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

PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL (Dkt. No. 136)

This class action lawsuit seeks to recover global damages for the Indian Health Service's contract support cost underpayments (or "CSC shortfalls") that over 300 class members suffered over a period of years through the application of a standard IHS policy declared illegal in *Cherokee Nation v. Leavitt*, 125 S. Ct. 1172 (2005). This motion seeks to compel production of testimony and documents directly relevant to Defendants' principal defense to certification of that class: their contention that damages for the CSC shortfalls cannot be calculated on a class-wide basis.[1]

Defendants admit that, in each of the years at issue, IHS maintained and tallied CSC shortfall data, as expressly required by Congress. 25 U.S.C. § 450j-1(c). That shortfall data is the measure of class damages sought in the Third through Sixth Causes of Action set forth in the Pueblo's First Amended Complaint. Dkt. No. 5. Following *Cherokee*, IHS 'cleaned up' that data to remove

[1] The Pueblo's Motion prompted Defendants to produce directly responsive discovery which Defendants had previously failed to disclose, and to identify substantial additional documents never before disclosed even by privilege log. Pls. Ex. 9. Absent this Motion, the very existence of responsive documents might never have come to light.

inaccuracies, and made calculations of the total amount of CSC shortfall owed to the class over a period of years. Def. Exh. A ¶¶ 9, 31. Nonetheless, Defendants now claim that any shortfall damage assessment will require "tribe-by-tribe, contract-by-contract scrutiny" (Opp. at 2); that it is impossible to calculate CSC shortfall damages on a class-wide basis; and that this alleged impossibility compels that no class should be certified.

To support this contention, Defendants advance a newly-minted litigating position: the IHS CSC shortfall data is worthless, and it is therefore impossible to use IHS's shortfall reports and data as a basis for quantifying class-wide damages. But as Defendants simultaneously must now admit, in March 2005 one of IHS's key employees used those very reports and data to create a class-wide damage calculation of the CSC shortfalls. Opp. at 7. By this Motion, the Pueblo seeks production of the 'cleaned-up' data in electronic form, IHS's class-wide damage calculations, and the related information about the data and calculations that is available only by re-deposing Mr. Demaray.[2]

Since Defendants persist in maintaining that certification must be denied because class-wide damage calculations are not possible, the Plaintiff is entitled to impeach that contention by securing full discovery of IHS's own class-wide damage calculations. The Defendants cannot have it both ways, belatedly invoking privilege as a shield against discovery of their own class-wide damage calculations, while simultaneously claiming the impossibility of such calculations as a sword against class certification. In considering whether to certify a class this Court is entitled to know the truth.

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[2] Defendants play a misleading wordgame when seeking to distinguish between IHS's CSC "shortfall" data and IHS's calculation of CSC "damages" due to those shortfalls, for the damages in any given year are simply the total of all shortfalls that year. Even Defendants admit that in computing CSC shortfall "damages," IHS employee Ron Demaray used the shortfall data. Thus, the damage assessments are the same as the shortfall data, plus various "adjustments" (Opp. at 8 n.3) made to clean up any perceived technical flaws in the data.

ARGUMENT

A. IHS Damage Assessments, and the CSC Underpayment "Shortfall" Data Upon Which They Are Based, Are Directly Relevant to Class Certification.

Defendants' Opposition addresses relevancy from two angles. First, Defendants spend considerable effort seeking to impugn the integrity of IHS's own historic CSC shortfall data. *E.g.* Opp. at 1 ("a complicated set of guesses based on inherently flawed data"), 3 ("rough estimates"), & 6 ("highly unreliable"). Second, Defendants contend that, accuracy aside, their damage calculations and the underlying CSC data are not relevant to certification.

1. Defendants' attack on their own credibility rings hollow and does not impact the discoverability of IHS's data and calculations. There is no small irony here. Defendants now call their own historic CSC shortfall reports to the President, to Congress and to the Supreme Court "highly unreliable." Yet, up until the *Cherokee* decision IHS consistently relied on this supposedly "unreliable" data (1) to calculate and award annual CSC payments to individual contractors; (2) to prepare annual reports to Congress on deficiencies in those CSC payments; (3) to report in the President's Annual Budget to Congress (and elsewhere, including through the General Accounting Office) on the amount of the CSC payments and shortfalls; (4) to represent to the Supreme Court the potential "up to $100 million" in liability IHS might face if the Court did not reverse the Federal Circuit's ruling in the *Cherokee* litigation, *see Thompson v. Cherokee Nation*, No. 03-853, U.S. Cert. Pet. at 27; Pls. Exh. 7 (Ltr. of Aug. 15, 2005, from Rachel Hines to Lloyd Miller at 5) (explaining the CSC shortfall reports "provided the general factual basis for the assertion in the Cherokee Nation brief"); and (5) even to declare by sworn affidavit in various litigations the precise amounts of the

CSC shortfalls in particular years.[3] Given that rich and continuing history spanning well over a decade, it is neither credible nor convincing for Defendants now to pretend that IHS's CSC shortfall data is worthless.[4]

It is not disputed that IHS continues to rely on the CSC shortfall data for these payment and reporting purposes. Thanks to information that first came to light in Mr. Demaray's deposition, Defendants are now compelled to admit that IHS also used that very same data as the "starting point" for its calculation of class-wide shortfall damages in this case. Opp. at 7. Discoverability of that data and related calculations turns only on its relevance to class certification issues (discussed next).

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[3] *E.g.*, *Cherokee v. Leavitt,* Nos. 02-1472, 03-853 (U.S.), JA at 215 (¶ 8) ("However, in order to inform Congress of any shortfalls in contract support costs in IHS' budget, IHS reports those shortfalls to Congress every year. For example, IHS submitted a shortfall report which indicated a[n] $81,996,000 shortfall in contract support costs for fiscal year 1997. In 1996 IHS did not submit a formal report but submitted information to the House and Senate Appropriations Committees indicating a $43,000,000 shortfall in contract support costs for 1996") (Affid. of Dir., IHS Div. of Fin. Mgt. (DFM), dated Sept. 3, 1999); JA at 288-89 (¶ 4) ("The 29.2 million on the ISD Queue of December 31, 1996, is the total amount of CSC funding that IHS is required to pay tribes for contracts/compacts for [programs] that they (the tribes) have assumed") (Affid. of Dep. Dir., IHS DFM, dated Feb. 18, 1999).

[4] IHS claims the CSC shortfall data merely reflects "the CSC that the Tribal contractor believed was needed," Opp. at 5, and repeatedly uses the new subjective word "need" to imply its own data reflects mere "estimates." Neither the statute nor the Circulars under which the data was maintained permitted "estimates," "guesswork" or compilations of subjective "need." Rather, the statute refers to "the amount required to be paid under paragraph (2) [in CSCs]," §450j-1(a)(5). *See also*, *e.g.*, §450j-1(a)(2) ("there shall be added to the amount required by paragraph (1) [CSCs] which shall consist of [certain described costs]"); and (a)(3)(A) (describing required CSCs). The statute also requires that the Secretary's annual report to Congress shall include, not guesswork or wish-lists, but strictly "an annual accounting of any deficiency in funds needed to provide required contract support costs to all contractors." § 450j-1(c)(2).

To the same effect are IHS's own CSC Circulars, which speak, not of some amorphous unilateral expression of need, but of "Contract Support Cost Requirements" that are "determined under this Circular pursuant to section 106 of [the ISDA]." *E.g.* IHS Cir. 2004-03, at § 4.E. The Circular has an entire section devoted to "Determining CSC Requirements." §5.A(2). Under "Roles and Responsibilities" IHS employees determine CSC requirements and resolve contractor appeals from those requirements. § 6. Finally, the annual "CONTRACT SUPPORT COSTS SHORTFALL REPORT" is based upon "historical records of funds negotiated and awarded" for all categories of CSCs, including "Direct CSC requirements" and "Indirect CSC requirements" (§ 7.A). Each IHS Area Office prepares "a report to the Director, OFA . . . that includes those data elements" (§ 7.B); each Area Office's data "shall be certified as accurate by the Area Finance Management Officer (FMO) and the Area Director" (§ 7.B); and "The Headquarters Director, OFA, shall consolidate all [12] Area reports into the 'IHS CSC Shortfall Report'" (§ 7.B(2)). Earlier Circulars are to similar effect in so far as pertinent here.

So long as that information is itself either relevant to certification issues or may lead to such evidence, it is discoverable. Fed.R.Civ.P. 26(b)(1). The data's "reliability" only impacts the weight the Court ultimately chooses to give it at the damages trial. As we next show, the discovery sought is directly relevant to class certification.

2. The IHS CSC shortfall reports and new calculations are discoverable. The Defendants' second approach is to argue that both the shortfall data and the damage estimates drawn from that data, even if accurate, are irrelevant to class certification issues and thus are not discoverable. That is demonstrably wrong, and fails to carry the Defendants' heavy burden.[5]

Returning to the basics, what is most relevant to discovery for a Rule 23(b)(3) class are the interrelated issues of predominance and superiority, after taking into account the interest of individual members in controlling separate actions, the extent of existing litigation, the desirability of concentrating the litigation before this Court, and class management issues. Fed.R.Civ.P. 23(b)(3)(A)-(D). What is most relevant to a Rule 23(b)(2) "declaratory relief" class is the defendant's generally applicable conduct toward all class members. Both these standards overlay the four Rule 23(a) interrelated issues of numerosity, commonality, typicality and adequacy. Class discovery must focus on these issues, and none others. Indeed, Chief Magistrate Judge Garcia has so ordered, *see* Scheduling and Discovery Order (Dkt. No. 52), at 2 (entered Apr. 21, 2005):

> The first phase of discovery (phase one) will be directed toward the Rule 23 issues of numerosity, commonality of questions of law or fact, typicality of claims or

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[5] "Once a party has requested discovery, the burden is on the party objecting to show that the discovery is not relevant . . . Relevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is any possibility the information sought may be relevant to the subject matter of the action." *Smith v. MCI Telecomm. Corp.*, 137 F.R.D. 25, 27 (D. Kan. 1991) (citations omitted) (emphasis added).

defenses, and whether the representative parties will fairly and adequately protect the interests of the class.

Defendants ignore all that. Instead, Defendants start from the assumption there will never be a class. From that, they advance the predictable proposition that the only relevant discovery is "individualized" and must be limited to "specific legal defenses that apply to it [each contractor] alone." Opp. at 13. When assessing the proper scope of discovery Defendants essentially would have the Court only consider their defenses, and ignore the Pueblo's class claims.[6]

Only by a studied refusal to accept that the parties are indeed involved with discovery with respect to a class action, as opposed to merits discovery after certification has been denied, can Defendants advance the remarkable proposition that, privileges aside, class-wide CSC shortfall data

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[6] *See also* Opp. at 13-14 (asserting that "the only factual–and thus discoverable–information and documents that are relevant" are those that would go to the government's defenses on the merits were the government only confronting a group of individual contractors.) Underlying the Defendant's opposition is the core premise that "the narrow issue of class certification in this breach of contract case" turns on the "promises . . . included in the [individual] ISDA contracts," because "those are the only relevant promises." Opp. at 6. That is not correct. In addition to the fact that the class in the First Amended Complaint advances <u>statutory claims</u> in addition to contract claims, the *Cherokee* decision makes plain that the two theories collapse into one, with the contract claims resolved as a matter of law <u>based upon the statutory language of the ISDA</u>. Tellingly, not once did the *Cherokee* Court rely on individual contract clauses (despite the Government's best efforts to divert attention to them), and the Court reversed Tenth Circuit and district court decisions which had improperly elevated those clauses above the statute. The Defendants' attempt to reinject those clauses into this case, and to do so as a reason to deny class certification, only reflects a continuing resistance to the Supreme Court's command.

Equally revealing is IHS's contention that the Supreme Court actually never resolved the Government's liability, but merely disposed of one "defense" that was "[n]arrow in scope." Opp. at 2. Actually, the Court rejected the sole defense IHS has ever asserted to the CSC shortfalls that contractors suffered over several years. As Portland Judge Stewart just ruled in granting one tribal contractor's Rule 60(b) motion to reopen a 3-year old judgment in light of *Cherokee*, "Hundreds of other Tribal contractors were experiencing problems similar to those the Shoshone-Bannock Tribes were experiencing with CSC shortfalls." *Shoshone-Bannock v. Leavitt*, No. 96-459-S, 2005 WL _____ (D. Or. Dec. 13, 2005), at 7. Judge Stewart observed: "The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay. Its sole defense consists of the argument that it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." *Id.* at 12-13. In finding that the circumstances presented warranted reopening a 2002 judgment, the court noted "this case involves a request for relief by a co-victim of the same wrongful act that was the subject of new decisional law." IHS's own affiant acknowledges "[t]he [*Cherokee*] decision . . . applied nationwide." Def. Exh. B ¶ 4.

and damage calculations are irrelevant.[7] To the contrary, IHS's "post-Cherokee litigation exposure estimates" (Opp. at 14) are directly relevant to the Rule 23(b)(3) class issues of superiority and case management, and directly disprove the Defendants' principal defense to certification. Not only will the Court in class certification motion practice hear from the Pueblo's experts that class-wide quantification is entirely feasible and practicable; the Court will also hear, through the discovery sought here, that IHS itself performed the very same class-wide damage calculations that Defendants claim are impossible, and that IHS did so in a few weeks by making "adjustments" to its core CSC shortfall data. In sum, the discovery sought here is directly relevant to class certification and will entirely impeach Defendants' central opposition to certification.[8]

B. IHS's 2005 CSC Calculations and Refined Shortfall Data Are Not Protected From Disclosure by Any Privilege.

Defendants next argue that the discovery sought is protected by the attorney-client, attorney work product and deliberative process privileges. As the Supreme Court cautioned in *Trammel v. United States*, 445 U.S. 40, 50-51 (1980):

> . . . privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence.'" As such, they must be strictly construed and accepted "only to the very

[7] IHS asserts "The fact that Plaintiff seeks to represent a putative class does not change the nature of the discovery related to the underlying dispute." Opp. at 14. But the parties are not yet at "discovery related to the underlying dispute;" they are only in Phase One class discovery. Although the Defendants may contend that "class" issues are "largely legal," *id.,* this Motion highlights how that proposition is simply wrong. (Indeed, it was at the Defendants' insistence that the original March 2005 class certification motion was withdrawn to permit class discovery.)

[8] The Defendants misplace their reliance on non-class cases where discovery of damage estimates was sought to prove a defendant's liability (and was, for that reason, denied). Opp. at 15 (discussing published and unpublished cases). The Pueblo does not seek IHS's calculations to prove liability, for the Supreme Court in *Cherokee* has already done that. Thus IHS no longer faces the risk of a damning liability admission; instead, the data and calculations are sought strictly to defeat the Defendants' position on the propriety of a class. Indeed, the final number is of less interest than the fact of the calculations and the nature of the data adjustments IHS made to get to its number.

> limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

(citations omitted). Further, these privileges do not exist in isolation. "In order to determine whether the agency's claim that the documents were properly withheld is valid, an understanding of the function the documents serve within the agency is crucial." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980).

The IHS Deponents testified that the CSC shortfall data and calculations at issue were prepared by Mr. Demeray, on his own initiative, in response to the *Cherokee* decision. *See* Pls. Exh. 2 at 167. Mr. Demaray explained (Pls. Exh. 3 at 133):

> I think as a result of the Cherokee decision, the fact that it had not been certified as a class action but we had the Tunica litigation going on, we had Zuni, we had other things going on that there is an interest in what now is potential liability, given Cherokee and other litigation and so forth. So * * * I wanted to know what types of potential liability there might be.

(emphasis added). While in some circumstances this conduct might implicate a cognizable privilege, here the asserted privileges do not apply. The attorney-client privilege does not apply because the Pueblo is not seeking "[c]onfidential disclosures . . . made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The work product protection does not apply because the Pueblo is seeking factual information not protected by the privilege, *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266-67 (10th Cir. 1995), and because to the extent the work product privilege could apply, Defendants waived that privilege by continuing to place at issue the accuracy of the shortfall data and the ability to calculate class damages. *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998). The deliberative privilege does not apply because

Defendants have not produced any evidence that any of the information sought was developed for the purpose of (or actually used for) developing IHS policies. *EPA v. Mink*, 410 U.S. 73, 88 (1973).

1. The Discovery Sought Is Not Protected Attorney-Client Communication. The attorney-client privilege is narrow. The party asserting the privilege bears the burden of clearly establishing its applicability with respect to specific questions or documents, not by making a blanket claim. Mot. at 9. Here, Defendants' *Privilege Log* reflects numerous communications transmitting Mr. Demaray's calculations among agency staff and agency lawyers. Def. Exh. E. The affidavits also state that the computations were communicated orally to both agency staff and non-agency staff. Def. Exh. A ¶11; Def. Exh. B ¶¶9, 10. None of these oral communications is described. Defendants fail to meet their burden. They have not shown that each of Mr. Demaray's communications (1) was intended to be "confidential," and (2) was made in order to obtain legal assistance.[9]

Defendants' affidavits recount the events of March and April 2005 and Mr. Demaray's refinement of the shortfall data. His first iteration of the data occurred on March 2nd, one day after the *Cherokee* decision. Defendants do not point to any evidence that the March 2nd computation was intended to be confidential or was "communicated . . . for the purpose of obtaining legal advice" as Defendants now assert (Opp. at 24). Rather, the record shows that (1) Mr. Demaray's first calculation was prepared on his own initiative (*supra* at 8, quoting Pls. Exh. 3); (2) it was furnished

[9] *See Fisher v. United States*, 425 U.S. 391, 403 (1976) (the privilege protects "[c]onfidential disclosures . . . made *in order to obtain legal assistance*" from the attorney); *Wilcoxon v. United States*, 231 F.2d 384, 386 (10th Cir. 1956) ("a communication must be made in confidence of the relationship and under circumstances from which it may reasonably be presumed that it will remain in confidence"); *United States v. Bump*, 605 F.2d 548, 550-551 (10th Cir. 1979) ("An important element of the lawyer-client privilege is a showing that the communication was meant to be kept secret"); *U.S. v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) ("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").

upon request to his supervisor Mr. Black, who is not a lawyer, Def. Exh. A ¶ 16; Pls. Exh. 2 at 151-152; (3) "[n]o lawyers were involved in putting together the estimate," Pls. Exh. 2 at 159; *see also* Def. Exh. A ¶ 16; and (4) an IHS attorney was merely a 'cc' to an e-mail transmission to Mr. Black. Def. Exh. A ¶ 16; Def. Exh. E, Mar. 2, 2005. This is insufficient to meet Defendants' heavy burden: "the mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege." *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550-51 (10th Cir. 1995). *See also State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 71-72 (1st Cir. 2002) ("The DOI erroneously assumes that the requirement of client communicated confidentiality is satisfied merely because the documents are communications between a client and attorney. . . . It must also be demonstrated that the information is confidential").

Mr. Demaray's next iterations of the shortfall data (March 11, 16, 21, 29) reflect various adjustments based on his professional opinion about the data's inherent problems. Defendants claim the iterations reflect the "advice and counsel" of IHS's attorney, perhaps regarding "possible defenses that the agency might have." Def. Exh. A ¶¶ 19, 21; Def. Exh. E. But the Pueblo is not requesting disclosure of the communications from counsel to Mr. Demaray about defenses. The Pueblo is simply requesting the data, the damage calculations, and discovery about how they were made. The attorney client privilege does not apply to such data and calculations.[10]

[10] As for the government's defenses, Defendants state that Mr. Demaray excluded those defenses from his consideration in order to generate a "worst case scenario." Opp. at 14; Dem. Aff. ¶14; McSwain Aff. ¶7; *see also* Pls. Exh. 3 at 113 (testifying he did the work on his own). "[B]are assertions" that Mr. Demaray merely communicated with counsel during some period about legal defenses will not satisfy the Defendants' burden. *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1276 n.6 (10th Cir. 1998).

Additionally, Mr. Demarary has never stated that he intended or considered the communications with counsel to be "confidential." His wide dissemination of the March 11, 16, 21, and 29 calculations to various IHS and DHHS employees and to a different Executive Branch agency suggests otherwise. *See Wilcoxin*, 231 F.2d at 386 (communications must be "made in confidence of the relationship and under circumstances from which it may reasonably be presumed that [they] will remain in confidence."). That various iterations of the data were developed with the "intent and purpose that [they] be communicated to others" demonstrates that the data is not privileged. *Id.*[11]

2. The Discovery Sought Is Not Protected Work Product. "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." *Resolution Trust*, 73 F.3d at 266-67 (upholding sanctions against attorney who asserted work product). The Defendants have not met this burden.

First, nothing establishes that Mr. Demaray's March 2005 calculations actually contain the mental impressions or strategies of an IHS attorney. The evidence shows that none were created at the behest of an attorney, and that at least one had no attorney involvement whatsoever. Def. Exh. A ¶ 16 (describing the March 2nd calculation as the "total CSC estimated shortfall for years 1994-2003"); *see also Id.* ¶ 17 (Mr. Demaray's oral disclosure to the Office of Budget "[t]hat same day"). Such matters of fact could not "divulg[e] the attorneys' strategies and legal impressions." *Dabney*,

[11] Def. Exh. E, Mar. 17, 2005 ("attachments re: OMB briefing"), Mar. 21 (same), Mar. 29 (8-page e-mail (presumably with attachments, though none are noted on the *Privilege Log*) prepared "in anticipation of a briefing with HHS and OMB"), Mar. 29 (5-page email, later referred to as "CSC briefing documents" on Mar. 30, citing DEF 29690-29694); Def. Exh. A ¶ 18, 26; Def. Exh. B ¶ 8, 10.

73 F.3d at 266; *In re grand Jury Proceedings*, 658 F.2d 782, 785 (10th Cir. 1981) (accountants' worksheets compiled at attorney's request were not work product).

Second, Mr. Demaray testifies that he "began to adjust the amounts to take into account . . . [his] personal and professional opinions about the inherent problems with the CSC shortfall data." Def. Exh. A ¶ 20. This is not attorney work product; it is Mr. Demaray's. These adjustments do not divulge legal strategies or impressions, but consist of facts directly relevant to Defendants' defenses (*i.e.*, whether the CSC shortfall data was inaccurate and the impact of any inaccuracies on the cumulative total amount).

Lastly, the Defendants fail to show how estimates prepared for unknown low-level OMB staffers were "prepared in anticipation of litigation or for trial." Rule 26(b)(3). The two affidavits and the *Privilege Log* disclose that several iterations of the refined shortfall data were prepared specifically "in anticipation of a briefing with OMB." *See e.g.*, Def. Exh. E, Mar. 29, 2005; Def. Exh. A ¶ 26. The Defendants never explain how work product protects those iterations. *Compare Maine v. Dep't. of the Interior*, 298 F.3d at 68-70.

3. Any Claim to Work Product Privilege was Waived. The work-product protection is a qualified privilege and may be waived. *See United States v. Nobles*, 422 U.S. 225, 238-239 (1975). In particular, "[w]hen a party puts privileged matter in issue as evidence in a case, it thereby waives the privilege as to all related privileged matters on the same subject." Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2016.2 (noting this waiver presents little difficulty and applies in many situations). As the Tenth Circuit has noted, "a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove

a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998).[12]

As discussed *supra* pp. 3-7, the Defendants raise as twin defenses to class certification (1) the asserted impossibility of calculating damages on a class basis; and (2) the inaccuracy of the shortfall data. Defendants have also, *non sequitur*, admitted that (3) the shortfall data can readily be 'cleaned up' if in electronic form, Def. Exh. A. ¶ 9; (4) that Mr. Demaray has already 'cleaned up' the data; and (5) that the 'cleaned up' data can be used to calculate an accurate "litigation estimate" of class damages. Def. Exh. E, Apr. 18, 2005. Defendants cannot raise these twin defenses and also conceal evidence in their possession that disproves them. Likewise, Defendants cannot publish the assertion that class-wide damages are "up to $100 million" (*supra* at 4-5), yet deny the Pueblo discovery of the computations behind that assertion.

4. The Pueblo has Shown a Substantial Need. Even when it applies, the work product protection may be overcome by demonstrating substantial need for the material and the inability to obtain the substantial equivalent of the material by other means without undue hardship. Fed.R.Civ.P. 26(b)(3). Here, the Pueblo has a substantial need for the new and 'cleaned up' shortfall data and the damage calculations, in electronic form, to counter Defendants' 'impossibility' and 'inaccuracy' assertions. The Pueblo will not be able to refute these defenses without access to the 'cleaned up' data and the ability to question Mr. Demaray regarding his adjustments to the data

[12] *See also Walsh v. Seaboard Surety Co.*, 184 F.R.D. 494 (D.Conn. 1999) ("even if a party does not attempt to make use of a privileged communication, he may waive the privilege if he asserts a factual claim the truth of which can only be assessed by examination of a privileged communication"); *Cincinnati Insurance Co. v. Zurich Insurance Co.*, 198 F.R.D. 81 (W.D.N.C. 2000) (allowing discovery into the Plaintiff's pre-trial evaluation of an earlier case in connection with a subsequent suit against attorneys for not settling the earlier case).

necessary to compute damages. *Cf. Williams v. E.I. du Pont*, 119 F.R.D. 648, 651 (1987) (requiring disclosure of the party's database where necessary to a full understanding of party's report).[13]

Only IHS possesses the shortfall data in electronic and easily manipulatable format. Defendants have refused to produce the electronic data. Even if the Defendants produce the hard copy print outs from these databases, it would constitute an undue hardship on the Pueblo to have to encode manually the massive documentation spanning 12 Area Offices, over 300 tribal contractors, and twelve years. *Cf. id.* (requiring disclosure of the Plaintiff's database where it would be an undue hardship "to encode manually the massive documentation"). There is "no reason to force [the Pueblo] to repeat this effort when such a document already exists and can be disclosed without harm to its creator." *Washington Bancorporation*, 145 F.R.D. at 279-80 (finding "undue hardship" if defendants had to create an index of 2400 boxes of document production); *see also Portis*, 2004 WL 1535854, *4 (finding undue hardship "to recreate the database from scratch"). Further, electronic production reveals new information not available from hard copy, such as embedded formulas and hidden columns and pages. *See infra*, 23-24.

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[13] Although the "substantial need" analysis does not apply to opinion work product, contrary to Defendants' assertions (Opp. at 19-20) the refined shortfall data is not opinion work product. Opp. at 19-20. IHS is required by Congress to maintain and publicly report CSC shortfall data. After *Cherokee* Mr. Demaray improved that data by making "adjustments" to take into account "inherent problems with the CSC shortfall data." Def. Exh. ¶ 20. None of that relates to the "mental process" or "opinion" of an IHS attorney. Although Defendants also suggest that legal defenses may be apparent from the disclosure, the defenses are well-known and stated in the Government's Answer. These are not the type of "sophisticated litigation theor[ies]" that would move the shortfall database from "fact work product" to "opinion work product." *Washington Bancorporation v. Said*, 145 F.R.D. 274, 278-80 (D.D.C. 1992) (finding a large index developed during litigation would not disclose the mental impressions or litigation strategy of the party); *see also Portis v. City of Chicago*, 2004 WL 1535854 (N.D. Ill 2004), * 3 ("Although database is a factual compilation, . . . the categories of information in the database reveal what data Plaintiff's lawyers deemed relevant to select and code. It does not follow, however, that disclosing the database to defendants will reveal Plaintiff's counsel's mental impression, opinions and legal strategy.") Besides, Mr. Demaray did not factor the defenses into his analysis. *Supra* 11 n.10.

Moreover, even if the Defendants turned over the 'cleaned up' shortfall data, the Pueblo will not be able to replicate and verify the "adjustments" Mr. Demaray made. Mr. Demaray possesses unique knowledge of the data and knows which "adjustments" are necessary to correct the data into a more accurate depiction of class-wide damages. For the past ten years he has been at the center of IHS's CSC policy development process and the resulting annual data collection effort. He can more accurately adjust the data than anyone else, and he is intimately familiar with formal and informal agency CSC policy over time. He has extensive knowledge of the diverse Area Office data collection and reporting practices. He is intimately familiar with the data and is able to detect gaps and to correct for those gaps in formulating class-wide damage calculations. In short, Mr. Demaray has unique knowledge that the Pueblo will have enormous difficulty reproducing. Def. Exh. A, ¶ 9. *Compare Wheeling-Pittsburgh Steel Corp. v. Underwriter Laboratories, Inc.*, 81 F.R.D. 8 (N.D. 1978) (allowing deposition questions regarding the "detailed compilation of statistical data"). Any otherwise applicable work-product protection must yield.

5. The Deliberative Process Privilege Does Not Apply. Defendants claim that Mr. Demaray's data and calculations are entitled to protection under the deliberative process privilege because this information reflects "deliberations related to specific liability issues." Opp. at 27. Defendants appear to be confusing the deliberative process privilege with the work-product doctrine:

> Work product protects 'mental processes of the attorney,' while deliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'

Mink, 410 U.S. at 88 (citations omitted). The Supreme Court has limited the deliberative process privilege to materials which are both (1) predecisional and (2) deliberative. *Id*. The burden is on

the agency "to show that the information in question satisfies both requirements." *Hunt v. U.S. Marine Corps.*, 935 F.Supp. 46, 51 (D.D.C. 1996). The deliberative process does not extend to "purely factual, investigative matters." *Mink*, 410 U.S. at 89; *see also Sierra Club v. United States Dep't of Interior*, 384 F. Supp. 2d 1, 26 (D.C. Cir. 2004) (noting that an email "regarding data about caribou calving on the coastal plain" would have to be released at least in part if it contained "the data itself"). As one court observed:

> the deliberative process privilege was designed to help preserve the vigor and creativity of the process by which government agencies formulate important public *policies.* The principal idea that inspires the privilege is that the people who contribute to *policy* formation will be less afraid to offer honest (albeit painful) analyses of current and contemplated policies, and will be less shy about suggesting bold, creative (and sometimes hairbrained) policy alternatives, if they know that their work is not likely to be disclosed to the public.

Kelly v. City of San Jose, 114 F.R.D. 653, 658-59 (N.D. Cal. 1987). Thus, "[a] document is 'deliberative' if it is 'actually . . . related to the process by which policies are formulated.'" *Mitchell v. Fishbein*, 227 F.R.D. 239, 250 (S.D. N.Y. 2005), *citing Hopkins v. United States Dept' of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). The document "'must bear on the formulation or exercise of policy-oriented judgment.'" *Id.* Mr. Demaray's 'cleaned up' CSC shortfall data and calculations are "purely factual, investigative matters" (*Mink*) and do not contain formulations, comparisons or analysis of federal policy issues. Since the privilege extends only to "'communications designed to directly contribute to the formulation of important public policy,'" *Soto v. City of Concord*, 1162 F.R.D. 603, 612 (N.D. Cal. 1995), the privilege does not apply here. "'[T]he privilege does not protect a document which is merely peripheral to actual policy

formulation.'" *Mitchell*, 227 F.R.D. at 250. It does not include an agency's discussions "related to liability issues." Opp. at 27.

Although Defendants' affiant asserts that the estimates were used in discussing "policy implications of the *Cherokee* decision," (Def. Exh. B ¶ 14), this mere assertion is insufficient. Defendants must carry the burden of pointing to each document as to which it claims the privilege and "pinpoint the specific agency decision to which the document correlates." *Providence Journal Co. v. U.S. Dept. of Army*, 981 F.2d 552, 557 (1st Cir. 1992). Defendants have failed to do so and have not demonstrated that Mr. Demaray's refinement of the shortfall data was either "recommendatory in nature . . . and . . . deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another." *Coastal States*, 617 F.2d at 866.[14] As in *Coastal States*, 617 F.2d at 868, Mr. Demaray's calculations have not been demonstrated to be:

> advice to a superior, or are the suggested dispositions of a case . . . They are not one step of an established adjudicatory process, which would result in a formal opinion. . . There is nothing subjective or personal about the [documents]; they are simply straightforward explanations of agency regulations in specific factual situations. They are more akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, to be contrasted to a factual or strategic advice giving opinion. Nor do they reflect 'agency give-and-take of the deliberative process by which the decision itself is made.' Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.

Moreover, the deliberative process privilege is qualified and may be overcome by a sufficient showing of need. *Landry v. FCIC*, 204 F.3d 1125, 1135-11367 (D.C. Cir. 2000); *see also Center*

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[14] In this sense, the documents are also not "predecisional." Mot. at 21-22. The relevant "decision" to adopt an agency-wide policy that violates the statute and tribal contracts was made long ago, as was the resulting damage to the Tribal contractors. *Supra*, 6 n.6 (discussing *Shoshone*). The compilation of shortfall data, and Mr. Demaray's later refinement of it, are at best "post-decisional" actions by the agency resulting from policy decisions made long ago.

for Biological Diversity v. Norton, 336 F.Supp. 2d, 1155, 1161 (D.N.M. 2004) (discussing four factors related to assessing need). As discussed in Part 4 (*supra*, 14-15), the Pueblo has demonstrated substantial need for these documents.

6. The Defendants Have Waived All Claims of Privilege. Finally, even if there were any basis for one or more of the asserted privileges, Defendants have waived any right to assert them. Defendants have done the very thing the discovery rules say they must not do: they have repeatedly withheld responsive information and documents, not even disclosing their existence, based on broad objections and vague references to privilege. This results in waiver.

a. *Failure to Disclose and Produce.* The Pueblo's discovery requests and deposition questions expressly encompassed the CSC shortfall data and the estimates Mr. Demaray generated in March 2005. *See e.g.*, Pls. Ex. 4 (RFP No. 3) (requesting "draft or final calculations of damages"), (RFP No. 23) (requesting "compilations of national data produced by Ron Demaray . . . setting forth historic or current data regarding contract support cost requirements"). In both its *Interrogatories* and *Requests for Production*, the Pueblo provided specific instructions to the Defendants for identifying responsive information or documents to which the Defendants claimed privilege.[15] Nevertheless, Defendants' responses were accompanied by non-specific assertions that the requests "are seeking documents that would necessarily be protected by the attorney-client, work-product and/or deliberative-process privileges," and refused to provide any privilege log. Pls. Exh. 4.

[15] *See e.g.*, Pls. Exh. 11("please state . . . (3) the basis for the alleged privilege"); Pls. Exh. 12 ("with respect to each objection (a) State with particularity the reason or reasons for the objection and the nature of any privilege asserted").

When the Pueblo challenged these assertions and requested a privilege log, *see* Pls. Exh. 10 (Aug. 7 and 9, 2005, letters), Defendants again refused, "stand[ing] by [their] objections" without even hinting that responsive documents actually existed. Pls. Exh. 7 (Aug. 15, 2005). The Pueblo immediately filed new Interrogatories to test the asserted privileges, such as whether damages calculations had in fact been made and, if so, by whom, for whom, and to whom they were communicated. Pls. Exh. 5 (Aug. 16, 2005). The Defendants refused to respond to these Interrogatories (Sept. 19, 2005), *id.*, and, again, never hinted that responsive documents in fact existed.

When the existence of estimates were finally revealed during the September 20th and 22nd depositions, the Pueblo sought to probe the extent of the privileges. Defendants' counsel repeatedly instructed the witnesses not to respond. *See, e.g.* Pls. Exh. 2 at 157;[16] Pls. Exh. 3 at 135. When counsel conferred regarding the filing of the Motion to Compel, Defendants again asserted blanket privileges, and again with no privilege log. Pls. Exh. 13 (Oct. 11, 2005 Letter).

Only in response to this Motion did the Defendants, for the first time, disclose the existence of information and numerous documents that were directly responsive to the Pueblo's discovery requests. But this production is too little and too late. Rule 26(b)(5) required the Defendants to provide such information about the nature of privileged documents and communications at the time

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[16] In one typical example, counsel refused to permit Mr. Black to answer whether the IHS CSC shortfall damage calculations were distributed outside IHS. Pls. Exh. 2 at 157. Yet, in a largely self-serving affidavit Defendants now detail at considerable length answers to this very question. Def. Ex. A ¶¶26-29.

they were requested but withheld. The repeated failure to provide a timely and detailed privilege log waives the litigant's privilege.[17]

The Advisory Committee Notes instruct that waiver was a contemplated remedy for non-compliance with Rule 26(b)(5): "A party must notify other parties if it is withholding materials . . . because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule . . . and may be viewed as a waiver of the privilege or protection." Waiver is appropriate here, given the Defendants' repeated failures to disclose even the existence of responsive documents, and their follow-on failure to allow the Pueblo to test the asserted privileges during depositions. *See* Pls. Exhs. 2, 3, 4, 5, 7 and 13.[18]

b. *Dissemination of Documents.* Any privilege that might otherwise attach was also waived when IHS attorneys and staff decided to distribute Mr. Demaray's computations to various mid- and low-level employees within IHS and DHHS, and then later to various OMB "individuals" and "staff." Def. Exh. A ¶ 26; Def. Exh. B ¶ 10. *See e.g., United States v. Ryans*, 903 F.2d 731, 741 n.13 (10th Cir. 1990) (privilege is waived by disclosure to third parties). When the client is by nature a group, as is true of both the government and corporations, "the test" for waiver is:

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[17] 8 Charles Alan Wright, Federal Practice and Procedure § 2016.1, at 228-29 (2d ed. 1994); *see e.g., Peat, Marwick, Mitchell & Co. v. Penn Square Bank*, 748 F.2d 540, 542 (10th Cir. 1985) ("It is not enough that a document would have been privileged if an adequate and timely showing had been made. The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.") Although waiver is a harsh remedy, *see Banks v. Office of the Senate Sergeant-at-Arms and Doorkeeper*, 226 F.R.D. 113, 116-117 (D.D.C. 2005), the Defendants' repeated failure to provide a privilege log warrants it.

[18] Defendants even withheld a published report IHS provided to Congress that contained "the annual CSC shortfall for fiscal years 1994 through 1997 with estimates of the projected shortfalls for fiscal years 1998 and 1999." Pls. Exh. 14 (with Plaintiff's correcting annotations). *See also* Pls. Exh. 9 (transmitting various newly-produced documents).

> whether the agency is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.' 184 U.S.App.D.C. at 361 n. 24, 566 F.2d at 253 n. 24. The purpose of the privilege is limited to protection of confidential facts. If facts have been made known to persons other than those who need to know them, there is nothing on which to base a conclusion that they are confidential.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980).

Within IHS and DHHS, Mr. Demaray's calculations went to a staff person in the Office of Tribal Programs (Mr. Sockey), Def. Exh. A ¶¶ 16, 21; to the Deputy Director for Health Policy, *Id.* ¶ 23; and to "an administrative support staff employee at IHS," *Id.* ¶ 24, all without any explanation why. The computations also went to employees in IHS's Finance Office "to update them." *Id.* ¶ 22. The Defendants have not demonstrated that Mr. Sockey, employees in IHS's Finance Office, the Deputy Director for Health Policy, and unidentified administrative support staff all needed to know the substance of Mr. Demaray's supposedly confidential communications with counsel. *Compare Alexander v. F.B.I.*, 186 F.R.D. 154, 162 (D.D.C. 1999) (denying the assertion of privilege where the Defense Department merely asserted that the recipient of information was a "Military Assistant to the Assistant Secretary of Defense for Public Affairs" and that he had "official interests in and responsibilities regarding this matter").

The calculations also went to various unknown "individuals" at OMB and "OMB staff." Defendants fail to meet their burden by failing to disclose who at OMB was provided the information, although presumably one individual was the OMB "Program Examiner" for IHS, Jennifer Gera. Def. Exh. A ¶ 9 (although Mr. McSwain refers to her as a "Budget Examiner," Def. Exh. B ¶ 8). Ms. Gera is but one of 25 "program examiners" in the OMB Health Division, hardly

a position privy to the "confidential" attorney-client communications of another agency. More significantly, disclosing the information outside DHHS was itself a waiver of the privilege. *But see* Opp. at 25 (erroneously suggesting the entire Executive Branch is the client of the IHS attorney, and that documents just need not be "too widely circulated"). "In the case of a government department or agency, [the client is] the department or agency that employed the attorney." *U.S. v. AT&T Co.*, 86 F.R.D. 603, 616 (D.D.C. 1980); *see also Willingham v. Ashcroft*, 228 F.R.D. 1, 7 (D.D.C. 2005) ("the client may be the agency and the attorney may be an agency lawyer"). Thus, disclosure of the computations to anyone at OMB waived any applicable privilege, be the disclosure oral or written.[19]

C. Production of IHS's Shortfall Data in Electronic Form is Not Unduly Burdensome

The Pueblo is not seeking duplicative discovery. First, the Defendants originally provided the Pueblo unusable and often unreadable documents, *see e.g.* Mather Aff, Exh. A-C, and thus did not fully comply with the substance of Fed.R.Civ.P. 34(b). Though the Defendants now have provided some of the documents in a more readable form, they should have done so in electronic format to avoid the very duplication problem they now complain of. Additionally, the Defendants have failed to address all the outstanding legibility problems.

Second, the Pueblo is seeking the documents "as they are kept in the usual course of business." Rule 34(b). As Mr. Demaray testified, he maintains these documents in EXCEL format.

[19] Mr. Demaray says his computations were "shared with these individuals orally." The attorney-client privilege is narrowly drawn and disclosure of any meaningful part of the privileged communication will waive the privilege "to all other communications relating to the same subject matter." *In re Sealed Case*, 29 F.3d 715, 719-20 (D.C. Cir. 1994).

Pls. Exh. 3 at 113, 123. It appears from the *Privilege Log* that electronic format is the only way these databases are transmitted between agency staff. Def. Ex. E (listing electronic documents only).

Third, Mr. Demaray testified that he is able to manipulate the shortfall data precisely because he maintains it in electronic format**.** Pls. Exh. 3 at 242. The Pueblo should have access to the data in the same manner. As discussed earlier, it would constitute an undue hardship for the Pueblo to encode manually this massive documentation, even if that were even possible. *Supra* 14, *citing Williams*, 119 F.R.D. at 651. (Inputting the data from hard copies of the unrefined shortfall reports that the Defendants have provided would also not replicate Mr. Demaray's March 2005 databases, given Mr. Demaray's "adjustments" for accuracy.)

Fourth -- and key to this issue -- the electronic format provides additional information, not purely duplicative information. Electronic documents contain "metadata," including additional columns, shading, embedded formulas and "comments." *See generally Williams v. Sprint/United Man. Co.*, 230 F.R.D. 640, 646 (D.Kan. 2005) (discussing metadata). Emerging standards recognize that "electronically stored information may be incomprehensible when separated from the system that created it." *Summary of the Report Of the Judicial Conference Committee on Rules of Practice and Procedure*, Agenda E-18 (Summary) Rules, September 2005 (recommending amendments to Civil discovery rules), at Rules App. C-18.[20]

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[20] For example, the Defendants' November 23 disclosure of additional CSC shortfall data provided two previously undisclosed documents, each in EXCEL format. The data is plugged into the spreadsheet in columns A through R, and T and U. Columns S and V through AA analyze the data with formulas like "=T14+O14" and "=SUM(0.8*V7)-Q7". The Pueblo can neither know nor verify these formulas without the electronic version of the document. Similarly, DEF 19909-e-g (Pls. Exh. 16) was originally provided in hard copy. On November 17, the Defendants produced a new DEF 19909e-g in EXCEL format. Not only is this the first readable version provided to the Pueblo; it also discloses formulas (*i.e.*, "=SUM(G23:I23)"). Significantly, this new version of the document contains differential "shading" (*i.e.*, color coding), and an entirely new column never previously disclosed. *Compare* Pls. Exh.

The two examples noted here in footnote are not unique. Given that word processing programs allow the creator to hide columns and formulas, the Pueblo cannot be sure what data or information is missing from a spreadsheet unless the Pueblo has the spreadsheet in electronic format. Thus, the Defendants should be compelled to produce this data too.

D. The Pueblo Has Moved in a Timely Manner.

Up until the deposition of Mr. Black and Mr. Demaray during the week of September 20, Defendants had successfully withheld the existence of any IHS class-wide CSC damage calculations. They even failed to provide a privilege log identifying unproduced documents and related communications, notwithstanding direct discovery requests on the point (including repeated requests for a privilege log). Pls. Exhs. 4 and 5; Pls. Exh. 10. Similarly, Defendants denied there existed any communications with Congress regarding such matters, and even challenged Pueblo's counsel to prove otherwise. Pls. Exh. 7, p.4; *but see supra* 20 n.18.

Notwithstanding this studied omission of the facts, Mr. Black and Mr. Demaray honestly admitted that both categories of information existed and disclosed the barest outline of their knowledge. These depositions raised for the first time significant questions regarding grave problems in the discovery process that, until that point, the Pueblo had been unaware of. The Pueblo timely filed its Motion to Compel within 20 days of those deposition disclosures.

Not until weeks after the filing of this Motion did Defendants finally respond with limited information; improved hard copies of some data; and limited data in EXCEL format. Even then,

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16 with Pls. Exh. 17 (excerpt of EXCEL document, condensed for filing here) (new column "Notes").

government counsel's cover letter made plain that the production covered only what the Defendants were choosing to produce or to log, and not the entire universe of documents responsive to the Pueblo's outstanding discovery requests. Pls. Exh. 9 (Nov. 10, 2005 at 3) ("We are voluntarily providing you with some of the documents that you are requesting.") (emphasis added).

The Defendants' belated and self-limited production does not moot this Motion. Nor does Mr. Demaray's carefully crafted affidavit, replete with lawyer-talk on key issues, substitute for Mr. Demaray's duty to answer the questions posed at his deposition without interference from Defendants' counsel. If anything, the significant post-Motion production and the new affidavit compel another opportunity to depose Mr. Demarary.

CONCLUSION

For the foregoing reasons and those set forth in the Pueblo's opening Memorandum, this Court should order the production of the adjusted CSC shortfall data (*i.e.*, the class-wide CSC damage computations). The Court should also order that the Pueblo be allowed to re-depose Mr. Demaray about his CSC shortfall damage computations. In this respect (and with the Defendants' consent) the Plaintiff has reserved the right to take a Rule 30(b)(6) deposition regarding "IHS calculations of potential class damages recoverable in Zuni v. United States," *see* Dkt. 154, ¶8, a further deposition that should now be permitted to go forward. Further, the Court should order production of all shortfall data and damage calculations in EXCEL or other CSC databases in which such records are maintained by IHS. Finally, the Pueblo respectfully requests that the Court award it attorneys' fee pursuant to Rule 37(a)(4)(A) (*see* also 28 U.S.C. § 2412(b), allowing fees against the government), as set out in the Affidavit of Lloyd B. Miller and attachment thereto (Pls. Exh. 15).

Respectfully submitted this 16th day of December 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL (Dkt. No. 136)** to the following attorneys of record this 16th day of December, 2005:

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By:____
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