

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. PLAINTIFFS’ ATTEMPT TO EXPAND THIS COURT’S SUBJECT MATTER JURISDICTION MUST FAIL 3

 A. The Court’s Jurisdiction is Limited to the Review of Presented Claims 3

 B. The ISDA’s Jurisdictional Provision Limits the Relief Available in this Lawsuit 5

II. DEFENDANTS DID NOT BREACH PLAINTIFFS CONTRACTS 6

III. THE ISDA DOES NOT ALTER THE CONTRACT ANALYSIS 7

IV. THE ISDA APPROPRIATIONS LIMIT THE AVAILABILITY OF ANY ADDITIONAL FUNDING IN YEARS AFTER 1997 10

V. RNC DOES NOT ALTER THE CONTRACT ANALYSIS 12

VI. PLAINTIFFS CANNOT RECOVER ADDITIONAL CSC FUNDING BECAUSE THEY ALREADY RECEIVED MORE THAN THEY INCURRED 16

VII. PLAINTIFFS WAIVED ANY CLAIMS TO ADDITIONAL FUNDING 16

 A. Plaintiffs’ Conduct Evinced An Intent to Waive Claims for Additional Funding 17

 B. Plaintiffs Had Knowledge of All “Rights” Flowing From the Law 18

 C. There Are No Procedural Bars to this Court’s Consideration of Waiver and Estoppel 21

VIII. THE SECRETARY IS NOT A TRUSTEE FOR PURPOSES OF ISDA FUNDING 22

IX. PLAINTIFFS FAIL TO REBUT DEFENDANTS’ JURISDICTIONAL AND OTHER THRESHOLD ARGUMENTS PRECLUDING ANY RELIEF RELATED TO THEIR INDIRECT COST RATES 23

CONCLUSION 25

INTRODUCTION

The Indian Self-Determination and Education Assistance Act (“ISDA”), given its proper interpretation, does not mandate the payment of a specific amount of contract support costs (“CSC”) nor does it provide a specific formula for calculating CSC. A right to payment of CSC arises only from contract terms that specify that there shall be payment. In this case, the contract terms at issue make clear that the Secretary promised a specific amount of funding, paid that amount, and thus did not breach any of Plaintiffs’ contracts.

Plaintiffs’ primary response in their Opposition is that the ISDA requires the payment of a sum certain of contract support costs (“CSC”), the right to which can never be waived.¹ They argue that this sum certain is due to them regardless of what their contracts actually provide and regardless of the amount of funding they have already accepted. Because the ISDA does not so provide, it is no surprise that Plaintiffs’ Opposition is elusive about this sum certain.

The ISDA was carefully crafted to give Tribes and Tribal organizations control over the contract formation process. A Tribal contractor may decide whether and for which programs to contract and it may develop specific programs and services that it believes will best serve its constituents. A Tribal contractor may propose funding levels for the contract. If the Secretary declines the contractor’s proposal, the Tribal contractor has the powerful option of seeking immediate judicial review in federal court. Even if the Tribal contractor accepts the funding levels in the contract and the contract is executed, it still may (1) ensure that the Secretary provides the

¹ “Defendants’ Motion” refers to Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment (docketed as #111); “Plaintiffs’ Opposition” refers to Plaintiffs’ Opposition to that Motion (docketed as #122); “Plaintiffs’ Motion” refers to Plaintiffs’ Motion for Partial Summary Judgment (docketed as #110); and “Defendants’ Opposition” refers to Defendants’ Opposition to that Motion (docketed as #121).

agreed-upon funds and, if funds are not forthcoming, may sue for breach of contract after administrative presentment, (2) insist upon desired terms in future annual funding agreement negotiations and if the terms are refused, seek judicial review, (3) suspend performance of the contract after notice to the Secretary if funding is not available, or (4) give the programs back to the Indian Health Service (“IHS”). ISDA’s procedural protections are clearly in place for the benefit of Tribal contractors to determine what they believe is best for their members. What the ISDA does not allow is the reopening of fully performed contracts to include new funding amounts to which the Secretary never agreed.

Defendants also demonstrated in their Motion that even if the ISDA could be read to mandate a sum certain, Plaintiffs waived any claim to that amount years ago. Plaintiffs’ execution of their contracts and acceptance of the funding levels specified therein demonstrates a knowing intent to waive any claims for funding above and beyond the funding terms provided for in their contracts. And because the Secretary has expended all relevant IHS appropriations for years 1995-2003 long ago and thus has acted to his detriment in reliance on Plaintiffs’ seeming acceptance of the terms of their contracts, Plaintiffs are also estopped from seeking additional funding. Finally, Plaintiffs offer no legally sufficient or reasonable argument to justify excusing them from both the mandatory presentment requirements of the Contract Disputes Act (“CDA”) for their breach of contract claims and the administrative exhaustion requirement under Office of Management and Budget Circular A-87 (“OMB A-87”) for their claims related to the indirect cost rate methodology.

Instead, Plaintiffs refer to the trust relationship between the United States and Indian peoples in the hopes of precluding application of contract law principles to this case. But the ISDA does not create trust duties for the Secretary in the execution or performance of ISDA contracts. ISDA contracts are to be treated like procurement contracts. See Cherokee Nation v. Leavitt, 543 U.S. 631,

643-44, 125 S. Ct. 1172, 1178 (2005). As such, both parties are held to their promises. For all of these reasons, Defendants' Motion should be granted, and the Second Amended Complaint dismissed. In the alternative, because there are no material facts in dispute, Defendants are entitled to summary judgment.

ARGUMENT

I. PLAINTIFFS' ATTEMPT TO EXPAND THIS COURT'S SUBJECT MATTER JURISDICTION MUST FAIL.

Underlying most of Plaintiffs' arguments are faulty premises about this Court's jurisdiction under the ISDA. In this case, the Court has jurisdiction over only one type of claim for one type of relief: claims of breach of contract for money damages that Plaintiffs have previously presented to an IHS contracting officer ("CO") under the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(a). The Court lacks jurisdiction over any claims not previously presented and over any claims for equitable or injunctive relief.

A. The Court's Jurisdiction is Limited to the Review of Presented Claims.

This Court has already held that the ISDA's limited waiver of sovereign immunity for contract claims depends upon a Tribal contractor's compliance with the CDA. See Tunica-Biloxi v. United States, No. 02-2413, slip op. at 8-11 (D.D.C. 2004) (docketed as #48) (hereinafter referred to as "Tunica 2004 Mem. Op."). Accordingly, in 2004, this Court dismissed all of Plaintiffs' claims that should have first been presented to a CO. See id. at 13-15; England v. The Swanson Group, Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990); Pueblo of Zuni v. United States, 467 F. Supp. 2d 1099, 1107 (D.N.M. 2006); United States v. Intrados/Int'l Mgmt. Group, 277 F. Supp. 2d 55, 64-65 (D.D.C. 2003); Johnson Controls World Servs. v. United States, 43 Fed. Cl. 589, 592 (1999). The only claims not already

considered by this Court in its 2004 Memorandum were those filed by the Ramah Navajo School Board (“RNSB”) on December 30, 2003, and September 21, 2005. (Defs.’ Ex. 25, 26.) Thus, in Defendants’ Motion, Defendants outlined the only claims over which the Court has jurisdiction (a total amount claimed by RNSB of \$1,489,312, and a total amount claimed by the Tunica-Biloxi Tribe of \$309,008.00). (Defs.’ Mem. at 11-12.) The Court lacks jurisdiction over all other claims in all other amounts, including the host of new claims related to the carry-forward methodology.

In an attempt to evade this jurisdictional limitation for the second time, Plaintiffs again invoke the “enlarged claim” doctrine, (Pls.’ Opp. at 46-49), a doctrine which, when applicable, permits the Court to exercise jurisdiction over “an increase in the amount of the claim 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.”² Johnson Controls, 43 Fed. Cl. at 594.

In its 2004 Opinion, this Court clearly rejected the application of this doctrine to the type of claims for additional CSC funding that Plaintiffs raise. See Tunica 2004 Mem. Op. at 14-15; see also Zuni, 467 F. Supp. 2d at 1110-11. The Court concluded that Plaintiffs’ claims for additional CSC were based on different legal theories, different operative facts, and resulted in differing mathematical calculations. See Tunica 2004 Mem. Op. at 14. In their Opposition, Plaintiffs provide

² Marcel Kerkmans’s (fourth) declaration provides calculations for each Plaintiff relating to their various claims, (Pls.’ Ex. 19 ¶ 2) offering numerous newly minted calculations that constitute new “operative facts” never presented to an IHS CO. Accordingly, this Court lacks jurisdiction over most, if not all, of these calculations. Plaintiffs attempt to bolster Mr. Kerkmans’s testimony by submitting declarations by John Donham (Pls.’ Ex. 18), Marlene Martinez (Pls.’ Ex. 20), and Doug Burke (Pls.’ Ex. 21), but these declarations lack a proper foundation, and the Court may freely ignore them as neither probative nor admissible. See Fed. R. Civ. P. 56(e) (“[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein”).

no new authority not already considered by this Court. Each of Plaintiffs' six new theories challenging the carry-forward methodology employed by the Department of the Interior ("DOI") involve a different set of operative facts for each year and result in entirely independent mathematical calculations. For this reason, the Court should for a second time reject application of the enlarged claim doctrine and dismiss all claims not previously presented.

B. The ISDA's Jurisdictional Provision Limits the Relief Available in this Lawsuit.

Plaintiffs also attempt to evade the bar of the CDA by alleging that they seek to enforce statutory duties against the Secretary and to obtain equitable or injunctive relief. (Pls.' Opp. at 51-52.) But there is a long line of cases prohibiting government contractors from "dressing up" contract claims as claims for statutory or regulatory violations in order to avoid the jurisdictional prerequisites of the CDA or the Tucker Act. See A & S Council Oil Co. v. Lader, 56 F.3d 234, 239-41 (D.C. Cir. 1995); Ingersoll-Rand Co. v. United States, 780 F.2d 74, 77-79 (D.C. Cir. 1985); Suburban Mortgage Assocs. v. HUD, 480 F.3d 1116, 1124-26, 1128 (Fed. Cir. 2007). Here, Plaintiffs do not seek to enjoin the Secretary's actions with respect to one of their contract or rate proposals; they seek retrospective monetary relief for contracts in effect between 1995-2003. It is clear that the type of claims Plaintiffs seek to litigate here are not equitable or injunctive but claims "arising under contracts." See 25 U.S.C. §§ 450m-1(a), (d). As such, application of the CDA presentment requirement was mandatory for all claims in this lawsuit.

Almost directly on point here is A & S Council. In A&S Council, government contractors sued the Small Business Administration over the amount of funding that they had received under their contracts, claimed unjust enrichment, alleged a violation of, inter alia, the statute that authorized the contracts, and sought money damages. See 56 F.3d at 236. In analyzing the case, the D.C. Circuit looked behind the labels on the claims and discerned that the claims were actually CDA

claims. See id. at 239. The court explained that whether a claim is a contract claim or not depends on “the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or [which is] appropriate).” Id. (quoting Megapulse Inc. v. Lewis, 672 F.2d 959, 968 (D.C. Cir. 1982)). Applying this rule, the Court held that all of the claimed injuries flowed from the plaintiffs’ contracts, notwithstanding the plaintiffs’ argument that their injury was based on “unlawful agency action” before contract formation. See id. at 241. The Court explained that many contract doctrines involve pre-contract behavior (i.e., mistake of fact, etc.), and further:

[A] plaintiff may not avoid the jurisdictional bar of the CDA merely by alleging violations of regulatory or statutory provisions rather than breach of contract. Where the alleged damage is entirely due to and measured in reference to plaintiff’s performance of a contract, and is exclusively money damages, plaintiffs’ claim that the wrong originated in some statutory violation does not strip that case of its contractual character.

Id. (quoting Ingersoll-Rand, 780 F.2d at 77). The same rationale applies here. The Court lacks jurisdiction over any claims, regardless of relief requested, that have not previously been presented.

II. DEFENDANTS DID NOT BREACH PLAINTIFFS CONTRACTS.

With respect to the claims that were presented, the Secretary fulfilled his duties under each of the contracts at issue in this case. Plaintiffs agreed to the amounts specified in their contracts by signing them, and IHS paid the amounts it promised to pay in all relevant years. (Defs.’ Mem. at 19-22.) Plaintiffs admit these material facts. See Pls.’ Resp. to Defs.’ Statement of Material Facts at B, C. IHS also agreed to use Plaintiffs’ indirect cost rates negotiated with DOI under OMB A-87 as a starting point for calculating CSC, and IHS did this. (Defs.’ Mem. at 19-22.) Plaintiffs admit these facts. See Pls.’ Resp. to Defs.’ Statement of Material Facts at D. Defendants did not breach any of Plaintiffs’ contracts, and thus they are entitled to summary judgment. This should be the end of the analysis, but Plaintiffs argue that the ISDA and a Tenth Circuit decision mandate a different

result. They do not, as discussed below.

III. THE ISDA DOES NOT ALTER THE CONTRACT ANALYSIS.

Ignoring the fact that there has been no breach because the Secretary paid all of the CSC that was due, Plaintiffs argue that the ISDA requires the Secretary to pay some other, higher amount. (Pls.' Opp. at 11-22.) Regardless of whether Plaintiffs argue that (1) there is a direct statutory entitlement under the ISDA to a certain amount of indirect CSC, or (2) an indirect statutory entitlement because the ISDA is incorporated into the contracts, the actual amount of funding to be awarded by IHS is not set by the ISDA; it is set through a negotiation between the parties as the ISDA itself requires.³ See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B), 450j-1(b), 450j(c), 450l(c)(b)(4); 25 C.F.R. §§ 900.12, 900.8(h). There is simply no abstract statutory right to (1) all costs desired by the ISDA contractor, (2) all costs that the contractor believes are "sufficient to operate the contracted program at the Secretarial level," or (3) all costs derived from application of the ISDA contractor's indirect cost rate to IHS program funds ("rate times base"). The only entitlement, as the Supreme Court has held, is that a party to a self-determination contract is entitled to rely on the terms and conditions therein. See Cherokee, 543 U.S. at 643-45, 125 S. Ct. at 1181.

An ISDA contract negotiation starts with a contractor's proposal. See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h). A contract proposal will be accepted if the Secretary agrees to the proposed terms. See 25 U.S.C. § 450f(a)(2). If the Secretary declines the proposal, the Tribe or Tribal organization may: (1) challenge the Secretary's declination in an

³ Contrary to Plaintiffs' assertion (Pls.' Opp. at 13), the Secretary does not claim to have unfettered discretion in awarding CSC. See, e.g., Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). The amount of CSC is the product a negotiation and is subject to the availability of appropriations. If a contractor is not satisfied with the result of a negotiation, it may insist on its own proposal and force a declination which is subject to judicial review.

administrative proceeding or directly in federal court as inconsistent with the ISDA, see id., or (2) acquiesce in the terms offered by the Secretary and accept the contract and funding. If the contractor does not avail itself of immediate review and instead acquiesces in the amount of funding proposed by IHS, the contractor is bound by the negotiated amount in the executed contract. If the contractor determines at a later time that the amount of funding is insufficient, it can suspend operation of the contract or retrocede the program for lack of funding. See id. §§ 450l(c)(b)(5), 450j(e). In future annual funding agreement negotiations, the contractor may again propose desired terms and if they are rejected by IHS, the contractor can force a declination and obtain review in federal court. The availability of immediate judicial review prior to contract formation demonstrates Congress's intent that it is at this time that a Tribe or Tribal organization must challenge the Secretary's rejection of the proposed amounts. The statutory scheme and purpose demonstrates that there is no "independent" right under the ISDA to CSC.

This is the conclusion that was reached in a well-reasoned decision by the Federal Circuit in Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005). In Samish, the Federal Circuit reviewed the ISDA and determined that its funding provisions did not curtail the Secretary's discretion to pay funds, did not set clear standards for the Secretary's payment of funds, did not specify precise amounts to be paid, and did not compel the payment of funds. See 419 F.3d at 1364; see also Pueblo of Zuni v. United States, 467 F. Supp. 2d 1114, 1116-17 (D.N.M. 2006).⁴

⁴ The only case Plaintiffs cite to the contrary is Appeals of Mississippi Band of Choctaw Indians. (Pls.' Opp. at 11.) This decision, however, must be read in light of Samish, as the Interior Board of Contract Appeals, now the Civilian Board of Contract Appeals, is bound by decisions of the Federal Circuit. See 28 U.S.C. § 1295(a)(10). Moreover, the administrative judge in Mississippi Band relied upon a unique fact: DOI admitted that the plaintiff was entitled to the funds it sought. (Pls.' Ex. 3.) Mississippi Band is thus akin to Cherokee, 543 U.S. at 636, 125 S. Ct. at 1177, where IHS admitted that it breached the plaintiffs' contracts, but entirely different from the circumstance here, where IHS fully performed and denies that Plaintiffs are

In response, Plaintiffs state that the ISDA requires the Secretary to pay “corrected rate times base.” (Pls.’ Opp. at 53.) But nowhere in the ISDA does it provide that CSC shall be calculated on this basis. Furthermore, the use of a “rate times base” calculation could easily be contrary to the ISDA because it could result in the double payment of a cost, which is prohibited by 25 U.S.C. § 450j-1(a)(3)(A). For example, if a contractor receives program funding for janitorial services from IHS, and these costs are also in the indirect cost pool used to calculate the indirect cost rate, then IHS must reduce the amount of CSC funding it pays to avoid duplication of costs and comply with § 450j-1(a)(3)(A). In addition, some Tribal contractors do not have indirect cost rates and instead negotiate indirect-type costs (a lump sum). (Defs.’ Ex. 60 at 17-18; Ex. 1 ¶ 35; Ex. 2 ¶ 75). There is simply no basis in the ISDA directing the payment of “rate times base.”⁵

If Plaintiffs’ argument that the CSC amount is set by statute were accepted, the CSC amount could never be determined pursuant to a contract negotiation. Under this theory, if the amounts the parties agreed upon were less than the amount the contractor later claimed in a lawsuit, the Secretary would still be liable, notwithstanding the fact that he might have agreed to every element of the contractor’s proposal. It would be almost impossible for the Secretary to administer the ISDA and to distribute each year’s appropriations consistent with congressional limitations.

At bottom, Plaintiffs urge that the ISDA creates an entitlement to whatever amount of funding they themselves deem reasonable and allowable. This is an untenable reading of the statute. And no court has so held; in fact, to the contrary, the Federal Circuit has specifically held that there

entitled to any additional CSC funding.

⁵ Throughout and attached to their Opposition are various statements and reports by, among others, Members of Congress, the General Accounting Office, and government employees, all expounding on the meaning of the ISDA. ISDA’s meaning, however, can only be derived by reviewing its plain text and cannot be rebutted in any way by extraneous statements.

is no entitlement to funding directly under the ISDA. See Samish, 419 F.3d at 1367. It is the contracts themselves that create an entitlement to CSC, the scope of which is determined under traditional contract principles.⁶ See id.; Cherokee, 543 U.S. at 643-44, 125 S. Ct. at 1181.

IV. THE ISDA APPROPRIATIONS LIMIT THE AVAILABILITY OF ANY ADDITIONAL FUNDING IN YEARS AFTER 1997.

Not only did Defendants award to Plaintiffs the specific amounts set forth in their contracts, but Defendants have an additional contract defense. In years after 1997, Congress capped the CSC appropriations, and the capped appropriation was less than all CSC requests made by Tribal contractors. (Defs.' Mem. at 26-27.) Thus, IHS had to equitably allocate the limited appropriations to all of the requests. Because these appropriations are now depleted, (Defs.' Mem. at 26), a fact that is not disputed, see Pls.' Resp. to Defs.' Statement of Material Facts at H, Plaintiffs' request for additional funding in these years must fail.

The D.C. Circuit has already held that when Congress appropriates funds under a "not to exceed" clause for a specific purpose, the agency must not exceed this limitation. See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). All other courts to consider the binding nature of the CSC capped appropriations, including this one, have agreed. See Tunica 2004 Mem. Op. at 22-26; Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999); Ramah Navajo Chapter v. Norton, No 90-957, slip op. at 14-15 (D.N.M. 2006)

⁶ Defendants do not dispute that some of Plaintiffs' contracts incorporate the ISDA. But, as already explained, the ISDA does not mandate the payment of a specific amount of funds, whether independently or as incorporated into a contract. But even if the Court disagreed, the Court would still need to resolve conflicting (not ambiguous) provisions in the contracts. Any such conflict should be resolved by reference to contract law directing that a specific provision of a contract governs over a general one. See Hometown Fin. Inc. v. United States, 409 F.3d 1360, 1369 (Fed. Cir. 2005); Conoco Inc. v. NLRB, 91 F.3d 1523, 1527 (D.C. Cir. 1996); Hills Materials Co. v. Rice, 982 F.2d 514, 517 (Fed. Cir. 1992).

(attached as Defs.' Ex. 30).⁷

Each of Plaintiffs' arguments to the contrary can be easily dismissed. First, Plaintiffs make a false distinction between the Secretary's contract authority and his role as "paymaster." (Pls.' Opp. at 23, 28.) There is absolutely no such distinction, and Plaintiffs cite no case in support. If this were the case, IHS would have contract authority for an unlimited amount of money and could obligate the government for billions of dollars without having any funds to liquidate those debts.

Plaintiffs also rely on New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966), and other cases as support for their claim of entitlement to "full" CSC funding. (Pls.' Opp. at 23-24.) But they fail to discuss critical passages in New York Airways that fundamentally distinguish it from this case. The governing statute in that case was the Federal Aviation Act ("FAA"), which the court held did not condition the defendant's duty to determine subsidy rates "upon the existence or adequacy of appropriations by Congress to pay the moneys which may fall due as the result of the Board's exercise of its rate-making power." New York Airways, 369 F.2d at 746. The New York Airways court explained:

Congress in this instance would have been required to incorporate into [the authorizing statute], either directly or by affirmative amendment in the appropriation act, suitable terminology restricting the Board's authority to set rates under [the authorizing statute] beyond available appropriations.

Id. Because no such restricting language existed in the FAA, the court concluded that Congress' failure to appropriate necessary funds did not extinguish the government's liability. Id. at 750. In this

⁷ Plaintiffs are without any basis in arguing that Oglala-Sioux may not longer be good law. (Pls.' Opp. at 25-26.) The Federal Circuit's decision in Cherokee, later affirmed by the Supreme Court, explicitly and carefully distinguished Oglala-Sioux as addressing capped CSC appropriations. See 334 F.3d 1075, 1084 (Fed. Cir. 2003). The Supreme Court's decision also specifically distinguished the circumstance where appropriations are legally restricted. See Cherokee, 543 U.S. at 643, 125 S. Ct. at 1180. If the Supreme Court had wanted to cast doubt on Oglala, it could have done so by means far more direct than those attributed to it by Plaintiffs.

instance, Congress has done exactly what the court in New York Airways indicated it must do--it included language in the authorizing statute restricting the amount of self-determination contracts to the “availability of appropriations,” and then limited the CSC funding available by placing restrictive “not to exceed” language in the appropriations statutes. (Defs.’ Mem. at 26-27.) Accordingly, New York Airways does not help Plaintiffs.

Plaintiffs’ argument about § 450j(c) is also incorrect. This section provides: “[t]he amounts of such [self-determination] contracts shall be subject to the availability of appropriations[.]” This does not apply only to the “out years of multi-year or indefinite term contracts.” (Pls.’ Opp. at 27.) Section 450j(c)(1), by its plain language, refers to a “self-determination contract” with a term “not to exceed three years” or mature contracts with “a definite or an indefinite term.” 25 U.S.C. § 450j(c)(1). That section further provides that the “amounts” of self-determination contracts are “subject to the availability of appropriations.” Id. Nothing in the statutory language suggests that a Tribal contractor is entitled to what it regards as “full” payment of CSC in the first year of its contract or that the appropriations cap applies only to “out years” of the contract.⁸ Finally, this Court has already rejected Plaintiffs’ claim that IHS requests to Congress give rise to liability under the contracts. See 2004 Tunica Mem. Op. at 37-40. Plaintiffs provide no basis for concluding that IHS’s capped appropriations in years after 1997 have no effect on this case.

V. RNC DOES NOT ALTER THE CONTRACT ANALYSIS.

Plaintiffs argue that Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (“RNC”) applies to this case and permits their contracts to be reopened and additional CSC funding

⁸ Plaintiffs argue that the appropriation caps are not legal restrictions. (Pls.’ Opp. at 28-29.) But the statutorily capped appropriations, such as those discussed here and those referenced in Cherokee, limit the total amount that can be paid in a year. See 543 U.S. at 637-38, 125 S. Ct. at 1177-78 (distinguishing between legally unrestricted and restricted funds).

added. (Pls.' Opp. at 13-16.) This is entirely unfounded. In RNC, the Tenth Circuit held that the indirect cost rates used in Bureau of Indian Affairs ("BIA") contracts violated the ISDA. See 112 F.3d at 1463. Pivotal to the court's analysis, however, was its determination that the ISDA provisions mandating payment of indirect CSC were ambiguous on the question of the "extent to which indirect costs are to be funded by defendants." Id. at 1461. In light of the perceived ambiguity, the court relied on the canon of statutory construction interpreting ambiguous provisions to the benefit of Native Americans. See id. at 1463. The Tenth Circuit stated that although inclusion of the New Mexico program 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. By including these funds in the direct costs base, the court found that the plaintiff had not sufficiently recovered CSC in 1989. Id. Thus, the court required BIA to pay those costs associated with the New Mexico programs. See id. The court said nothing about invalidating ISDA contracts or requiring that they be reopened after full performance.

Moreover, immediately after the decision, Congress amended the ISDA to clarify any ambiguity that the Tenth Circuit found and directed that "[b]efore, on, and after October 21, 1998," IHS may not pay any indirect costs not directly attributable to its programs. See 25 U.S.C. § 450j-2. This was a clear repudiation of the Tenth Circuit's decision and applies to all indirect cost rates and CSC funding for years prior to October 1998. Applying this provision and others, Defendants explained in their Motion that Plaintiffs' claims would result in unlawfully shifting costs from various other federal agencies to IHS. (Defs.' Mem. at 45-47.)

In response, Plaintiffs dispute the meaning of § 450j-2 and assert that it cannot be applied retroactively because it would impair their contract rights. (Pls.' Opp. at 32-34.) As already explained, IHS did not breach Plaintiffs' contracts and thus there is no issue with the impairment of

contract rights. Moreover, as a matter of law, Congress can retroactively clarify an ambiguous statute. (Defs.’ Mem. at 40-41.) Plaintiffs also argue that all of the costs in their indirect cost pools are IHS costs, and thus, they assert, there is no conflict with § 450j-2. (Pls.’ Opp. at 16.) But all of the costs in Plaintiffs’ indirect cost pools are there because they benefit all of the programs in the direct cost bases (e.g., BIA, Department of Education, etc.). In addition, Arizona v. Thompson and Nebraska v. HHS, (Pls.’ Opp. at 16), do not stand for the propositions that Plaintiffs suggest. In both cases, the Department of Health and Human Services (“HHS”) specifically authorized the allocation of more indirect costs to it than it would be allocated under OMB A-87. In contrast, there are specific statutory commands, §§ 450j-1(a)(2), 450j-2, directing that IHS not be charged more than its fair share. It is clear that the ISDA, while not mandating the use of OMB A-87 rates, endorses their use subject to various adjustments, e.g., to avoid duplication of costs and to take into account limited appropriations. (Defs.’ Mem. at 28-37.) Plaintiffs utterly fail to justify their suggested methodology and have not rebutted that it would unlawfully shift costs from other federal agencies to IHS.

Even if RNC were to have some applicability to this case, Defendants point out two factual distinctions between these contractors and RNC. First, the Tenth Circuit relied upon a finding that RNC’s costs were fixed. See RNC, 112 F.3d at 1461-62. Whether or not this was true, it is demonstrably not true for Plaintiffs, as explained by Defendants’ expert, Charles Wilkins. (Defs.’ Mem. at 41-45.) In addition, the Tenth Circuit explicitly relied upon the fact that RNC did not recover any indirect costs from its non-ISDA (BIA) program, and implicitly upon the fact that its BIA programs comprised the vast majority of its direct cost base. See RNC, 112 F.3d at 1461-62. In this instance, Plaintiffs recover a significant amount of indirect costs from their non-IHS programs, and IHS programs do not comprise most of their direct cost base. (Defs.’ Mem. at 44-45.)

In their Opposition, Plaintiffs assert that their indirect costs are fixed⁹ and challenge Mr. Wilkins's conclusion, based on over twenty years of experience in government contracting, government accounting, and government indirect costs, (Defs.' Ex. 5), to the contrary. (Pls.' Opp. at 17-22.) First, they challenge his use of the term "revenue" instead of "direct costs." For this purpose, there is little difference between the two terms and, to the extent there is some difference with respect to Tunica, Mr. Wilkins discusses both. (Defs.' Ex. 5 at 12-13.) Second, Plaintiffs argue that their costs are fixed because there are instances where their revenues went up and their indirect costs went down as well as instances where their revenues went down and their indirect costs went up. The opposite is true. If indirect costs change with changes in revenue, then the costs cannot be said to be fixed; a fixed cost does not change when revenue changes.¹⁰ (Defs.' Ex. 5.) An example that Plaintiffs raise in their Opposition, where revenue rose by 84% and indirect costs rose by 28.5%, also makes Defendants' point. That revenue and costs changed in different proportions has no bearing on the fact that the indirect costs in this example rose when funding changed.

Plaintiffs do not even attempt to challenge Mr. Wilkins's conclusion that the types of costs that Plaintiffs have in their indirect cost pools are decidedly not fixed costs. (Defs.' Ex. 5.) They also do not dispute that IHS comprised very small proportions of their direct cost base in all years.¹¹ See

⁹ Curiously, in their Response to Defendants' Statement of Material Facts at I, they state: "Plaintiffs do not allege that their indirect cost pools are fixed."

¹⁰ After many rounds of discovery and years of briefing, Plaintiffs submit with their Opposition entirely new calculations. (Pls.' Ex. 6, 19.) This type of "litigation by surprise" should not be countenanced, and the Court should disregard these late-filed materials.

¹¹ They urge the Court to consider together the IHS and the BIA share of their direct cost bases. BIA, however, is not a defendant in this lawsuit, and any grievances against it cannot be imputed to IHS.

Pls.' Resp. to Defs.' Statement of Material Facts at J.¹²

Finally, Plaintiffs attempt to invoke collateral estoppel based on RNC as a bar to (what they claim is) Defendants' attempt to re-litigate the validity of the indirect cost rate methodology in OMB Circular A-87. (Pls.' Opp. at 14-16.) Defendants have discussed in length why collateral estoppel does not apply in their Opposition at pages 22-47.

VI. PLAINTIFFS CANNOT RECOVER ADDITIONAL CSC FUNDING BECAUSE THEY ALREADY RECEIVED MORE THAN THEY INCURRED.

An additional reason exists to bar Plaintiffs' claims. In this case, if the Court were to award additional CSC funding to Plaintiffs, they would get a windfall, which is not permitted under ISDA. See Samish, 419 F.3d at 1367; RNC, 112 F.3d at 1464. Plaintiffs actual costs are now known for many of the years at issue and, for these years, IHS paid more than its proportional share. (Defs.' Ex. 3 ¶¶ 58-65, 70-71, Ex. 36 at 3-4); see also Pls.' Resp. to Defs.' Statement of Material Facts at E. While DOI has since adjusted Plaintiffs' rates to take this over-recovery into account, any additional recovery here would exceed IHS's share of indirect costs and thus violate §§ 450j-1(a)(2), 450j-2.

VII. PLAINTIFFS WAIVED ANY CLAIMS TO ADDITIONAL FUNDING.

Even assuming, for purposes of argument, that the ISDA entitled contractors to be paid a sum certain, this "right" can be waived as long as Congress has not precluded the waiver in the governing statute. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 705, 65 S. Ct. 895, 900-01 (1945). A waiver is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938). In the ISDA, Congress did not preclude

¹² It appears that Plaintiffs are confusing two different concepts: fixed costs versus a fixed percentage ("constant" or "steady" costs). A fixed indirect cost is a cost that will remain the same, regardless of whether there are two programs or ten. (Defs.' Ex. 5.) In contrast, a fixed percentage is when the base and pool grow or shrink in proportion to each other. The latter is unrelated to the fixed cost concept in RNC.

the waiver of judicial remedies by Tribal contractors. In fact, Congress fully endorsed the possibility of waiver by allowing contractors access to a federal court before execution of an ISDA contract, and providing in the alternative for acceptance by the contractor of the contract terms. Thus, when a Tribal contractor believes that the government has violated the ISDA by virtue of the terms or conditions in a contract, the contractor cannot simply continue contract performance, without protest, without waiving its claim. (Defs.' Mem. at 47-53.) In this instance, Plaintiffs have signed numerous funding agreements without once utilizing the prescribed pre-execution, judicial review procedure to challenge the Secretary's CSC funding offers under the law. They have thus waived any and all claims for additional funding based on the Secretary's alleged non-compliance with the law.

A. Plaintiffs' Conduct Evinced An Intent to Waive Claims for Additional Funding.

There is no better evidence of an intent to waive a statutory or regulatory right than (a) not taking advantage of pre-execution remedies, (b) signing a contract, (c) performing the contract, and (d) accepting funds under the contract. See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563-64 (Fed. Cir. 1990) (accepting contract terms that are contrary to constitutional entitlement is voluntary and knowing waiver of constitutional entitlement); Aleutian Constructors v. United States, 24 Cl. Ct. 372, 384 (1991) ("Continuance of the contract is the most common and clearest case of waiver."); Appeal of USD Techs., Inc., ASBCA No. 31305, 1987 WL 40766 (Mar. 12, 1987), aff'd without opinion, (Fed. Cir. Feb. 3, 1988) ("In the realm of Government contracts, absent mistake or duress . . . few things signify knowing and intentional conduct more than does the execution of a bilateral modification.").

In response, Plaintiffs argue that the Secretary has been well aware of their claim. (Pls.' Opp. at 42.) Whether the Secretary was aware of generalized complaints by various Tribal contractors about the amount of funding appropriated by Congress for CSC is not relevant to waiver. Plaintiffs'

recourse at all times, if dissatisfied with the funding amounts offered by IHS, was to reject the amount, insist on the amount or terms to which they thought themselves entitled (which IHS would then decline) and bring a lawsuit challenging the declination at the contract formation stage, as described above.¹³ Other Tribal contractors have availed themselves of this remedy, thus properly notifying the Secretary of a specific grievance. By foregoing this remedy, Plaintiffs evinced an intent to perform under the terms and conditions of their contracts. The decision not to take advantage of the pre-execution judicial remedy available and instead accepting the terms and conditions of the contracts demonstrate an intent to waive claims to additional funding under the ISDA.

B. Plaintiffs Had Knowledge of All “Rights” Flowing From the Law.

Plaintiffs next urge that they did not know of the “illegality of the rate system.” (Pls.’ Opp. at 44.) It is difficult to accept this argument on its face, as Plaintiffs were part of the class of contractors who brought similar claims against BIA in 1990 in RNC, with the assistance of Michael Gross, Esq., the same attorney assisting Plaintiffs here. In addition, RNSB has more than once presented its understanding of the ISDA’s funding provisions in federal court. See Ramah Navajo Sch. Bd. v. Shalala, No. 94-914 (D.N.M.) (seeking CSC) (attached as Defs.’ Ex. G to Defs.’ (Initial) Mot. to Dismiss, docketed as #17); Ramah Navajo Sch. Bd., 87 F.3d 1338 (challenging allocation of CSC). But even assuming that Plaintiffs were not familiar with the terms of the ISDA and the terms of their contracts they signed, they are imputed with that knowledge. See Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S. Ct. 1, 3 (1947) (“[E]veryone is charged with knowledge of the United States Statutes at Large”); Hartford Accident & Indem. Co. v. United States, 127 F. Supp. 565,

¹³ Plaintiffs argue that they could not challenge their contracts any earlier because the Secretary did not issue a declination. But the Secretary only issues a declination when there is dispute on a proposal. See 25 U.S.C. § 450f. Here, there was no dispute.

567 (Cl. Ct. 1955) (parties to a contract are charged with knowledge of its terms). Moreover, judicial pronouncements simply explain the operative effect of the law and do not create it. See Catawba Indian Tribe v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993); Jones v. United States, 6 Cl. Ct. 531, 533 (1984); Ide v. United States, 25 Ct. Cl. 401, 1800 WL 1849, at *5 (1890), aff'd, 150 U.S. 517, 14 S. Ct. 188 (1983).

Nothing prevented Plaintiffs from litigating the issues raised in this lawsuit before they executed their ISDA contracts. In such circumstances, Plaintiffs' failure to raise their claims for additional funding before signing the contracts and instead accepting the terms and conditions of the contract and the funding provided thereunder amply demonstrate the waiver of a known right. To hold otherwise would allow Plaintiffs and other government contractors to agree to terms of contracts knowing full well that they planned to challenge them, perform, accept government funds for years, and then come back to the government years later and attempt to get an additional funding. Allowing contractors to do this would lead to extreme instability in federal contracting and federal appropriations and would create a disincentive for Tribal contractors to make their claims known.

The instances where courts have declined to apply waiver and estoppel are few and are distinguishable, either because the contractor carefully protected his or her rights before the contract was executed or shortly thereafter or because there was egregious behavior on the part of the government. See Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 409, 412-13 (2003) (explaining that waiver was not applied in cases where contractors complained about the alleged invalidity of the contracts at the formation stage, or, at the very least, at any early stage in the conflict), rev'd on other grounds sub nom., Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); LaBarge Prods., Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) (explaining that waiver would not apply because the government's conduct in the bidding process was improper).

The administrative decision, Appeals of Seldovia Village Tribe, cited by Plaintiffs for the proposition that waiver should not apply is neither authoritative nor binding here. Seldovia was decided before Cherokee, the case in which the Supreme Court indicated that ISDA contracts should be treated like ordinary government contracts. Second, the decision in Seldovia is not persuasive because the administrative judge but did not discuss authoritative Federal Circuit decisions such as Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443 (Fed. Cir. 1997),² and E. Walters & Co. v. United States, 576 F.2d 362 (Cl. Ct. 1978).¹⁴ Here, IHS has not benefitted from the CSC contract terms which Plaintiffs claim violate the ISDA. To hold that a party to a government contract may agree to the contract, accept its benefits, and then claim that it is entitled to a better deal, would make it virtually impossible for the government to contract within its appropriation limits and would render such limits meaningless.

Plaintiffs have likewise not rebutted the application of estoppel. Defendants explained that all pertinent appropriations that might have been available for obligation in Plaintiffs' 1995-2003 agreements (had they challenged the funding levels prior to execution) have lapsed as a matter of law, and most have long since been obligated for other purposes. (Defs.' Mem. at 51-53.) In response, Plaintiffs merely assert the availability of the Judgment Fund. (Pls.' Opp. at 43.) But the Judgment Fund requires that funds awarded under the CDA be reimbursed by the defendant-agency. See 41 U.S.C. § 612(c). Therefore, if IHS is found liable and thus is required to repay the Judgment Fund, IHS's other programs, all of which are for the benefit of Tribal contractors, will be harmed. See 25 U.S.C. § 450j-1(b). The declination process ensures that if a contractor is not satisfied with the

¹⁴ Plaintiffs cite to a second Seldovia decision (Pls.' Opp. at 45-46 & n.42, 43), in which the Board awarded attorney's fees to the plaintiffs, but fail to tell the Court that this decision has been vacated. (Defs.' Ex. 66.)

funding levels offered by the Secretary, the dispute will be resolved before any promises are made and generally before all relevant appropriations are exhausted. Once contracts are executed, the Secretary has every reason to rely on their terms and not to expect that additional funds would be required. Estoppel applies to bar Plaintiffs' claims.

C. There Are No Procedural Bars to this Court's Consideration of Waiver and Estoppel.

Plaintiffs also argue that there are two procedural bars to the Court's consideration of waiver and estoppel. First, Plaintiffs argue that Federal Rule of Civil Procedure 12(g) bars the Court's consideration of waiver and estoppel because they were not raised in Defendants' Initial Motion to Dismiss filed on March 31, 2003. (Pls.' Opp. at 35.) They are wrong for several reasons. The defense of waiver can be raised under Rules 12(b)(6), 12(c), 56(c), at a trial on the merits, or in the party's responsive pleading. See Fed. R. Civ. P. 12(g), (h); Wyatt v. Syrian Arab Republic 398 F. Supp. 2d 131, 142 n.7 (D.D.C. 2005). This is in contrast to the defenses raised in the cases cited by Plaintiffs, involving improper venue, see Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 908-11 (5th Cir. 1993), and lack of personal jurisdiction, see Seretse-Khama v. Ashcroft, 215 F. Supp. 2d 37, 39-40 (D.D.C. 2002), defenses which fall within Rule 12(g). A motion to dismiss for failure to state a claim does not. See Fed. R. Civ. P. 12(g), (h)(2).

In this case, the Court granted in part and denied in part Defendants' initial Motion to Dismiss pending jurisdictional discovery. Before the Court resolved the remainder of the Motion, the case was stayed pending Cherokee, as it was expected that Cherokee would provide critical guidance about the nature of ISDA contracts. Once Cherokee was decided, the claims in the Complaint had to be read in a new light and Defendants' original defenses needed to be modified. The Court permitted Defendants to make this entirely proper modification in a renewed Motion.

Plaintiffs also assert that Defendants cannot raise waiver and estoppel here because these defenses were not specifically discussed in the CO decisions. (Pls.' Opp. at 34.) But as discussed above, a claim is analyzed by reference to its operative facts, and when a claim (or defense) involves a separate set of operative facts not presented to or the subject of a CO decision, the reviewing federal court lacks jurisdiction. The affirmative defenses of waiver and estoppel, however, do not involve any facts beyond the undisputed fact of the existence of contracts under which Plaintiffs accepted government funds. (2d Am. Compl. ¶¶ 1-5.) Moreover, Foley v. United States, the case cited by Plaintiffs, did not endorse the view that no new defenses could be raised in federal court. See 26 Cl. Ct. 936, 940 (1992). It stated that where, as with the facts presented, the new defenses had to be supported with new facts (i.e., proof of quantity overruns and unforeseeability), the defenses were more like counterclaims and had to be the subject of a CO decision before being adjudicated in federal court. See id. Waiver and estoppel are entirely unlike the defenses discussed in Foley, because these defenses are primarily legal and arise out of facts not disputed. Foley provides no assistance to Plaintiffs here.

VIII. THE SECRETARY IS NOT A TRUSTEE FOR PURPOSES OF ISDA FUNDING.

Plaintiffs' Opposition is riddled with references to a "trust relationship" between the Secretary and Plaintiffs. While there is a general trust relationship between the Indian people and the United States, see United States v. Navajo Nation, 537 U.S. 488, 506, 123 S. Ct. 1079, 1091 (2003), reaffirmed in the ISDA itself, see 25 U.S.C. § 450(c)(d)(1)(A), this relationship is not actionable in and of itself. The reaffirmation of this general duty in a statute does not transform Plaintiffs' role under the ISDA from one of contractor to one of beneficiary or the Secretary's role as disbursing of federal funds for contracts to one of trustee. See Samish, 419 F.3d at 1367; Reuben Quick Bear v. Leupp, 210 U.S. 50, 77, 28 S. Ct. 690, 694-95 (1908) (distinguishing public funds from trust or Tribal

money and stating that the former “relates to public moneys belonging to the government” and the latter “belong to the Indians”). For an enforceable trust relationship, the government must control Indian property. See United States v. White Mountain Apache Tribe, 537 U.S. 465, 473-74, 123 S. Ct. 1126, 1133 (2003); United States v. Mitchell, 463 U.S. 206, 225-28, 103 S. Ct. 2961, 2972-74 (1983); Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2001).

In reviewing the ISDA, the Supreme Court has specifically stated that ISDA contractors should be treated like other government contractors and their contracts subject to ordinary contract principles. See Cherokee, 543 U.S. at 638, 643-44, 125 S. Ct. at 1178, 1181. The ISDA also does not authorize the Secretary to assume control over Plaintiffs’ property or manage Plaintiffs’ property. Instead, the ISDA directs the Secretary to distribute federal taxpayer funds pursuant to the terms under which an ISDA contract is entered. Finally, there is no basis for Plaintiffs’ argument (Pls.’ Opp. at 5, 8 & n.39), that HHS is barred under the law of trusts from raising defenses in this case. See, e.g., DuMarce v. Scarlett, 446 F.3d 1294, 1302 (Fed. Cir. 2006). The ISDA did not create a trust relationship applicable here.

IX. PLAINTIFFS FAIL TO REBUT DEFENDANTS’ JURISDICTIONAL AND OTHER THRESHOLD ARGUMENTS PRECLUDING ANY RELIEF RELATED TO THEIR INDIRECT COST RATES.

Plaintiffs do not even attempt to rebut the fact that they failed to challenge the validity of their indirect cost rates through DOI’s administrative appeal process (2 C.F.R. Pt. 225, App. E, § F.4; 43 C.F.R. §§ 4.1 et seq.). In fact, they admit they did not exhaust administrative remedies. See Pls.’ Resp. to Defs.’ Statement of Material Facts at F. Their claims related to their indirect cost rates thus fail for failure to exhaust administrative remedies and should be dismissed. (Def’s.’ Mem. at 54-55.) They also barely address the fact that the relief they seek is already available via multiple rates and provisional/final rates. (Def’s.’ Mem. at 58-59.) Mr. Kerkmans testified in RNC that multiple rates

assist contractors in obtaining most or all of their indirect costs. (Defs.' Ex. 34 ¶ 3.) Similarly, Mr. Donham, testified that provisional/final rates eliminate the perceived deficiencies with the fixed-with-carry-forward rates. (Defs.' Ex. 59 at 48.) Plaintiffs cannot rebut the fact that a provisional/final rate obviates the need for a carry-forward, and thus their use would moot their carry-forward claims. At bottom, Plaintiffs cannot refuse to take advantage of the many alternative and flexible methodologies available under the OMB Circulars--methodologies that would likely address Plaintiffs' concerns--refuse to bring their challenge to the agency through the administrative process, and instead ask the Court to hold an entire federal regulatory scheme invalid. Because Plaintiffs failed to take advantage of the administrative process provided for in OMB A-87, their claims challenging their indirect cost rates should be dismissed. See Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004). Plaintiffs have not come close to satisfying their burden to show that exhaustion would be futile. See Honig v. Doe, 484 U.S. 305, 327, 108 S. Ct. 592, 606 (1988). Plaintiffs also fail to rebut application of waiver, which is applicable to these claims because they negotiated and executed rate agreements over the years. (Defs.' Mem. at 55-56.)

Defendants also explained in their Motion that Plaintiffs' claims against NBC for rate adjustments for 1995-2001, if successful, would have no practical effect, because the readjustment of a rate separate and apart from its use in an actual contract would not change Plaintiffs' situation in any practical way. Plaintiffs do not rebut this. As such, Plaintiffs' claims for rate adjustment should be dismissed. (Defs.' Mem. at 53-59.)

CONCLUSION

For the reasons set forth above and in Defendants' Motion to Dismiss or for Summary Judgment, Defendants' Motion should be granted, and the Second Amended Complaint dismissed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

/s/Rachel J. Hines

SHEILA M. LIEBER
Deputy Director
RACHEL J. HINES (D.C. Bar #424774)
HANNAH Y.S. CHANOINE
Trial Attorneys
Federal Programs Branch, Room 7314
Civil Division
Mailing Address
P.O. Box 883
Washington, DC 20044
Delivery Address
20 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 514-5532
Facsimile: (202) 318-7604
E-mail: rachel.hines@usdoj.gov

Dated: May 4, 2007

Counsel for Defendants