiations was premised on the expectation that, upon the contractor’s negotiation of a new current rate, any under-recoveries or over-recoveries of indirect costs resulting from the use of the old rate would either be refunded to IHS by the contractor or be accounted for in the rate negotiation through a carry-forward. See Ketcher Dec. at ¶ 33 (Def. Ex. 1); Zuni Dec. at ¶ 72 (Def. Ex. 2).
27. This paragraph is not a statement of material fact. It is a characterization of OMB A-87 (2 C.F.R. Pt. 225) and possibly of the ISDA, and thus no response is required.
28. This paragraph is not a statement of material fact. It is a characterization of OMB A-87 (2 C.F.R. Pt. 225), and possibly of the ISDA, and thus no response is required.
29. This paragraph is repetitive and immaterial for purposes of Plaintiffs’ Motion. It is also disputed. See Moberly Dec. ¶¶ 74-76 (Def. Ex. 3).

30. The first sentence of this paragraph disputed. See Wilkins Expert Report at 9-16 (Def. Ex. 5). The second sentence of this paragraph is not a statement of material fact. It is a legal characterization of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, to which no response is required. It is undisputed that it is Plaintiffs' choice to take on programs they know do not pay indirect costs. See Donham Dep. at 228:12-20 (Def. Ex. 59); Moberly Dec. ¶ 76 (Def. Ex. 3).
31. To the extent this paragraph relies upon characterizations of OMB A-87 (2 C.F.R. Pt. 225), no response is required. It is also disputed. See Moberly Dec. ¶¶ 57-71; 73, 76 (Def. Ex. 3); 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57); Ketcher Dec. ¶¶ 9-11, 14, 17, 19, 21, 26, 27 (Def. Ex. 1); Zuni Dec. ¶¶ 10, 13, 16-66 (Def. Ex. 2); Donham Dep. at 218:23-220:10 (Def. Ex. 59).
32. This paragraph is a hypothetical, not a statement of material fact, and thus requires no response. In addition, it employs legal characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA which are not statements of material fact, and thus require no response. It is also disputed. See Moberly Dec. ¶¶ 4, 44-48, 56, 73-76 (Def. Ex. 3); Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2).
33. It is undisputed for purposes of this litigation that Tunica and RNSB negotiated indirect cost rates with OIG or NBC under OMB A-87 and other agency guidance, and that Tunica lacks an indirect cost rate for any year after 1996, and RNSB lacks an indirect cost rate for any year after 2006. See Ketcher Dec. ¶ 35 (Def. Ex. 1); Zuni Dec ¶ 75 (Def. Ex. 2); Moberly Dec. ¶¶ 17-30 (Def. Ex. 3); 2d Moberly Dec. ¶ 36 (Def. Ex. 57); Donham Dep. at 228:12-20 (Def. Ex. 59). The rates elected for use in the indirect cost negotiations by "most other ISDA" contractors is immaterial to Plaintiffs' Motion. To

the extent the phrase “fixed with carryforward system” is a legal characterization of OMB A-87 (2 C.F.R. Pt. 225), it is not a statement of material fact requiring a response.

34. This paragraph is disputed, except it is undisputed for the purposes of this litigation that a tribal contractor may elect to propose a “fixed-with-carry-forward” rate to NBC (or its predecessor OIG), which is a rate that is based both on an estimate of the costs to be incurred for the applicable period and on an adjustment (called a carry-forward) that takes into account the difference between the estimated and actual costs from an earlier period. The purpose of the carry-forward is to “finalize” or “close-out” a prior year’s rate by accounting for the difference between a contractor’s actual expenses and over- or under-recoveries from an earlier period. See Moberly Dec. ¶ 18 (Def. Ex. 3).
35. This paragraph is disputed. See 2d Moberly Dec. ¶¶ 16-23 (Def. Ex. 57).
36. This paragraph is disputed. See Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75 (Def. Ex. 2); Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3). To the extent that it is also a characterization of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, no response is required. It is also a hypothetical, not a statement of material fact, and thus no response is required.
37. For the purposes of this litigation, it is undisputed that shortfalls reflecting under-recoveries based upon legal or contractual limitations on the amount of the indirect cost recovery by a particular program are not carried forward. See Moberly Dec. ¶ 23, 73 (Def. Ex. 3). The rest of the paragraph is disputed. Id. ¶¶ 7-13, 47-48, 56, 73-76.
38. This paragraph is disputed, except it is undisputed that if a contractor receives funds for a program but uses them instead to pay for indirect costs, NBC considers those funds to be part of the indirect cost recovery. See 2d Moberly Dec. ¶ 28 (Def. Ex. 57).

39. This paragraph is disputed. See 2d Moberly Dec. ¶ 29 (Def. Ex. 57).
40. This paragraph is disputed. See 2d Moberly Dec. ¶ 30 (Def. Ex. 57).
41. This paragraph is not a statement of material fact. It is a characterization of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required. It is also disputed in Defendants' Memorandum.
42. The first sentence of this paragraph relies upon characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, such as the undefined and subjective term "necessary" to which no response is required. For purposes of this litigation, it is undisputed that Tunica and OIG agreed to an indirect cost rate of 53.23% for 1995. See Def. Ex. 13. For purposes of this litigation, it is undisputed that Tunica proposed an indirect cost rate of 68.9% for 1995. The fourth sentence of this paragraph is immaterial to Plaintiffs' Motion. The rest of the paragraph is disputed. Compare Ex. 1 of Burke Dec. (Pl. Ex. 2) with Ex. 9 to Burke Dec. at 10 (Pl. Ex. 2).
43. For purposes of this litigation, it is undisputed that Tunica and OIG agreed to a negotiated indirect cost rate of 54.78% for 1996. See Def. Ex. 14. It is undisputed that for years 1997 through 2001 (and later), because Tunica failed to obtain a current negotiated rate, IHS permitted Tunica to negotiate indirect cost funding using its 1996 rate. See Ketcher Dec. ¶¶ 15-27, 32-33 (Def. Ex. 1). This permission was premised on the expectation that, upon Tunica's negotiation of a new current rate, any under-recoveries or over-recoveries of indirect costs resulting from the use of the old rate would either be refunded to IHS by Tunica or be accounted for in the rate negotiation process with OIG through the carry-forward. Id. For contracts entered into in fiscal years 2005 forward, IHS no longer permits contractors to use indirect cost rates that are more than three years old. See IHS

CSC Policy Circular 2004-03 (Def. Ex. 33). Upon recent submission of Tunica's new indirect cost proposals to NBC, see Ex. 9 to Burke Dec. (Pl. Ex. 2), though still unverified, Tunica appears to report massive over-recoveries pursuant to the use of the 1996 rate for fiscal years 1995-2001. See 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57). The third sentence of this paragraph is immaterial to Plaintiffs' Motion, and, for purposes of this litigation, it is undisputed that Tunica directly negotiated with IHS for indirect-type costs. See Ketcher Dep. at 17-18 (Def. Ex. 60).

45. The first sentence in this paragraph is undisputed for purposes of this litigation. The second sentence of this paragraph is not a material fact, as it is a characterization of Tunica's "wants" and thus no response is required. Plaintiffs also provided no admissible evidence to support this statement and thus no response is required. The third sentence of this paragraph is disputed. See Ketcher Dec. ¶¶ 30, 35 (Def. Ex. 1); Moberly Dec. ¶¶ 45-46 (Def. Ex. 3).
46. With respect to the first two sentences, for purposes of this litigation, it is undisputed that Tunica and OIG agreed to an indirect cost rate for 1995 which relied upon the inclusion of State and Other Grants in Tunica's direct cost base. See Def. Ex. 13. The characterizations of OIG's actions are disputed. See Moberly Dec. ¶¶ 37-46 (Def. Ex. 3). Tunica could have disputed the rate itself by accessing dispute resolution procedures set forth by regulation, but did not do so. See id. ¶¶ 45-46. The fourth sentence is undisputed. The fifth sentence is a hypothetical and thus is not a statement of material fact, for which no response is required.
47. This paragraph is not a statement of material fact but a characterization of OMB A-87 and the ISDA to which no response is required. It is also disputed. See Ketcher Dec. ¶¶ 9-11,

14, 17, 19, 21, 26, 27, 30, 35 (Def. Ex. 1); Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3); Donham Dep. at 218:23-220:10 (Def. Ex. 59).

48. This paragraph is immaterial to Plaintiffs' Motion. It is also not a statement of material fact but a characterization of OMB A-87 and the ISDA to which no response is required. It is also disputed, except it is undisputed that Tunica and OIG agreed to an indirect cost rate for 1996 which included other programs in Tunica's direct cost base. See Ketcher Dec. ¶¶ 9-11, 14, 17, 19, 21, 26, 27, 30, 35 (Def. Ex. 1); Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3); Donham Dep. at 218:23-220:10 (Def. Ex. 59); Def. Ex. 14; Compare Ex. 1 to Burke Dec. (Pl. Ex. 2) with Ex. 9 to Burke Dec. at 10-11 (Pl. Ex. 2). To the extent that this paragraph includes hypotheticals, no response is required.
49. The first and second sentences of this paragraph are immaterial to Plaintiffs' Motion, but are undisputed for purposes of this litigation. The third sentence is disputed. See Moberly Dec. ¶ 41 (Def. Ex. 3). For purposes of this litigation, however, it is undisputed that OIG and Tunica did not negotiate an indirect cost rate for any fiscal years after 1996.
50. This paragraph is not a statement of material fact pertaining to Plaintiffs' Motion, as it is a statement of future intention and conduct to which no response is required.
51. It is undisputed that for years 1997 through 2001 (and after), because Tunica failed to obtain a current negotiated rate, IHS permitted Tunica to negotiate indirect cost funding using its 1996 rate. See Ketcher Dec. ¶¶ 15-27, 32-33 (Def. Ex. 1). This permission was premised on the expectation that, upon Tunica's negotiation of a new current rate, any under-recoveries or over-recoveries of indirect costs resulting from the use of the old rate would either be refunded to IHS by Tunica or be accounted for in the rate negotiation process with OIG or NBC through the carry-forward. Id. For contracts entered into in

fiscal years after 2004, IHS no longer permitted contractors to use indirect cost rates that were more than three years old. See IHS CSC Policy Circular 2004-03 (Def. Ex. 33). It is undisputed that for 2005-2006, Tunica negotiated indirect-type costs directly with IHS. See Ketcher Dep. at 17-18 (Def. Ex. 60).

52. This paragraph is disputed. See 2d Moberly Dec. ¶¶ 16-23 (Def. Ex. 57). It also incorporates characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required. This paragraph also contains hypotheticals, not statements of material fact, and thus no response is required.
53. This paragraph contains characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, to which no response is required. This paragraph also contains hypotheticals, not statements of material fact, to which no response is required. This paragraph is disputed, except that, for the purposes of this litigation, it is undisputed that shortfalls reflecting under-recoveries based upon legal or contractual limitations on the amount of the indirect cost recovery by a particular program are not carried forward. See Donham Dep. at 218:23-220:10 (Def. Ex. 59); Moberly Dec. ¶¶ 23, 73, 67-71, 76 (Def. Ex. 3); Ketcher Dec. ¶¶ 9-11, 14, 17, 19, 21, 26, 27 (Def. Ex. 1); 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57).
54. For purposes of this litigation, it is undisputed that RNSB negotiated fixed-with-carry-forward indirect cost rates with OIG and later NBC from 1993 to 2006. It is also undisputed that RNSB was under no obligation to propose rates to OIG or NBC that utilized the carry-forward. See Moberly Dec. ¶ 27 (Def. Ex. 3); Donham Dep. at 218:23-220:10 (Def. Ex. 59).
55. This paragraph is undisputed for purposes of this litigation, see Def. Ex. 15, but is immaterial to Plaintiffs' Motion.

56. This paragraph is undisputed for purposes of this litigation, see Def. Ex. 15, but is immaterial to Plaintiffs' Motion.
57. The first sentence of this paragraph relies upon characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required. For purposes of this litigation, it is undisputed that RNSB and OIG agreed to an indirect cost rate (a fixed with carry forward) of 25.8% in 1995. See Def. Ex. 15. The third sentence of this paragraph is immaterial to Plaintiffs' Motion. It is also disputed. Compare Ex. 5 to Martinez Dec. with Def. Ex. 17 at 12. The rest of the paragraph is disputed. See Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3); Zuni Dec. ¶¶ 67-75. (Def. Ex. 2).
58. The first sentence of this paragraph relies upon characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required. For purposes of this litigation, it is undisputed that RNSB and OIG agreed to an indirect cost rate of 21.3%. See Def. Ex. 16. The third sentence of this paragraph is immaterial to Plaintiffs' Motion, and is disputed. Compare Ex. 5 to Martinez Dec., with Def. Ex. 18 at 8. The rest of the paragraph is disputed. See Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3); Zuni Dec. ¶¶ 67-75. (Def. Ex. 2).
59. For purposes of this litigation, it is undisputed that RNSB and OIG negotiated indirect cost rates for 1995-2005. RNSB could have disputed the rate by accessing dispute resolution procedures set forth by regulation, but did not do so. See Moberly Dec. ¶¶ 45-46 (Def. Ex. 3). The third sentence of this paragraph is immaterial to Plaintiffs' Motion, has not been factually supported, and is disputed. See Wilkins Expert Report at 9-16 (Def. Ex. 5).

60. This statement is a hypothetical and not a statement of material fact and no response is required. This statement is also a characterization of OMB A-87 and the ISDA to which no response is required. It is also disputed that Plaintiffs suffered damage under this theory. See Zuni Dec. ¶¶ 10, 13, 16-66 (Def. Ex. 2); Moberly Dec. ¶¶ 67-66 (Def. Ex. 3); 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57); Excerpts from Plaintiffs' Answers to Defendants' Second Set of Interrogatories and Requests for Production at 35-4 to 35-7 (Def. Ex. 35).
61. This paragraph is disputed. See 2d Moberly Dec. ¶¶ 16-23 (Def. Ex. 57). It also incorporates characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required.
62. This paragraph is disputed. See 2d Moberly Dec. ¶¶ 16-23 (Def. Ex. 57). It also incorporates characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required.
63. This paragraph is disputed. See 2d Moberly Dec. ¶ 31 (Def. Ex. 57). It also incorporates characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA to which no response is required.
64. This paragraph is immaterial to Plaintiffs' Motion. Plaintiffs have also failed to introduce evidence about the Western Region policies. It is also disputed. For purposes of this litigation, it is undisputed that RNSB's indirect cost rate agreements in 1995-1997 contained carry-forwards of Public Law 100-297 over-recoveries.
65. This paragraph is immaterial for purposes of Plaintiffs' Motion. It is, however, undisputed for purposes of this litigation.

66. This paragraph is disputed. See Ketcher Dec. ¶¶ 30-31 (Def. Ex. 1); Zuni Dec. ¶¶ 69-70 (Def. Ex. 2); Moberly Dec. ¶¶ 57-66 (Def. Ex. 3); 2d Moberly Dec. ¶¶ 32-33 (Def. Ex. 57); Excerpts from Plaintiffs’ Answers to Defendants’ Second Set of Interrogatories and Requests for Production at 35-4 to 35-7 (Def. Ex. 35). To the extent this paragraph refers to “other ISDA contractors,” it is immaterial to Plaintiffs’ Motion.
- 66A. This paragraph is disputed. See, e.g., Ketcher Dec. ¶¶ 9-11, 14, 17, 19, 21, 26, 27 (Def. Ex. 1); Zuni Dec. ¶¶ 10, 13, 16-66 (Ex. 2); Moberly Dec. ¶¶ 58-60, 70-71 (Ex. 3). To the extent that the terms “contract price” and “under-calculated” are legal characterizations of OMB A-87 (2 C.F.R. Pt. 225) and the ISDA, they are not statements of material fact and require no response.
67. This paragraph is disputed. See, e.g., Ketcher Dec. ¶¶ 9-11, 14, 17, 19, 21, 26, 27 (Def. Ex. 1); Zuni Dec. ¶¶ 10, 13, 16-66 (Def. Ex. 2); Moberly Dec. ¶¶ 58-71 (Def. Ex. 3); 2d Moberly Dec. ¶¶ 32-36 (Def. Ex. 57).
68. This paragraph is immaterial to Plaintiffs’ Motion. This paragraph also includes suppositions about Congressional decision making that are not statements of material fact, and require no response. This paragraph is disputed. See Def. Supp. Response to Interrogatory 13 at 3-4 (Def. Ex. 65).
69. This paragraph is disputed, except as follows. For the purposes of this litigation, it is undisputed that on April 2 and September 27, 2001, Tunica submitted contract dispute claims to IHS related to its 1995 through 2001 contracts and AFAs. See Def. Ex. 21-22. Tunica raised three legal theories to support its claims. The first was that IHS had underfunded indirect CSC generated by its indirect cost rate (“Claim One” or “the underfunding claim”). Id. The second challenged the calculation of its indirect cost rate,

relying on Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (“Claim Two” or “the RNC” claim). The third challenged the rate methodology as not making adjustments for shortfalls in the carry-forward (“Claim Three” or “the carry-forward shortfall claim”). Id. Claim Three’s specific theory applied the RNC claim to the carry-forward calculation, alleging that none of the tribe’s “actual under-recoveries” from agencies “whose programs were not included in the direct cost base” were carried forward, but that all of the tribe’s actual over-recoveries were carried forward, thereby depressing the rate. Def. Ex. 21-5-7, Def. Ex. 22-3-4. Tunica’s 1995-2001 CDA claims raise no other theory as a basis for challenging the carry-forward calculation. Id. It is further undisputed that on August 31, 2001, RNSB submitted contract dispute claims to IHS related to its 1993-1996 contracts. See Def. Ex. 24. RNSB raised only Claims One and Two. Id. To date, RNSB has not submitted any claims related to its 1997 contract. On December 30, 2003, RNSB submitted an additional contract dispute for 1998, which likewise raised only Claims One and Two. See Def. Ex. 25. On September 21, 2005, RNSB submitted a third claim letter related to its contracts in effect between 1999-2003. See Def. Ex. 26. In this letter, RNSB raised Claims One, Two, and Three. RNSB’s CDA claims – including its 1999-2003 CDA claims challenging the carrying-forward for reflecting over-recoveries, but not under-recoveries – raise no other theory as a basis for challenging the carry-forward calculation. It is disputed that any other matters set forth in Plaintiffs’ Motion, or any other matters in this lawsuit, have been exhausted.

70. This paragraph is immaterial to Plaintiffs’ Motion. It is also disputed, as set forth in the charts below. In not a single year at issue can Plaintiffs demonstrate that they received “the majority of the funds in their direct cost bases from IHS and BIA ISDA Contracts.”

In most years, the total percentage of combined BIA and IHS ISDA programs is only about a third of each Plaintiffs' total direct cost base.

<b>RNSB 1995-2003</b>				
<b>Combined Actual % of IHS and BIA ISDA Programs</b>				
<b>(From RNSB Indirect Cost Rate Agreements)</b>				
Year	IHS ISDA Contracts (or "638 Contracts")	BIA ISDA Contracts (or "638 contracts") <i>Not challenged in this action</i>	Total ISDA	RNSB Rate Agreements With OIG and Later NBC (Def. Exs. 15-20)
1995	14.4%	19.8%	34.2%	Def. Ex. 17-12
1996	18.2%	11.0%	29.2%	Def. Ex. 18-8
1997	17.1%	10.2%	27.3%	Def. Ex. 18-10
1998	18.8%	9.9%	28.7%	Def. Ex. 18-12
1999	21.7%	9.4%	31.1%	Def. Ex. 18-14
2000	23.3%	9.0%	32.3%	Def. Ex. 18-16
2001	20.8%	8.8%	29.6%	Def. Ex. 19-9
2002	19.5%	9.0%	28.5%	Def. Ex. 20-9
2003	19.5%	8.82%	27.87%	Def. Ex. 56-9

<b>Combined Actual % of IHS and BIA ISDA Programs Tunica 1995-2001</b>				
<b>(From Tunica's Submissions Characterizing its Actual Indirect Costs*)</b>				
<i>*Numbers remain unverified.</i>				
Year	IHS ISDA Contracts (or "638 Contracts")	BIA ISDA Contracts (or "638 contracts") <i>Not challenged in this action</i>	Total ISDA	Tunica Rate Proposal 1998-2003 Ex. x. to Burke Dec. (Pl. Ex. 2)
1995	21.15%	24.61%	45.76%	<u>Id.</u> at 10
1996	27.13%	21.36%	48.49%	<u>Id.</u> at 11
1997	19.11%	20.15%	39.26%	<u>Id.</u> at 12
1998	19.35%	18.62%	37.97%	<u>Id.</u> at 13
1999	13.64%	16.14%	29.78%	<u>Id.</u> at 14
2000	13.48%	19.10%	32.58%	<u>Id.</u> at 15
2001	12.59%	16.32%	28.91%	<u>Id.</u> at 16

71. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of obligations under the ISDA or OMB A-87 (2 C.F.R. Pt. 225) to which no response is required.
72. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of obligations under the ISDA or OMB A-87 (2 C.F.R. Pt. 225) to which no response is required.
73. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of obligations under the ISDA or OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed. See Ketcher Dec. ¶¶ 28-35 (Def. Ex. 1); Zuni Dec. ¶¶ 67-75. (Def. Ex. 2); Moberly Dec. ¶¶ 7-13, 47-48, 56, 73-76 (Def. Ex. 3).
74. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of obligations under the ISDA or OMB A-87 (2 C.F.R. Pt. 225) to which no response is required.
74. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of ISDA and OMB A-87 (2 C.F.R. Pt. 225) to which no response is required.
76. This paragraph is immaterial to Plaintiffs' Motion. It also depends on legal characterizations of obligations under the ISDA or OMB A-87 (2 C.F.R. Pt. 225) to which no response is required. It is also disputed. See Def. Supp. Response to Interrogatory 13 at 3-4 (Def. Ex. 65).

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