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Dated: March 31, 2003

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

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

Plaintiffs,

v.

UNITED STATES of AMERICA;
TOMMY G. THOMPSON, Secretary of the
United States Department of Health and Human
Services; GALE A. NORTON, Secretary of the
United States Department of the Interior;
CHARLES W. GRIM, Interim Director of the
Indian Health Service, United States
Department of Health and Human Services;
EARL E. DEVANEY, Inspector General,
United States Department of the Interior;
TIMOTHY G. VIGOTSKY, Director, National
Business Center, United States Department of the
Interior,

Defendants.

Case No. 1:02CV02413
The Honorable Reggie B. Walton

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, Tunica-Biloxi Tribe and Ramah Navajo School Board, are parties to self-determination contracts with the Secretary of the U.S. Department of Health and Human Services (“HHS”), as authorized by the Indian Self-Determination and Education Assistance Act (“ISDA”).¹ They challenge the amount of funding they received from the Indian Health Service (“IHS”), an agency of HHS, under their self-determination contracts for “indirect” contract support costs (“CSC”).² Plaintiffs seek monetary relief for past fiscal year CSC as well as prospective declaratory relief related to how indirect CSC is calculated.

Their Complaint, however, is filed both too early and too late. Their retrospective claims for monetary relief are filed too late because IHS no longer has the authority to obligate indirect CSC funding under the ISDA for fiscal years 1993 through 2002. In contrast, Plaintiffs’ claim for prospective relief—seeking review of the indirect cost formula—is brought too early because neither Plaintiff has negotiated and obtained an indirect cost rate since 1996. Plaintiffs must negotiate and obtain current rates before they can demonstrate any injury in fact for standing to sue or ripeness for review. Plaintiffs also fail to state a claim that they are entitled to full indirect CSC funding from a source other than the relevant indirect CSC appropriation. Two federal courts of appeal have rejected identical claims for full indirect CSC funding against IHS, and two

¹ The ISDA permits Indian tribes and tribal organizations to provide services to their members that would otherwise be provided by IHS or the U.S. Department of the Interior (“DOI”). These services are provided under a self-determination contract entered into by the tribe or tribal organization and the appropriate Secretary.

² Indirect CSC are administrative costs that benefit more than one program or service under contract. For example, a contracting tribe with many contracts may hire an accountant to provide accounting services for all of its programs under contract. Under the ISDA and federal contracting law, each contract is charged a share of the accountant’s salary, according to an indirect cost formula, because all of the contracts are supported by the accountant’s services.

other federal courts of appeal, including the D.C. Circuit, have rejected claims for full indirect CSC funding against the U.S. Department of the Interior’s (“DOI”) Bureau of Indian Affairs (“BIA”).

Some of Plaintiffs’ claims are also barred by res judicata, the applicable statute of limitations, and the failure to exhaust mandatory administrative remedies. Finally, Plaintiffs fail to state a claim for which relief may be granted regarding their contention that the Secretary of HHS was required to ask Congress for the full amount of their indirect CSC need.

LEGAL AND STATUTORY BACKGROUND

I. The Indian Self-Determination and Education Assistance Act

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDA”), a statute that was designed to encourage Indian self-government by permitting the transfer of certain federal programs to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs both the Secretary of the Department of Health and Human Services (“HHS”) and the Secretary of the Department of the Interior (“DOI”), upon the request of an Indian tribe, to enter into a “self-determination contract.” See id. § 450f(a)(1); id. § 450b(i) (defining “Secretary”). A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by IHS or DOI] to Indian tribes and their members pursuant to Federal law.” Id. § 450b(j).

At issue in this litigation are self-determination contracts entered into between Plaintiffs and the Secretary of HHS for the direct operation of health programs ordinarily performed by IHS. IHS’s principal mission is to provide health care for American Indians and Alaska Natives throughout the United States. See Lincoln v. Vigil, 508 U.S. 182, 185, 113 S. Ct. 2024, 2027

(1993). IHS operates under the authority of the Snyder Act, which authorizes it to “expend such moneys as Congress may from time to time appropriate” for the conservation of the health of Indians. See 25 U.S.C. § 13 (providing that BIA will expend funds as appropriated for, inter alia, the “conservation of health” of Indians); 42 U.S.C. § 2001(a) (transferring to IHS BIA’s responsibility for Indian health care).

A self-determination contract’s funding under ISDA includes two components—the Secretarial amount and contract support costs (“CSC”). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of health services. See 25 U.S.C. § 450f(a)(1); id. § 450j-1(a)(1) (the “amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program”). Because some of the costs of running a federal program, however, are borne by federal agencies outside of IHS, the Secretarial amount does not necessarily cover all of the administrative or operating expenses of a particular program (e.g., the cost of payroll services for IHS employees). See id. § 450j-1(a)(2). Thus, a self-determination contract also includes funds for CSC. See id.

Contract support costs can be further broken down into three categories. See id. § 450j-1(a)(3)(A). First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers’ compensation insurance. See id. § 450j-1(a)(3)(A)(i);³ id. § 450b(c). Second, there are indirect CSC, which are administrative costs that are shared by several different programs or services, such as accountants or shared facilities. See id. § 450j-1(a)(3)(A)(ii);⁴ id. § 450b(f). Finally, in the initial year of a contract, CSC include

³ Congress added this provision in 1994. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 1457-58 (1994).

⁴ See supra n.3.

“startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis.”⁵ Id. § 450j-1(a)(5). The ISDA only permits payment of CSC that are reasonable in light of the activities to be conducted. See id. § 450j-1(a)(2). Moreover, the ISDA provides that funding for CSC “shall not duplicate any funding provided under [the Secretarial amount].” Id. § 450j-1(a)(3).

Most important, Congress made the payment of any and all funds under the ISDA conditional: “Notwithstanding any other provision in [the ISDA], the provision of funds under this subchapter is subject to the availability of appropriations . . .” Id. § 450j-1(b) (emphasis added). The Act reiterates in another provision that “[t]he amounts of such [self-determination] contracts shall be subject to the availability of appropriations.” Id. § 450j(c). And since 1994, the ISDA has mandated that every self-determination contract contain the following clause: “Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement” Id. § 450j(c), Model Agreement § 1(b)(4). “[T]he Secretary is [also] not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization” Id. § 450j-1(b).

At issue in this litigation is both the availability of funding for indirect CSC incurred by ongoing self-determination contracts,⁶ (2d Am. Compl. ¶¶ 2, 5), and the methodology for

⁵ See supra n.3.

⁶ Ongoing CSC should be distinguished from CSC for new and expanded contracts, a category of CSC that has generally been appropriated by Congress in a separate earmark. See, e.g., Department of the Interior & Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1407-08 (1992) (Exh. P at 2-3). There are no allegations in the Second Amended Complaint or Plaintiffs’ CDA administrative claims that Plaintiffs are claiming any entitlement to the funds appropriated for CSC for new and expanded contracts. Therefore, unless

determining the amount of indirect CSC that will be paid under the ISDA contracts, (2d Am. Compl. ¶¶ 3, 4).

A. The Availability of Funding for Contract Support Costs

Since before 1993, Congress has provided funding each fiscal year through the appropriations process for IHS to fund, among other things, CSC for ongoing self-determination contracts.⁷ At all times relevant to the Complaint, ongoing CSC were paid from IHS's Indian Health Services non-earmarked appropriation, which was available for obligation for one year. See, e.g., Department of the Interior & Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1407-08, 1415 (§ 304) (1992) (Exh. P). The appropriation is used by IHS to perform most of its statutory duties. See id. In addition to the IHS appropriation, Congress appropriates a small amount of funds for IHS to use for facilities construction. See id.

For fiscal year 1993, Congress appropriated \$1,524,779,000 for Indian Health Services, with some of the funds earmarked for specific purposes not relevant here. See Department of the Interior & Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1407-08, 1420-21 (1992) (Exh. P). This general appropriation was for all of IHS's programs, including the funding of ongoing CSC. See id. For fiscal years 1994-1997, Congress again appropriated lump sums (\$1,645,877,000, \$1,707,092,071, \$1,745,309,000, and \$1,806,269,000, respectively) for all of IHS's programs and earmarked some of these funds for specific items. See Department of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (Exh. Q); Department of the Interior & Related Agencies

otherwise noted, references to CSC in this Memorandum are to ongoing CSC.

⁷ The federal fiscal year runs from October 1 to September 30. Thus, fiscal year 1993 started on October 1, 1992, and ended on September 30, 1993. See 31 U.S.C. § 1102.

Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2538 (1994) (Exh. R); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, & Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 248 (1995) (Exh. R); Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-80-81 (1996) (Exh. S); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213 (1996) (Exh. T).

For fiscal years 1994-1998, the House and Senate Appropriations Committees recommended that IHS spend a certain amount of the IHS appropriation on ongoing CSC. See H.R. Rep. No. 103-158, at 100 (1993) (Exh. Q), S. Rep. No. 103-114, at 107 (1993) (Exh. Q); H.R. Rep. 103-551, at 103 (1994) (Exh. R); S. Rep. 103-294, at 106 (1994) (Exh. R); H.R. Rep. No. 104-173, at 95 (1995) (Exh. S); S. Rep. No. 104-125, at 92 (1995) (Exh. S); H.R. Rep. No. 104-625, at 91 (1996) (Exh. T); S. Rep. No. 104-319, at 89 (1996) (Exh. T).

Starting in 1998, Congress began to cap the funds that could be awarded for ongoing CSC directly in the appropriations acts. For 1998, Congress capped the amount to be spent on ongoing CSC at \$161,202,000. See Department of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997) (Exh. U). For 1999, Congress capped ongoing CSC at \$203,781,000. See Omnibus Consolidated & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79 (1998) (Exh. V). For years 2000-2002, Congress capped CSC at \$228,781,000, \$248,233,682, and \$268,234,000, respectively. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82 (1999) (Exh. W); Department of the Interior & Related

Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79 (2000) (Exh. X); Consolidated Appropriations, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763-214 (2000) (Exh. X); Department of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 456 (2001) (Exh. Y).

B. Litigation Challenging IHS's Funding Decisions and Clarification by Congress

Although in 1998 and all years after, Congress provided specific capped amounts for ongoing CSC in IHS's annual appropriation, prior to that time Congress had recommended a specific amount for ongoing CSC in the appropriation committee reports. IHS followed Congress's recommendations by budgeting and allocating these recommended amounts. But because the recommended amounts were less than the total tribal need for indirect CSC, several contracting tribes sued IHS for additional indirect CSC funding. In at least one case, a contracting tribe was (initially) successful in obtaining an order directing IHS to pay additional CSC from sources other than that budgeted and allocated for CSC for new and expanded contracts. See, e.g., Shoshone-Bannock Tribes v. Shalala, 999 F. Supp. 1395, 1397 (D. Or. 1998), reversed, 279 F.3d 660 (9th Cir. 2002). In response to the district court order (and others), Congress enacted legislation clarifying its intention that IHS not expend more than was recommended in the appropriation committee reports for fiscal years 1994 through 1998 for CSC. This legislation stated:

Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian

Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes

Omnibus Consolidated & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998) (emphasis added) (Exh. V). Since 1998, Congress has enacted identical provisions each year in the annual appropriations legislation. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 313, 113 Stat. 1501, 1501A-192 (1999) (Exh. W); Department of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 312, 114 Stat. 922, 987-88 (2000) (Exh. X); Department of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 310, 115 Stat. 414, 456 (2001) (Exh. Y).

By doing so, Congress clarified any ambiguity in the ISDA and the appropriations acts regarding the amount of funding that could be spent on CSC for fiscal years 1994-1998. And since the enactment of this legislation (called § 314), two courts of appeal have relied on it to hold that the amount available to all contracting tribes for CSC in a particular year was limited to the committee report recommendation for CSC for that year. See Cherokee Nation v. Thompson, 311 F.3d 1054, 1065 (10th Cir. 2002) (holding that, based on § 314, committee report allocation limited the amount of funding available for ongoing CSC for fiscal years 1996 and 1997); Shoshone-Bannock Tribes v. Secretary, Dep't of Health & Human Servs., 279 F.3d 660, 666-67 (9th Cir. 2002) (holding that, based on § 314, committee report allocation limited the amount of funding available for CSC for new and expanded ISDA contracts for fiscal year 1996).

C. The Methodology for Calculating Indirect Contract Support Costs

At issue in this litigation is indirect CSC for ongoing contracts. The ISDA defines

indirect CSC as “costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved.” 25 U.S.C. § 450b(f). In other words, indirect CSC are administrative costs that are shared by more than one program. For example, the salary for the accountant that provides accounting services for multiple programs cannot easily be allocated to any of the contracts because of the difficulty in determining exactly how much of the accountant’s salary is attributable to work on any of the programs.

The ISDA definition of indirect CSC is drawn directly from Office of Management and Budget (“OMB”) A-87, the relevant federal policy guidance for determining the indirect costs attributable to contracts or other agreements between the federal government and state, local, and tribal governments. See 60 Fed. Reg. 26,484, 26,490 (1995) (as revised) (Attachment A, § A.1);⁸ id. at 26,492 (Attachment A, § F.1). See generally *Arizona v. Thompson*, 281 F.3d 248, 251 & n.2 (D.C. Cir. 2002) (explaining OMB-87 principles). OMB A-87 is applied “by all Federal agencies in determining costs incurred by governmental units [including tribal governmental units and agencies] under Federal awards” 60 Fed. Reg. at 26,490 (Attachment A, § A.3.a), id. at 26,491 (Attachment A, § B.13) (defining governmental units).

It is a general principle that costs paid under a federal contract or grant can only be those that are incurred by the program or service operating under the contract or grant. See id. at 26,492 (Attachment A, § C.3.a) (stating that an “allocable cost” is one that “is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such

⁸ The citations in this Memorandum are to the 1995 version of OMB A-87. In 1997, minor amendments not relevant here were made, but an amended version was not published in the Federal Register. See 62 Fed. Reg. 45,934 (1997).

cost objective in accordance with relative benefit received”). Because actually calculating the indirect costs related to a particular contract is not cost effective, federal law sets out a formula for allocating indirect costs. The formula in turn yields a rate that is applied to each contract.

The ISDA recognizes these principles and the need for indirect cost rates. It defines an indirect cost rate as “the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate federal agency.”⁹ 25 U.S.C. § 450b(g). To obtain an indirect cost rate, a contracting tribe must first submit an indirect cost proposal to its cognizant agency. See 60 Fed. Reg. at 26,506 (Attachment E, § D.1.a). The proposal “must be developed within six months after the close of the [tribe’s] fiscal year, unless an exception is approved by the cognizant Federal agency.” Id. at 26,506 (Attachment E, § D.1.d). OMB A-87 sets forth the proposal requirements. See id. at 26,506 (Attachment E, § D.2).

Once an indirect cost proposal is submitted, the cognizant agency will review, negotiate, and ultimately approve an indirect cost rate. See id. at 26,506 (Attachment E, § E.1). An indirect cost rate is the ratio, expressed as a percentage, of the total indirect costs incurred by the tribe to the total amount of program funding received by the tribe. See id. at 26,504 (Attachment E, § B.2) (defining an indirect cost rate as “a device for determining in a reasonable manner the proportion of indirect costs each program should bear. It is the ratio (expressed as a percentage) of the indirect costs to a direct cost base”). The numerator is the sum of the indirect costs a tribe

⁹ With respect to Plaintiffs, DOI was the appropriate federal agency with which to negotiate their rates. (2d Am. Compl. ¶ 4.) Up until late 2002, the Office of the Inspector General (“OIG”) of DOI was responsible for negotiating indirect cost rates with Plaintiffs. In late 2002, this responsibility was transferred to DOI’s National Business Center (“NBC”). Plaintiffs have thus sued both the Inspector General and the Director of NBC. OIG and NBC are separate entities from BIA, and they do not have the authority to enter into or fund self-determination contracts.

expects to incur in a given fiscal year. See id. at 26,484, 26,504 (Attachment E, § B.3). The denominator is the sum of all of the direct base funding received by a tribe in a given fiscal year. See id. at 26,505 (Attachment E, §§ B.4, C.2).

Once an indirect cost rate is approved, it is available to all federal agencies for their use, as agreed to in any particular contract or grant agreement. See id. at 26,506 (Attachment E, § E.3). Application of this rate to each contract ensures that the principles of OMB A-87 related to indirect costs are implemented, namely that each federal agency with federal contracts provides a pro rata share of the indirect costs relative to the size of the program or service under contract, and that no agency is required to fund the indirect costs of another agency. See id. at 26,492 (Attachment A, § F.3).

A (very simple) example of the formula and its application is as follows:

Facts: Tribe A has three contracts to provide various programs for its members: one with the Department of the Interior to provide law enforcement services, one with the Indian Health Service to run a health clinic, and one with another federal agency to run a housing program. The direct costs associated with the law enforcement contract are \$100,000. The direct costs associated with the health clinic are \$500,000. The direct costs associated with the housing program are \$200,000. To support these programs, Tribe A rents one building and employs two accountants to provide accounting services for the three programs. The rent for the building is \$10,000 and the salary for each accountant is \$25,000.

Application of Indirect Cost Formula. To arrive at the indirect cost rate for each of the three contracts, (1) All of the direct costs are calculated, for a total of \$800,000, (2) All of the indirect costs are calculated, for a total of \$60,000. The indirect costs divided by the direct costs results in an indirect cost rate of 7.5%. Thus, the indirect costs associated with the law enforcement program are \$7,500 ($\$100,000 \times .075$), the indirect CSC associated with the health clinic are \$37,500 ($\$500,000 \times .075$), and the indirect CSC associated with the housing program are \$15,000 ($\$200,000 \times .075$).

Under the formula, each contract is charged its pro rata share of the contracting tribe's

indirect costs, and the tribe has received the total \$60,000 needed in indirect CSC.

A problem can arise when an agency, either because of a statutory bar or otherwise, does not pay its pro rata share of indirect CSC based on the indirect cost rate. Nonetheless, OMB A-87 mandates that “[a]ny cost allocable to a particular Federal award or cost objective under the principles provided for in [OMB A-87] may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons.” Id. at 26,492 (Attachment A, § C.3.c). Related to this, “[a]mounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation.” Id. at 26,492 (Attachment A, § F.3.b).

1. Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997)

In 1990, Ramah Navajo Chapter challenged the indirect cost rate formula in the U.S. District Court for the District of New Mexico. See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). RNC sued BIA and DOI’s Office of the Inspector General (“OIG”) on behalf of itself and all other tribes contracting with BIA. See id. The complaint alleged that OIG had improperly calculated RNC’s indirect cost rates and thus BIA had failed to pay all required indirect CSC. See id. at 1459. RNC had five self-determination contracts with BIA (direct program costs totaling \$755,770), and two contracts with the State of New Mexico funded by the U.S. Department of Justice (direct program costs totaling \$62,927). See id. at 1458-59. OIG applied the formula as described above and arrived at a rate of 44.5%. See id. at 1459. RNC asserted that the State of New Mexico refused to apply the amount of indirect costs generated by the rate, and thus argued that the ISDA required BIA to pay all of RNC’s indirect CSC for

services that supported BIA's contracts, regardless of whether they were actually attributable under the indirect cost formula to the State of Mexico's contracted programs. See id. at 1458-59.

The district court granted summary judgment to BIA, finding that nothing in the ISDA required DOI to do anything other than apply OMB A-87 and its resulting formula, which required BIA to pay "those indirect costs . . . allocable and associated with the BIA programs." Id. at 1460. The Tenth Circuit reversed and held that the ISDA was ambiguous as to whether it required BIA to fully fund all indirect costs incurred under self-determination contracts, regardless of whether the services associated with these indirect costs benefitted other programs. See id. at 1461. To resolve the ambiguity, the court construed the statute in favor of the tribes instead of deferring to DOI under agency deference principles. See id. at 1462. Thus, it held that BIA had "to ensure that a tribe received sufficient funding to cover those reasonable indirect costs necessary to carry out its self-determination contracts." Id. at 1464.

2. Congressional Enactment of 25 U.S.C. § 450j-2 and 25 U.S.C. § 450j-3

In response to the Ramah decision, Congress stepped in to clarify any ambiguity that the Tenth Circuit had found in the ISDA that permitted the Tenth Circuit to rule for the plaintiffs.

On October 21, 1998, Congress amended the ISDA to state:

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

25 U.S.C. § 450j-2 (emphasis added). The next year, Congress passed a similar amendment regarding the funds available to BIA. See id. § 450j-3. Thus, to the extent that the Tenth Circuit’s decision in Ramah required BIA to pay the total amount of indirect CSC incurred by a tribe for its self-determination contracts regardless of whether other programs benefitted from those services, Congress mandated that BIA and IHS only pay those costs directly attributable to their contracts. By passing § 450j-2 and 450j-3, Congress reaffirmed that the ISDA was meant to incorporate the principle, embodied in OMB A-87, that one agency cannot pay another agency’s share of indirect costs.

3. Carryforwards

There are additional components that go into the calculation of indirect cost rates, depending on the type of rate used by the contracting tribe. A fixed carryforward rate is applicable for a specified period (one year) and is based on “an estimate of the costs to be incurred during the period.” 60 Fed. Reg. at 26,505 (Attachment E, §§ B.5, B.6). Because the rate is based on estimates, once the actual costs are known, “the difference between the estimated costs and the actual, allowable costs of the period covered by the rate is carried forward as an adjustment” to a future years’ rate. Id. Carryforward adjustments for over- or under-recoveries of indirect costs include adjustments for the difference between estimated and actual indirect cost expenditures, and indirect cost recoveries in excess of the approved indirect cost rate. See id. Plaintiffs use a fixed carryforward indirect cost rate. (2d Am. Compl. ¶ 23.)

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs' Contracts

Plaintiffs have self-determination contracts with the Secretary of HHS. Under the ISDA, there are three components to an ISDA self-determination contract: the contract itself, modifications to the contract, and, since 1995, annual funding agreements (“AFA”). See 25 U.S.C. § 450*l* (providing for a model contract); id. § 450*l*(e)(2) (providing for written modifications to the contract); id. § 450*l*(f)(2)(B) (providing that the AFA is incorporated into the contract).

Tunica's Contracts. Tunica-Biloxi Tribe of Louisiana (“Tunica”) is a federally-recognized tribe located in the State of Louisiana. (2d Am. Compl. ¶ 8.) Since before 1995, Tunica has had a self-determination contract with the Secretary of HHS to run a comprehensive health service program for its members. (2d Am. Compl. ¶ 8.) Tunica's Contracts at issue in this case covered fiscal years 1995-2001 (a 1995 Contract attached as Exhibit I, a 1996 Contract in effect until 2000 and attached as Exhibit J, and a 2000 Contract attached as Exhibit K).

Tunica's AFAs included the amount of funds that IHS would pay Tunica for, inter alia, indirect CSC. (Exh. N.) Numerous modifications were made to the Contracts and AFAs, primarily to increase the amount of available funding for Tunica. (Exhs. I at 49-66, J at 55-190, K at 35-111.) But any and all funding under Tunica's three Contracts was “subject to the availability of appropriations,” as specifically stated or incorporated into the Contracts through 25 U.S.C. § 450*l*. (Exhs. I at 2, J at 3, 13, K at 3, 8, 11.) All three Contracts required Tunica to obtain an indirect cost rate from DOI, and provided that indirect costs would be based on the application of the negotiated indirect cost rate to the Contracts' direct cost base. (Exhs. I at 32, J

at 13, K at 11.) Tunica's most recent indirect cost rate of 54.78% was issued on March 5, 1997, and was effective from January 1, 1996, through December 30, 1996. (Exh. A at 5.) In 1998, Tunica submitted an indirect cost rate proposal for 1998. (Exh. A ¶ 5.) DOI notified Tunica that the proposal lacked necessary information. (Exh. A ¶ 5.) Tunica never provided this information. (Exh. A ¶ 5.) Thus, Tunica never negotiated a rate for 1998, nor did it submit indirect cost proposals for 1997, 1999, 2000, 2001, 2002, or 2003. (Exh. A ¶¶ 5, 6.)

Ramah's Contracts. The second plaintiff, Ramah Navajo School Board ("Ramah"), is a New Mexico non-profit corporation established by the Ramah Navajo Chapter of the Navajo Nation. (2d Am. Compl. ¶ 9.) Since 1976, Ramah has had a self-determination contract to run a health clinic. (2d Am. Compl. ¶ 9.) Ramah's Contracts at issue in this litigation cover fiscal years 1993-1996 (a 1988 Contract in effect until 1995 attached as Exhibit L, and a 1995 Contract in effect in 1995 and 1996, attached as Exhibit M).

Ramah's AFAs included the amount of funds that IHS would pay Ramah for, inter alia, indirect CSC. (Exh. O.) Numerous modifications to the Contracts and the AFAs were made, primarily to increase the amount of funding available to Ramah. (Exhs. L at 26-131, M at 21-34.) Funding under Ramah's two Contracts for years after 1988, however, was "subject to the availability of appropriations," as specifically stated or incorporated into the Contracts through 25 U.S.C. § 450*l*. (Exhs. L at 19, M at 1.) Indirect CSC were to be reimbursed at indirect cost rates established between Ramah and DOI. (Exhs. L at 12, M at 19.) Ramah's most recent rate of 21.3% was issued on November 13, 1996, and was effective from January 1, 1996, through December 30, 1996. (Exh. A at 10.) DOI offered a rate of 17.2% for 1997, but Ramah never returned a signed rate agreement to DOI. (Exh. A ¶ 8.) Ramah did not submit indirect cost

proposals for 1998, 1999, 2000, 2001, 2002, or 2003. (Exh. A ¶ 9.)

II. Plaintiffs' Contract Disputes

Under the ISDA, 25 U.S.C. § 450m-1, contract disputes can be brought in the federal district courts or the U.S. Court of Federal Claims. See 25 U.S.C. § 450m-1(a). The Contract Disputes Act (“CDA”) applies to contract dispute claims under the ISDA. See id. § 450m-1(d). The CDA is found at 41 U.S.C. §§ 601 et seq., and requires, inter alia, that all claims brought thereunder first be presented to a contracting officer at the relevant agency. See 41 U.S.C. § 605(a); see also 25 C.F.R. §§ 900.215-900.230 (explaining the exhaustion requirement for contract dispute claims brought under the ISDA).

Tunica’s CDA claims. On April 2, 2001, Tunica filed a CDA claim with IHS, alleging that its indirect CSC had been underfunded from fiscal year 1996 through fiscal year 2001 in the amount of \$269,060. (Exh. B at 1-8.) On September 27, 2001, Tunica added similar claims of underfunding of \$27,909 under its fiscal year 1995 Contract. (Exh. C at 1-5.) First, Tunica claimed that IHS was required by the ISDA to pay all of its indirect CSC based on its indirect cost rate, regardless of the amount appropriated by Congress and that on this basis, Tunica was owed \$127,540, the difference between \$1,169,815 (the amount already paid by IHS under the annual funding agreements) and the amount to which Tunica claimed entitlement. (Exhs. B at 1-3, C at 1-2.) Second, Tunica alleged that DOI improperly calculated its indirect cost rate by including “other federal agency programs in the direct cost base under OMB A-87,” even though “other federal agencies do not reimburse indirect costs or do so at a vastly reduced level. . . .” and that the underfunding on this basis was \$106,628. (Exhs. B at 4-5, C at 2-3.) Third, Tunica alleged that the calculated rates improperly took into account previous year over-recoveries, but

failed to account for previous year under-recoveries due to the insufficiency of congressional appropriations. (Exhs. B at 5-7, C at 3-4.) Tunica alleged \$62,801 of underfunding on this basis. (Exhs. B at 5-7, C at 3-4.) IHS denied Tunica's claims.¹⁰ (Exh. D.)

Ramah's CDA claims. On August 31, 2001, Ramah filed a CDA claim with the Director of the Division of Contracts and Grants in the Albuquerque Area IHS office. (Exh. E.) Ramah alleged that it had been underpaid for ongoing indirect CSC for fiscal years 1993-1996. (Exh. E at 1-4.) First, Ramah alleged that the ISDA required IHS to pay all of its indirect CSC, as calculated by the indirect cost rate, regardless of congressional appropriation. (Exh. E at 1-3.) Ramah alleged that the difference between what IHS had already paid over these four years, \$1,402,656, and what Ramah was owed, was \$297,088. (Exh. E at 1-3.) The second claim was that DOI improperly calculated its indirect cost rate by including in the direct cost base funding from agencies other than BIA or IHS that did not pay their full share of indirect costs. (Exh. E at 3-4.) Ramah alleged that the under-recovery on this basis for all four years was \$145,910. (Exh. E at 4.) Ramah did not challenge the method by which DOI carries forward over- and under-recoveries in the rate calculation. (Exh. E.) By letter dated December 18, 2001, IHS denied Ramah's claims in full. (Exh. F.)

ARGUMENT

In the Second Amended Complaint, Plaintiffs essentially raise five claims. First, they claim that they are statutorily and contractually entitled to be paid the full amount of indirect CSC that they incur, regardless of the amount appropriated for CSC by Congress, (2d Am.

¹⁰ In the denial letter of May 3, 2002, it does not appear that IHS addressed Tunica's 1995 CDA claim. (Exh. D.) Nonetheless, under the CDA, if the contracting officer has not denied a claim within 60 days, the lack of a response operates as a denial. See 41 U.S.C. § 605(c)(5).

Compl. ¶¶ 19, 35, 39), an argument rejected by the four courts of appeal that have considered this issue. Their second and third claims are challenges to the formula that DOI uses to determine the indirect cost rate. (2d Am. Compl. ¶¶ 20-25, 35, 39.) As relief for these three claims, they seek money damages for underpayment of past fiscal years' indirect CSC (hereinafter referred to as retrospective relief) and a declaratory judgment that the formula used by DOI to calculate the indirect cost rate violates the ISDA (hereinafter referred to as prospective relief). (2d Am. Compl. Prayer for Relief B, C.) Their fourth claim asserts that the Secretary of HHS breached the implied covenant of good faith and fair dealing by failing to request sufficient indirect CSC from Congress. (2d Am. Compl. ¶ 36.) Fifth and finally, they claim that this failure also breached a trust duty owed to the tribes. (2d Am. Compl. ¶¶ 43-46.)

As demonstrated below, all of these claims should be dismissed pursuant to either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

There are several jurisdictional bases upon which some or all of Plaintiffs' claims must be dismissed. First, some of Plaintiffs' claims have not been properly exhausted. Second, Plaintiffs' claims for retrospective relief are moot because IHS's authority to obligate the relevant appropriation has lapsed. Third, some of the claims are barred by the statute of limitations. And fourth, because Plaintiffs have failed to obtain current rates for the last seven years, they lack standing to challenge the indirect cost formula and, for the same reason, their claims are unripe.

A. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to

dismiss a claim on the ground that the court lacks jurisdiction over the subject matter. Where necessary, “the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.”¹¹ Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). Accordingly, a motion to dismiss for lack of subject matter jurisdiction that relies on matters outside the pleadings, such as a declaration or other documents, should not be converted to a Rule 56 motion for summary judgment. See Federation for Am. Immigration Reform, Inc. v. Reno, 897 F. Supp. 595, 600 n.6 (D.D.C. 1995), aff’d, 93 F.3d 897 (D.C. Cir. 1996); see also 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1366 at 484-85 (2d ed. 1990) (explaining that attaching documents to a Rule 12(b)(1) motion does not convert it to one for summary judgment).

B. Plaintiffs Failed to Satisfy the Mandatory Exhaustion Requirement of the Contract Disputes Act for Some of Their Claims.

Plaintiffs’ Second Amended Complaint fails to specify which contracts, funding agreements, or even fiscal years they are challenging. The different bases for Plaintiffs’ allegation of underfunding, however, are that (1) the ISDA mandates that HHS pay all indirect CSC (“Claim One”), (2) DOI is violating the ISDA by considering, in the calculation of indirect cost rates, agency programs (other than IHS or BIA) that do not pay their share of CSC (“Claim Two”), (3) DOI is violating the ISDA by carrying forward, in the calculation of indirect cost rates, over-recoveries but not under-recoveries (“Claim Three”), and (4) HHS breached the

¹¹ The only facts outside of the pleadings on which this Memorandum relies are found in the declaration of Inge Montich, attached as Exhibit A, Tunica’s two CDA claims, attached as Exhibits B and C, and Ramah’s CDA claim, attached as Exhibit E.

implied covenant of good faith and fair dealing by not asking Congress for the full amount of indirect CSC need (“Claim Four”).¹²

The Contract Disputes Act (“CDA”) is incorporated into the ISDA for all claims for monetary relief. See 25 U.S.C. § 450m-1. The CDA requires, inter alia, that before any CDA claim may be brought in federal court, the claim must be presented to a contracting officer in the relevant agency. See 41 U.S.C. § 605 (“All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.”). This requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim. See SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990). Therefore, claims that were not presented to a contracting officer must be dismissed for lack of subject matter jurisdiction.

The contours of a CDA “claim” are determined by reference to the operative facts underlying the claim and the policies behind the exhaustion requirement--notifying the agency of a dispute and allowing the agency the first opportunity to review the claim and attempt to resolve it without litigation. See SMS Data, 19 Cl. Ct. at 614-15; see also Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238, 243 (2000) (“The relevant determination is whether the claim [the plaintiff] submitted was a clear and unequivocal statement that put the agency on sufficient notice of the basis for the claim currently before the court.”). SMS Data sets forth the analysis for determining whether a claim was previously brought before a contracting officer. In that case, a contractor brought a claim of wrongful termination of a contract to a contracting

¹² The fifth claim, that the Secretary of HHS breached a fiduciary duty to Plaintiffs by not asking Congress for the full amount of indirect CSC they needed, does not arise under the contracts and thus arguably did not need to be exhausted.

officer and asked for a sum certain in compensatory relief. See 19 Cl. Ct. at 613-14. Before the Court of Claims, the plaintiff brought the same claim, but in addition to seeking compensatory relief, the plaintiff sought lost profits and other consequential damages. See id. at 614. The Court of Claims found that the additional claims for lost profits and other consequential damages had not been properly exhausted because they involved different facts under a different theory of liability, and thus dismissed the claim for lack of jurisdiction. See id. at 616.

Thus, in this context, a “claim” is limited to an allegation of underfunding for one fiscal year (e.g., 1993) on one basis (e.g., the ISDA mandates the payment of all indirect CSC regardless of congressional appropriation). There is no question that each fiscal year involves distinct operative facts. The amount of congressional appropriation for indirect CSC, a tribe’s indirect cost rate, and the amount of indirect CSC funding paid by IHS to that particular tribe all vary from fiscal year to fiscal year. Moreover, each of the bases for additional funding rely on distinct operative facts. For example, Plaintiffs’ allegation that the indirect cost rate formula violates the ISDA (Claim Two) requires examination of the particular set of programs Plaintiffs operated that year and any restrictions such programs may have had on indirect cost recovery. In contrast, Plaintiffs’ allegation that their indirect cost rates were improperly depressed because certain over-recoveries but not under-recoveries were carried forward (Claim Three) involves application of the ISDA to facts showing, inter alia, the funding Plaintiffs received from IHS for indirect CSC compared to their actual indirect CSC. The facts underlying Claim Four are entirely different. At issue is the total CSC need for all tribes in each year, the amount requested by the President, and the amount Congress ultimately appropriated for CSC in that year. In sum, the failure by Plaintiffs to exhaust any of the particular bases for additional funding alleged in

this lawsuit deprived IHS of notice of the scope of the claims and the amount of money at issue.

Neither Plaintiff raised Claims One, Two, Three, or Four for any year prior to 1993 or after 2001. (Exhs. B, C, and E.) Therefore, to the extent that their Second Amended Complaint could be construed as raising any claims for years prior to fiscal year 1993 or after 2001, they must be dismissed for lack of subject matter jurisdiction. Challenges to fiscal years 1993-1994 are limited to Claims One and Two. (Exhs. B, C, and E.) Challenges to fiscal years 1995-2001 are limited to Claims One, Two, and Three. (Exhs. B, C, and E.) Claim Four, that the Secretary of HHS breached the implied covenant of good faith and fair dealing, should be dismissed for all years because neither Plaintiff presented this claim to a contracting officer. (Exhs. B, C, and E.)

C. Plaintiffs' Claims for Monetary Relief Arising Out of the Distribution of Indirect CSC in Fiscal Years 1993-2002 Are Moot.

Plaintiffs' claims for monetary relief arising out of the distribution of indirect CSC in fiscal years 1993-2002 are moot because the relevant appropriation has lapsed and there is no other source of funding available for this purpose.

1. Under D.C. Circuit case law, Plaintiffs Were Only Ever Entitled to a Share of the Relevant One-Year Appropriation.

The D.C. Circuit has already held, in a case brought by one of the plaintiffs here, that in years in which Congress fails to appropriate sufficient funds to cover all tribal CSC need, tribes contracting with the government under the ISDA are not entitled to payment of the full amount of indirect CSC incurred. See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). “[I]f the money is not available, it need not be provided, despite a Tribe’s claim that the ISDA ‘entitles’ it to the funds.” Id. “[E]ach Tribe had a right only to the amount of CSF it would have received under a legal allocation plan.” Id. at 1346; see also Cherokee Nation, 311

F.3d at 1061, 1066 (holding that there is no entitlement independent of whether Congress appropriates money to cover it and that the Secretary's liability, under the statute or ISDA contract, is limited to the amount appropriated by Congress for indirect CSC); Shoshone-Bannock Tribes, 279 F.3d at 665 (same); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378-79 (Fed. Cir. 1999) (same), cert. denied, 530 U.S. 1203, 120 S. Ct. 2196 (2000).

These decisions implicitly recognize that the Permanent Judgment Fund, 31 U.S.C. § 1304, is not available to pay additional indirect CSC. In other contexts, damages under the Contract Disputes Act can be paid from the Judgment Fund; the contracting agency then reimburses the Judgment Fund. See 41 U.S.C. § 612. As these courts have held, however, Congress limited all funding under the ISDA to the relevant appropriation. Thus, the Judgment Fund is unavailable as a matter of law. See Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424, 110 S. Ct. 2465, 2471 (1990).

2. There is No Relief that Can be Granted Because the Authority to Obligate the Relevant One-Year Appropriations Has Lapsed.

Ramah establishes that Plaintiffs cannot be paid more than their share of the relevant fiscal year appropriation for indirect CSC. Although Plaintiffs acknowledge that they were paid indirect CSC for all years at issue, (Exhs. B, C, and E), they challenge the allocation of funds under the indirect cost rate formula. (2d Am. Compl. ¶¶ 20-25.) A court cannot review the allocation of funds to a plaintiff under a limited appropriation, however, when: (1) the administering agency's authority to obligate the funds has lapsed, or (2) the appropriation has been fully obligated. See City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421, 1427 (D.C. Cir. 1994). Under these circumstances, a claim challenging the allocation of funding

is moot and must be dismissed for lack of subject matter jurisdiction. See id. at 1424, 1426; National Ass'n of Reg'l Councils v. Costle, 564 F.2d 583, 588-90 (D.C. Cir. 1977).

This principle was explained in City of Houston: “It is an elementary principle of the budget process that, in general, a federal agency’s budgetary authority lapses on the last day of the period for which the funds were obligated.” 24 F.3d at 1426 (quoting West Virginia Ass’n of Community Health Ctrs., Inc. v. Heckler, 734 F.2d 1570, 1576 (D.C. Cir. 1984)). Courts, however, have the power to “award funds based on an appropriation even after the date when the appropriation lapses, so long as the lawsuit was instituted on or before that date.” Id. “If, however, budget authority has lapsed before suit was brought, there is no underlying congressional authority for the court to preserve. It has vanished and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in Congress.” Id.

The rationale behind these cases is the necessary recognition that the Appropriations Clause of the U.S. Constitution would prohibit otherwise. The Appropriations Clause provides that “[N]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7. This clause “vests Congress with exclusive power over the federal purse,” assuring that “Congress has absolute control of the moneys of the United States.” Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 185 (D.C. Cir. 1992) (citations and internal quotation marks omitted). As the Supreme Court reaffirmed in Office of Personnel Management, 496 U.S. at 424, 110 S. Ct. at 2471 (citation and internal quotation marks omitted), the Appropriations Clause “means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” The Appropriations Clause limits even the power

of the judiciary to provide remedies.¹³ See 496 U.S. at 425, 110 S. Ct. at 2472.

As will be made clear below, all of the appropriations to which Plaintiffs claim entitlement lapsed before the institution of this lawsuit and are no longer available for either IHS or the Court to obligate. Because there is no relief that can be granted for Plaintiffs' monetary claims, they must be dismissed as moot.¹⁴

For fiscal year 1993, Congress appropriated \$1,537,851,000 to IHS for "Indian Health Services." See Department of the Interior & Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1407-08 (1992). Of this amount, \$348,904,000 was earmarked for items other than ongoing CSC.¹⁵ See id. In the same legislation, Congress ordered an across the board reduction of .85%. See 106 Stat. at 1420-21. Thus, the general IHS appropriation of \$1,188,947,000 was further reduced to \$1,178,840,951. The \$1,178,840,951 was only available to IHS for obligation for one year: Congress directed that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." Id. § 304, 106 Stat. at 1415.

¹³ In Ramah, the D.C. Circuit was able to review the plaintiffs' share of the relevant appropriation because the plaintiffs--one of which is a plaintiff here--challenged their share of indirect CSC for fiscal year 1995 by bringing a claim for a preliminary injunction prior to the end of the fiscal year and obtaining a stay of the funds to which they claimed entitlement prior to the lapse of BIA's obligational authority. See 87 F.3d at 1340. These funds provided a basis for the D.C. Circuit's jurisdiction to review whether BIA had properly allocated the relevant appropriation.

¹⁴ Although these funds are not available as a matter of law, Defendants expect to be able to present the Court with factual support to demonstrate that all of the relevant appropriations have been obligated or otherwise are no longer available for obligation. Under City of Houston, such a showing would also render Plaintiffs' claims moot.

¹⁵ These earmarked funds could not have been expended on Plaintiffs' ongoing CSC need. See 31 U.S.C. § 1301(a). Section 1301(a) states that an appropriation can only be applied "to the objects for which the appropriations were made except as otherwise provided by law." Id.

Plaintiffs allege that the non-earmarked general appropriation was available for obligation for indirect CSC. (2d Am. Compl. ¶ 35.) Even assuming, arguendo, that Plaintiffs' allegation is true for purposes of this Motion, the fiscal year 1993 appropriation lapsed at the end of fiscal year 1993 and can no longer be obligated as a matter of law. See 31 U.S.C. § 1301(c) ("An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation . . . expressly provides that it is available after the fiscal year covered by the law in which it appears.") (emphasis added); City of Houston, 24 F.3d at 1426. Therefore, Plaintiffs' claims related to fiscal year 1993 are moot.

The same is true for all subsequent years. In 1994-1997, Congress did not specify directly in the appropriation acts how much IHS could spend on ongoing CSC, but instead made a general appropriation (with some specific earmarks not applicable to ongoing CSC) to IHS for Indian Health Services, available for one year.¹⁶ See Department of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408, 1415 (1993) (appropriating \$1,277,003,000 in fiscal year 1994 non-earmarked funds, to be available to IHS for obligation for one year) (Exh. Q); Department of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536, 2537-38 (1994)

¹⁶ Notably, in fiscal years 1994-1997, the House and Senate Appropriations Committees put recommendations regarding the amount IHS should spend on ongoing CSC in the committee reports accompanying the appropriations legislation. Although Plaintiffs allege that the general appropriation was available in all years prior to 1998 for indirect CSC funding, (2d Am. Compl. ¶ 35), in 1999, Congress clarified that these committee report recommendations "capped" the amount of funds that IHS could spend on ongoing CSC. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998) (Exh. V). Nonetheless, because neither the general IHS appropriation nor the specific amount Congress recommended for ongoing CSC could be obligated after the close of the relevant fiscal year, even under Plaintiffs' theory their claims should be dismissed.

(appropriating, after reduction and rescission,¹⁷ \$1,325,461,380 in fiscal year 1995 non-earmarked funds, to be available to IHS for obligation for one year) (Exh. R); Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-196, 1321-380-81 (1996) (appropriating, after a rescission of \$2,533,000, \$1,363,939,000 in fiscal year 1996 non-earmarked funds, to be available to IHS for obligation for one year) (Exh. S); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-212-13, 3009-220 (1996) (appropriating \$1,418,738,000 in fiscal year 1997 non-earmarked funds, to be available to IHS for obligation for one year) (Exh. T).

Starting in 1998, Congress capped the specific amount of funds for ongoing CSC directly in the appropriation acts, but also made these funds available for one year. See Department of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997) (appropriating an amount not to exceed \$161,202,000 for ongoing CSC to be available to IHS for obligation for one year) (Exh. U); Omnibus Consolidated & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79, 2681-286 (1998) (appropriating an amount not to exceed \$203,781,000 for ongoing CSC to be available to IHS for one year) (Exh. V); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82, 1501A-190 (1999) (appropriating \$228,781,000 for CSC, to be available to IHS for one year) (Exh. W); Department of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79, 987 (2000)

¹⁷ Congress enacted a rescission of \$2,688,000 from IHS's general appropriation in Public Law No. 104-19, 109 Stat. 194, 248 (1995) (Exh. S).

(appropriating, after rescission,¹⁸ \$248,233,682 for CSC to be available to IHS for one year) (Exh. X).¹⁹

As is clearly demonstrated, Plaintiffs' claims related to fiscal years 1993-2001 are moot because the relevant appropriation lapsed before institution of this lawsuit. Neither IHS nor the Court has the authority to obligate these funds at this late date. Thus, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction.

D. Some of Plaintiffs' Claims Are Filed Outside of the Limitations Period.

Although Plaintiffs bring their Complaint (filed December 9, 2002) under the CDA, their primary contention is that the ISDA (and not the individual contracts) required IHS to fund a specific amount of indirect CSC. (2d Am. Compl. ¶ 19.) If such a statutory claim were found to state a claim, any allegation related to IHS's funding decisions made prior to December 9, 1996, would be barred by the six-year general statute of limitations applicable to claims against the federal government. See 28 U.S.C. § 2401(a). The applicable statute of limitations is a jurisdictional bar. See Kendall v. Army Bd. for Correction of Military Records, 996 F.2d 362, 366 (D.C. Cir. 1993). Thus, any statutory claims related to indirect CSC funding prior to December 9, 1996, also should be dismissed.

E. The Article III Doctrines of Standing and Ripeness Prevent Plaintiffs' Claims Regarding the Indirect Cost Formula From Going Forward.

Reading the Second Amended Complaint in a light most favorable to Plaintiffs, what

¹⁸ Congress enacted a rescission for fiscal year 2001 of .22% in Public Law No. 106-554, § 1403, 114 Stat. 2763, 2763A-214 (2000) (Exh. X).

¹⁹ Although neither Plaintiff exhausted a challenge to the allocation of fiscal year 2002 CSC funds, this appropriation of \$238,234,000 for CSC has lapsed as well. See Department of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 456, 465, § 304 (2001) (Exh. Y).

remains is a request for prospective declaratory relief related to the allocation of funds under the indirect cost rate formula. But this claim suffers from numerous jurisdictional infirmities due to the fact that neither Plaintiff has a current indirect cost rate. Although Plaintiffs recognize that fixed carryforward rates are to be set annually, (2d Am. Compl. ¶¶ 8, 20); see also 60 Fed. Reg. at 26,506 (1995) (Attachment E, § D.1.d), neither Plaintiff has received a new indirect cost rate since 1996--Plaintiffs have not updated their rates for seven years. (Exh. A ¶¶ 4, 7.) Tunica never submitted a proposal for 1997. (Exh. A ¶ 6.) Tunica did submit a proposal for 1998, but failed to supplement it with necessary information as requested by DOI. (Exh. A ¶ 5.) DOI has not received any other proposals from Tunica for years 1999-2003. (Exh. A ¶ 6.) Ramah submitted a proposal for 1997, and DOI offered a rate. (Exh. A ¶ 8.) Ramah, however, never returned a signed agreement to DOI, and thus the 1997 rate was never finalized. (Exh. A ¶ 8.) DOI has not received any other proposals from Ramah for years 1998-2003. (Exh. A ¶ 9.) Because of Plaintiffs' failure to obtain current rates, it is entirely unclear whether there is even a case or controversy that requires judicial resolution.

1. Plaintiffs lack standing to challenge the indirect cost rate formula.

The doctrine of standing is grounded in “the Article III notion that federal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process.” Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325 (1984) (citations, alterations, and internal quotation marks omitted). To establish the “irreducible constitutional minimum of standing,” a plaintiff must allege:

[First], an injury in fact--an invasion of a legally protected interest which is (a)

concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations, alterations, and internal citation marks omitted).

Plaintiffs challenge the inclusion of agency programs in the direct cost base when that agency does not pay its share of indirect costs under the indirect cost rate. The failure of both Plaintiffs to obtain indirect cost rates since 1996, however, makes it impossible to determine whether either Plaintiff has actually been injured such that they have standing to challenge the indirect cost rate formula in this manner. Although the formula is applied to each tribe, whether the application of the formula actually causes any financial injury can only be determined on a case by case and year by year basis. For example, as part of the negotiation process, DOI and the contracting tribe agree on the relevant direct cost base and the indirect costs associated with the relevant direct cost base. See 60 Fed. Reg. at 26,506 (Attachment E, § E.1). This amount may vary each year for each tribe. In some years, the direct cost base may include agency programs that do not pay their indirect costs under the indirect cost rate; in other years, it may not. But here, since Plaintiffs have not applied for current rates, DOI has not reviewed Plaintiffs' actual indirect costs or their actual direct program base funding for the last seven years to determine whether any such agency programs are even included. Without the inclusion of such programs, Plaintiffs lack an injury in fact sufficient to challenge the indirect cost formula.

In addition, because Plaintiffs have been using indirect cost rates that are out of date, IHS

may have paid them more indirect CSC than they actually incurred. The normal mechanism used by the federal government to recover these types of overpayments is the use of negative carryforwards. See 60 Fed. Reg. at 26,505 (Attachment E, §§ B.5, B.6). Thus, if a tribe receives an over-recovery in year one, the rate used in year three will take this over-recovery into account, and the government will be able to offset its overpayment. In Plaintiffs' cases, if there is an over-recovery not yet accounted for in a current rate, it is possible that Plaintiffs have received over-recoveries in excess of the amount they are claiming they were underpaid in this litigation. Until Plaintiffs submit and negotiate indirect cost rates for the last seven years, it is impossible to determine whether Plaintiffs have even suffered an injury under the indirect cost formula. For this reason, their claim for prospective relief should be dismissed.²⁰

2. Plaintiffs' claims are not ripe.

The failure of both Plaintiffs to obtain indirect cost rates since 1996 also renders their claims for prospective relief unripe. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515 (1967). "A case is ripe when it presents a concrete legal dispute and no further factual development is essential to clarify the issues . . . and there is no doubt whatever that the challenged agency practice has crystallized sufficiently for purposes of judicial review." Public Citizen v. Department of State, 276 F.3d 634, 641 (D.C. Cir. 2002) (citation, alterations, and internal quotation marks omitted).

²⁰ For the same reason, Plaintiffs lack standing to challenge the indirect cost formula for all years after 1996.

As explained above, this case does not present a concrete legal dispute. OMB A-87 requires that the indirect cost proposals be submitted to a tribe's cognizant agency on an annual basis. See 60 Fed. Reg. at 26,506 (1995) (Attachment E, § D.1.d). It is at the agency level that the indirect cost rate should be negotiated, not in district court. DOI and Plaintiffs must develop the facts underlying the annual indirect cost rate by negotiating the direct cost base and the indirect costs for the last seven years. In this instance, there has been no recent factual development of Plaintiffs' indirect and direct costs associated with application of the indirect cost rate formula. For this reason, Plaintiffs' challenge to the indirect cost rate formula is not ripe for review.

In sum, Plaintiffs' retrospective challenges to the indirect cost rate formula are moot, and Plaintiffs cannot bring a prospective challenge to the formula because they have failed to obtain current rates. Under the Article III doctrines of mootness, standing, and ripeness, these claims should not go forward at this time.²¹

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR FULL CSC FUNDING BECAUSE THE ISDA AND THE PLAINTIFFS' CONTRACTS DO NOT ENTITLE PLAINTIFFS TO BE PAID MORE THAN A SHARE OF THE RELEVANT APPROPRIATION ALLOCATED FOR INDIRECT CONTRACT SUPPORT COST FUNDING.

Plaintiffs allege that they are statutorily and contractually entitled to be paid the full amount of indirect CSC that they incur, (2d Am. Compl. ¶ 19), regardless of the amount appropriated for CSC by Congress (Claim One). They allege that the ISDA and their individual

²¹ Defendants have not moved for summary judgment because of the threshold jurisdictional infirmities in Plaintiffs' Complaint. But should this case proceed to the merits, Defendants would demonstrate that the formula used to allocate the limited CSC funding does not violate the ISDA in any way. In fact, the ISDA precludes IHS from paying CSC that are not directly attributable to its own contracted programs. See 25 U.S.C. § 450j-2.

self-determination contracts create an “entitlement” on their part to all of their reasonably incurred indirect CSC. (2d Am. Compl. ¶ 15.) This claim appears to be both retrospective and prospective. As a matter of law, however, Plaintiffs (and all other tribes with self-determination contracts) are, and always were, entitled only to a share of the limited amount of CSC funding that Congress appropriated and apportioned to IHS in any given year. Plaintiffs’ implicit allegation--that there is some other source of funding available to make up the difference when Congress fails to appropriate enough funds for CSC--should be dismissed for failure to state a claim.

A. Standard of Review

A motion to dismiss for failure to state a claim should be granted where the complaint fails to “state a claim upon which relief may be granted.” Fed. R. Civ. P. 12(b)(6). A court may grant a Rule 12(b)(6) motion when there it appears that there is no set of facts under which the plaintiff would be entitled to relief. See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). In deciding a motion to dismiss under Rule 12(b)(6), a court “may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice.” Id. Because Ramah Navajo School Board and Tunica-Biloxi’s Contracts are central to their claims and are referenced in the Complaint, they are incorporated therein.²² See id.; Stuto v. Fleishman, 164 F.3d 820, 826 n.1 (2d Cir. 1999); Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993); 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 1327 (2d ed.

²² All of the contracts and modifications are attached as Exhibits I-M. The annual funding agreements, which are part of the contracts, are attached as Exhibits N and O.

1990).

B. Funding for Indirect Contract Support Costs is Limited by the Relevant Appropriation Allocated for Indirect Contract Support Costs.

As briefly explained above, the D.C. Circuit has already held, in a case brought by one of the plaintiffs here, that tribes contracting with the government under the ISDA are not entitled to payment of the full amount of indirect CSC incurred in years in which Congress fails to appropriate sufficient funds to cover all tribal CSC need. See Ramah, 87 F.3d at 1345. In so holding, the D.C. Circuit relied on the ISDA, 25 U.S.C. § 450j-1(b), which states:

Notwithstanding any other provision in [the Act], the provision of funds under [the Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA].

Id. at 1342 (quoting 25 U.S.C. § 450j-1(b)). This statutory provision has been in the ISDA since 1988, and is found in or incorporated into all of the contracts at issue in this case. See Exhs. I at 2, J at 3, 13, K at 3, 8, 11, L at 19, M at 1.

The D.C. Circuit unequivocally held that 25 U.S.C. § 450j-1(b) means that “the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act.” 87 F.3d at 1345. “Thus, if the money is not available, it need not be provided, despite a Tribe’s claim that the ISDA ‘entitles’ it to the funds.” Id. In summary, “each Tribe had a right only to the amount of [contract support funds] it would have received under a legal allocation plan.” Id. at 1346.

All circuits to consider whether tribes can recover, for breach of contract or specific performance, any additional CSC funds beyond those appropriated by Congress, have followed the D.C. Circuit’s decision and held that neither IHS nor a court may award funds to tribal

contractors beyond each tribe's share of funds under a legal allocation plan. See Cherokee Nation, 311 F.3d at 1061, 1066 (holding that there is no entitlement independent of whether Congress appropriates money to cover it and that the Secretary's liability, under the statute or ISDA contract, is limited to the amount appropriated by Congress for indirect CSC); Shoshone-Bannock Tribes, 279 F.3d at 665 (holding that there is no entitlement, under the statute or the individual ISDA contracts, for CSC beyond the amount of the appropriation provided by Congress); Oglala Sioux, 194 F.3d at 1378-79 (same).

These courts have recognized that although the tribes and the government have entered into "contracts," there is no entitlement to a set amount of funds or remedies for a "breach." Because there is no liability for failure to pay full indirect CSC, no other source of funding, including the Permanent Judgment Fund, 31 U.S.C. § 1304, is available to pay Plaintiffs' claims. Under the D.C. Circuit's decision in Ramah, Plaintiffs are not entitled to be paid more than their share of the amount of the relevant congressional appropriation. And, as explained above, to challenge their share of the relevant appropriation, they must bring their claim before the relevant appropriation has lapsed.

III. RAMAH'S CHALLENGE TO FISCAL YEAR 1993 CSC FUNDING IS BARRED BY RES JUDICATA.

In a prior lawsuit, Ramah raised and settled claims related to its indirect cost rate and CSC funding for fiscal year 1993. See Ramah Navajo Sch. Bd. v. Shalala, No. 94-914 (D.N.M.) (filed Aug. 10, 1994) (Exhs. G, H.). Therefore, Ramah's challenges to fiscal year 1993 funding should be dismissed as barred by res judicata.

The doctrine of res judicata provides: "[T]he parties to a suit and their privies are bound

by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate--even if they chose not to exploit that opportunity--whether the initial judgment was erroneous or not.” Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984) (citation and internal quotation marks omitted). The prior judgment “bars any further claim based on the same ‘nucleus of facts,’ for it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.” Id.

On August 10, 1994, Ramah filed a complaint against, among others, the Secretary of HHS (then Donna E. Shalala).²³ (Exh. G.) This complaint sought “declaratory relief and damages” under the CDA and the ISDA. (Exh. G ¶ 1.) At issue was CSC funding for fiscal years 1991, 1992, and 1993, for the same contract at issue in this case: Ramah’s Contract to run the Pine Hill Health Clinic. (Exh. G ¶¶ 7-11.) For fiscal year 1993, Ramah was complaining about IHS’s nonpayment of certain direct CSC--employee social security and insurance benefit costs--which Ramah alleged impacted its indirect cost rate and the amount of indirect CSC paid by IHS. (Exh. G at 49-57.) On May 1, 1996, the parties entered into a “Stipulation for Compromise Settlement and Release in Full[,]” which provided for a cash settlement in exchange for:

[F]ull settlement and final satisfaction of any and all claims Plaintiff . . . now have or may maybe [sic] have hereafter acquire against the United States of America on account of the litigation or circumstances giving rise to this litigation, i.e., disputed 1992 and 1993 direct CSC and associated indirect costs and costs of

²³ In ruling on a Rule 12(b)(6) motion to dismiss based on res judicata, a court may take judicial notice of public records, such as pleadings filed in another court, without converting the motion to one for summary judgment. See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

providing group health insurance and FICA coverage for direct program personnel plus associated indirect costs for 1992 and 1993.

(Exh. H at 2.)

The parties to the earlier litigation are the same as the parties to this litigation. The litigation ended in a settlement agreement, which is considered a final judgment on the merits for purposes of res judicata. See Arizona v. California, 530 U.S. 392, 414, 120 S. Ct. 2304, 2318-19 (2000). And the claims in the 1994 litigation involved the same nucleus of facts as in this case with respect to fiscal year 1993. In the earlier case, Ramah was challenging the amount of direct and indirect CSC that it had been provided by IHS. In this litigation, Ramah is again challenging the amount of indirect CSC that they have been provided by IHS. In the first litigation, Ramah's legal theory was that it had not received the correct amount of indirect CSC because IHS was not paying certain direct CSC mandated by the ISDA. In this litigation, Ramah's legal theory is that Ramah was not paid its full indirect CSC as mandated by the ISDA, both because of the actual formula used to calculate indirect costs as well as the agency's limited appropriation. Although Ramah did not challenge the indirect cost awards under the same legal theories as are raised here, these legal theories were available in the earlier litigation and could have been raised. In both instances, Ramah was well aware of the amount of indirect CSC paid in fiscal year 1993, as well as the terms and provisions of both the ISDA and its specific contract.

Res judicata is intended to promote judicial economy and finality by requiring a plaintiff to advance in a single action all the legal theories and demands for relief arising out of the same cause of action. See generally Parklane Hosiery Co v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 649 (1979). These principles do not permit a litigant to waste judicial resources by advancing in

this piecemeal fashion challenges to the same underlying factual circumstances. For this reason, Ramah’s challenges related to funding in fiscal year 1993 should be dismissed.

IV. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM THAT THE SECRETARY HAD A DUTY TO ASK CONGRESS FOR ADDITIONAL APPROPRIATIONS.

The Second Amended Complaint alleges that there was a duty on the part of the Secretary of HHS to request from Congress “sufficient appropriations to meet its contractual obligations.” (2d Am. Compl. ¶¶ 36, 40, 44.) Plaintiffs allege that breach of this alleged duty violated: (1) the implied covenant of good faith and fair dealing, (2d Am. Compl. ¶ 36), and (2) a fiduciary duty to Plaintiffs based on “the trust responsibility of the United States to Indian tribes and people,” (2d Am. Compl. ¶¶ 43-45). Even assuming, for purposes of this Rule 12(b) Motion, that the Secretary did not ask Congress for sufficient appropriations to satisfy all of the tribes’ indirect CSC need, Plaintiffs lack standing and fail to state a claim upon which relief may be granted.

A. Plaintiffs Lack Standing to Claim that the Secretary Had to Ask Congress for CSC Appropriations.

As stated above, standing can only be established by alleging (1) an injury in fact that is concrete and particularized and not hypothetical, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. See Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136. Plaintiffs’ only concrete and particularized injury in this respect is that Congress did not appropriate sufficient appropriations to pay their full indirect CSC. This alleged injury was not caused by any alleged failure on the part of the Secretary (or the President) to ask for appropriations, nor will it be redressed by an

order requiring the Secretary (or the President) to ask Congress for certain appropriations.²⁴

First, it is the President of the United States, and not the Secretary, that prepares the budget seeking appropriations from Congress. See 31 U.S.C. § 1104. To assist the President, the head of each agency, including the Secretary of HHS, must submit appropriations requests to the President which the President can accept or reject. See id. § 1108(b)(1). But even assuming that the President were to accept the Secretary's request to include a certain amount of CSC in his budget, Congress alone controls the appropriation of public funds--Congress can accept or reject any budget request by the President. See U.S. Const., art. I, § 9, cl. 7. Therefore, there is no causal relationship between the claimed injury--lack of funds--and the Secretary's (or the President's) budget requests. Additionally, Plaintiffs' injury would not be redressed by an order requiring the Secretary (or the President) to ask Congress for funding--Congress is under no obligation to appropriate any additional funds. For these reasons, Plaintiffs lack standing to claim that the Secretary was required to ask Congress for specific appropriations.

B. Defendants Did Not Violate the Implied Covenant of Good Faith and Fair Dealing.

Plaintiffs also fail to state a claim that the Secretary breached the duty of good faith and fair dealing in allegedly failing to ask Congress for additional appropriations. "Every contract imposes a duty of good faith and fair dealing." Price v. United States, 46 Fed. Cl. 640, 650 (2000), aff'd, 2001 WL 528120 (Fed. Cir. 2001). Therefore, courts recognize a claim for breach of the duty of good faith and fair dealing under the Contract Disputes Act. See id. Plaintiffs'

²⁴ Notably, since 1994, the ISDA has required the Secretary of HHS to prepare and submit to Congress reports of the amount of CSC shortfall. See 25 U.S.C. § 450j-1(c)(2). Therefore, Congress is entirely aware of the amount of CSC shortfall, yet it has not appropriated additional funds to cover all CSC need.

claim, however, lacks merit because the duty of good faith and fair dealing “must attach to a specific substantive obligation, mutually assented to by the parties.” *Id.* at 651 (citations and internal quotation marks omitted). The duty of good faith and fair dealing only requires that each party carry out its obligations under the contract in good faith; it does not permit a court to impose additional duties. *See id.*; *see also United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 796 (8th Cir. 2001) (holding that good faith should not construed to “give rise to new obligations not otherwise contained in the contract’s express terms.”) (citation and internal quotation marks omitted), *cert. denied*, 534 U.S. 1115, 112 S. Ct. 924 (2002). Plaintiffs’ claim must fail for the simple reason that it would impose a new obligation on the Secretary—to ask for appropriations from Congress—that is not found in any of the contracts. (Exhs. I-M.) As such, the Secretary did not breach the implied covenant of good faith and fair dealing.

C. There Is No Trust Duty to Ask for Additional Appropriations.

With no support, Plaintiffs also allege that the Secretary has a fiduciary duty to request additional appropriations from Congress based on his trust responsibility to Indian tribes. To the extent that Plaintiffs seek an order directing the Secretary to ask Congress for additional appropriations, Plaintiffs fail to state a claim because they can point to no statute that created a trust relationship requiring the Secretary, on behalf of Plaintiffs, to ask Congress for additional appropriations for indirect CSC.

As a preliminary matter, an enforceable trust relationship, with attendant fiduciary duties, can only arise from a statute, treaty, or executive order. *See Cobell v. Norton*, 240 F.3d 1081, 1098-99 (D.C. Cir. 2001) (citing *National Wildlife Fed’n v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980)). For example, the D.C. Circuit has recognized a trust relationship between the

federal government and Indian tribes when federal statutes provided for government control over property belonging to Indians. See id. at 1110 (affirming district court’s determination that there was a trust relationship under various federal statutes that authorized federal government control over Indian lands and revenue generated from these lands); see also United States v. White Mountain Apache Tribe, 123 S. Ct. 1126, 1133 (2003) (recognizing a trust relationship because a federal statute expressly stated that real property “was to be held in trust by the United States for the White Mountain Apache Tribe”); United States v. Mitchell, 463 U.S. 206, 225-28, 103 S. Ct. 2961, 2972-74 (1983) (holding that a fiduciary relationship was created by various federal statutes giving the government full responsibility to manage Indian resources for their benefit).²⁵

In this case, there is no provision in the ISDA (or any other statute) that creates an enforceable trust relationship between the Secretary and Plaintiffs related to the payment of or request for indirect CSC. The ISDA does not authorize the Secretary of HHS to assume control over Plaintiffs’ property or manage Plaintiffs’ property in any way. In other words, there is no trust corpus governed by the ISDA. Instead, the ISDA directs the Secretary to distribute federal (taxpayer) funds for the purpose of paying indirect CSC incurred by self-determination contracts. This funding is limited in the statute itself and in the individual contracts, and the decision of how much funding will be provided to the Secretary is made by Congress through the appropriations process. Because the ISDA did not create a trust relationship with fiduciary duties, the Secretary of HHS could not have breached a duty to ask for additional appropriations.

²⁵ Even in instances in which courts have identified a trust relationship under a statute, the attendant fiduciary duties must also be fairly inferred from the statute. In some instances, the trust relationship is so limited that the government does not have the duties of a trustee. See, e.g., United States v. Navajo Nation, 123 S. Ct. 1079, 1092-94 (2003) (finding a limited trust relationship for which there was no claim for breach of trust).

Additionally, it is unclear from Plaintiffs' Complaint whether they seek to recover monetary relief related to this "trust" claim, or whether they seek solely an order directing the Secretary of HHS to ask for a specified amount of appropriations from Congress in the future. The Second Amended Complaint points to only one possible waiver of sovereign immunity for monetary damages in this Court, 25 U.S.C. § 450m-1. (2d Am. Compl. ¶ 6.) Under this provision, the waiver is limited to claims under the Contract Disputes Act and not for claims of breach of trust. See id. "It is elementary that the United States, as a sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980) (citation and internal quotation marks omitted). Moreover, waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." 445 U.S. at 538, 110 S. Ct. at 1351. Because there is no applicable waiver of sovereign immunity for money damages for breach of trust in this Court, any such claim should be dismissed for lack of subject matter jurisdiction.²⁶

²⁶ As established above, there is no basis to find a duty to request funds from Congress under any theory, but were the Court to imply one and order the Secretary to ask Congress for appropriations for CSC, the order would violate the constitutional separation of powers by improperly intruding on the President's Article II powers under the Take Care Clause and the Recommendations Clause. See U.S. Const., art. II, § 3. In order to take care that the laws are faithfully executed, the President must have subordinate agency officials to assist him. See, e.g., Myers v. United States, 272 U.S. 52, 163-64, 47 S. Ct. 21, 41 (1926). He also must have control over his subordinates, in particular, over his subordinates' disclosures of official information to Congress or the public. There is no question that the Secretary of HHS is a subordinate officer of the President, and thus that ordering the Secretary to report directly to Congress would unnecessarily interfere with the President's control over his subordinates. Such an order would also interfere with the President's power to ensure that the budget requirements of 31 U.S.C. §§ 1101 et seq. are faithfully executed. Under 31 U.S.C. §§ 1104, 1105, the President must submit a budget to Congress each year. As part of this process, subordinate agency officials must submit appropriation requests to the President, which the President may accept or reject prior to

V. FOUR OF THE DEFENDANTS MUST BE DISMISSED FOR LACK OF AN APPLICABLE WAIVER OF SOVEREIGN IMMUNITY.

Defendants also move to dismiss four of the defendants named in this action: the United States, Charles Grim, Earl Devaney, and Timothy Vigotsky. There is no applicable waiver of sovereign immunity for any of Plaintiffs' claims against these defendants, and thus the Court lacks subject matter jurisdiction over them. The only applicable waiver of sovereign immunity for purposes of this lawsuit is found in 25 U.S.C. § 450m-1(a), which reads, in pertinent part:

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter.

25 U.S.C. § 450m-1(a) (emphasis added).²⁷ As is made clear by the statute, only the Secretary of HHS or DOI are subject to suit under the ISDA. See id. The other defendants must be dismissed for lack of an applicable waiver of sovereign immunity.²⁸

submission to Congress. See 31 U.S.C. § 1108(b). Requiring the Secretary of HHS to make a separate appropriations request to Congress would contravene these provisions.

Related to this, the Recommendations Clause provides that the President shall “recommend to [Congress] such Measures as he shall judge necessary and expedient.” As a subordinate officer, the Secretary of HHS provides recommendations to the President for his consideration. If the President deems these recommendations to be necessary and expedient, he has the power to recommend them to the Congress. But ordering the Secretary to provide recommendations directly to Congress would infringe upon the President’s recommendation power as well as his authority over subordinate officers.

²⁷ As explained above, the United States and its agencies can be sued only to the extent that they have waived their sovereign immunity. See Mitchell, 445 U.S. at 538, 110 S. Ct. at 1351. The terms of the United States’s consent to be sued defines that court’s jurisdiction. See id.

²⁸ Although the docket demonstrates that a summons was issued for Secretary Norton on March 24, 2003, it does not appear that Secretary Norton or Timothy Vigotsky have been properly served pursuant to Federal Rule of Civil Procedure 4(i)(2)(A). Therefore, Defendants move to dismiss these defendants for insufficiency of service of process.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted, and the Second Amended Complaint dismissed.

Respectfully submitted,

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/s/

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Dated: March 31, 2003

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2003, I sent, via first class mail, postage pre-paid, a copy of Defendants' Motion to Dismiss, Memorandum in Support of Defendants' Motion to Dismiss, Exhibits in Support of Defendants' Motion to Dismiss, and a proposed order, addressed to:

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

TUNICA-BILOXI TRIBE OF LOUISIANA;)	
RAMAH NAVAJO SCHOOL BOARD, INC.,)	
)	
Plaintiffs,)	Case No. 1:02CV02413
)	The Honorable Reggie B. Walton
v.)	
)	
UNITED STATES of AMERICA;)	
TOMMY G. THOMPSON, Secretary of the)	
United States Department of Health and Human)	
Services; GALE A. NORTON, Secretary of the)	
United States Department of the Interior;)	
CHARLES W. GRIM, Interim Director of the)	
Indian Health Service, United States)	
Department of Health and Human Services;)	
EARL E. DEVANEY, Inspector General,)	
United States Department of the Interior;)	
TIMOTHY G. VIGOTSKY, Director, National)	
Business Center, United States Department of the)	
Interior,)	
)	
Defendants.)	

ORDER

Upon consideration of Defendants’ Motion to Dismiss, IT IS ORDERED that Defendants’ Motion be and hereby is GRANTED; and IT IS FURTHER ORDERED that the Second Amended Complaint is hereby dismissed. All retrospective claims for underpayment of indirect contract support costs are dismissed with prejudice as moot. See City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421, 1427 (D.C. Cir. 1994). All claims for prospective declaratory relief related to the methodology employed by DOI to calculate indirect contract support costs are hereby dismissed without prejudice for lack of standing and ripeness.

All claims for breach of trust are hereby dismissed with prejudice for failure to state a claim.

There is no trust relationship between Plaintiffs and Defendants related to the payment of indirect contract support costs under ISDA self-determination contracts. See Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2001).

Dated this ___ day of _____, 2003.

BY THE COURT:

UNITED STATES DISTRICT JUDGE

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