

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ZUNI, on behalf of itself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA; *et al*)
)
Defendants.)
_____)

Case No. CIV 01-1046 WJ/WPL
Filed Electronically

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S COMBINED RULE 37(a)(2)(B)
MOTION TO COMPEL DISCOVERY REGARDING INDIAN HEALTH SERVICE
SHORTFALL DATA, AND TO ENLARGE TIME FOR FILING SAID MOTION
PURSUANT TO LOCAL RULE 26.6**

Plaintiff Pueblo of Zuni seeks an Order –

- (1) compelling the Defendants to answer certain deposition questions posed to Douglas Black, Director of the Indian Health Service Office of Tribal Programs, and to Ronald Demaray, Associate Director of the IHS Office of Tribal Programs (conducted September 20 and 22, 2005, respectively) regarding the content of certain global “contract support cost” (CSC) damage computations prepared by Mr. Demaray in approximately April 2005 (*see* Exhibits 2 and 3), and regarding earlier CSC damage computations furnished to congressional staff in approximately 2003 (*see* Exhibit 3);
- (2) compelling the production of documents pertaining to Indian Health Service CSC shortfall calculations, to which the Defendants objected on July 14, 2005 (*see* Exhibit 4); and
- (3) compelling answers to interrogatories and compelling the production of documents (again regarding Indian Health Service CSC shortfall calculations) to which the Defendants objected on September 19, 2005 (*see* Exhibit 5).

A. INTRODUCTION

1. Nature of the Case.

This class action lawsuit arises under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458aaa-18 (“ISDA” or “Act”) and seeks damages for the failure of the Indian Health Service (“IHS”) to pay tribal contractors their full “contract support costs” (“CSCs”) as required by the Act. More specifically, this action seeks damages for the defendants’ continuing implementation of an unlawful systemwide policy, carried out over the course of several years (*inter alia* through a succession of “circulars”) that annually underpaid hundreds of Indian Tribes the CSCs that the Act required the Government to pay. The plaintiff seeks relief on its own behalf and on behalf of a class of tribal contractors that had ISDA contracts with the IHS.

The plaintiff alleges that the IHS breached its obligations under the ISDA and the Tribes’ contracts (1) by miscalculating the amount of CSCs the Act required IHS to pay the Tribes (the “miscalculation claim”); and (2) by failing to pay even the miscalculated amounts (the “shortfall claim”). In *Cherokee Nation v. Leavitt*, 125 S.Ct. 1172 (2005) the Supreme Court considered the “shortfall claim” and held unlawful the defendants’ failure to pay full CSCs to two Tribal contractors in certain years. This *Zuni* action (which was stayed for four years pending *Cherokee Nation*) in part seeks to extend the Supreme Court’s ruling to all other tribal contractors. This action also seeks to extend to IHS this Circuit’s ruling in *Ramah Navajo Chapter, et al. v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), involving the miscalculation of CSC requirements associated with ISDA contracts between Indian Tribes and the Bureau of Indian Affairs.

2. Class Discovery Proceedings.

On April 19, 2005, Chief Magistrate Judge Garcia issued a Scheduling and Discovery Order which, among other things, established a “phase one [class] discovery” program “directed toward the Rule 23 issues of numerosity, commonality of questions of law or fact, typicality of claims or defenses, and whether the representative parties [*sic*] will fairly and adequately protect the interests of the class.” Dkt. No. 52. Since that time the parties have been immersed in class discovery process currently slated to conclude November 4, 2005, by the parties’ agreement. Dkt. Nos. 125 & 129.

3. Background to the current controversy.

In opposing class certification the Defendants have taken the position that certification is not warranted because, among several other contentions, damages for the underpayment of CSCs (*ie*: the amount of the CSC payment shortfalls) cannot be ascertained on a global basis, and instead requires a contract-by-contract examination of each tribal contractor’s situation.¹ While the Plaintiff does not agree that difficulties in class damage quantification issues are even relevant to the issue of class certification, in order to rebut the Defendants’ contention the Plaintiff has (*inter alia*) sought discovery of the Defendants’ own global CSC shortfall computations (including Area and Headquarters computations) and related CSC damage calculations. With these calculations in hand, the Plaintiff can then offer expert testimony regarding class damage quantification issues and rebut

¹*E.g.*, Dkt. No. 128 (Joint Status Report) (stating, as “Defendants’ position” that the *Cherokee Nation* decision “in no way obviates the need to assess, on a case by case basis, Zuni’s (and any other contractor’s) individual contracts, claim(s), and any applicable defenses”).

the Defendants' position.

Existing law has since 1988 required the defendants to maintain records of all contract support cost shortfalls. Thus, 25 U.S.C. 450j-1(c) ("Annual Reports"), as recently reenacted, requires as follows:

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

- (1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;
- (2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;
- (3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;
- (4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;
- (5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and
- (6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

According to the discovery produced to date, Defendants have to varying degrees generated and maintained this shortfall data from fiscal year 1993 forward in various formats at the Headquarters and 12 Area Office levels; they have used the data to prepare congressional reports (although, contrary to the Act's command, the reports have never been submitted to Congress); they have used the data as a basis for budget projections annually submitted to Congress; and they have used the data for purposes of allocating CSC payments to individual tribal contractors. All of these activities

have been driven by the ISDA's command quoted above, by the ISDA's related repeated commands to add full contract support costs to every ISDA contract, *see* 25 U.S.C. §§ 450j-1(a)(2), (3), (4), (5), § 450j-1(g); and by the Defendants' own agency-wide "circulars" concerning the calculation and payment of CSCs. None of these activities has been prompted by any litigation.

The disagreements prompting this Motion are as follows. First, the Defendants have refused to produce their Area and Headquarters shortfall data (including so-called "Queue" or "Priority Lists") in the computerized format in which Defendants have generated and maintained the data (believed to be in EXCEL format). *See* Exhibit 4 (RFP 2, 6); Exhibit 6; Exhibit 5 (RFP 23); Affidavit of Dr. Mather (filed separately October 11, 2005) (hereafter "Mather affidavit"), para. 5.² This has not only produced voluminous paper records that in significant measure are hardly decipherable, much less usable (*see* Exhibits A-C to Mather Affidavit), it has denied the Plaintiff the ability to examine the computerized records in order to make its case that global class damages can indeed fairly be quantified.

Second, the Defendants have denied that there exist any accumulated global shortfall or damage estimates ever submitted to Congress, and they have thus refused to disclose such estimates (either in paper format or in computerized format). Exhibit 4 (RFP 5(4) & (5)); Exhibit 5 (Inters. 23-25); Exhibit 7, p. 4. This failure to produce has continued notwithstanding the three-week old deposition testimony from Defendants' representative Ron Demaray, Associate Director of the IHS

² The Defendants' own witnesses have acknowledged that the data needed to calculate total CSC underpayments is maintained in computerized form. Exhibit 2, pp. 88-89; Exhibit 3, pp. 113, 122-123.

Headquarters Office of Tribal Programs, that such documents in fact exist. Exhibit 3, pp. 138-145.

Third, defendants have refused to disclose their internal global CSC shortfall damage calculations, even though those calculations are directly relevant to the Defendants' contention that CSC shortfalls cannot be calculated on a global basis. Exhibit 2, pp. 151-152, 157, 165; Exhibit 3, pp. 108-114.

This Motion seeks to resolve at one time all these inter-related issues going to CSC shortfall reports, CSC shortfall calculations and CSC damage calculations.

B. ARGUMENT

In response to Plaintiff's interrogatories requesting information regarding CSC shortfall calculations, Exhibit 5 (Inters. 23-26), and Plaintiff's document requests seeking production of documents pertaining to CSC shortfall calculations, Exhibits 4 (RFP 2, 3) and 5 (RFP 23), the Defendants asserted blanket claims of privileges without providing any basis for the claimed privileges. The Defendants have also refused to provide computer readable shortfall data and calculations in response to a specific request for their production. Exhibit 5 (RFP 23); Exhibit 6.

In an effort to ascertain more concrete factual information regarding CSC shortfall reports, CSC shortfall calculations and CSC damage calculations held by Defendants, the Plaintiffs on September 20, 2005, deposed Douglas Black, Director of the IHS Office of Tribal Programs, and on September 22, 2005, Ron Demaray, Associate Director of the IHS Office of Tribal Programs. The deponents testified that computerized data is maintained by IHS that can be used to calculate global

class damages. The Defendants have offered no compelling response for their failure to disclose such records.³

Additionally, during the depositions Plaintiff asked whether IHS had performed a cumulative-years-CSC-shortfall calculation. Counsel for Defendants refused to allow Mr. Demeray or Mr. Black to answer this question, as well as numerous related questions pertaining to CSC shortfall reports and damage calculations. *See* Section B.1, *supra*, at 9-10. As with their earlier responses to Plaintiff's discovery requests, Defendants asserted that the information Plaintiff requested was protected from disclosure by the attorney-client privilege, attorney work-product privilege and deliberative-process privilege. But, the burden is on the Defendants to show that a claimed privilege is actually applicable, *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985). Defendants' blanket of privilege claims in response to Plaintiff's requests fail to establish the applicability of each claimed privilege. Accordingly, this Court should issue an Order granting Plaintiff's Motion to Compel.

1. The Attorney-Client Privilege Does Not Protect The Requested CSC Shortfall Information From Disclosure Because It Was Not A Confidential Communication Made In Order To Obtain Legal Assistance.

³ We assume that like all other issues involving CSC shortfall data, the Defendants' primary objections are work product, attorney-client, and deliberative process privileges, *see e.g.*, Exhibit 5, general objection 4, and we address those issues below. The Defendants' other objections are make-weight. First, the term "contract support cost requirements" is not vague and is defined in Defendants' own circulars. The term was well-understood by the Defendants' deponents. Exhibit 2, p. 100; Exhibit 3, pp. 29-32. Second, discovery of the Defendants' calculations is directly relevant to one of the Defendants' main objections to class certification. Third, the Defendants cannot claim that the materials are duplicative because they asserted that the electronic data was not previously requested. Exhibit 6.

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citations omitted). The attorney-client privilege only protects “‘confidential communications by a client to an attorney made in order to obtain legal assistance’ from the attorney in his capacity as legal advisor. The privilege is to be construed narrowly.” *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 278 (10th Cir. 1983) (citations omitted). *See also Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D 1, 3-4 (D.D.C. 2004). The purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn*, 449 U.S. at 389. Thus, the privilege extends only to communications, not to underlying facts, and a party cannot conceal a fact merely by revealing it to his attorney. *Id.* at 395-396. As the Supreme Court in *Upjohn* explained:

“‘[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.’

Id. at 395-396, (alteration in original) (citations omitted). *See also Allen v. McGraw*, 106 F.3d 582, 604 (4th Cir. 1997) (“attorney-client privilege is never ‘available to allow a [client] to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.’”) (alteration in original) (citations omitted). Moreover, “‘the mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege.’ In order to be covered by the attorney-client privilege, a communication

between a lawyer and client must relate to legal advice or strategy sought by the client.” *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) (internal citations omitted).

“The burden of establishing the applicability of the privilege rests on the party seeking to assert it.” *In re Grand Jury*, 697 F.2d at 279 (citations omitted). “The party must bear the burden as to specific questions or documents, not by making a blanket claim.” *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) (citing *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1276 n. 6 (10th Cir. 1988)). The Tenth Circuit explained this burden in *In re Grand Jury Subpoena Duces Tecum*. There the court rejected taxpayers’ broad claim of attorney-client privilege with respect to documents given to an accountant-attorney for preparation of their tax returns. The court acknowledged that the privilege might be available where “a client provides information to an attorney and leaves the decision whether to include that information in the tax return to the attorney’s discretion.” 679 F.2d at 280. But the court ruled that to carry its burden, the party asserting the privilege was required “to explain why a particular document should be found privileged.” *Id.* at 280. The court explained that it is not the responsibility of the party requesting the information “to sort out what is privileged from what is not; the burden of establishing a privilege is on the one who asserts it.” *Id.* (citation omitted). Having “failed to establish which, if any, of the subpoenaed materials were supplied by [the taxpayers]” and whether materials were intended to remain confidential, the taxpayers failed to carry their burden and the court concluded the privilege did not apply. *Id.*

During Mr. Black’s deposition it was established that around April 2005 IHS performed a cumulative years CSC shortfall damage estimate. Exhibit 2 at 152-157. When Mr. Black was questioned with respect to who received the estimate, he responded “It went to the office of the

director . . . in the Indian Health Service.” Exhibit 2 at 165(19)-165(23). Mr. Black further testified that he became aware of the fact that the estimate went to the Office of General Counsel “[s]ometime after it was provided to the office of the director.” *Id.* at 167(07)-167(20). Mr. Demaray was also questioned with respect to whether and by whom he was asked to perform the April 2005 damage estimate. Exhibit 3 at 108(14)-110(23). Mr. Demaray responded that he was asked to prepare the estimate, but could not recall who asked him. *Id.* at 109(13)-110(24). When asked further about the estimate, Mr. Demaray noted that he performed the estimate on his own. *Id.* at 113(7)-113(8). Counsel for Plaintiff continued to ask probative questions regarding the factual basis for the estimate, *i.e.*, what years were included, *id.* at 111(10)-111(12), where the numbers for the estimate came from, *id.* at 127(7)-127(8), and what the final amount was, *id.* 134(17)-134(19). Despite the absence of any claim by Mr. Demaray that he consulted an attorney in confidence and in order to obtain legal advice with respect to the estimate, counsel for Defendants continued to broadly claim that any information regarding the estimate was protected by the attorney-client privilege. *See e.g., id.* at 111(10)-111(22), 112(14)-112(22), 127(9)-128(3); 134(20)-136(07).⁴

Mr. Demaray repeatedly testified that he did not prepare the estimate at the direction of an attorney and that he did not know who had directed that it be prepared. *Id.* at 109(4)-110(12),

⁴ Counsel for Defendants, claiming privilege, would not even permit Mr. Demaray to share his knowledge relating to how shortfall estimates contained on deposition exhibit RD-1 would have to be adjusted to determine liability. *See* Exhibit 3 at 162(15)-168(14) and attachment to Exhibit 3. (Although RD-1 is Mr. Demaray’s own recapitulation of historic CSC-related information, the Defendants never produced it in response to relevant production requests. Instead, the Plaintiff discovered it through other sources. It is possible that the document is located at DEF 027618, listed in the 54-page privilege log (*see* Exhibit 8), but the lack of specificity in the log makes this unclear.)

112(21)-113(5). But, after several hours of testimony and countless off-the-record attorney consultations, Mr. Demaray suddenly revealed that during the course of his work he had asked IHS attorney Jocelyn Beer for “advice.” *Id.* at 157(14)-160(24). After repeatedly indicating that no attorneys were involved in the preparation of the estimate, *id.* at 109(4)-110(12), 112(21)-113(5), and despite numerous private and lengthy consultations with Ms. Beer and Defendants’ counsel Ms. Hines, Mr. Demaray’s sudden “recollection” that he actually did ask an attorney for advice strains credibility. But even if Mr. Demaray really did speak with Ms. Beer about the estimate, the April 2005 CSC damage estimate is still not protected by attorney-client privilege.

Nothing in Mr. Demaray’s testimony establishes that the attorney-client privilege protects the April 2005 damage estimate. Mr. Demaray testified that he spoke to his attorney, Exhibit 3 at 157(14)-157(20), but he also testified that he prepared the estimate himself, *id.* at 113(7)-113(8), and only spoke to Ms. Beer “sometime before it was released.” *Id.* at 159(7)-159(14). Mr. Demaray’s testimony does not establish that any legal advice was sought, or that such advice was ever given, or that such advice was used in the April 2005 damage estimate. Nor does Mr. Demaray’s testimony suggest that his conversation with Ms. Beer regarding the April 2005 estimate was intended to remain confidential.

In any event, the privilege does not protect underlying facts and a party cannot conceal a fact merely by revealing it to his attorney. *Upjohn*, 449 U.S. at 395-396. *See also Allen*, 106 F.3d at 603 n.12, 604. The IHS keeps Excel spreadsheets detailing what “the needs are that tribes have that were not funded,” Exhibit 2 at 113(16)-113(24), and Mr. Demaray testified that he had personal knowledge of how cumulative shortfall damages can be calculated. *Id.* at 163(23)-164(10). He also

testified that his office had previously conducted a similar estimate in response to a request from Congress. *Id.* at 140(01)-141(06). Even though the IHS's communications to Ms. Beer relating the April 2005 damage estimate may be privileged, the privilege does not extend to underlying facts or documents regarding CSC shortfall estimates or calculations that Mr. Demaray or Mr. Black have personal knowledge about.

Furthermore, Defendants' counsel instructed both witnesses not to answer questions regarding whether the April 2005 damage estimate had left IHS. Exhibit 2 at 156(01)-157(11); Exhibit 3 at 160(25)-161(5). Counsel for Defendants would only permit the witnesses to answer whether the April 2005 damage estimate had ever left the Executive Branch. Exhibit 2 at 156(01)-157(11); Exhibit 3 at 160(25)-161(5). The District Court of New Mexico, however, has rejected such a broad claim of attorney-client privilege. *See Wyoming v. United States Dep't of Agriculture*, 239 F. Supp. 2d 1219, 1232 (D.N.M. 2002) ("this Court notes that it has rejected the Federal Defendants unprecedented argument that the attorney-client privilege attaches between different agencies of the federal government. . . . [T]he privilege only attaches when the documents in question are circulated among those agency employees who are authorized to speak on the subject matter dealt with in the documents), *vacated on other grounds*, 414 F.3d 1207 (2005). *See also Coastal States Gas. Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (ruling that the privilege may be waived where a document has been too broadly circulated within an agency because the privilege only extends to "those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'"). Plaintiffs are entitled to know whether the April 2005 damage estimate has been disseminated outside of IHS to persons

other than the agency's attorneys in order to establish whether, if the attorney-client privilege does apply to communications regarding the calculation, there has been a waiver of the privilege.

Additionally, the deposition of Mr. Demaray establishes that the Defendants have waived any attorney-client privilege protection over CSC shortfall data and reports contained in IHS Excel spreadsheets, which were previously requested in Plaintiff's document requests. Exhibits 4 (RFP 2, 6) & 5 (RFP 23). The attorney-client privilege is waived by disclosing the information to third parties. *United States v. Ryans*, 903 F.2d 731, 741 n.13 (10th Cir. 1990). And, the waiver "extends to all other communications relating to the same subject matter." *In re Sealed Case*, 29 F.3d 715, 719-720 (D.C. Cir. 1994) (quoting *In re Sealed Case*, 676 F.3d 793, 811 (D.C. Cir. 1982)). In his deposition, Mr. Demaray stated that he has at times shared CSC shortfall information contained in the agency's Excel spreadsheets to third parties outside the agency – specifically, the IHS Contract Support Work Group (Work Group). Exhibit 3 at 122(22)-123(24). The Work Group is an open work group that gives Tribal leaders and representatives an opportunity to review IHS policy and practice regarding CSC calculations and payments. Exhibit 2, pp. 8-9. The documents and communications exchanged within the Work Group are not intended to be kept confidential. Thus, to the extent Mr. Demaray or anyone else within the agency has provided CSC shortfall information contained in Excel spreadsheets to the Work Group, a third party outside the agency, Defendants have waived any attorney-client privilege that would otherwise protect the information from disclosure. *See e.g.*, Exhibit 3 at 123.

2. The Work-Product Privilege Does Not Protect The Requested Information Because It Was Not Generated In Anticipation Of Litigation, And Even If It Was The Plaintiff Has A Substantial Need For The Information.

a. The work-product privilege is not applicable here.

Federal Rule of Civil Procedure 26(b)(3) restates the “work-product privilege” rule and “protect[s] against disclosing the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.* The privilege only extends to documents prepared by an attorney for the client in anticipation of litigation. *In re Grand Jury Proceedings*, 727 F.2d 941, 945 (10th Cir. 1984). Importantly, “[b]ecause the work-product doctrine is intended only to guard against divulging the attorney’s strategies and legal impressions, it does not protect facts concerning the creation of work-product or facts contained within work-product. Thus, work-product does not preclude the inquiry into the mere fact of an investigation.” *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). For instance, in *In re Grand Jury Proceedings*, 658 F.2d 782, 784-85 (10th Cir. 1981), the Tenth Circuit held that the work-product privilege did not protect an accountant’s worksheets, even though the attorney alleged that he asked an accountant to prepare the worksheets in anticipation of litigation as a result of a Department of Energy audit. The court performed an *in camera* inspection of the documents and found that “none of the attorney’s mental impressions [we]re recorded in the worksheets themselves. . . . Instead, the worksheets entailed a compilation of the business records of [the corporation] rather than the attorney’s mental impressions.” *Id.*

“The party asserting a work-product privilege as a bar to discovery must prove the doctrine is applicable. A mere allegation that the work-product doctrine applies is insufficient.” *Dabney*, 73

F.3d at 266 (citations omitted). For example, in *Dabney*, this Circuit upheld sanctions against an attorney who instructed a witness not to answer any questions using a blanket claim of work-product privilege. *Id.* at 266-67. The attorney refused to allow the witness to answer any questions relating to his investigations of loans. *Id.* at 266. The Circuit Court held that the attorney's blanket claims of privilege were insufficient and thus the attorney failed to "meet his burden of proving that each question he instructed [the witness] to answer called for work-product." *Id.*

Defendants' blanket claim of work-product privilege with respect to the April 2005 damage estimate and other CSC shortfall reports and calculations does not satisfy their burden under Rule 23(b)(3). *See Dabney*, 73 F.3d at 266. Mr. Black testified during his deposition that the April 2005 damage estimate was not done at the direction of lawyers. Exhibit 2 at 151(16)-152(17). Mr. Black very clearly stated that "[n]o lawyers were involved in putting together the estimate." Exhibit 2 at 159(6)-159(8). Yet, when asked by Plaintiff's counsel what the result of the work was, Defendants' counsel claimed attorney work-product privilege without establishing any basis for the claim. *Id.* at 153(21)-154(25). As discussed above, Mr. Demaray could not recall where the direction came from to perform the April 2005 damage estimate. Exhibit 3 at 109(4)-109(17). Nevertheless, when probed with respect to the underlying facts surrounding the estimate, Defendants' counsel continued to assert the work-product privilege, *see, e.g., id.* at 111(10)-111(22), 127(7)-127(24), and when pressed simply asserted, without providing a foundation for the involvement of any attorney, "[t]he basis for that claim is that it was done – he explained that it was post-Cherokee. We have got litigation going on, and we are all sitting here in depositions." *Id.* at 127(25)-128(03). While Mr. Demaray did eventually testify that he asked his attorney, Ms. Beer, for advice before his work was

published, *id.* 157(14)-157(22), 159(7)-159(11), nothing in Mr. Demaray’s testimony purports to establish that any part of the April 2005 damage estimate contains the mental impressions or strategies of his attorneys. In fact, Mr. Demaray testified that he alone completed the estimate. *Id.* at 113(7)-113(8). Like the worksheets at issue in *In re Grand Jury Proceedings*, 658 F.2d at 784-85, the April 2005 damage estimate, which is based on factual information contained in CSC shortfall reports and CSC shortfall calculations, is merely a “compilation[] of business records” of the agency. More significantly, IHS has a pre-existing statutory duty to compile shortfall data of this kind and report on it to Congress. *See* 25 U.S.C. § 450j-1(c); Exhibit 3 at 232(21)-233(13). The damage estimate is merely a compilation of the facts contained in these mandatory records, and is not within the scope of the work-product privilege.

b. Even if the work-product privilege did apply in this instance, the privilege is not absolute, and Plaintiff has a substantial need for the documents relating to CSC shortfalls, including IHS’s damage calculations, and cannot feasibly obtain the information elsewhere.

Even if this Court concludes that Defendants have met their burden and the CSC shortfall reports and calculations fall within the scope of the work-product privilege, this Court should still hold that the privilege does not apply. The work-product privilege is a qualified privilege and does not apply when a party can show there is a “substantial need of the materials in the preparation of the party’s case, and . . . the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (“Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may

properly be had”). For instance, in *Wheeling-Pittsburgh Steel Corp, v. Underwriter Laboratories, Inc.*, 81 F.R.D. 8 (N.D. Ill. 1978), the court held that the work-product privilege did not protect the defendant's employee from answering oral deposition questions concerning the calculation of damages in the defendant's counterclaim. *Id.* at 11, cited approvingly in *Wright and Miller, Federal Practice and Procedure*, § 2025, at p. 390 (2d 1994). The district court held that even if the information were work product, disclosure was necessary because the "detailed compilations of statistical data" provided in response to plaintiff's interrogatories would be "meaningless" "without some knowledge as to the rationale employed in arriving at such figures." *Id.* at 12.

Mr. Demaray testified that he has records of contract underpayments in Excel spreadsheets. Exhibit 3 at 113(16)-113(24). He conceded that:

the agency has been having great difficulty in locating the report for ['95, '96, '97] because of the transfer of responsibility and movement of offices and these sort of things. To say that the agency has determined these amounts, you know in the current content of fiscal years, I think, was probably accurate. The fact that we have maintained records of these amounts and are reporting individually to each awardee those amounts, I am not sure that we would be able to product those records today and be able to show, you know, what constitutes a particular amount or number on a shortfall report in those years.

Exhibit 3 at 230(17)-230(25). Then, when asked how a calculation of a shortfall could be done in an increasingly accurate manner, Mr. Demaray suggested one way would be to “take the shortfall reports themselves and just substitute appropriate rates, make an assumption that the pass-through amounts and all of those are accurate and just get the appropriate rates for those years.” *Id.* at 242(1)-242(16). The rates would need to be obtained from the National Business Center and

inputting them into an Excel spreadsheet would “help substantially” to get the job completed. *Id.* at 242(11)-242(24). This method, Mr. Demaray noted, would be less labor intensive than contacting each tribe and renegotiating each need.” *Id.* 243(25)-244.⁵ This method would also be “significantly more efficient, cost effective and accurate” than requiring the Plaintiff’s consultants to recreate historic shortfall reports in new Excel databases. *See* Mather Affidavit, para 11. The Plaintiff would suffer undue hardship if it were required to recreate in electronic form 12 years of shortfall reports and six years of Queue lists. Moreover, without the Defendants’ own damages calculations in electronic format, the Plaintiff cannot challenge the Defendants’ self-serving assertion in this litigation that Defendants’ own data is inaccurate. The Defendants’ are thus running from their own data as fast as they can, but refuse to permit the Plaintiff access to the source data necessary to explore their new “more accurate” data.

3. The deliberative-process privilege does not protect the requested information from disclosure because the information does not relate to predecisional policy matters; rather, it relates to factual data that explains the effects of final agency policies.

The deliberative-process privilege only applies to pre-decisional communications or documents that are meant to advise, recommend, deliberate on, or provide personal opinions with regard to what policy an agency should adopt.⁶ The privilege does not apply to purely factual

⁵ Mr. Demaray was not allowed to answer specific questions regarding how he prepared the April 2005 damage estimate. Presumably, he manipulated past shortfall reports with updated rates and more accurate amounts.

⁶ The deliberative-process privilege is often invoked in the Freedom of Information Act [FOIA] context. FOIA has incorporated the common law deliberative-process privilege. As such, these cases are instructive as to the application of the privilege. *See, e.g., NLRB v. Sears, Roebuck*

information or to material that represents or explains the “final disposition” of the agency since these are not “predecisional” or “ingredient[s] of the decision making process.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975). As the D.C. Circuit has explained:

[t]he deliberative-process privilege protects “confidential intra-agency advisory opinions . . . disclosure of which would be injurious to the consultative functions of government.” It encompasses “documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, as well as other subjective documents that reflect the personal opinions of the writer prior to the agency’s adoption of a policy.” It does not, however, apply to final statements of agency policy or to statements that explain actions that an agency has taken. In other words, it protects “predecisional communications” reflecting an agency’s internal deliberations, but not communications that explain a decision that has already been made.

Tax Analysts v. IRS, 294 F.3d 71, 80 (D.C. Cir. 2002) (citations omitted). See also *Maricopa Audobon Soc’y v. United States Forest Service*, 108 F.3d 1089, 1094-1095 (9th Cir. 1997) (holding regional forester’s letter that was prepared for the purpose of advising superior and providing suggestions and recommendations that reflected “the personal opinions of the writer rather than the policy of the agency” are protected by the privilege) (citation omitted).

In explaining what “predecisional” documents and inquiries are, the D.C. Circuit has noted that the deliberative-process privilege does not protect “final agency actions that constitute statements of policy or final opinions that have the force of law, or which explain actions that an agency has already taken. . . . [or] communications that implement an established policy of an

& Co., 421 U.S. 132, 150 (1975); *Judicial Watch Inc. v. Dep’t of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005).

agency.” *Taxation with Representation Fund*, 646 F.2d at 677 (discussing FOIA’s exemption 5 – the deliberative-process privilege). The court further explained that:

Predecisional documents are thought generally to reflect the agency “give-and-take” leading up to a decision that is characteristic of the deliberative-process; whereas post-decisional documents often represent the agency’s position on an issue, or explain such a position, and thus may constitute the “working law” of an agency. . . . [T]he courts have recognized a strong public interest in the disclosure of reasons that do supply the basis for an agency policy actually adopted. . . .
. . . Predecisional documents are not exempt merely because they are predecisional; they must also be part of the deliberative-process by which a decision is made. Moreover, a document that is predecisional at the time of preparation may lose exempt status if “adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”

Id. at 677–678 (citations omitted). “Under the deliberative-process privilege, factual information generally must be disclosed, but materials embodying officials’ opinions are ordinarily exempt.” *Petroleum Information Corp. v. United States Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

In *Sears*, 421 U.S. at 136-38, *Sears* sought disclosure, under FOIA, of various Appeals and Advice Memoranda written and produced by the NLRB’s General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints. *Sears* argued that the memoranda it sought were expressions of the legal and policy decisions already adopted by the agency, which constituted final decisions and instructions to staff. *Id.* at 137. The Court pointed out that there is a difference between predecisional communications, which are privileged, and communications that are made after the decision and are designed to explain it which are not privileged. *Id.* at 151-152 (citing cases). Notably, the Court explained that the deliberative-process privilege “can never apply” to “‘final opinions,’ which not only invariably explain agency action

already taken or an agency decision already made, but [which] also constitute ‘final dispositions’ of matters by an agency” *Id.* at 153-54. The Court explained that the

quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of the decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed.

Id. at 151. Applying the deliberative-process privilege, the Court held that Appeals and Advice Memoranda “which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party” are not protected by FOIA’s deliberative-process privilege exemption and must be disclosed. *Id.* at 155. The Court viewed these documents as “‘final opinions’ made in the adjudication of a case and . . . outside the scope of” the deliberative-process exemption].” *Id.* at 148. On the other hand, the Court held that “those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the [NLRB]” are not final opinions and are protected by the privilege because they contemplate upcoming litigation and may contain the General Counsel’s theory of the case or communicate litigation strategy or settlement advice. *Id.* at 155, 159-60.

Defendants have failed to make an adequate showing that any of the requested information was “pre-decisional,” or that it reflects the internal deliberations and personal opinions of agency employees for purposes of advising the agency on what kind of policy to adopt. *See Tax Analysts*, 294 F.3d at 80; *Maricopa Audobon Soc’y*, 108 F.3d at 1094-95. Rather, as in *Sears*, Mr. Demaray’s

and Mr. Black's depositions show that estimates, reports and calculations regarding CSC shortfalls are implementations of final agency policy as reflected in IHS's various CSC circulars. Established IHS policy is not to pay CSCs in excess of what IHS believes to be the annually available appropriations. Exhibit 2 at 56(22)-57(1), Exhibit 3 at 28(25)-29(3). Mr. Demaray further testified that in the period 1995 to 1997 "the amount [of funds] . . . appropriated and limited for contract support was less than the total of what all tribes collectively needed for contract support costs." Exhibit 3 at 29(4)-29(21). Mr. Demaray and Mr. Black both conceded in their depositions that the April 2005 damage estimate is a cumulative summary of total amounts that have not been paid in contract support cost requirements for the period 1995 through 1998 or any portion thereof. Exhibit 2 at 151(16)-152(8), Exhibit 3 at 109(4)-109(17). Similarly, shortfall reports and CSC calculations are prepared or calculated in strict accordance with agency issued "circulars," *see* Exhibit 3 at 134(2)-134(6), which are intended to implement agency policy regarding "how to determine amounts of indirect costs – contract support costs and how to allocate funding that's available." *Id.* at 169(1)-169(17).

Nothing in the Defendants' answers to Plaintiffs' interrogatories or document requests, or in the depositions of Mr. Demaray and Mr. Black, establishes that CSC shortfall damage estimates, shortfall reports or CSC calculations encompass pre-decisional communications necessary to policymaking. Rather, the testimony of both deponents suggests exactly the opposite – that these reports and calculations implement final agency policy. Indeed, the agency has a statutory duty to evaluate the impact of its policy regarding allocation of CSCs and to report CSC shortfalls to Congress. *See* 25 U.S.C. § 450j-1(c).

b. Even if the deliberative-process applies, it is a qualified privilege that should be waived here because the Plaintiffs have shown that their need for the information outweighs the Defendants' need for privacy.

As the D.C. Circuit has noted,

the deliberative-process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis. “[E]ach time [the deliberative-process privilege] is asserted the district court must undertake a fresh balancing of the competing interests,” taking into account factors such as “the relevance of the evidence,” “the availability of other evidence,” “the seriousness of the litigation,” “the role of the government,” and the “possibility of future timidity by government employees.”

In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997) (citations omitted). The information requested in this Motion is directly relevant to Plaintiff’s motion for class certification. Defendants have taken the position that certification is not warranted because (among other contentions) damages for the underpayment of CSCs (*i.e.*, the amount of the CSC payment shortfalls) cannot be ascertained on a global basis and instead compels a contract-by-contract analysis. The cumulative shortfall reports and the April 2005 damage estimate are necessary to adequately rebut Defendants’ objections to class certification and show commonality as between putative class members. Further, Mr. Demaray’s own testimony shows that the agency has, in the past, been unable to produce all Headquarters shortfall reports, so that the April 2005 damage estimate may well be the only document of its kind detailing cumulative CSC shortfalls for previous years. Exhibit 3 at 230(17)-230(05). The Government is the only entity that has access to all of these documents and it would be grossly inefficient and a waste of resources to require that the Plaintiff seek the same information from each Indian tribe that received CSCs during the period at issue in this case. Lastly, disclosure

of CSC shortfall information would not result in the “possibility of future timidity by government employees” because the IHS has a statutory duty to compile factual information regarding CSC shortfalls and CSC calculations and to disclose that information to Congress. 25 U.S.C. § 450j-1(c); Exhibit 3 at 232(21)-233(13). None of the information requested pertains to communications or opinions by agency officials or employees. Therefore, even if this Court were to conclude that the deliberative-process privilege applied in the first instance, it should hold that the privilege does not protect the information Plaintiff now seeks.

C. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant this Motion to Compel. A proposed Order is included herein as Exhibit 1.

Respectfully submitted this 11th day of October 2005.

SONOSKY, CHAMBERS, SACHSE,
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2005, I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Memorandum in Support of Plaintiff's Combined Rule 37(a)(2)(B) Motion to Compel Discovery Regarding Indian Health Service Shortfall Data, and to Enlarge Time for Filing Said Motion Pursuant to Local Rule 26.6** to the following attorneys of record (or their co-counsel) for Defendants:

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