

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

**TUNICA-BILOXI TRIBE OF LOUISIANA and
RAMAH NAVAJO SCHOOL BOARD, INC.**

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA, *et al.*,

DEFENDANTS.

No.: 1:02CV02413(RBW)

Magistrate Judge
Deborah A. Robinson

**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. NO. 110)**

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- 1 Deposition of Ronald B. Demaray, Aug. 22, 2006 (excerpts)
- 2 Deposition of Ralph Ketcher, Sept. 21, 2006 (further excerpts)
- 3 Defendants' Crossmotion for Summary Judgment on Liability and Declaratory Judgment in *Ramah Navajo Chapter v. Lujan*, U.S. District Court for District of New Mexico, Civ. No. 90-0957 (Jan. 24, 1992)
- 4 Fifth Declaration of Marcel Kerkmans
- 5 Declaration of Lawrence A. Ruzow
- 6 Fourth Declaration of Marlene Martinez
- 7 Depositions of Marcel Kerkmans (excerpts)
 - A. April 5, 2006
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- 8 U.S. Department of Health & Human Services, Division of Cost Allocation, *Guidelines for Establishing Fixed Rates with Carried-Forward Provisions*

(appendix F to OASMB-5, A Guide for Nonprofit Organizations: Cost Principles and Procedures for Establishing Indirect Cost and Other Rates for Grants and Contracts with the Department of Health and Human Services (1983))

- 9 *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33421, 2006 WL 3071259
- 10 *Hardrives, Inc.*, 93-2 BCA 25779, 1992 WL 390995 (IBCA 1992)
- 11 *J.M.T. Machine Co.*, ASBCA No. 24,298, 84-1 BCA ¶ 17,118, 1984 WL 14110
- 12 Stipulated Order in *Ramah Navajo Chapter v. Lujan*, U.S. District Court for District of New Mexico, Civ. No. 90-0957 (Sept. 21, 1999)

**LIST OF AUTHORITIES CITED IN THIS OPPOSITION
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ABBREVIATIONS

A-87	U.S. Office of Management & Budget, Circular No. A-87
BIA	Bureau of Indian Affairs, in the U.S. Department of the Interior
CDA	Contract Disputes Act, Public Law 95-563, 92 Stat. 2383 (1978), enacting 41 U.S.C. §§ 601 <i>et seq.</i> and amending parts of titles 5, 28, and 31, U.S.C.
<i>Cherokee</i>	<i>Cherokee Nation v. Leavitt</i> , 543 U.S. 631, 125 S. Ct. 1172 (2005)
CSC	contract support costs
<i>Def. Facts Resp.</i>	Defendants' Response to Plaintiffs' Statement of Material Fact (Dkt. No. 122)
<i>Def. Memo.</i>	Defendants' Memorandum in Support of Motion to Dismiss or for Summary Judgment (Dkt. No. 111)
<i>Def. Opp.</i>	Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 122)
FWCF	fixed-with-carry-forward, a type of indirect cost rate
HHS	U.S. Department of Health & Human Services
IDC	indirect contract support costs
IHS	Indian Health Service, in the U.S. Department of Health & Human Services
ISDA	Indian Self-Determination Act and Education Assistance Act of 1975, 25 U.S.C. §§ 450 <i>et seq.</i> , as amended
NBC	National Business Center, in the U.S. Department of the Interior
OIG	Office of the Inspector General, in the U.S. Department of the Interior
OMB	U.S. Office of Management and Budget
<i>Plfs. Facts</i>	Plaintiffs' Statement of Material Facts Not in Genuine Dispute (Dkt. No. 110)
<i>Plfs. Memo.</i>	Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (Dkt. No. 110)
<i>Plfs. Opp.</i>	Plaintiffs' Opposition to Defendants' Motion to Dismiss or for Summary Judgment (Dkt. No. 121)
<i>RNC v. Lujan</i>	<i>Ramah Navajo Chapter v. Lujan</i> , 112 F. 3d 1455 (1997)
RNSB	Ramah Navajo School Board, Inc.
Tunica	Tunica-Biloxi Tribe of Louisiana

ARGUMENT¹

I. DEFENDANTS HAVE NOT COMPLIED WITH RULE 56(e).²

This case is about a system that continues to shortchange contractors providing health care to their people. The facts are all on paper and no longer legitimately controvertible. The case demands contract interpretation on issues decided according to contract law.

Although Defendants' Response to Statement of Material Facts (*Def's. Facts Resp.*) appears to contest every numbered fact but number 44, it repeatedly fails to provide record evidence, and even where evidence is adduced the dispute is generally not a good faith fact dispute.

Response 1 is typical. The United States is the contracting party and the Secretaries (through their contracting officers) sign as agents as shown by the signature block. *See, e.g.*, Dkt. No. 11, Exh. M, at 1. Nothing in fact 1 is subject to good faith dispute and Defendants submit no evidence to the contrary, yet conclude "It is *also* disputed in Defendants' Memorandum." (Emphasis added.) No page citation is given and, in any case, argument of counsel is not evidence and does not meet the requirements of Rule 56(e).

Response 2 again offers no dispute, followed by the same "disputed in the memorandum" formula with no page reference. The third response is double talk and again no evidence is cited, nor is anything cited in responses 9, 13, 14, 18, 27, 28, 41, 50, 64, 71, 72, 74, or 74 again (*sic, i.e., 75*). In responses 17, 24, 26, 33, 34, 43 (*sic, 44*), 51, and 54, and parts of responses 19, 22,

¹ Plaintiffs incorporate by reference the arguments made in their opposition to Defendants' motion to dismiss or for summary judgment, Dkt. No. 121.

² ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." F.R.Cv.P. 56(e).

30, 42, 46, 57, and 58, no record evidence is cited to refute Plaintiffs; evidence is cited only to demonstrate something else Defendants want to argue.

On their face these responses do not comply with Rule 56(e). Therefore, responses 1, 2, 3, 9, 13, 14, 17, 18, 24, 26, 27, 28, 33, 34, 41, 43 (*sic*, 44), 50, 51, 54, 64, 72, 74, and 75, and portions of responses 19, 22, 30, 42, 46, 57, and 58 must be ignored.

Response 4 citing the Moberly declaration dissolves when the reference is examined. Relying on an NBC template, Ms. Moberly attributes indirect cost contributions to non-ISDA agencies. But none of the non-ISDA agencies was required to provide *supplemental contract support* as ISDA agencies must. The fourth response is typical in that the referenced evidence speaks past the fact it purportedly refutes, as it does in most of the responses.

While some of Defendants' declarants seem to controvert various points, the same declarants limit or explain their denials and the points are admitted on deposition or elsewhere in discovery. Nothing in the identically worded sections of the Zuni and Ketcher declarations offered in the Government's fifth response contradicts anything Plaintiffs say. Although the declarants declare that "IHS does not require that ISDA contractors have an indirect cost rate," if they do not have a rate IHS will provide one according to the same flawed methodology. Deposition of Ronald Demaray (Exhibit 1 to this Reply) 102:10 to 103:15; Deposition of Ralph Ketcher (Exhibit 2 to this Reply) 19:17 to 20:8; Dkt. No. 81, Exh. 13 (IHS Policy Memo. 92-02) at 8 ¶ 7.D; Dkt. No. 81, Exh. 14 (IHS Circ. 96-04), at 6 ¶ 4.A.2.c.

Response 10 pretends to raise a dispute founded in this January's incorporation of the former Interior Board of Contract Appeals into a new multi-agency Civilian Board of Contract Appeals. The change is not material to the issues.

In Response 37, Defendants provide citations that are simply wrong. *See* p. 12 n. 18, *infra*, & acc. text, noting Defendants' citation to totally irrelevant evidence in purporting to dispute Plaintiffs' assertion that only NBC uses the shortfall column and only for ISDA contractors.

The sole substantive dispute for which Defendants offer evidence is Mr. Wilkins' attack on Plaintiffs' contention that administrative costs tend to be relatively fixed. We have shown his views not credible. This is therefore not a genuine dispute, *Plfs' Opp.* 19-22, and the contention is not absolutely vital to Plaintiffs' claim though it does support the justice of it.

For these reasons, Defendants have not raised genuine issues of material fact sufficient to defeat Plaintiffs' motion.

II. DEFENDANTS ARE PRECLUDED FROM RELITIGATING THE ALREADY ADJUDICATED FICTION THAT NON-PAYING AGENCIES IN THE BASE HAVE PAID.

Defendants' major concern is to avoid the issue-preclusive effect of *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10th Cir. 1997) (*RNC v. Lujan*).

Issue preclusion minimizes inconsistent determinations among different forums and promotes judicial economy. It serves both the parties' interest in avoiding the expense and trouble of repetitious litigation and the public's interest in conserving judicial resources. In this case, it also preserves and promotes the uniform ISDA system intended by Congress for health services and non-health services.

In *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575 (1984), the Supreme Court confirmed that mutual collateral estoppel applies against the United States. All the requisites for applying the doctrine exist here. In the *RNC v. Lujan* litigation, defendant United States had a full and fair opportunity to defend its use in calculating indirect cost rates of the fiction that non-IDC-paying-agencies pay their proportionate share of IDCs. The Attorney General

represented the United States and its officers including the Secretary of the Interior in that lawsuit and represents them here. *See* Exhibit 3 hereto (United States a movant for summary judgment on issue). The United States should not be permitted to relitigate. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03, 60 S.Ct. 907 (1940)(“There 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.”).

A. THE PARTIES HERE WERE ALSO PARTIES IN *RNC V. LUJAN*.

Defendants do not dispute that Plaintiffs were members of the plaintiff class in *RNC v. Lujan*. *Defs. Facts Resp.* ¶ 13. Instead, they attempt to avoid mutuality by focusing on the separate agencies and sub-agencies of the United States—Interior, HHS, BIA, IHS, OIG, and NBC—suggesting that the federal contracting party is other than the United States and that, despite Supreme Court precedent to the contrary, components of the Federal Executive Branch are not in privity.

1. The United States is the contracting party to all ISDA contracts.

The Secretaries are contracting “agents” of the United States. Under normal agency law, they act for and on behalf of the United States. *See* 31 U.S.C. §§ 101, 102; *United States v. Tinney*, 30 U.S. 115, 128 (1831) (Story, J.) (United States as body politic may within its constitutional powers, through department to which those powers are confided, enter into contracts not prohibited by law and appropriate to exercise of those powers); Exhibit 4 (Kerkmans 5th Decl.) ¶ 14.

The Secretary by contract obligates the United States, not the Agency. 31 U.S.C. § 1501. Contractor claims are claims against the Government, not against the Agency. 41 U.S.C.

§ 605(a). Successful damage claims result in judgments against the United States, not against the Agency. *Id.* § 612(a).

Section 1(a)(1) of the Model Agreement, 25 U.S.C. § 450l(c), recognizes these fundamentals:

This agreement, denoted a Self-Determination Contract (referred to in this agreement as the ‘Contract’), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the ‘Secretary’), **for and on behalf of the United States** pursuant to title I [of ISDA]

. . . .

(Emphasis added.)³ As noted above, they are confirmed by the signature for the “United States of America” on the cover page of each of the contracts at issue. *See, e.g.*, Dkt. No. 12, Exh. J, at 75, Exh. K, at 84, Exh. L, at 1, Exh. M, at 1. *See also* Dkt. 110, Exh. 13 (Ketcher depo.) 24:13-16 (IHS contracting officer signs ISDA contracts on behalf of United States).

2. Congress has made clear that Defendants administer a single statutory scheme.

Congress has charged both Defendant Secretaries with the duty to administer ISDA in a uniform manner to achieve its purposes. The Secretaries recognize this mandate. Their implementing regulations, adopted jointly as required by Congress, 25 U.S.C. § 450k, state at the outset:

These regulations are prepared, issued, and maintained jointly by the Secretary of Health and Human Services and the Secretary of the Interior

25 C.F.R. § 900.1. The joint regulations “codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI)

³ 25 U.S.C. § 450b(j), defining self-determination contracts as between a tribal organization and the appropriate Secretary is not to the contrary in view of the Secretaries’ role as agents of the United States. *See Defs. Opp.* 27 n. 20. Were it insisted that § 450b(j) is inconsistent with section 1(a)(1) of the Model Agreement set out in 25 U.S.C. § 450l(c), the Model Agreement provision, enacted in 1994, would prevail over § 450b(j), enacted in 1988.

in implementing title I of [ISDA].” *Id.* § 900.2(a). *See also id.* § 900.3(b)(3)(“ It is the policy of [each] Secretary to provide a uniform and consistent set of rules for contracts under the Act”).

Administrative CDA appeals, whether from Interior or HHS decisions, are appealable to a single board of contract appeals, formerly the Interior Board and now the new Civilian Board. 25 U.S.C. § 450m-1(d), *amended by* Publ. L. 109-163 § 847(e), 119 Stat. 3136, 3391-3395 (2006). *See also* 25 U.S.C. § 900.152. None of Defendants’ citations involves a unitary statutory scheme administered by two agencies, such as ISDA. *See also* 25 U.S.C. § 450k, restricting each Secretary with regard to promulgating new rules.

Defendants argue that IHS’s application of indirect cost rates to determine that component of an ISDA contract price is so different from BIA’s application of those rates to determine that component of an ISDA contract price that issue preclusion should not apply. *Def’s. Opp.* 29-30 & n. 21.

The denominator of the IDC ratio is the central issue for which preclusion is sought. Interior and IHS each use indirect cost rates including non-paying agencies in the base. In this respect, no difference with Interior exists and no IHS policy justifies relitigation. Minute differences as to appeals of pre-contract declinations are immaterial, *Def’s. Opp.* 26 n. 16, and in any case do not concern disputes after a contract is executed. 25 C.F.R. § 900.151. No evidence has been adduced to counter Plaintiffs’ assertion that IDC rates are used in the same or similar manner by both agencies. Dkt. No. 110, Exh. 4 (3d Kerkmans Decl.) ¶¶ 9-10.

If *RNC v. Lujan* is not given preclusive effect here and the Court instead reaches the opposite conclusion about the legality of the rate system, ISDA will be interpreted one way for the IHS and the opposite way for the BIA. *Plfs. Memo.* 11 & cases there cited. But the meaning of a federal statute administered by more than one federal agency should not change depending

upon which agency is administering it. *Id.*⁴ Moreover, it defeats the ISDA scheme for one Secretary to interpret a key element of funding in a manner fundamentally at odds with the other.

3. Interior and HHS jointly require use of IDC rates or their equivalent to determine the indirect cost component of ISDA contract prices.

HHS and Interior each require that the indirect contract support cost component of the ISDA contract price be determined by a rate, if one exists. Each agency must accept the rate set by the cognizant agency. Dkt. No. 81, Exh. 7 (OMB A-87), Att. E ¶ E.1. No evidence has been adduced to show that IHS's use of the rate is significantly different from the BIA's. The joint regulations also require submission with an ISDA contract proposal of "the most recent indirect cost rate agreement (if it exists)". 25 C.F.R. § 900.8(h)(3)(i). Most agencies require grantees to have rates in order to use grant money for indirect costs. Dkt. No. 81, Exh. 9 (ASMB C-10) ¶¶ 6.6.1; Dkt. No. 81, Exh. 8 (OASC-10), at 10; 4th Martinez Decl., Exhibit 6 hereto.

The contention that IHS has no knowledge or involvement with the cognizant agency is contradicted by the Secretary's own regulations and by A-87 itself. Privity is also shown by IHS involvement in settlement negotiations for the first *RNC v. Lujan* settlement. *Plfs. Memo.* 11-12. In any case, it is the United States that must make good on the contracts.

B. THE ISSUE IS THE SAME, AND IT WAS ACTUALLY AND NECESSARILY DETERMINED.

If the legal theory in both actions is the same and there are no significant differences in the facts upon which each action is based, identity of issue is satisfied. The impropriety of non-paying agencies in the direct cost base was not only fully litigated in *RNC v. Lujan*, it was the sole issue in that case.

⁴ The joint regulations permit "the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation." 61 Fed. Reg. 32482 (June 24, 1996).

The fiction here precluded from re-litigation is thus not an “incidental matter[.]”, *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1183 (3d Cir. 1972); a matter that did not “receive close judicial attention,” *Commercial Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092, 1097 (1st Cir. 1993), a matter unappealable by virtue of being incidental to a decision, Restatement (Second) of Judgments § 27 comment *h*, or an “immaterial” matter, *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981). *See generally* 18 C. Wright, *et al.*, Federal Practice and Procedure § 4421, at 539 (2d ed. 2002); 1B Moore's Federal Practice 0.443[2], at 572 (“to avoid collateral estoppel on the ground that the facts found in the first action have a different legal significance in the second suit, it is necessary to show that the difference in significance is substantial.”)

That the nonpaying-agencies-in-the-base issue was actually and necessarily litigated is self-evident from the Tenth Circuit’s decision at 112 F.3d 1455 (1997), on remand, 50 F.Supp. 2d 1091, 1094, 1097-98. *See also* Exhibit 3 hereto.

C. NO CHANGE IN CIRCUMSTANCES BARS ISSUE PRECLUSION.

Defendants argue the legal landscape has changed. *Def’s. Memo.* 41. Indeed it did, but it changed in Plaintiffs’ favor. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005) (ISDA contracts are real contracts enforceable as such). *Cherokee* makes issue preclusion even more appropriate here.

Defendants also argue a legislative change, citing 25 U.S.C. § 450j-2, which they assert has retroactive effect. They maintain it was enacted to clarify an ambiguity exposed in *RNC v. Lujan*. For the lump-sum years 1995-1997, the effort raises serious constitutional problems exhaustively analyzed in *United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432 (1996), an analysis pointedly extended to ISDA contracts in *Cherokee*, 543 U.S. at 646. *See Plfs. Opp.* 32-33.

Significantly, 25 U.S.C. § 450l(c), *Model Agreement* sec. 1(a)(2), resolves any ambiguity at the commencement of the contract in favor of the contractor. A later Congressional attempt to resolve an already contractually-resolved ambiguity has no effect.

The provision is not enforceable for broader reasons. It is fundamentally ambiguous. It juxtaposes imprecise, undefined terms incapable of juxtaposition: “directly attributable” and “associated with”. In the indirect cost rate system, every cost in the pool is directly attributable to every program in the base because by definition it is a “common cost”. *Arizona v. Thompson*, 281 F.3d 248, 255 n. 11 (D.C. Cir. 2002) (A-87 does not bar primary funding source from paying common costs even if they benefit programs funded from other sources). Yet every cost in the pool is also “associated with” every program in the base because by definition it is a cost difficult or impossible of allocation to a discrete program or function. *RNC v. Lujan*, 112 F.3d at 1461. With no distinction between “directly attributable” and “associated with”, the amendment cannot be applied in the manner put forward by Defendants. Defendants’ reading would play havoc with the use of indirect cost rates for ISDA funding.⁵

In short, an appropriations committee inserted a loosely drafted codicil to ISDA in a 919-page consolidated and emergency appropriations bill.⁶ The provision was introduced and passed without hearings or investigations or consultations with Indian tribes and carries only the sparsest of legislative history. It exemplifies one of those perennial wars between appropriators and authorizers that has bedeviled orderly legislative processes at least since *TVA v. Hill*, 437 U.S.

⁵ Indeed, by recognizing that Congress has endorsed the indirect cost rate system, Defendants undercut their own argument because common costs are the heart of the system.

⁶ Omnibus Consolidated and Emergency Appropriations Act for FY 1999, Pub. L. 105-277, div. A, § 101(e) [title II], 112 Stat. 2681, 2681-280 to 2681-281 (1998).

153, 189-93, 98 S. Ct. 2279 (1978).⁷ It should not be read to undermine the fundamental purposes of ISDA.

D. FAIRNESS FAVORS PLAINTIFFS.

The D.C. Circuit in *Jack Faucett Assocs., Inc. v. AT&T*, 744 F.2d 118 (1984), reversed the application of offensive collateral estoppel because its application would be unfair to the defendant. Despite Defendants' *passim* reliance on *Faucett*, that case differs significantly from the current case because there the party seeking to invoke issue preclusion was not in privity with the party that had obtained the earlier ruling against the defendant. 744 F.2d at 120-22, 124. As the Supreme Court made clear in *Stauffer*, the analysis is entirely different for *mutual* offensive collateral estoppel. The discussion at pp. 5- 7, above, shows that far from working an injustice to the Government, preclusion is necessary to avoid destruction of the unified self-determination scheme envisioned by Congress.

Issue preclusion here cannot be deemed "unfair" to the Government as that term is used in *Faucett* and in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330, 99 S.Ct. 645 (1979). HHS was well aware of the stakes involved in the *RNC v. Lujan* litigation. See Dkt. No. 81, Exh. 16 (Gross Decl.) & exh. C thereto. That was hardly an insignificant case since it resulted in a settlement of over \$76 million. *RNC v. Babbitt*, 50 F. Supp. 2d 1091, 1109-1111 (D.N.M. 1999). In light of *Cherokee*, there is no indication that the Tenth Circuit would overrule its holding in *RNC v. Lujan*. No case has reached a different result. The Government will suffer absolutely no unfairness by application of issue preclusion. Indeed, *Cherokee's* disposition of the analo-

⁷ The Senate Appropriations Committee in approving the bill directed the GAO to undertake a comprehensive study of "the worsening CSC situation". Sen. Rep. 105-227, at 52 (1998). The resulting GAO report found that the aggregate national indirect cost rate had remained stable for the past ten years, at just under 25%. Dkt. No. 21, Att. 2 (GAO Rep.), at 25.

gous § 314 from the same appropriations act evidences the Court's distaste for retroactive amendments that "clarify" contractual obligations already assumed.

E. MENDOZA CONCERNS FOR DEVELOPMENT OF THE LAW DO NOT BAR ISSUE PRECLUSION AS PLAINTIFFS IN THE INSTANT CASE ARE IN PRIVITY WITH THOSE IN THE EARLIER NATIONWIDE CLASS ACTION.

Defendants, citing *United States v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568, 572 (1984) (*Mendoza*), argue that issue preclusion would freeze the law, depriving courts of the chance to decide an issue once one court has finally decided it. *Defs. Opp.* 24. That rationale falls apart, however, when the Government defends a class action involving tribes and tribal organizations from all over the Nation under a unitary statutory scheme, as it did in *RNC v. Lujan*. See Dkt. No. 110, Exh. 31. The Department of Justice did not lack incentive to defend that action or to appeal an adverse result. And it singled out HHS's interests for express treatment in the settlement agreement. See Dkt. No. 81, Exh. 16 (Gross Decl.) & exh. C thereto.

The plaintiff in *Mendoza*, unlike those in this case, was not in privity with those in the earlier case. 464 U.S. at 155. See discussion, above, at pp. 4 *et seq.* The Supreme Court made clear in the companion case, *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169, 104 S.Ct. 575 (1984), that when the parties are in privity, issue preclusion applies. See *Plfs. Memo*, at 8-10. See *Humane Society v. Clinton*, 44 F. Supp. 2d 260, 274-75 (CIT 1999), *affirmed* 236 F.3d 1320 (Fed. Cir. 2001) ("Since mutual defensive collateral estoppel runs against the government, see *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); see also *Montana v. United States*, 440 U.S. 147 (1979), there is no reason to make an exception for mutual offensive collateral estoppel.").

F. DEFENDANTS' ALLEGATION THAT PLAINTIFFS HAD A "STRATEGIC PLAN" TO SUBJECT I.H.S. TO RNC V. LUJAN IS BASELESS.

The assertion that RNSB could have intervened in *RNC v. Lujan* to bring IHS into that case is insupportable. RNSB, although it has close ties to RNC, is not the same entity.⁸ Declaration of Lawrence A. Ruzow, Exhibit 5 hereto. In fact, RNSB was skeptical about the merits of the case and chose not to join it as a named plaintiff. Dkt. No. 110, Exh. 10 (Demaray depo.) 70:10 to 71:5. RNC has never operated a health clinic.⁹ It could therefore not have brought IHS into the *RNC v. Lujan* case.¹⁰ Defendants' argument is fanciful, irrelevant, and unsupported. This is not a case "where a plaintiff could easily have joined in the earlier action", *Parklane Hosiery*, 439 U.S. at 331.

III. THE GOVERNMENT'S ALTERNATIVES TO THE NBC/OIG TEMPLATE METHODOLOGY ARE IMPRACTICAL.

The general theme running through the defense is that Plaintiffs brought themselves voluntarily into the IDC rate system and must live with the results. The Government seeks to avoid responsibility for its rate manipulations by arguing that Plaintiffs' injuries were "self-inflicted." Plaintiffs, the Government says, could have obtained a provisional/final rate or a multiple rate, or could have foregone obtaining any indirect cost rate at all. *Defs. 'Opp.* 32, 48, 49.

But these other alternatives are impractical.¹¹ Without a rate, a contractor cannot charge indirect costs to grants from other federal agencies. Dkt. No. 81, Exh. 9 (ASMB C-10) ¶¶ 6.6.1; Dkt. No. 81, Exh. 8 (OASC-10), at 10. *See, for example*, 34 C.F.R. § 75.560 (Dep't of Educa-

⁸ Defendants recognize the separate corporate existence of RNSB. *Defs. Opp.* 4; Exhibit 1 hereto (Demaray Depo.), at 24:7 to 25:5.

⁹ *See Defs. Opp.* 39 n. 32.

¹⁰ The other named plaintiffs in *RNC v. Lujan*, the Pueblo of Zuni and the Oglala Sioux Tribe, did not enter the case until after the 10th Circuit's decision and the first partial settlement, *RNC v. Babbitt*, 50 F.Supp.2d 1091 (D.N.M. 1999).

¹¹ Congress implicitly recognized the central role of FWCF rates in enacting 25 U.S.C. § 450j-1(d)(1), prohibiting theoretical over-recoveries and other adverse adjustments, a prohibition which Defendants' practices violate.

tion); 23 C.F.R. § 420.113(b) (Fed. Hwy. Adm.); Fourth Declaration of Marlene Martinez, Exhibit 6 hereto, at ¶ 8. If an ISDA contractor has a rate, it must submit it with its contract proposal. 25 C.F.R. § 900.8(h)(3)(i). Rates other than FWCF rates have significant disadvantages. Dkt. No. 110, Exh. 4 (3d Kerkmans Decl.), at ¶¶ 38-40; Dkt. No. 110, Exh. 42 (Donham Decl.) ¶¶ 13-14; Dkt. No. 110, Exh. 2 (3d Burke Decl.) ¶ 7. Even if a contractor foregoes obtaining a rate, indirect costs negotiated without a rate are determined according to the same rules. Dkt. No. 81, Exh. 13 (IHS Policy Memo. 92-02), at 7 ¶ 5; Dkt. No. 81, Exh. 14 (IHS Circ. 96-04), at 6 ¶ 4.A.c.¹²

The Government further suggests that because Plaintiffs submitted indirect cost rate proposals to NBC/OIG that conformed to NBC/OIG rules as set out in their templates, they waived their rights. *Defs. ' Opp.* 54. The Government repeatedly suggests that the United States and ISDA contractors have *negotiated* the amount of indirect costs added to each contract. IDC rates, it says, are negotiated between the contractor and its cognizant agency, *see id.* 4, and the rates there determined then become the “starting point” for negotiating the indirect CSC component of each contractor’s contract price, *id.* 4, 16, 33, 50. This is not so.

¹² Defendants fiercely attempt to blame Plaintiffs for not having a new rate for long stretches. But Tunica repeatedly attempted to obtain a new rate, despite the administrative impediments thrown in its path by OIG/NBC and that agency’s tolerance for old rates because of its own backlogs. Dkt. No. 110, Exh. 2 (3d Burke Decl.) ¶¶ 36-38 & exhs. 4, 8. RNSB’s new rate for 2003 was similarly based on the oppressive template challenged here because otherwise it could not get a new rate. Dkt. No. 110, Exh. 3 (2d Martinez Decl.) ¶¶ 2-5, 7 & exh. 1. *See also* 2d Kerkmans Deposition 66:24 to 69:17, Exhibit 7-A hereto; *Plfs. Facts* ¶ 26, and sources there cited. NBC has not answered the Nov. 6, 2006, letter from Tunica Chairman Barbry, Dkt. No. 110, Exh. 2 (3d Burke Decl.), exh. 7, nor has it responded to Tunica’s new rate proposals submitted on Jan. 26, 2007, Dkt. No. 116, and Mar. 19, 2007, Dkt. No. 119. RNSB tried to negotiate an indirect-cost-type agreement with its contracting officer but was rebuffed. 4th Martinez Decl. ¶¶ 4-6 (Exhibit 6 hereto).

NBC rigidly constrains everything about the one-sided procedure, which NBC insists is commanded by OMB Circular A-87. 2 C.F.R. pt. 225, appx. A, at 9-11 ¶¶ C.1, C.2; *id.* appx. B. Contractor proposals not in conformity with the OIG/NBC template will not be approved. *See* 5th Kerkmans Decl. (Exhibit 4 hereto) ¶ 16; Dkt. No. 110, Exh. 2 (3d Burke Decl.) ¶ 36 & exhs. 4, 8; Dkt. No. 110, Exh. 3 (Martinez Decl.) ¶¶ 2-7 & exh. 1; 2d Kerkmans Deposition 16:2-21, Exhibit 7-B hereto (“[Y]ou are supposed to be in negotiations with them. Instead of negotiations they said: this is the way we are going to do it. You basically either sign the document, or you didn't get a rate.”).

The contractor is then required to take its rate to the IHS. Dkt. No. 81, Exh. 13 (IHS Policy Memo. 92-02), at 6 ¶ 5.B.1; Dkt. No. 81, Exh. 14 (IHS Circ. 96-04), at 7 ¶ 4.A.2.c.i. IHS then requires application of the rate to the base to determine the indirect cost component of the contract price. No other factor is taken into account. *Id.*; Dkt. No. 110, Exh. 4 (3d Kerkmans Decl.) ¶¶ 8-9; Dkt. No. 110, Exh. 9 (LaRouche Depo.) 21:7-16, 22:6 to 23:10, 25:2-15, 34:2-10; Dkt. No. 110, Exh. 14 (Black Depo.) 46:6-18; *Defs.’ Opp.* 49. This is negotiation by diktat.

IV. DEFENDANTS FALSELY ASSERT THAT THE MAJOR PURPOSE OF A-87 IS TO PREVENT ONE FEDERAL AGENCY FROM PAYING THE INDIRECT COSTS OF ANOTHER FEDERAL AGENCY.

Defendants’ briefing fundamentally misrepresents the purpose of the A-87 indirect cost rate system. Ms. Moberly states:

The main function of the Circulars is to ensure that federal programs (contracts and grants) are allocated their fair share of indirect costs and to ensure that no federal program is allocated more than its fair share of costs. . . .

Dkt. No. 111, Exh. 3, ¶ 11.

Ms. Moberly’s comment is meant to justify a defense based on rigid separation of dollars in the indirect cost pool by mathematical proportions based on each contributing agency’s por-

tion of the total base. If IHS has a \$15,000 program under ISDA contract with a contractor and the total base is \$100,000, Ms. Moberly would have it that IHS' total indirect cost obligation cannot exceed 15% of the pool because paying more would mean subsidizing the indirect costs of other federal agencies.

But she misstates the purpose of the Circular. The purpose of the indirect cost rate system is not to allocate rigid mathematical proportions of indirect costs *among* federal agencies, *only to allocate indirect costs between collective federal funding on the one hand and non-federal funding on the other*. The Purpose and Scope section appears at the beginning of A-87:

Objectives. This Attachment establishes principles for determining the allowable costs incurred by State, local, and federally-recognized Indian tribal governments (governmental units) under grants, cost reimbursement contracts, and other agreements with the Federal Government (**collectively referred to in this Circular as “Federal awards”**). The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project. The principles are designed to provide that **Federal awards** bear their fair share of cost recognized under these principles except where restricted or prohibited by law. . . .

(Emphasis added.)

The quoted provision treats Federal awards collectively, not individually. The switch to the singular in paragraph 11 of Ms. Moberly's declaration imparts an entirely new meaning to the provision that does not comport with the text of the Circular. Collectively, Federal awards are to bear their fair share of costs, which may be translated into a proportion of the base. Defendants incorrectly read the Circular as barring individual Federal agencies from paying more than their proportion of the base vis-à-vis other Federal awards.¹³

¹³ Significantly, there is no evidence that the “fair share” percentage column is used for other than ISDA contractors. HHS's Division of Cost Allocation (DCA) does not mention fair share in its template for establishing FWCF rates. *See* Exhibit 8 hereto. DCA simply assigns a

Only if *all* funding sources in the base paid their percentages would the rate-times-IHS-base formula result in the mandated amount of indirect costs. Instead, IHS escapes the burden of paying the full cost to run its program, which by definition requires the entire pool. Significantly, Defendants concede that “[a]n understated rate means that the indirect cost component of the IHS contract price will be less than the reasonable indirect costs necessary to ensure compliance with the terms of the contract and prudent management.” *Defs. Facts Resp.* ¶ 23.

In *Arizona v. Thompson*, the D.C. Circuit made clear that indirect costs are common costs, and that A-87 does not prohibit one Federal program from assuming a greater than proportionate share of those costs vis-à-vis other Federal awards. Common costs are attributable to all the Federal programs, as *Arizona v. Thompson* expressly holds. Failure to collect the entire pool prevents the ISDA contractor from receiving its true need as required by statute, a factor not present in *Arizona v. Thompson*, making the principle of that case even more compelling here.

To meet the statutory/contractual command of 25 U.S.C. § 450j-1(a) and (g), the ISDA agencies must ensure that the contractor collects the portion of the pool not paid by other agencies. This is not “paying the contract support costs of other agencies”; it is paying the necessary costs to operate the ISDA program, just as this Circuit held in *Arizona v. Thompson*, and just as *RNC v. Lujan* held in the ISDA context.

V. THIS COURT HAS JURISDICTION TO AWARD DAMAGES ON ALL PRESENTED CLAIMS FOR 1995-1997 AND TO GRANT DECLARATORY AND INJUNCTIVE RELIEF.

A. THE C.D.A. WAS INCORPORATED INTO I.S.D.A. TO EXPAND REMEDIES.

rate to the rate-holder, expecting the rate-holder to collect the entire pool. The rate does not specify from where the funds are to be obtained.

The Government urges that the CDA must be strictly construed. But the CDA was incorporated into ISDA to expand contractor remedies against the Government, overruling *Busby School v. United States*, 8 Cl.Ct. 596 (1985). See S. Rep. 100-274, at 34-35 (Dkt. No. 21, Att. 12). Jurisdiction for equitable relief and definition of “same set of operative facts” (a judicial construct) to meet presentment requirement and claims or evidence discovered during litigation must all be construed with this remedial purpose in mind.

The contracting officers denied Plaintiffs’ claim on grounds of liability and never considered how damages should be calculated. Dkt. No. 13, Exh. D & Exh. F. No matter what rate calculation claims RNSB and Tunica had presented to the contracting officers, those claims would have been denied under the rationale of the contracting officers’ decisions. See *Diversified Energy, Inc. v. TVA*, 339 F.3d 437, 444-45 (6th Cir. 2003) (“claim” to be interpreted broadly; when contracting officer denied on liability grounds, he necessarily denied under any available theory of damages; CDA jurisdiction confirmed).

While the CDA provides a framework for the assertion of contract claims against the Government, it nowhere defines what constitutes a “claim”. *Modeer v. United States*, 68 Fed. Cl. 131, 136 (2005).¹⁴ Dictionaries define “operative” as “significant” or “having effect”. See, e.g., American Heritage Dictionary of the English Language (4th ed. 2000). Like “obscenity” or “foreseeability”, “operative” is elusive; it is not helpful in determining the specificity with which facts must be alleged to constitute a “claim”.

¹⁴ The Federal Acquisition Regulations (FAR), not the CDA, set out more specific requirements for a “claim”. The FAR and precedents thereunder, however, do not apply to ISDA contracts. 25 U.S.C. § 450j(a)(1). Defendants thus err, *Defs. Opp.* 9, in suggesting that ISDA contractor claims presented to a contracting officer must be in a sum certain. That is a requirement of FAR, not the CDA. See 48 C.F.R. § 2.101.

Plaintiffs presented a claim that their entitlement under ISDA to full payment of CSC was diminished by the Government's unlawful miscalculation of indirect cost rates. *See Plfs. Opp.* 46-49. The IHS suggests that claims should be parsed by contract years¹⁵ and the precise manipulations employed.¹⁶ The essentials of each claim—the contract, the rates, and the payments—are the same. A fair reading is that the contract disputes satisfied the presentment requirement.¹⁷

As employed in ISDA, the CDA must be interpreted according to the same liberal rule of construction to which all ISDA and contract provisions are subject through the Model Agreement. 25 U.S.C. § 450l(c), *Model Agreement* sec. 1(a)(2). An imprecise judge-made construct such as “operative facts” must not be used as a cudgel to deny Indian contractors their fundamental right to damages when they asserted that the rate was flawed.

B. DOUBLE-DIPPING IS SUBSUMED BY THE SHORTFALL COLUMN.

1. The “shortfall column” is unauthorized.

¹⁵ Plaintiffs have previously cited the ASBCA decision in *Holmes & Narver, Inc.*, No. 51430, 99-1 BCA ¶ 30,131, 1998 WL 791850 (Dkt. No. 121, Exh. 13). There, the ASBCA held that a contractor’s claim could encompass the Government’s exclusion of particular costs from the indirect cost pool that would recur across several fiscal years and into the future. 1998 WL 791850*6. Here, each Plaintiff has a mature multi-year contract, into which are incorporated annual funding agreements. *See, e.g.*, Dkt. No. 13, Exhs. J, L; 25 U.S.C. §§ 450b(h), 450j(c)(1)(B), 450l *Model Agreement* sec. 1(c)(2).

¹⁶ “[T]he contractor need not include a detailed breakdown of costs. The contractor may supply adequate notice of the basis and amount of the claim without accounting for each cost component.” *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995).

¹⁷ RNSB did not present carry-forward errors as a separate claim until its 1998-2003 contract dispute, *Def’s Memo* 11, but its 1995 and 1996 claims did present the *RNC v. Lujan* claim. In *Diversified Energy, supra*, 339 F.3d at 445, the claim for liquidated damages was based on the “operative facts” of the TVA’s repudiation of the contract. Here, the presented *RNC v. Lujan* claim was based on the “operative facts” of Defendants’ failure to pay full CSC under the A-87 scheme. The carry-forwards claim is based on those same operative facts and, like the unarticulated lost profits claim in *Diversified Energy*, within the Court’s jurisdiction.

The “shortfall column” into which most actual under-recoveries are shunted eliminates all possibility of a rate boost and, therefore, an eventual recovery. This violates the basic premise of FWCF rates, that the contractor shall be made whole by future rate adjustments. 5th Kerkmans Decl. (Exhibit 4 hereto) ¶¶ 5-7, 11-12, 22-23, 29.

Defendants say that if shortfalls were carried forward, the shortfalls of one program would be allocated to other programs, evading legal or contractual limitations that might be applicable to those other programs. Dkt. No. 122, Exh. 57 (2d Moberly Decl.) ¶ 14. This contention is directly contradicted by *Arizona v. Thompson*.

No other cognizant agency uses the shortfall column and even NBC does not use it except for ISDA contractors. No evidence to the contrary has been proffered. *Def. Facts Resp.* ¶ 37.¹⁸ “Shortfall” is not defined, and Congress and the agencies use it different senses.¹⁹ *See also* Exhibit 8 hereto, the template used by HHS’s Division of Cost Allocation, which does not use the shortfall column. That no shortfall column is found in the templates of other rate-making agencies underlines that the Government uses this unique manipulation only to depress IDC rates and, consequently, the contract price of ISDA contractors and not those of any other Government contractor. This practice violates 25 U.S.C. § 450j-1(d)(1) and therefore the contract. *See* 5th Kerkmans Decl. (Exhibit 4 hereto) ¶ 20 (the “shortfall” column disproportionately

¹⁸ A particularly egregious violation of FRCvP 56(e) appears in ¶ 37, which purports to dispute this fact, citing Ms. to Moberly’s latest declaration. Of the fourteen cited paragraphs of the Moberly declaration, none supports Defendants’ position or even mentions the shortfall column let alone its use in the computation of indirect cost rates. *See Aftergood v. National Reconnaissance Office*, 441 F. Supp. 2d 37, 41-42 (D.D.C. 2006) & cases there cited (nonmoving party may not rely on conclusory non-specific allegations).

¹⁹ *Compare* Dkt. No. 21, Att. 2 (GAO Report), at 3 (using shortfall to mean difference on national basis between allowable indirect costs and funds appropriated to pay those costs); *Def. Opp.* 50 (using same definition in describing agency reporting requirements under 25 U.S.C. § 450j-1(c)), *with id.* 51 (shortfalls as difference between individual contractor IDC recoveries, on the one hand, and estimated and incurred indirect costs on the other).

spreads the burden of under-and over-recoveries such that the agencies which have generated them are not credited or charged with them in a fair manner).²⁰

Many times, Defendants have stated that NBC does not concern itself with how the pool is funded. *See, e.g.*, Dkt. No. 111, Exh. 3 (Moberly Decl.) ¶ 73. The admission is significant, for it demonstrates that IHS—charged with funding by statute and contract—blindly uses a system known to understate Plaintiffs’ true cost of running the IHS program at the Secretarial level.²¹

2. Double-dipping amplifies the “shortfall column” error to further depress rates.

a. CDA claims may be increased during litigation. Once a Court has acquired jurisdiction over a CDA claim, that claim may be increased during litigation based on newly discovered evidence or analyses during the course of litigation. *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33421, 2006 WL 3071259*5-6 (Exhibit 9 hereto). Claimants are not bound to the same legal theories presented to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). The essential *facts*—the contract, the rates, and the payments—presented to the contracting officer by each Plaintiff are not substantively different from those before this Court.

“A contractor is not precluded from changing the amount of a claim or producing additional data in support of increased damages.” *J.F. Shea v. United States*, 4 Cl. Ct. 46, 54 (1983). *Accord*, *AAI Corp. v. United States*, 22 Cl. Ct. 541, 545 (1991) (additional information requiring recalculation of claim permissible and not new claim so long as theory of entitlement for dam-

²⁰ The harm from the shortfall column was also exacerbated by the shift from the “Western” to the “Eastern” method. *See* 5th Kerkmans Decl. (Exhibit 4 hereto) ¶¶ 42-43.

²¹ Incredibly, Defendants state that the HHS employee designated under Rule 30(b)(6) to speak for the agency on IHS policy for implementing ISDA contract support cost provisions “is not competent to testify about NBC’s rate methodology”. *Def’s. Opp.* 55 n. 38. *See* Dkt. No. 110, Exh. 21; *Plfs. Memo.* 22.

ages based on same set of operative facts); *Hardrives, Inc.*, 93-2 BCA 25779, 1992 WL 390995*17 (IBCA 1992) (Exhibit 10 hereto) (modified presentation involving different statement and arrangement of quantum based upon factors and damage analysis developed in years since original claims not new claim); *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA 22595, at 113385, 113386-87, 1990 WL 101600, at *3 (Dkt. No. 121, Exh. 15) (assertion of new legal theory of recovery based on same operative facts not new claim); *J.M.T. Machine Co.*, ASBCA No. 24298, 84-1 BCA ¶ 17,118, 1984 WL 14110*8-9 (Exhibit 11 hereto) (that specific item of damage was not contained in original claim does not warrant treatment as different claim). In substance, Plaintiffs claimed that the rate, consisting of a numerator and a denominator, was miscalculated and therefore the contract price was set too low.

b. Double dipping was discovered in this litigation to be an adjunct of the “shortfall column” claim. Defendants do not contest that both Plaintiffs presented the “shortfall column” claim for certain years. *Def’s. Facts Resp.* ¶ 69. Double-dipping expands the harmful effects of the shortfall column.²² During discovery preceding the filing of these motions, Plaintiffs first discovered the added harm from the unauthorized shortfall column caused by the practice of twice reducing Plaintiffs' annual contract price for a single previous year's over-recovery. Exhibit 4 hereto (5th Kerkmans Decl.) ¶¶ 24-36; Dkt. No. 121, Exh. 19 (4th Kerkmans Decl) *passim* & atts. B(3), (C)(3). While the practice of “estimating” and “reconciling” an over-recovery or under-recovery may have been known, its amplification of the harm caused by the shortfall column was never disclosed and only perceived by Plaintiffs during preparations for depositions. Exhibit 4 ¶¶ 26-27.

²² The spreadsheets to Kerkmans' 4th Declaration demonstrate the need for contract reformation to avoid compounding the harms caused by defects in the numerator of the FWCF rate. Dkt. No. 121, Exh. 19, atts. A(1) - C(4).

Because the shortfall column essentially eliminates under-recoveries, double-dipping improperly penalizes contractors.²³ This guarantees that the bargain between FWCF rate-holders including Plaintiffs—recovery of under-recoveries on equal terms with the Government's recovery of over-recoveries—cannot happen.

Plaintiffs' discovery through litigation of the extra harm caused by Defendants' double-dipping manipulation cannot reasonably be faulted. Defendants argue that double-dipping is explained in HHS guidance, citing Dkt. No. 122, Exh. 57 (Moberly Decl.) ¶ 24. Ms. Moberly in turn cites a 1983 HHS Guide for non-profit organizations. *Id.* Att. A. The cited "explanation", *id.* at 77, expressed as an algebraic formula, is abstruse:

The following formula should be used to compute the amount of the carry forward:

$$x=(ab)-c-d$$

x=Amount of carry-forward to be used as adjustment to rate for future year

a=Fixed rate previously established for a given year

b=Actual direct cost base for year covered by fixed rate

c=Amount of carry-forward adjustment from earlier year used in computation of fixed rate

d=Actual indirect costs for year covered by fixed rate

This formula does not "explain" anything. And, indeed, the preceding page states that "Generally, the carry-forward amount for a given fixed rate year will be used as an adjustment to the rate computation *for a single future year.*" *Id.* at 76 (emphasis added).

The comparable HHS guide for tribal governments (and State and local governments), ASMB C-10, does not hint of the double-dip or give an example in which it is performed. *See* Dkt. No. 81, Exh. 9. Spreadsheet cells in an earlier version not specifically directed at tribal governments, OASC-10, showed the manipulation but did not explain it. *See* Dkt. No. 81, Exh.

²³ Mr. Kerkmans' 5th declaration, Exhibit 4 hereto, refutes Ms. Moberly's declaration, Dkt. No. 122, Exh. 57, point-by-point.

8, exh. B. And its preface contradicted the example: “when the actual costs of that period become known, the difference between the estimated costs and the actual costs is carried-forward as an adjustment to a **subsequent period** for which a rate is established.” *Id.* (emphasis added).

A trustee has a special duty to explain the effects of his business dealings with a beneficiary, Indian tribes here. G. Bogert, *Trusts & Trustees* § 544, at 493 (2d rev. ed. 1993) (“ . . . most important in making a showing of good faith is that the fiduciary made a full and frank disclosure of all relevant information which he had. He must inform the principal all he knows of . . . their value and the effect of the proposed transaction.”); *Ferguson v. Bateman*, 1 App. D.C. 279 (1893) (same); *Loudner v. United States*, 108 F.3d 896, 900, 901 (8th Cir. 1997) (Indians entitled to rely on good faith and expertise of United States). The Court has already recognized that the Secretary of the Interior is a trustee for Indians. Dkt. No. 48 (Amd. Opinion) 37-38.

IHS’s Rule 30(b)(6) designee, Mr. Demaray, for ten years has been in charge of IHS CSC policy. So complex and convoluted are the carry-forward calculations that even he was unaware those calculations included double-dipping. Dkt. No. 110, Exh.10 (Demaray depo.) 44:20-21; 240:16 to 252:13, especially 248:17 to 252:13. Neither NBC’s designee, Ms. Moberly, nor her predecessor as Indirect Cost Negotiator, Ms. Montich, could offer a rationale for OIG/NBC’s deduction of the same over-recovery in two successive calculation cycles. Dkt. No. 110, Exh. 11 (Moberly depo.) 14:13-17; 18:14 to 19:22; 153:14 to 179:8, especially 162:10 to 163:6; Dkt. No. 110, Exh. 12 (Montich depo.) 83:12 to 95:3, especially 92:22 to 95:3.

Defendants now belatedly assert that double-dipping is necessary so that estimates booked in Year 3 can be reconciled in Year 5. They do not explain why the contract price should be reduced in two different years to compensate the Government for a single over-

recovery. Nor do they adduce any evidence to refute that double-dipping reduces two annual contract prices for a single year's over-recovery.

Double dipping is not only part of the carry-forward claim; it is also necessary to determine damages for all Defendants' rate miscalculations and manipulations. Contract obligations cannot be compared with payments without taking into account the effects of the double dip.

Dkt. No. 121, Exh. 19 (4th Kerkmans Decl.) ¶¶ 10, 17-25.

D. 25 U.S.C. § 450m-1(a) AUTHORIZES EQUITABLE RELIEF WITHOUT PRESENTMENT.

25 U.S.C. § 450m-1(a) on its face authorizes this Court to order injunctive relief. *See also* Sen. Rep. 100-274 (Dkt. No. 21, Att. 12), at 34. Defendants' motion, even if granted, would therefore not end the case,²⁴ nor could it under *RNSB v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).

The Government's suggestion, *Defs. Opp.* 3-4, that the CDA governs all disputes once a contract is in existence is belied by *RNSB v. Babbitt*, in which authority for equitable relief outside of the CDA was found in 25 U.S.C. § 450m-1(a), even though the Court was fully aware ISDA contracts had already been issued. 87 F.3d at 1341. "Section 450m-1 of the ISDA expressly declares that United States district courts shall have original jurisdiction over 'any civil action or claim against the appropriate Secretary arising under [the Act]'.²⁴" *Id.* at 1344 (emphasis in original). The Court made no reference to CDA presentment requirements.

VI. DEFENDANTS' FURTHER ARGUMENTS LACK MERIT.

Defendants again charge that Plaintiffs, by accepting a rate, waived their rights to any change in that rate required by ISDA. *Defs. Opp.* 15. Plaintiffs have addressed Defendants'

²⁴ Where a statute includes, as does ISDA, provisions authorizing an injured party to obtain injunctive relief to enforce the statute, that party is not required to plead or prove irreparable injury. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Environmental Defense Fund v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983); *CSC Holdings, Inc. v. New Information Technologies, Inc.*, 148 F.Supp.2d 755, 763 (N.D. Tex. 2001).

waiver and acquiescence arguments in detail. *Plfs. Opp.* 34-46. We add only that defendants, including NBC's predecessor, OIG, specifically stipulated in *RNC v. Lujan* that no member of the class in that case, including Plaintiffs here, waived any rights by accepting a rate. Exhibit 12 hereto, at 2.

The Government contends Plaintiffs have waived or abandoned their cap-year claims (for 1998 forward) because they did not file a dispositive motion on their claims for those years. *Def's. Opp.* 58-59. But no party is under obligation to seek to resolve a case by filing a dispositive motion. Rule 56, FRCvP, is clear: "A party . . . *may* . . . move . . . for a summary judgment" (Emphasis added.) The Court's requirement that all dispositive motions be filed by a set date referred to the previously-filed motions. The Court did not require that all claims be made the subject of dispositive motions. Orders, June 5, 2006 (Dkt. #110), Oct. 3, 2006, and Nov. 20, 2006. Moreover, the Court has power to grant summary judgment in favor of the party opposing the motion for summary judgment. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 45 (D.D.C. 1998).

CONCLUSION

For the reasons set out in Plaintiffs' motion and memorandum, this Reply, and the exhibits thereto, Plaintiffs' request that this Court grant their motion for partial summary judgment, and that the Court set this case for trial on damages for all material years and grant such further relief as may be just and meet.

Respectfully submitted,

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