IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS,

vs.

**UNITED STATES OF AMERICA; MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services; DIRK KEMPTHORNE, Secretary of the United States Department of the Interior,**

DEFENDANTS.

**No. 1:02CV02413 (RBW)**

**MAGISTRATE JUDGE DEBORAH A. ROBINSON**

**RENEWED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND RENEWED OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

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# PART ONE
# MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

## OVERVIEW

Plaintiffs are an Indian tribe and a tribal organization who were underpaid for health care rendered on contracts with the United States of America issued pursuant to the Indian Self-Determination Act of 1975 (ISDA), 25 U.S.C. §§ 450 *et seq*. As held by the Supreme Court in *Cherokee v. Leavitt*, 543 U.S. 631, 125 S.Ct. 1172 (2005) (*Cherokee*), such contracts are governed by ordinary contract law and are no less binding than procurement contracts. Defendants are the United States and two cabinet Secretaries who for twenty years have resisted explicit congressional directives.

At issue is the manner in which the Secretaries, operating jointly, calculate the price term of a key component of funding called indirect contract support costs (CSC).

Even before *Cherokee*, the 10th Circuit ruled against the United States in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (Exh. 1), involving ISDA contracts issued by the Bureau of Indian Affairs (BIA) on one of Plaintiffs' claims in this case: improper rate depression caused by including in the rate fraction programs of agencies that do not pay or limit payment of indirect costs. Collateral estoppel applies against the Indian Health Service (IHS) on that issue.

A second category of rate manipulations was discovered after the *RNC v. Lujan* decision and in discovery in this case. This involves improper adjustments to the rate through carryforwards ostensibly intended to reconcile actual costs and needs for indirect CSC with a previous period's estimates. As employed by Defendants carryforwards improperly reduce the rate further.

The motion seeks an order: [1] declaring the United States in breach of contract and liable in money damages for the years 1995, 1996, and 1997 for (a) rate reduction caused by inclusion of non-paying-other-agencies in the base, and (b) rate reductions caused by carry-forward accounting; and [2] mandating reform of the improper practices.[1]

The federal government has long recognized the obligation to provide health care to American Indians, Snyder Act, 25 U.S.C. §§ 13, 13-1, 13a, 13b. In 1975, Congress enacted ISDA, directing the Secretaries of Interior and HHS to contract with qualified Indian tribes and tribal organizations to operate the programs previously run by distant and ineffective federal bureaucracies. The legislation is remedial and seeks to ensure that tribes and tribal organizations may exercise their right to contract without diminution of services.

The price term of the ISDA contract consists of the "secretarial amount," what the agency would have expended had it operated the program itself, together with "contract support costs" (CSC), additional overhead needed for the tribe to operate the program without any reduction in service. "Direct CSC" are those costs readily identified with the operation of a particular program. This lawsuit concerns "indirect CSC" (or "indirect costs"), which are common overhead costs not readily identified with a particular program. Indirect cost rates are a fraction whose denominator is all program monies from whatever source and whose numerator is all estimated common costs of administration of those programs

The motion is confined to fiscal years 1995-97 because those were years in which "lump sum" appropriations were enacted for IHS without any specific earmark of funds for CSC. The

[1] A Third Partial Settlement of *Ramah v. Lujan* embodying such reform for the BIA ISDA contracts is in negotiation. *Ramah Navajo Chapter v. Kempthorne*, D.N.M., No. CIV 90-0957, Doc. 1135, April 24, 2008.

liability for contract obligations in those years, even if the Secretary had expended the full sum internally budgeted by the agency for CSC, was confirmed by the unanimous Supreme Court in *Cherokee*. ISDA contracts remain enforceable, payable from the Judgment Fund if the Secretary has expended his internal budget for the category encompassed by the contract.

The Court's jurisdiction rests on 25 U.S.C. § 450m-1(a) and 41 U.S.C. §§ 601 *et seq.*, and other jurisdictional statutes cited in the second amended complaint.

**THE STATUTORY SCHEME AND ITS LEGISLATIVE HISTORY**

The objective of the ISDA is to put tribes in charge of providing their own governmental services.[2] The IHS and the BIA contract with qualified tribes and tribal organizations to provide the services theretofore provided by these agencies. 25 U.S.C. § 450f(a)(1). Under the Model Agreement mandated by P.L. 103-413, 25 U.S.C. § 450*l*(c), Section 1(a)(1), the provisions of Title I of ISDA are incorporated into every ISDA contract. Under the Model Agreement the Secretary of the Interior and the Secretary of Health and Human Services "act as agents of the United States", § 450*l*(c), § 1(a)(1); Plaintiffs' Statement of Material Facts (*Facts*) ¶ 9*; see also* Doc. 48 (Amended Memorandum Opinion), at 36. The Model Agreement embodies a liberal rule of construction in favor of contractors, § 1(a)(2). In consideration of the contractors' performing

[2] ISDA was not designed to force Indian tribes "to make hard choices." The intent of ISDA is to allow the transfer of programs to the tribes with no reduction in services. *See, e.g.*, 25 U.S.C. § 450a(a) (recognizing United States' "obligation … to assur[e] maximum Indian participation in the direction of educational as well as other Federal services to Indian communities" and (b) Congress' "commitment … to establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." *See also* 25 C.F.R. § 900.3(a)(1), (2), (4), (5), (9), and (b)(1), (3), (5), (7), (8), (10), and (11). Defendants' "hard choices" argument demonstrates how they have lost sight of their trust responsibility to Indian tribes and members.

services the United States agrees to pay the secretarial amount – the amount the agency would have paid had it provided the service – plus full CSC. The statutory provisions critical to this motion incorporated into the contracts are:

•***25 U.S.C. § 450j-1(a)(1)*: [The Secretarial Amount]** the amount the Secretary would spend for his own direct operation of the program;

•***25 U.S.C. § 450j-1(a)(*2: [Contract Support Costs]** the additional costs of administering the program which the Secretary would not have to expend, such as insurance or legal costs including both direct CSC and indirect CSC, *id*. § 450j-1(a)(3);

• ***25 U.S.C. § 450j-1(a)(4)*: [Contractor Retention of Savings]** any savings may be used to expand program services or carried over to the next fiscal year.

•***25 U.S.C. § 450j-1(d):* [Prohibition Against Rate Dilutions in Carryforwards]:**

> (2) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, **such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount** for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization. . . (2) **nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.** [Emphasis added.]

•***25 U.S.C. § 450j-1(g)*: [Mandatory Funding]**

> Upon the approval of a self-determination contract, **the Secretary shall add to the contract the full amount of funds to which the contractor is entitled** under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract. [Emphasis added.][3]

[3] This directive is repeated in the Model Agreement, § 1(b)(4).

In the process of enacting the 1988 amendments, Congress specifically addressed abuses raised by Plaintiffs. They include agency resistance and the failure of the BIA and the IHS to pay full indirect costs:

> [T]he Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from direct program costs, which results in decreased amounts of funds for services.

S. Rpt. 100-274, at 12 (1988)(Exh.[4] 62, at 6).

> [T]he term 'contract costs' is intended to insure that the Federal government provides an amount of funds to a tribal contractor that will enable the contractor to provide at least the same amount of services as the Secretary would have otherwise provided.

*Id*. at 16 (Exh. 62, at 8).

> A new section 106 [25 U.S.C. § 450j-1]. . . protects the contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for the costs incurred by the federal government. The protection of contract funding will provide year-to-year stability for tribal contractors, and will contribute to better tribal planning, management, and service delivery.

*Id.* at 30 (Exh. 62, at 19). There is no contrary legislative history.

In 1994, finding the BIA and IHS still intransigent, Congress enacted more amendments, Public Law 103-413, removing most of the agencies' rule-making authority, 25 U.S.C. § 450k; re-emphasizing that full contract support costs must be paid to ensure delivery of services at the Secretarial level; and adding a requirement that direct CSC be included in addition to indirect CSC, 25 U.S.C. § 450j-1(a)(3)(i). To explain its reforms, Congress stated:

> Throughout this section the Committee's objective has been to **assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation**. In the absence of section 106(a)(2) as amended, a tribe would be compelled to divert program funds

[4] "Exh." refers to Plaintiffs' exhibits, filed herewith. Exhibits to Defendants' cross-motion are identified as "*Def. Exh*."

> to prudently manage the contract, a result Congress has consistently sought to avoid.

S. Rpt. 103-374, at 9 (emphasis added).

In 1994, Congress also mandated the Model Agreement, commenting:

> Section 1(b)(3) [codified as 25 U.S.C. § 450*l*(c) *Model Agreement* sec. (1)(b)(4)]. . . provides that the Contractor shall receive no less than the Secretary would have provided for the operation of the program or portions thereof for the period covered by the contract, **plus funding for contract support needs.**

*Id*., at 11 (emphasis added).

In 1997, the IHS itself told Congress:

> The full funding of CSC [contract support costs] is integral to tribes being able to assume the operation of IHS and other Federal programs. . . . The failure to adequately fund CSC inhibits the ability of tribes to develop the capability and expertise to manage services to their own people, and is directly responsible for inhibiting the number and scope of new tribal requests. This is contrary to the policy of the Congress and the intent of the ISDA. . . . There is simply no incentive for tribal governments and organizations to assume IHS [programs] knowing they may have to reduce already under-funded health services.

Exh. 19, at 5-6. Despite this admission, nine years later the IHS still resists the statutory command.[5]

## VIOLATIONS IN CALCULATING INDIRECT CONTRACT SUPPORT

### 1. Indirect Cost Rates Are An Accounting Tool Developed For In-House Use By Federal Agencies And Were Never Intended To Serve As A Measure of A Contract Entitlement.

Indirect costs represent 80% of all CSC. *Facts* ¶ 64. To determine the amount of indirect CSC required by ISDA, the agencies multiply the "secretarial amount" by the contractor's

[5] This was a special report to Congress. IHS admits it has never submitted the required annual contract support shortfall report mandated in 25 U.S.C. § 450j-1(c). *Facts* ¶ 76.

"indirect cost rate." *Facts* ¶¶ 5, 15, 18, 22. Defendant Kempthornes's National Business Center ("NBC")(formerly the Office of Inspector General, "OIG"), an agency of the Interior Department, calculates an "indirect cost rate" for each contractor through use of guidelines set forth in OMB Circular A-87 and related circulars.

OMB Circular A-87 was designed to allocate administrative costs of federal programs for federal accounting purposes. It was not intended to serve as a means for determining contract prices for federal contracts. *Facts* ¶¶ 15-16. The circular nevertheless does contain provisions that would allow the agency to more nearly meet the statutory ISDA command regarding CSC. 2 C.F.R. pt. 225, Appx. E, ¶ E.3. But neither Secretary has attempted to make the system consistent of ISDA. *Facts* ¶¶ 71-72.

Although Defendant Secretaries have joint responsibility to implement ISDA and carry out Congress' intent, each Secretary disclaims responsibility. The Secretary of HHS pleads he has no control over rate-making; the Secretary of the Interior pleads he only sets a rate and has no responsibility for contracting with Plaintiffs. *Facts* ¶ 73. Where both share responsibility through joint regulations, pleading non-involvement or ignorance is not a valid defense.

**2. Including Non-Paying Agencies In The Base Ensures Inadequate Administration of ISDA Programs.**

The indirect cost rate is established according to a complex protocol, *Facts* ¶¶ 15-26, 33-34, several elements of which are challenged. Since no other federal and state agencies are under statutory mandate to pay contract support costs in the manner of ISDA, and since most other federal and state agencies restrict or prohibit program monies use for administration, the requirement to include all of those agencies' programs in the rate base produces underfunding of ISDA mandated indirect costs. Plaintiffs cannot recover the entire pool from outside sources and

are left without sufficient funds to operate their ISDA programs at full efficiency. *Facts* ¶¶ 7, 27-32, 42-46, 50-51, 59-60. The result impedes contractors' ability to administer the services at the level the agency would have provided.

If, for example, the contractor has an IHS base of $1,000,000 and an indirect costs need (indirect cost pool) agreed to by NBC of $500,000 and runs no other programs, its indirect cost rate is 50% (500,000÷1,000,000). The contractor is entitled to "the Secretarial program" amount of $1,000,000 plus the total indirect cost pool amount of $500,000.

If the contractor adds an additional program of $250,000 from another federal agency which does not allow or provide for any common costs to be charged to its program, Defendants' methodology produces a rate of 40% ($500,000÷1,250,000). Yet Because of the generally inelastic nature of the common costs, the contractor's indirect cost pool does not adjust in the same proportion as changes in the base. *Facts* ¶¶ 19-30. IHS pays only $400,000 (40% X $1,000,000) and the other $100,000 goes unpaid.

This example illustrates the violation found by the Tenth Circuit in *RNC v. Lujan.* Because indirect costs are common costs, every dollar in the indirect cost pool is needed to operate every program in the base. Depending on the mix of programs in the base and their levels of reimbursement of common costs, the damages will vary, but it is clear that any indirect cost dollar not collected by the ISDA contractor will hurt operation of the ISDA program to some extent.[6] *RNC v. Lujan* has already conclusively ruled as a matter of law on this issue.

3. **The Carryforwards Compound The Problem**.

Most ISDA contractors use a "fixed with carryforward rate" ("FCF"). This allows

[6] If a cost in the indirect cost pool varies in direct proportion to a cost in the base, it would be a direct cost and be placed in the base by the A-87 rules. *Facts* ¶ 19.

adjustments to future year rates in lieu of immediate payments from one party to the other if actual indirect costs incurred in a given year vary from estimates. Several carryforward practices and assumptions operate to further depress the rate below the level mandated by ISDA. Each of these practices violates the "other adverse adjustments" clause in 25 U.S.C. § 450j-1(d)(1):

**(1).** **assuming, incorrectly**, that what the contractor actually spends (incurs) in indirect costs represents its need for indirect CSC. The assumption ignores ISDA contractors' inability for lack of tax bases or business income to spend the full estimated amount of indirect costs except by reducing programs or using tribal governmental funds which in turn diminishes tribal services. In other words, the amount spent for indirect CSC is not a good indicator of what a contractor needs, because indirect costs are almost never collected in full. *Facts* ¶ 35[9]; exh. 33, at 4, ¶¶ 12-13.

**(2).** **shunting** most FCF under-recoveries, which would otherwise operate to increase a future year's rate and recovery to pay back for a previous year's loss, into an arbitrarily non-recoverable slot called the "shortfalls" column, which unjustifiably excludes them from normal carry forward rate calculations. *Facts* ¶¶ 36, 53, 64; exh. 33, at ¶¶ 18-23.

This practice, in violation of § 450j-1(d)(1), defeats Congress' mandate to provide full funding of indirect contract support to ISDA contractors. *RNC v. Lujan*, 112 F.3d at 1463.[7] It breaches the premise that both will recover reciprocally for over- or under-recoveries through a future rate adjustment either upward or downward, if indirect costs in a given period do not equal estimates. Only downward rate adjustments are generally recognized and therefore only the

[7] In the years 1997 forward, RNSB's rate calculation, like Tunica's in 1996, reflected major use of the "shortfall" column by NBC and OIG. RNSB did not experience "shortfalls" in 1995, 1996, and 1997 when the Western OIG Region did not make use of that column. In 2001, NBC improperly implemented a change eliminating the Western approach and thence employing the Eastern method which was applied retroactively to RNSB back to 1997 when it applied for a new rate in 2005. *Facts* ¶ 63.

Defendants reap the rewards of the promised carryforward.

NBC employs a shortfall column only for Indian tribes because it is aware that only ISDA contract prices are determined on the basis of rate. It is the only federal rate-making agency that employs a "shortfall" column and only for ISDA contractors. *Facts* ¶ 36.[8]

**(3). double counting over-recoveries** (referred to here as "double dipping") from prior years to effect reductions in the contract price for indirect CSC in the next rate cycle (the second succeeding year) whereby the government is made whole, then effecting a further unjustified reduction for the initial over-recovery in the rate calculation for the fourth succeeding year,. *Facts* ¶¶ 37, 52, 61. This practice reimburses the government twice for a single over-recovery.[9]

**(4). counting diverted program or tribal monies as indirect cost recoveries** in the carryforward process, further driving down indirect cost rates and program levels. *Facts* ¶¶ 38-39; exh. 33, at 19 ¶ 54. This unauthorized practice diminishes program services and skews annual CSC reports to Congress.

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[8] For example, Secretary Leavitt's Division of Cost Allocation – the HHS equivalent of NBC – does not shuffle under-recoveries into an unrecoverable "shortfalls" slot in its indirect cost calculations. Exh. 25, at 14-16. *Compare* Exh. 9 (NBC's "Template to calculate the carryforward amount for Native American entities") *with* Exh. 10 (NBC's "Template to calculate the carryforward amount for state and local governments and non-profit organizations").

[9] Plaintiffs deposed Defendants' FRCvP 30(b)(6) designees on indirect cost issues – one the Associate Director of Self-Determination Services for IHS and the other NBC's Indirect Cost Coordinator. Both designees were or appeared to be unaware of this double dipping for which neither could offer any immediate rationale. The IHS' designee as much as admitted that it appeared to be a prohibited adverse adjustment, Exh. 22 (Demaray depo.) 6, 32-35, especially 34-34; exh. 11 (Moberly depo.), at 5-6, 22-29, especially 25. Ms. Moberly's predecessor as Indirect Cost Negotiator similarly could not explain why NBC deducted the same over-recovery in two successive calculation cycles. Exh. 12, at 4-8, especially 7-8. Both Tunica and RNSB have had their contract prices reduced improperly by double dipping. *Facts* ¶ 52, 61.

**(5.) (applies only to RNSB) counting P.L. 100-297 funds in carryforwards calculation.** ***Facts*** **¶ 62; esh. 33, at 18 ¶ 51.**

The cumulative harm caused by each of these rate defects is shown through the spreadsheets of Marcel Kerkmans shown below.

Exhibit 1: Part 1 — TUNICA CUMULATIVE IMPACTS

| | | | 1995 | | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | **IHS Actual Base** | | **$ 354,893** | | **$ 432,694** | **$ 336,320** | **$ 357,151** | **$ 348,629** | **$ 360,364** | **$ 377,888** | **$ 403,619** | **$ 382,704** | **$ 415,063** | **$ 415,694** |
| 2 | | | | | | | | | | | | | | |
| 3 | **Government Rate** | | **53.23%** | | **54.78%** | **23.35%** | **30.96%** | **19.69%** | **26.86%** | **26.84%** | **27.25%** | **19.85%** | **19.22%** | **20.85%** |
| 4 | | | | | | | | | | | | | | |
| 5 | Adjusted for *Ramah v Lujan* | | 4 11% | | 11 33% | 0 73% | 0.425% | 0 18% | 0 348% | 0 21% | 0 496% | 0.31% | 3 65% | 4 48% |
| 6 | Adjusted for Double Dipping | | 0.00% | | 13 94% | 2 02% | 1 73% | 2 70% | 1 32% | 2.35% | 1 13% | 2 77% | 2 54% | 2 34% |
| 7 | Adjusted for Shortfall | | 2 15% | | 2 62% | 1 83% | 1.71% | 0 48% | 1.49% | 1 36% | ' 2 72% | 3 88% | 3.79% | 2 26% |
| 8 | | | | | | | | | | | | | | |
| 9 | **Corrected Rate** | | **59.49%** | | **82.67%** | **27.93%** | **34.83%** | **23.05%** | **30.02%** | **30.76%** | **31.60%** | **26.81%** | **29.20%** | **29.93%** |
| 10 | | | | | | | | | | | | | | |
| 11 | IHS Claims It Paid | | $ 165,806 | | $ 162,691 | $ 163,016 | $ 164,047 | $ 176,273 | $ 163,016 | $ 182,884 | $ 217,126 | $ 187,577 | $ 216,538 | $ 156,665 |
| 12 | Plf Exh. 42 | | | | | Pg 16 | Pg 18 | Pg 20 | Pg 22 | Pg 24 | Pg 26 | Pg 28 | Pg 30 | Pg 32 |
| 13 | Overrecovery Carry-forward Payback | (1) | $ 83,353 | | $ 41,875 | $ 84,456 | $ 53,549 | $ 107,660 | $ 66,152 | $ 95,738 | $ 107,173 | $ 113,607 | $ 136,773 | $ 69,956 |
| 14 | Plf Exh 42 | | | | | Pg 16 | Pg 18 | Pg 20 | Pg 22 | Pg 24 | Pg 26 | Pg 28 | Pg 30 | Pg 32 |
| 15 | Net Payment | (2) | $ 82,453 | | $ 120,816 | $ 78,560 | $ 110,498 | $ 68,613 | $ 96,864 | $ 87,146 | $ 109,953 | $ 73,970 | $ 79,765 | $ 86,709 |
| 16 | | | | | | | | | | | | | | |
| 17 | Government's Contract Price for CSC | (3) | $ 188,910 | (4) | $ 237,030 | $ 78,531 | $ 110,574 | $ 68,645 | $ 96,794 | $ 101,425 | $ 109,986 | $ 75,967 | $ 79,775 | $ 86,672 |
| 18 | | | | | | | | | | | | | | |
| 19 | **Corrected Contract Price for CSC** | (5) | **$ 211,126** | | **$ 357,708** | **$ 93,934** | **$ 124,378** | **$ 80,359** | **$ 108,174** | **$ 116,238** | **$ 127,527** | **$ 102,603** | **$ 121,198** | **$ 124,417** |
| 20 | | | | | | | | | | | | | | |
| 21 | **DAMAGES** | (6) | **$ 22,216** | | **$ 120,678** | **$ 15,403** | **$ 13,804** | **$ 11,714** | **$ 11,380** | **$ 14,813** | **$ 17,541** | **$ 26,636** | **$ 41,423** | **$ 37,745** |
| 22 | | | | | | | | | | | | | | |
| 23 | **CUMULATIVE DAMAGES** | | | | | | | | | | | | | **$ 333,355** |

(1) See my declaration ¶¶ 15-25 and Plf Exh 42
(2) Line 11 minus line 13
(3) Line 1 multiplied by line 3
(4) This is the product of applying the rate of 53 23% to the IHS base, the 1995 annual funding agreement recited a rate of 57 4% but in fact multiplied the base by 52 9%
(5) Line 1 multiplied by line 9
(6) Rate damages (line 19 minus line 17) are net of total damages (line 19 minus line 15).

Attachment A (2) — RNSB CUMULATIVE IMPACTS

| | | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | **IHS Actual Base** | | **$ 1,496,944** | **$ 1,537,975** | **$ 1,531,178** | **$ 1,679,525** | **$ 2,029,752** | **$ 2,411,556** | **$ 2,229,056** | **$ 2,193,929** | **$ 2,568,729** |
| 2 | | | | | | | | | | | |
| 3 | **GOVERNMENT RATE** | | **25.80%** | **21.30%** | **17.20%** | **20.49%** | **19.33%** | **18.40%** | **17.30%** | **17.04%** | **30.17%** |
| 4 | | | | | | | | | | | |
| 5 | Adjusted for *Ramah v Lujan* | | 1.04% | 0.37% | 0 28% | 1.20% | 0.94% | 0.93% | 0.28% | 0.61% | 1 45% |
| 6 | Adjusted for PL-100-297 | (1) | 0.08% | 1.42% | 1 38% | N/A | N/A | N/A | N/A | N/A | N/A |
| 7 | Adjusted for Double dipping | | 1.65% | 1.94% | 1.37% | 0.71% | 0.62% | -0.45% | 0.37% | 0 13% | 0.99% |
| 8 | Adjusted for Shortfall | | 0 00% | 0.00% | 0.00% | 2.21% | 1 41% | 0.98% | 1.21% | 1.15% | 1.16% |
| 9 | | | | | | | | | | | |
| 10 | **Corrected Rate** | | **28.57%** | **25.03%** | **20.23%** | **24.61%** | **22.30%** | **19.86%** | **19.16%** | **18.93%** | **33.77%** |
| 11 | | | | | | | | | | | |
| 12 | IHS Claims It Paid | | $ 328,505 | $ 336,720 | $ 370,895 | $ 478,228 | $ 483,666 | $ 500,063 | $ 540,832 | $ 417,815 | $ 417,815 |
| 13 | | | | | | | | | | | |
| 14 | Overrecovery Carry-forward Payback | (2) | $ 130,825 | $ 60,924 | $ 77,394 | $ 62,257 | $ 71,244 | $ 36,691 | $ 243,521 | $ 65,798 | $ 64,007 |
| 15 | | | | | | | | | | | |
| 16 | Net Payment | (3) | $ 197,680 | $ 275,796 | $ 293,501 | $ 415,971 | $ 412,422 | $ 463,372 | $ 297,311 | $ 352,017 | $ 353,808 |
| 17 | | | | | | | | | | | |
| 18 | Government's Contract Price for CSC | (4) | $ 386,212 | $ 327,589 | $ 263,363 | $ 344,135 | $ 392,351 | $ 443,726 | $ 385,627 | $ 373,846 | $ 774,986 |
| 19 | | | | | | | | | | | |
| 20 | **Corrected Contract Price for CSC** | (5) | **$ 427,677** | **$ 384,955** | **$ 309,757** | **$ 413,331** | **$ 452,635** | **$ 478,935** | **$ 427,087** | **$ 415,311** | **$ 867,460** |
| 21 | | | | | | | | | | | |
| 22 | **DAMAGES** | (6) | **$ 41,465** | **$ 57,366** | **$ 46,395** | **$ 69,196** | **$ 60,284** | **$ 35,209** | **$ 41,460** | **$ 41,465** | **$ 92,474** |
| 23 | | | | | | | | | | | |
| 24 | **CUMULATIVE DAMAGES** | | | | | | | | | | **$ 485,315** |

(1) The P L 100-297 error was corrected for 1998 and later years.
(2) See my declaration ¶¶ 15-25
(3) Line 12 minus line 14
(4) Line 1 multiplied by line 3.
(5) Line 1 multiplied by line 8.
(6) Rate damages (line 20 minus line 18) are net of total damages (line 20 minus line 16)

## STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FRCvP 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). "Contract interpretation is a matter of law . . . ." *Neal & Co. v. United States*, 945 F.2d 385, 390 (Fed. Cir. 1991) (citing *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985)). Thus, contract interpretation is suited to resolution by summary judgment. *P.R. Burke Corp. v. United States*, 58 Fed. Cl. 549, 554 (2003).

## ARGUMENT

### I. THE ISDA REQUIRES A DEFINITE PRICE TO BE INCLUDED FOR CONTRACT SUPPORT COSTS IN THE FULL AMOUNT REQUIRED TO RUN THE CONTRACTED PROGRAM.

#### A. The Statute Requires A Contract Price Including Full Contract Support Costs.

The Secretarial amount together with the **full amount of CSC necessary to operate the program without diminution of services** represents the contract price term. 25 U.S.C. § 450j-1(g). Several recent as well as older decisions have vigorously confirmed this mandate: In *Ramah Navajo School Board, Inc. v. Leavitt*, D.N.M. No. 6:07-cv-289 (2008), (Exh. 71) RNSB is suing to reverse a declination premised on the IHS' theory that it was not appropriated enough CSC to fund the contract. In granting summary judgment to RNSB, the court construed § 450j-1(b) as follows:

> The plain language of the statute provides that the applicable funding level for a self-determination contract is the amount the Secretary would have provided plus contract support costs. Consequently, RNSB's proposal, which seeks the amount the Secretary would have provided plus contract support costs, is not in excess of the applicable funding level as determined under § 450j-1(a). Defendants'

> argument that the "applicable funding level" is determined by reference to the amount of appropriations available is not supported by the statutory language and framework. While the statute does provide that the provision of funds under a contract is subject to the availability of appropriations, it does not make the approval of a contract conditioned on the availability of funds.

*Id.,* at 11. In *Menominee Indian Tribe v. United* States, __ F. Supp.2d __, 2008 WL 680379 (D.D.C. March 14, 2008), an Indian tribe is suing for CSC during cap years as well as lump sum years. Refuting the Secretary's argument that the tribe was bound to a contract for a definite but smaller amount than needed because of an appropriation cap, the court held against the United States and for the tribe saying:

> In his brief, the Secretary asserts that "ISDA does not mandate the payment of a specific amount of indirect CSC," Def.'s Mem. at 16, and "[i]t is the contracts themselves that create an entitlement to CSC." *Id*. at 17. These statements represent a very troubling misapprehension of the statute. ISDA mandates the payment of *full* indirect CSC and ISDA itself establishes that entitlement. *Ramah Navajo Sch. Bd., Inc., v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("[T]he [ISDA] requires the Secretary to allocate certain Contract Support Funds to cover the full administrative costs the Tribe will incur . . . . [and] which the statute refers to as an entitlement of the contracting Tribes." (citing 25 U.S.C. § 450j-1(g)).

See *MAPCO Petrol., Inc. v. United States*, 27 Fed. Cl. 4095, 430-31 (1992), *overruled on oth. grds. Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005)(statutory benefit intended for govt. contractors may not be waived except in narrow circumstances); *Seldovia Village Tribe,* Interior Board of Contract Appeals Nos. 3862 and 3863 (2003) (Exh. 66), at 11 (applying *MAPCO* rule to ISDA contract dispute; held, ISDA contractor was entitled to full contract support costs despite having signed a funding agreement for a lower amount).

In *GHS Health Maintenance Org. v. United States*, 76 Fed. Cl. 339, 369 (2007), the issue concerned a mandatory regulation applied peremptorily to contracts with health care providers prohibiting the normal yearly reconciliations (akin to carryforwards) in the final year of a contract.

The agency had promulgated the rule without statutory authority. The contractors were entitled to reformation to remove the offensive clauses and had not waived their rights by signing the coerced agreements. The court in GHS held that attempting to change the rule administratively was futile, denying a waiver defense since the governing act was written for the contractors' benefit.

At the least, the Secretaries are both charged with knowledge of the necessity of reforming the rate-making system since *RNC v. Lujan* was decided.

**B. The United States Is Liable In Money Damages For Any Breach Of The Contract Price Provisions Of Plaintiffs' Contracts During Lump Sum Years.**

While this headline applies to all years, *Cherokee Nation v. Leavitt*, 543 U.S. at 634-635, 125 S. Ct. at 1176, settled the question of whether the United States is liable for breach of an ISDA contract's price term during lump sum years, the only years at issue on this motion. Where an appropriation is larger than given contract obligations, the appropriation is deemed available to pay the contract debt even if the Secretary has expended the entire appropriation for other legitimate purposes. If the Secretary cannot pay the debt, it is paid from the Permanent and Indefinite Judgment Fund, 31 U.S.C. § 1304, incorporated into the CDA by 41 U.S.C. § 612. Plaintiffs could not reasonably be charged with knowing the condition of the appropriation at the Treasury. *Dougherty v. United States*, 18 Ct. Cl. 542, 503 (1882) (persons contracting with government … under general appropriation are not bound to know "the condition of the appropriation account at Treasury or on the contract book of the Department"); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (contractor who is one of several to be paid from appropriation not chargeable with knowledge of its administration and his legal rights are not affected by expenditure of appropriation for other purposes). The *Cherokee* rule applies to all the injuries caused by the rate manipulations challenged here.

## II. THESE RATE-MAKING PROCEDURES VIOLATE ISDA AND CONSTITUTE BREACHES OF CONTRACT.

### A. *RNC v. Lujan* Fully Adjudicated The Other-Agencies-In-Base Issue And Is Preclusive.

The base amount of indirect CSCs was adjudicated in a class action against the United States in which Tunica and RNSB were both class members. In *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455, 1462 (10th Cir. 1997) (Exh. 1) ("*RNC v. Lujan*"), the Court of Appeals, reversed the district court and granted summary judgment to the plaintiff class, holding that the inclusion of non-indirect-cost-paying agencies in the base violated the ISDA by depriving the plaintiffs of "full funding of indirect costs." This case has preclusive effect because of mutuality of parties and issues. None of the grounds for not applying collateral estoppel are present.[10] HHS employs the same rate-making methodology held illegal for BIA.

#### 1. *Stauffer* and *Mendoza* Provide the Principles of Mutuality,

Under ISDA the Secretaries of the Interior and HHS enter into contracts as agents of the United States. *Facts* ¶ 9. Each uses the rate issued by the same cognizant agency to Plaintiffs

[10] In discussing mass tort class actions, Newberg on Class Actions, 4th ed., § 17:51 in a lengthy discussion generally extols the virtues of applying collateral estoppel even where disparate damages for individual victims are to be determined. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979) sets forth four criteria for denying offensive collateral estoppel. None applies here: (1) **where the defendant was not given a fair opportunity to defend:** *RNC v. Lujan* was itself a certified class action, and the Defendants had every opportunity and incentive to defend; the then Secretary of HHS was aware of the case and could have intervened in it. Indeed she participated, benefitting from a partial release; (2) **where the damages were nominal and thus the incentive to vigorously defend was absent:** damages in *RNC v. Lujan* were anything but nominal ( $76 million partial settlement); (3) **where there were previous judgments in favor of defendant:** there are no judgments at odds with the *RNC v. Lujan,* a case of first impression; and (4) **where there are procedural advantages to plaintiff in the second case not available in the first:** there are no procedural advantages to Plaintiffs here not available in *RNC v. Lujan*.

(and the majority of ISDA contractors) and each therefore uses the OMB Circular A-87 rate procedure to determine indirect CSC. The two Secretaries employ a single set of regulations to implement ISDA. 25 C.F.R. pt. 900. Plaintiffs Tunica and RNSB were and are members of the *RNC v. Lujan* plaintiff class and are bound by that decision. *Facts* ¶ 13. The Indian Health Service participated in the first *RNC v. Lujan* settlement and received a partial release. *Facts* ¶ 14. The principles of mutuality required to establish collateral estoppel against federal government agencies are set forth in the 1984 companion cases of *United States v. Stauffer Chemical Co.,* 464 U.S. 165, 104 S.Ct. 575, and *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568.

In *Stauffer*, the United States twice sued the same chemical manufacturer for refusal to allow inspections by EPA-contracted inspectors. In the first case, *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981), the manufacturer successfully resisted inspection of its plant because the contracted inspector refused to agree not to disclose trade secrets. In the second case, the EPA tried to inspect another Stauffer plant through a different contracted inspector. Stauffer challenged the EPA's civil contempt warrant on grounds of collateral estoppel. The district court agreed. *United States v. Stauffer Chemical Co.*, 684 F.2d 1174 (6th Cir. 1982). The Sixth Circuit sustained the district court based on its own reading of the legislation, Judge Jones concurring in the result but on the district court's theory that collateral estoppel barred relitigation. Affirming the result, the Supreme Court followed Judge Jones: "[T]he doctrine of mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." 464 U.S. at 169.

*Mendoza* reached the opposite conclusion because of lack of mutuality where the party

asserting collateral estoppel was not a party to the earlier litigation. But the Court was careful to point out that

> Today in a companion case we hold that the Government may be estopped under certain circumstances from relitigating a question when the parties to the two lawsuits are the same. . . The concern underlying our disapproval of collateral estoppel against the Government are for the most part inapplicable where mutuality is present as in *Stauffer*. . .

464 U.S. at 163-164 (citations and footnote omitted).

Mutuality exists for Plaintiffs in the present case because class members are parties by representation. Had the *RNC v. Lujan* class lost, Tunica and RNSB would have been precluded from suing. *Gunnels v. Healthplan Services, Inc.*, 348 F.3d 417, 422-24 (4th Cir. 2003) (class certification is binding on all its members; "class certification promotes consistency of results…"); *see* Newberg on Class Actions, 4th ed., § 17:51. Because the class was successful, the benefits of mutual collateral estoppel are available to Plaintiffs. *Disability Rights Counsel v. WMATA*, 239 F.R.D. 9, 17 (D.D.C. 2006) (class of disabled persons granted class status for equitable relief on grounds, in part, that not certifying class would cause hardship for those not named as plaintiffs). *See also Lightfoot v. District of Columbia*, 246 F.R.D. 326, 341 (D.D.C. 2007) (disability rights class certified under Rule 23(b)(2), citing *WMATA*).

**2. The United States is Contracting Party in Every ISDA Contract.**

That the agency here is HHS instead of Interior is immaterial. Defendants admit the ISDA scheme applies equally to both agencies. *Def. Memo*, at 3. Neither has unilateral discretion to alter any of the Model Agreement terms, all of which are mandatory. The United States, not the agency or official sued, is the party bound by contract. Its agents had full authority to represent its interests. "The crucial point is whether or not in the earlier litigation the representatives of the

United States had authority to represent its interests in a final adjudication of the issue in controversy." [11]

Congress contemplated a unitary self-determination scheme with one set of regulations. The meaning of a federal statute, administered by more than one federal agency, should not change depending upon which agency is administering it.[12]

Congress' intent that ISDA be administered uniformly by IHS and BIA is emphasized by its mandate that all administrative appeals regarding ISDA contract disputes be resolved by the Department of the Interior's Interior Board of Contract Appeals ("IBCA"). *Facts* ¶ 10[13], and by the joint regulations. 25 C.F.R. pt. 900.

Finally, in 1998 in settlement talks on remand in *RNC v. Lujan* culminating in approval of

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[11] *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S. Ct. 907 (1940) (officers of the government are in privity for res judicata purposes); *Polsby v. Thompson*, 201 F. Supp. 2d 45, 49 (D.D.C. 2002) (officials of United States are in privity for res judicata purposes); *Accord*, *Mervin v. Federal Trade Commission*, 591 F.2d 821, 830 (D.C. Cir. 1978) ("[A] judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government."). S*ee also Elliott v. FDIC*, 305 F. Supp. 2d 79 (D.D.C. 2004), distinguishing issue preclusion from *res judicata* and applying issue preclusion to a case brought by a former federal employee whose termination was upheld in earlier litigation.

[12] *See Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 613 (D.C. Cir. 1997)(meaning of FOIA should be the same no matter which agency is asked to produce records), *followed in Al Fayed v. Central Intelligence Agency*, 254 F.3d 300, 306 (D.C. Cir. 2001); *Rapaport v. U.S. Department of the Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996)(no deference to agency interpretation where agency is one of four agencies administering statute; a regulatory regime interpreted by each of several agencies responsible for administration would be "peculiar"). *See also Public Citizen Health Group v. Food & Drug Administration*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) (different agencies adopting inconsistent interpretations of single federal statute would produce "an intolerable situation"). "Treating like cases alike is, we have said, 'the most basic principle of jurisprudence.'" *Tax Analysts*, above, 117 F.3d at 614, *citing LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*).

[13] Since January of last year, all civilian agency contract appeals are now handled by a government-wide appeals board, the Civilian Board of Contract Appeals, which, however, follows the precedents of the predecessor Interior Board in ISDA cases. *Facts* ¶ 10.

a monetary settlement, *sub. nom. Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D.N.M. 1999), IHS was represented by counsel and participated. *Facts* ¶ 14. The judgment approving the first settlement in *RNC v. Babbitt* after remand specifically refers to IHS, following its demand to be released from certain claims. That release is set forth in the settlement agreement in *RNC v. Lujan*, exh. 4, at 5, 17-18. Not only is IHS bound as agent of the United States, it was expressly made subject to and benefited from the judgment accompanying the *RNC v. Lujan* settlement. IHS also participated in a nationwide task force monitoring legal and administrative developments regarding CSC. *Facts* ¶ 14.

**3. *RNC v. Lujan* Held the Inclusion of Non-Paying Agencies in the Base a Violation of ISDA.**

The rate base question has already been fully litigated and decided in favor of Plaintiffs in an earlier case. In *RNC v. Lujan*, the Tenth Circuit held:

> We therefore agree with plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts…. [D]efendants included in the direct costs base the funds plaintiff received from the United States Department of Justice (via the State of New Mexico) for criminal justice and juvenile offender restitution programs. Although inclusion of these funds in the direct costs base would have been proper if those programs included funding for their apportioned share of the indirect costs pool, the uncontroverted facts indicate they did not. By including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.

*RNC v. Lujan*, 112 F. 3d at 1463.

The fiction of using nonexistent contributions from non-contributing agencies to reduce entitlements was fully litigated in *RNC v. Lujan*. The government had the full opportunity to

litigate and did. The same rate-making procedure at issue here was at issue there. The Tenth Circuit Court of Appeals ruled such rate dilution violates the ISDA command to pay the full contract support costs. On remand the United States agreed to settle. The judgment included the following findings of fact:

> 4. Indirect costs for ISDA contractors are generally fixed, not variable. Also, other federal agencies do not typically pay their fair share for indirect costs as determined by the OMB A-87 system. As a result of the inclusion of other federal agencies' programs in the base, the indirect cost rate is reduced. Under the OMB Circular A-87 system followed by the Defendants, the BIA then applied the rate to its portion of the direct base each year.[14]
>
> 5. Because other federal agencies are under statutory or regulatory restrictions as to supplemental payment of indirect costs for administration of their programs, the result of the BIA system including the rate-making negotiation pursuant to the OMB A-87 Circular was to chronically underfund RNC and other Class members in terms of their reimbursement of indirect costs.
>
> 6. These underpayments or shortfalls had two elements: (1) given the fixed nature of indirect costs, the shortfalls produced less than full need for monies required by RNC and the Class members to operate BIA programs; and (2) the shortfalls produced less than the full need for monies to operate programs of other federal agencies "associated with" their ISDA contracts. *See* 25 U.S.C. § 450j-1(d)(2).

*RNC v. Babbitt*, 50 F. Supp. 2d at 1097; *see also Facts* ¶¶ 13-14. Under *Stauffer* these findings are binding on Defendants here.[15]

The generally inelastic nature of the pool as found by the *RNC* court amplifies the effect of improper additions to the base. But any failure to recover common costs harms administration of

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[14] The IHS applies the A-87 indirect cost rate in the same manner. Exh. 18, at 5, 9, 13, 19, 24, 31.

[15] A second settlement for other claims of underpayment of contract support costs for certain years followed: *RNC v. Norton*, 250 F. Supp.3d 1303 (D.N.M. 2002). These claims included the "shortfalls claim" (not to be confused with the Shortfalls Report to Congress) for failure to pay even the level of CSC produced by the faulty rate, and the "direct CSC claim" for failure to pay direct contract support costs.

all programs in the base. *Arizona v. Thompson*, 281 F.3d 248, 255 n. 11, 256 (D.C. Cir. 2002) (under OMB Cir. A-87, common costs may be assumed by a primary program or funding source because the primary program benefits from the entire indirect cost pool to "help accomplish the [statutory] purpose")[16]. In *RNC v. Lujan* the Tenth Circuit recommended the rate dilution be corrected by removing non-paying agencies from the base.

The Tenth Circuit in *RNC v. Lujan* focused primarily on 25 U.S.C. § 450j-1(d)(2), holding that funds of non-paying agencies included in the base were "associated with a self-determination contract." But the insistence on including non-paying federal and state programs in the base also constitutes "an adverse adjustment to a future year's rate or amount" barred by 25 U.S.C. § 450j-1(d)(1), as the Tenth Circuit also held:

> Plaintiff contends the 1988 amendments to [to ISDA] require full funding of indirect costs and prohibit any adverse adjustments stemming from the failure of other agencies to pay their full share of indirect costs. We conclude this construction is reasonable and consistent with the legislative history accompanying the 1988 amendments.

*RNC v. Lujan,* 112 F.3d at 1461-1462.

The contract officer's denial of Plaintiff RNSB's claim in the instant case implicitly concedes the point:

> [T]his provision [25 U.S.C. § 450j-1(d)(1)] addressed the liability of tribal contractors for uncollectible indirect costs from other federal agencies . . . . **When these "theoretical over-recoveries" were carried forward, the**

[16] The purpose of ISDA is to improve tribal self-government, 25 U.S.C. §§ 450, 450a, a purpose which cannot be achieved by restraining Indian tribes from making use of other sources of federal assistance. Contrary to Defendants' contention, ISDA does not require Indian tribes to make "hard choices" about service levels. The regulations themselves, 25 C.F.R. pt. 900, as well as the policy statements in ISDA, 25 U.S.C. § 450a, serve as ample proof that the intent of Congress was the opposite, to allow tribes to make decisions about contracting not affected by any diminution of program levels from the choice but only as to the effectiveness of the service.

**result was a lower indirect rate.**

Exh.53, at 19, 25 (emphasis supplied).

This Court need not re-litigate this point. *RNC v. Lujan* is persuasive and relitigation wastes valuable judicial resources. A contrary ruling would create a schism in administration of the self-determination scheme contrary to Congress' intent. *Cf. Disability Rights Council*, 239 F. R.D. 9, at 24 (D.D.C. 2006) (class of disabled workers certified for injunctive relief because "injunctive relief [only for individual plaintiffs] would not likely provide the unnamed class members the benefit of nonmutual estoppel, whereas estoppel would be available to all members of a successful class")'; *GHS Health Maintenance Org. v. United States*, 76 Fed. Cl. at 369.

**B. The Carryforward Manipulations Violate ISDA.**

The Defendants' carryforward practices violate ISDA's prohibition against "other adverse adjustments to a future year's rate or amount", 25 U.S.C. § 450j-1(d)(1), based on *RNC v. Lujan*. Any doubt or ambiguity as to the applicability of this provision falls under the liberal rule of construction clause in the Model Agreement 25 U.S.C. § 450*l*(c), sec. 1(a)(2) which reads in part:

> Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding . . . to the Contractor.

The same rule is also contained in the Secretaries' regulations. 25 C.F.R. § 900.3(b)(11).

*Cherokee* holds that ordinary rules of contract law are to be applied to ISDA contracts. The hallmark of contract interpretation is holistic review, which requires the entire contract and its context to be considered in assessing ambiguity. The rule applies to ISDA contracts. *Susanville Indian Rancheria v. Leavitt,* F. Supp. 2d 2008 WL 58951*7, (E.D. Cal. 2008) (ISDA case applying holistic review to statutory construction: The plainness or ambiguity of statutory

language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 2008 WL 58951*13, citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S. Ct. 843 (1997). Defendants have ignored this rule.

Procedures which produce contract prices markedly lower than the statute and contracts require are invalid. *See* Exh. 33, at 7-8, ¶¶ 21.

Each carryforward manipulation deprives Plaintiffs of indirect contract support costs necessary to fund the contractor's program at the Secretarial level and constitutes a violation of, 25 U.S.C.§ 450j-1(a)(2)-(3), (d)(1), and (g).[17]

> We therefore agree with plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts.

*RNC v. Lujan*, 112 F.3d at 1463. Besides lowering the contract price for indirect CSC below the requisite amount, these manipulations produce other untoward consequences. Because of them, Defendants' estimates of nationwide contract support need on which Congress bases appropriations are skewed. To provide what is needed, Congress must know what is needed. *Facts* ¶ 68. IHS has never complied with ISDA's specific directive to submit annual reports of contract support cost appropriation insufficiencies in violation of 25 U.S.C. § 450j-1(c). *Facts* ¶ 75.

Also, under 25 U.S.C. § 450j-1(a)(4), ISDA contractors are entitled to use surpluses to

[17] The carryforward manipulations also violate the theoretical over-recoveries prohibition as well as the adverse adjustments clause in § 450j-1(d)(1), since, in most cases, under-recoveries are not properly carried forward to increase future rates and instead cause repeated over-recoveries, an outcome which is purely theoretical and not real.

expand programs in the next year.[18] By carrying forward over-recoveries of indirect costs to reduce future-year indirect cost rates but generally not carrying forward under-recoveries, Defendants not only discourage contractor efficiencies, but they deny contractors the effective use of surpluses, undermining the obvious purpose of this provision. *RNC v. Lujan*, 112 F. 3d at 1463; *Facts* ¶ 41.

As applied by Defendants, carryforwards deprive the Plaintiffs of the certainty that contracts require. Instead of a rate system that reflects the true need for indirect CSC, the system redefines "need" based on what was spent, a question-begging and arbitrary measure directly at odds with the full funding provision in 25 U.S.C. § 450j-1(g). Exh. 33, at 405 ¶¶ 12-14. This practice confounds normal contract law by putting the buyer in control of the price. Defendants do not pay enough; therefore, Plaintiffs cannot spend enough; so Defendants lower the contract price the next year because the "need" was equated with what was spent. Effectively, the buyer reduces the price after the service has been performed. ("A promise to pay, with a reserved right to deny or change the effect of that promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1878), as quoted by Mr. Justice Breyer in *United States v. Winstar* (concurring) 518 U.S. 839, 913, 116 S.Ct. 2432 (1996)).

Carryforward manipulations violate the contracts and Congressional intent to put enough

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[18] *See also* section 1(b)(9) of the Model Agreement, 25 U.S.C. § 450*l*(c) (all funds provided under an ISDA contract shall remain available until expended and that they may be expended without further approval from the Secretary or justifying documentation from the contractor); *Def. Exh. 6*, at 40-41 ¶ 5.1.a-.b (Tunica-Biloxi contract) ("Funds carried over into a succeeding contract funding period shall be added to the contract amount for that period. The savings or unexpended funds shall not reduce the amount that would have been available by IHS if there had been no savings or unexpended funds.") *See also* 25 U.S.C. § 13a (no automatic reversion of Snyder Act appropriations at end of fiscal year; savings may be employed by ISDA contractors without additional justification).

money in contractors' hands to run contracted programs at the Secretarial level. Carryforward manipulations combine to reduce indirect cost rates by several percentage points per year, representing tens of thousands to hundreds of thousands of dollars per contractor in unpaid contract support costs. *Facts* ¶¶ 33-41, 53-53, 61-63, 66-67.

OMB Cir. A-87 states:

> 3. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. **This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. . .**

(Emphasis added.) 2 C.F.R. pt. 225, Appx. E, ¶ E.3; *Facts* ¶ 74. This authority, as well as the power conferred on this Court by 25 U.S.C. § 450m-1(a)(1), should be employed to reform and redress serious indirect cost rate manipulations that act as the butcher's thumb on the scale.

## PART TWO
## PLAINTIFF'S OPPOSITION TO
## DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

### INTRODUCTION

Ignoring Congressional intent that self-determination not reduce program levels, Sen. Rep. 103-374, at 9, 12 (1994),[19] Defendants raise a hodgepodge of technical and equitable defenses. Most of these defenses were not raised by the contracting officer who denied Plaintiffs' contract claims at the administrative level hence are unavailable at this stage. Others were denied in earlier litigation that binds the parties. In light of the trust relationship it is improper for the government to ask this Court to excuse its contractual obligations on equitable grounds.

[19] *See also* Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), proposing enactment of ISDA, at 4.

Defendants argue that they paid 100% of what they paid and therefore could not be liable for breach. They beg the question of how much the Government should have paid to comply with the contractual and statutory mandate of full payment. Defendants do not and cannot show that the amount paid equals the amount owed. Defendants would limit jurisdiction to the Contract Disputes Act (CDA). But 25 U.S.C. 450m-1(a) explicitly provides further jurisdiction beyond the CDA, including equitable jurisdiction, as this Circuit recognizes.[20] *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d at 1344. The overall defense philosophy is that the purpose behind ISDA was to force Indian tribes to make "hard choices": let the agency provide the services as before, or take on the responsibility without adequate funding. That is simply not true. The Secretaries' own regulations state that the contractibility of programs is to be encouraged, not discouraged. 25 C.F.R. § 900.3(b)(8). But from the outset the IHS has resisted self-determination contracting.[21] As in *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049 (1942), "In carrying out its treaty obligations with the Indian tribes, the government is something more than a mere contracting party." At the very least, it should not be held to a lower standard than it must observe with other federal contractors. As Senator Daniel Inouye said:

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[20] The Court's Memorandum Opinion of January 22, 2004, held that the CDA is a jurisdictional prerequisite to a suit for money damages under the ISDA. It did not address any claims for equitable relief. No CDA contract dispute is required to assert a claim for equitable relief. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (injunctive relief granted in suit under APA by ISDA contractors to bar Secretary from limiting payments of CSC below pro rata nationwide disbursement of limited CSC appropriation, citing 25 U.S.C. §. 450m-1(a)).

[21] "Despite [ISDA's] successes, the implementation of the act has consistently been plagued by an oppressive Federal bureaucracy." 140 Cong. Rec. S4554-03, 1994 WL 139982*43 (daily ed., Apr. 20, 1994) (statement of Sen. McCain on introducing what became the 1994 amendments in the Senate).

> A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, "Sorry, boys, we don't have the cash, so we're going to stop right here, after you've put up all the money. . . ."

*Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 before the Senate Select Subcomm. on Indian Affairs*, 100th Cong., at 55 (1987).

## STANDARD OF REVIEW

"As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the materials it lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). *Accord*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S. Ct. 2548 (1986).

## ARGUMENT

### I. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES REQUIRED BY THE CDA AS TO MONEY DAMAGES AND SHOULD NOT BE REQUIRED TO EXHAUST IN LIGHT OF THE DEFENDANTS' PREDETERMINED POSITIONS.

#### A. Plaintiffs Have Satisfied the Exhaustion Requirements of the Contract Disputes Act.

The Contract Disputes Act requires that claims for money damages be initially submitted

to the contracting officer to start the resolution process. This was done.[22]

Defendants complain that certain disputes for 1998 through 2003 are not sufficiently specific as to damages. This is simply not true. Tunica and RNSB provided specific dollar amounts for their claims. Exh. 35, at 7, 15; exh. 53, at 12; exh. 55, at 69, 70.

Moreover in *Health Insurance Plan v. United States*, 62 Fed. Cl. 33, 48-50 (2004), decided subsequent to this court's January 22, 2004 amended opinion, the claims court addressed a similar defense by the United States:

> While there is no specific reference in these claims to the contingency reserve or to the specific amounts allocable thereto, it remains that one of the "contractual and statutory duties" of the United States under the FEHB program is to pay a designated portion of collected premiums into the contingency reserve. This is required both by 5 U.S.C. § 8909, the regulations thereunder, and the various contracts in question. Because the obligation to fund the contingency reserve and administrative account was well known and flows directly from the government's contractual and statutory duty to collect and pay premiums to its FEHB Program carriers, the government was on notice that this duty would attach were it found to have underpaid premiums to HIP-NY. As such, in the court's view, plaintiff's claims were adequate to satisfy the exhaustion requirements of the CDA.

(Footnotes omitted)

Proper calculation of indirect contract support costs involves the same contracts and the same defective rate making methodology each year. Once the Court corrects the method of calculation, the sum owed each contractor can be determined by simple mathematical operation.

> Where the parties have identified and disputed a specific cost allocation/ allowability issue, there is no support for the Government's proposition that a

[22] The latest CDA disputes were sent in 2007. Tunica filed a contract dispute for all challenged rate-making claims for 2001 through 2005 on September 14, 2007. Exh. 73. The dispute was denied on March 26, 2008. Exh. 33, at 45. RNSB filed a contract dispute on June 22, 2007, for all challenged rate-making claims for the years 2004 through 2006. Exh. 48. That claim has not yet been decided by the contracting officer. Depending on the Court's ruling the pending motions, an appropriate amendment to bring the claims for money damages up to date under FRCvP 15(d) will be sought.

> contractor must incur the disputed costs and then wait until each fiscal year's indirect cost is audited and final indirect cost rates are established, before seeking a CO decision that the disputed costs are allowable and may properly be included in the contractor's indirect cost pools. . . . In this regard the Court of Federal Claims said sometime ago that it would be unreasonable not to allow for the single resolution of a dispute in a final decision on an issue which controls the allowability of an item that will surface . . . throughout the life of the contract." *Metric Const. Co., Inc. v. United States*, 1 Cl. Ct. 383, 395 (1983).

*Holmes & Narver* ASBCA No. 51430, 99-1 BCA ¶ 30,131, at 149050, 149055, 1998 WL 791850 *6.[23] In *Metric Construction*, the court elaborated:

> . . . . It was obvious. . . .that a ruling by the contracting officer on plaintiff's claim [for one year] would undoubtedly be followed by the contracting officer if similar claims were presented to him at a later time relative to the same contract. . . . Viewed in this light, the final decision of the contracting officer on the fee question was just that, **and was applicable to all change orders issued in this case, past, present and future. . . .**
>
> . . . **[S]aid decision satisfied the CDA prerequisites for bringing suit in this court on a claim seeking fee indemnification costs for all contract orders and modifications issued during the life of the contract.**
>
> . . . If defendant's contentions were adopted, it could encourage postponement of the submission of disputes to the contracting officer or, worse still, **encourage the submission of a blizzard of claims,** one claim filed for each change order modification used. **Such a proliferation of claims should be avoided where possible**. **It would be unreasonable not to allow for the single resolution of a dispute in a final decision on an issue which controls cost allowability of an item that will surface in change orders to be issued throughout the life of the contract.**

*Metric Construction Co., Inc. v. United States*, 1 Cl. Ct. 383, 393-95 (1983) (emphasis added).

Here too no useful purpose is served by requiring resubmission of the same claim to the

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[23] RNSB was a pioneer in promoting Indian self-determination and has vigorously advocated to implement it, starting in *Ramah Navajo School Bd., Inc. v. N.M. Bur. of Revenue*, 458 U.S. 832, 102 S.Ct. 3394, 3397 n. 1 (1982). It has every right to claim judicial relief wherever a court has jurisdiction. As for the putative class action in New Mexico, FRCvP 23(g) requires that "the best qualified lawyer" be appointed class counsel. It is hard to see how any court can make this decision without reviewing the applicants' resumés and statements as to their qualifications.

contracting officer for each fiscal year. *See also Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (claim increase due to extension of contract for additional years does not need to be resubmitted to contracting officer).[24] Nevertheless, Plaintiffs did submit specific dollar claims for each of the years in question.

Defendants argue that RNSB did not present what they call "Claim Three" (carryforwards) for 1998. Defendants' parsing of Plaintiffs' claims at page 10 of Defendants' brief is not accurate and not useful. Defendants misread the pleadings if they think that what they call "Claim One" or "the shortfall claim" - that funding falls short of even the miscalculated rate - is presented in this case. That claim is raised in other ISDA litigation but not here. Plaintiffs do complain about the "shortfall column" that Defendants employ in their template to calculate rates for ISDA organizations (and only for ISDA organizations, not for any other rate holders) as a device to arbitrarily ignore underrecoveries that would otherwise cause rates to adjust upwards.

The "shortfall column" has nothing to do with the "shortfall claim" other than the unfortunate, confusingly similar name. It is a factor in the "miscalculation claim" raised in *RNSB v. Lujan.* In the course of that ongoing litigation and in discovery in this case, Plaintiffs became

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[24] *See also Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984) (same); *J.F. Shea v. United States*, 4 Cl. Ct. 46, 54 (1983) (requiring resubmission to contracting officer of claim increased during course of litigation would disrupt normal litigation procedure; no CDA jurisdictional bar to presenting evidence of additional damages arising from same claim); *Minuteman Aviation, Inc.*, AGBCA No. 98-201-1, 1999 WL 1212544*6 (when complaint alleged entitlement to equitable adjustments on same theory for 1997 and 1998, board of contract appeals had CDA jurisdiction to decide the claim for 1998, notwithstanding that contracting officer's decision addressed only 1997 costs); *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA 22,595, at 113385, 113386-87, 1990 WL 101600*3 (additional facts not altering the nature of the original claim, a dollar increase in the amount claimed, or assertion of new legal theory, when based upon same operative facts included in original claim, do not constitute new claims). *See New South Press*, GPOBCA No. 45-92, 1994 WL 837425*10 n. 1.

aware of defects in carryforward adjustments, among them the use of the "shortfall column," which magnifies the rate dilution of non-paying programs in the base. "Claim Two" and "Claim Three" in Defendants' confused terminology are inextricably intertwined and both are fairly raised in RNSB's 1998 presentments.

Finally, Defendants contend that RNSB's September 21, 2005 CDA claim letter shows an overpayment for 2001 by virtue of which 2001 becomes no longer in issue. The letter presents an overall consolidated claim for underpayment under the same contract through the multi-year cycle of the fixed-with-carryforward process. The specifics of damages are for trial, and as the carryforward and other elements of miscalculation are unraveled, the 2001 theoretical overrecovery will be shown to be an actual underpayment as well.

**B. The "Standing" Defense Falls.**

Defendants' standing argument directed to the so-called "shortfall claim" is irrelevant because the operative pleadings allege no "shortfall claim," being directed solely to the "(mis)calculation claim" addressed in *RNC v. Lujan, sub nom. RNC v. Norton,* 250 F. Supp. 1303, 1305-08 (D.N.M. 2002 (second class settlement of CSC claims approved; court findings distinguish "shortfall claim" from "the calculation claim").

In any event, the defense that Plaintiffs got "overpaid" is not a standing defense.[25] This mislabeled defense really argues that because Defendants did not breach the contracts, there was no injury in fact. *Disability Rights Council v. WMATA,* 239 F.R.D. 9, 16-17 (D.D.C. 2006) (for standing plaintiff need only allege direct injury); *Do-Well Machine Shop, Inc. v. United States,*

[25] The defense rests, however, on legal analysis of undisputed facts, making summary judgment appropriate.

870 F.2d 637, 639 (Fed. Cir. 1989) (presence of valid defense does not oust tribunal of jurisdiction unless defense is jurisdictional).

**C. The Claims Against Secretary Kempthorne are Not Moot.**

The first sentence of 25 U.S.C. § 450m-1(a) grants the Court jurisdiction "over any civil action or claim against the appropriate Secretary arising under [ISDA]" and over claims filed for money damages arising under ISDA contracts pursuant to the CDA. The second sentence of § 450m-1(a) authorizes the Court to:

> order appropriate relief including money damages, **injunctive relief against an officer of the United States or any agency thereof . . . or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty . . . or to compel the Secretary to award and fund** an approved self-determination contract.

(Emphasis added.). In *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d at 1344 the D.C. Circuit reversed an order denying preliminary injuntive relief for monetary relief to ISDA contractors. The Circuit Court relied for its jurisdiction solely upon this provision, not even mentioning the Contract Disputes Act. [26]

The Court's authority to order equitable relief or to compel the funding of an approved ISDA contract is independent of the CDA. *RNSB v. Babbitt* reversed the denial of injunctive relief to two ISDA contractors that had alleged arbitrary treatment in provision of IDC. 87 F.3d at 1341 n.1, 1352. The court noted the broad scope of § 450m-1(a), *id*. at 1344, and did not suggest either that plaintiffs were limited to CDA remedies or were required to exhaust administrative

[26] Defendants rely on this case for the proposition that the ISDA contract obligation is limited to available appropriations. Plaintiffs disagree strongly. *See* pp. 34 *et seq*., *infra*.

remedies.[27] The contrast in how Congress dealt with breach of contract claims as opposed to equitable claims is significant. For CDA breaches, exhaustion is expressly required. That is a jurisdictional prerequisite. For all other claims, exhaustion is not required. This Circuit clearly recognized the distinction by grounding its jurisdiction on § 450m-1(a) without even bothering to mention § 450m-1(d), which incorporates the CDA.

### D. Plaintiffs Are Not Required to Satisfy Exhaustion Requirements Additional to Those of the Contract Disputes Act.

Where exhaustion of administrative remedies is not required by statute (the case here, except for the CDA requirement regarding money damages, with which Plaintiffs have complied), the judge-made rule of exhaustion is discretionary. *McCarthy v. Madigan*, 503 U.S. 140, 148, 112 S. Ct. 108 (1992) (prisoner's rights case; exhaustion of grievance procedure not required when agency is shown to be biased or has otherwise predetermined the issue). A balancing of interests dictates whether exhaustion should be imposed. *Id.* 503 U.S. at 144: "Of 'paramount importance' to any exhaustion inquiry is congressional intent". Here, the ISDA statute, § 450m-1(a) expressly empowers this Court to issue "immediate injunctive relief . . . to compel the Secretary to award and fund an approved self-determination contract." A clearer statement of intent to avoid the delay of an administrative appeal could not be easily imagined. *See also Avocados Plus Corp. v. Veneman*, 370 F.3d 1243, 1247 (2004) (First Amendment case; exhaustion excused where futility is apparent).

Plaintiffs invoke a Congressional scheme, P.L. 100-472, enacted after years of intense legislative activity involving multiple hearings, reports, and investigations. Six years later the

[27] Nor did the court condition relief for the co-plaintiff Puyallup Tribe on its having a current indirect cost rate. *Id*. at 1342 n. 5 & acc. text.

agencies charged with carrying out that scheme were rebuked in remedial legislation, P.L. 103-413, for systematically impeding implementation. Denying jurisdiction for failure to exhaust non-statutorily required administrative remedies would abuse discretion.

The agencies have had twenty years to act in the manner Congress intended. They have been castigated by Congress and the courts yet the only changes made in the A-87 system have further impeded realization of the full funding commanded by ISDA. Exh. 33, at 6-8 ¶¶ 19-23. Moreover, the IHS exhibits vindictive behavior towards claimants: declining RNSB's recent application for a self-determination contract for additional tribal shares, *id*. at 11, ¶ 29; interposing a counterclaim in the hundreds of thousands of dollars against Tunica, *id*. at 11-12 (¶¶ 30-34), 45; as well as filing frivolous defenses (*e.g.*, "standing"), rendering theoretical administrative remedies futile.

In *RNC v. Lujan*, the Ramah Navajo Chapter filed a contract dispute under the CDA and, when that was denied, filed suit. That is the same procedure employed here.

## II. DEFENDANTS' CAPS ARGUMENT VIOLATES FUNDAMENTAL RULES OF CONSTRUCTION.

The Secretary's contract authority for indirect contract support costs directs him to bind the United States in advance of appropriations. He is required to exercise that authority.

Relying on 25 USC 450j-1(b) and 450j(c), Defendants contend that "all funding under the ISDA is subject to the availability of appropriations". *Def. Memo* 6, 23, 24, 27. That is incorrect. Once a program appropriation is made (§ 450j-1(a)(1)), the corresponding CSC amount must be added (§ 450j-1(a)(2), (3)). *See Menominee* and *RNSB v. Leavitt*, discussed at 12-13, above. Defendants contend the contract price for CSC is to be determined some time in the future after the extent of the appropriation for all contractors' contracts has been determined and services have

been performed, a negation of the central contract principle of a mutual bargain. *Murray v. Charleston*, above, at 24. They suggest Plaintiffs could have retroceded their contracts, but doing so would mean abandoning the promise of self-determination.

The guiding principle in interpretation is holistic review. "Plain meaning" cannot be determined in the abstract. It does not consist of picking and choosing words or phrases from a lengthy document and ignoring the rest. "The cardinal principle of statutory construction is to save and not to destroy," *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513 (1955) (naturalization case, rejecting U.S.' contention that a single clause negated others). The duty of the court is to make sure "the object designed to be reached by the act" is realized. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 560, 12 S.Ct. 511 (1892). Harmonization of all words, phrases, clauses, paragraphs, and in fact the entire text must be achieved if at all possible. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55, 113 S.Ct. 2173 (1993) (in a "plain meaning analysis," the court "'look[s] to the provisions of the whole law, and to its object and policy'").

### A. Section 450 j-1(b) Governs Only Provision of Funds, Not Contract Entitlements To Indirect CSC.

25 U.S.C. § 450j-1(b) expressly governs only *"provision of funds"*, not the Secretary's contract authority (and duty) to enter into a contract for the full amount required to operate the program at the Secretarial level. Defendants' contrary reading creates conflict within ISDA which the Court should avoid.

"Contract authority" is the term of art in federal appropriations law for authority in a government official to bind the United States in advance of appropriations. The distinction between contract authority and expenditure authority is well recognized, beginning with the

statutory definitions in the Budget Act, 2 U.S.C. § 622(2)(A)(iii):

> The term "budget authority" means the Authority provided by Federal law to incur financial obligations, as follows: . . .
>
> (iii) **contract authority**, which means the making of funds available for **obligation**, but not for **expenditure** . . . .

(Emphasis added.) *See Wetsell-Oviatt v. United States*, 38 Fed. Cl. 563, 570-71 (1997) (recognizing the distinction between contract and expenditure authority and upholding contractor's claim since contract had been validly entered; if agency has spent appropriation, contract damages are paid from the Permanent and Indefinite Judgment Fund, 31 U.S.C. § 1304(a)). Many cases turn on the distinction. *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), cited twice with approval in *Cherokee*, 543 U.S. at 642-43, 125 S. Ct. at 1180-81, is particularly noteworthy, construing contracts issued pursuant to a remarkably parallel statutory mandate, discussed at 42-43, *infra*.[28]

The Secretary of Health and Human Services (HHS) is both agent of the United States in entering the contract and the paymaster who pays contractors what is due under those contracts from available appropriations. Contract *funding* and contract *payment* are different matters.

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[28] *And see United States v. Langston*, 118 U.S. 389, 394, 6 S.Ct. 1185, 1187 (1996) (simply because appropriation is not sufficient to pay an obligation of the United States does not mean the obligation is abolished); *Gibney v. United States*, 114 Ct. Cl. 38, 51-52, (1996) (limitation on appropriations does not repeal or suspend existing statutory obligation); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (contractor who is one of several to be paid from appropriation not chargeable with knowledge of its administration; his legal rights are not affected by expenditure of appropriation for other purposes); *Bath Iron Works v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1996) (judgment fund is appropriation from which contract debts of government are paid, regardless whether agency has the funds itself); *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1882) (persons contracting with government for partial services under general appropriations are not bound to know condition of appropriation account at Treasury or on contract book of Department); *Major Collins' Case*, 15 Ct. Cl. 22, 35 (1879) (government liabilities may be created without appropriation to pay them; payment depends on appropriation but liability is independent and can be enforced judicially).

*Contract authority* to bind the United States by executing ISDA contracts and *expenditure authority* to fulfill ISDA contract obligations are not one and the same.

When the Secretary enters into an ISDA contract, he exercises contract authority to obligate the United States to pay full CSC: •§ 450f(a)(1) - "The Secretary is directed . . . to enter a self-determination contract. . ." •§ 450j-1(a)(1) - "The amount of funds [to be contracted] shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program. . ." •§ 450j-1(a)(2) - "There shall be added to the amount required by [1(a)(1)] contract support costs . . ." •§ 450j-1(g) - "[T]he Secretary shall add the full amount [of CSC] to which the contractor is entitled under subsection (a). . ."

If the Secretary has funds to operate a program, he must contract *and add full CSC*. This is the only reading that harmonizes all provisions. *Only the Secretary's role as paymaster* is limited by the § 450j-1(b) proviso and its corollary in section 1(b)(4) of the Model Agreement. *Menominee; RNSB v. Leavitt*, slip opinion at 11. On its face § 450j-1(b)'s proviso addresses only "provision of funds", *i.e.*, payment. Unlike numerous other statutes in which Congress has carefully and precisely limited the contract authority of an official or agency to available appropriations,[29] the proviso seeks only to guard against the Secretary's favoring contractors over non-contracting tribes. But the contractual bargain made by the United States remains in place.

Defendants' awareness of the difference between contract authority and expenditure authority is demonstrated by their insertion of an unauthorized clause in Tunica's contracts for

[29] *Compare* 25 U.S.C. § 1658: "The authority of the Secretary to enter into contracts under this title shall be to the extent and in an amount, provided for in appropriation Acts." *See also* 25 U.S.C. § 2008(j)(2). Congress clearly knows how to limit contract authority when it wants to.

1995-1998, and for 2000 through 2003. In each contract,[30] in Art. II.4, there properly appears the language set forth in section 1(b)(4) of the Model Agreement, 25 U.S.C. § 450*l*(c), the key wording of which is the "make available" clause in the first sentence. *Def. Exh.* 7, at 7; *Def. Exh.* 8 at 7. But then, in Art. V.5(H)(i), a radically different clause on the same subject substitutes the phrase "*there shall be obligated*" for the Model Agreement's "*shall make available*". *Def. Exh.* 7 at 17; *Def. Exh.* 8 at 15. The spurious clause showing awareness of the distinction between "*shall be obligated*" and "*shall make available*" constitutes an admission against interest. Defendants may not by the simple expedient of writing their own rules into ISDA contracts substitute those rules for what Congress has imposed. Even if the insertions were legitimate, the conflict thereby created within each contract would have to be resolved in favor of tribal contractors by the ambiguity rule in the Model Agreement.

*Cherokee* recognized that "[t]he Act also reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." 543 U.S. at 639, 125 S.Ct. at 1178-1179. *Cherokee* did not reach the caps issue because the case before it presented only claims for lump sum years. But significantly, in a pre-*Cherokee* ruling, the DHHS Appeals Board, whose decisions are final for the Department, recognized contract authority and applied it to an ISDA contractor's entitlement to CSC. *See In re St. Regis Mohawk Tribe,* Departmental Appeal Board, No. A-02-12, Decision No. 1808 (Jan. 17, 2002) (Exh. 67), holding it was Congress' intent to empower the agency to enter into a contract for full funding of contractor's calendar year contract, even though no appropriation had yet been made for the portion of the calendar year

falling in the next federal fiscal year. Citing *Wetsel-Oviatt*, *supra*, the Board rejected arguments that 25 U.S.C. § 450j(c), the 25 U.S.C. § 450j-1(b) proviso, or the Anti-Deficiency Act barred payment in advance of appropriations under an existing ISDA contract. *See also Menominee*, 2008 WL 680379*2 ("ISDA mandates the payment of full indirect CSC and ISDA itself establishes that entitlement")

Defendants cite the Federal Circuit's 1999 decision in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (*Oglala*), *cert. denied*, 530 U.S. 1203, 120 S. Ct. 2196 (2000), to support their contention that the price term in an ISDA contract can be decreased if the Secretary receives insufficient appropriations to liquidate the contract obligation. *Def. Memo.* 24, 27. But *Cherokee* casts this Federal Circuit decision in doubt. *Oglala* reversed a decision of the Interior Board of Contract Appeals (IBCA) in *Appeals of Alamo Navajo School Board, Inc. & Miccosukee Corp.*, No. 3463, 98-2 B.C.A. 29,832, 1997 WL 759441 (1997) (*Alamo/Miccosukee*), *See Oglala*, 194 F.3d at 1377 n. 1 & acc. text. The Supreme Court in *Cherokee* cites the IBCA *Alamo/Miccosukee* ruling without mentioning that the decision was overturned by the Federal Circuit in *Oglala*. 543 U.S. at 645-46, 125 S.Ct. 1182. The unusual omission suggests that the Federal Circuit's decision in *Babbitt* is flawed and the 53-page IBCA decision is better reasoned and more persuasive. Government contract authorities Ralph C. Nash & John Cibinic agree that ISDA confers contract authority as to CSC. CHEROKEE NATION: MORE THAN MEETS THE EYE, 19 Nash & Cibinic Report No. 29, at 4-5 (2005) (Exh. 69) (ISDA provides Secretaries "contract authority" to "enter into contracts incurring obligations . . . without the necessity of an

appropriation").[31]

### B. Section 450j(c)[32] Applies Only To Out-Years Of Multi-Year Contracts And A Contrary Reading Would Create Internal Conflict in ISDA.

Defendants cite 25 U.S.C. § 450j(c)(1), a provision dating from the original act, P.L. 93-638. Even then its purpose to prevent contracts in advance of annual program appropriations was clear. *See* H. Rep. No. 93-1600, at 29, 1975 USCCAN 7775, 7790 (1975): "This discretionary authority provides for contracts over a year in length but, *as to years after the first year*, the contract is more of a declaration of intent until sufficient appropriated funds have become available for the future years." (Emphasis added.) When the 1988 amendments were made mandating full CSC in § 450j-1(a)(2), (3), and 1(g), the section's out-years purpose became even clearer. Section 450j(c) is a limit on the Secretary's contract authority with respect *only to the out-years of multi-year or indefinite term contracts*. Its force is spent as to any year for which there has been an appropriation creating the Secretarial amount.

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[31] Nash and Cibinic are authors of the oft-cited "major treatise on government contracts." *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1373 (Fed. Cir. 2003). *United States v. Winstar*, 518 U.S. 839, 890 n. 36, 116 S.Ct. 2432 (1996) cites the 3d edition of their treatise, Federal Procurement Law. *Short Bros., PLC v. United States*, 65 Fed. Cl. 695, 775 (2005) recognizes them as "Government contracts experts").

[32] 25 U.S.C § 450j(c) in pertinent part reads:

*Term of self-determination contracts; annual renegotiation*

(1) A self-determination contract shall be –

(A) For a term not to exceed three years in the case of other than mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) For a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations. . . .

The Department understands the provision that way as well. Tunica's contract, *Def Exh.* 7, at 12, follows and incorporates this reading of 25 U.S.C. § 450j(c)(2). Paragraph 14 of Article II, entitled "*Successor* Annual Funding Agreement," and referring to §450j(c)(2), states that *future* annual funding agreements ("AFAs") may be negotiated prior to the end of the preceding AFA: "Except as provided in section . . .450j(c)(2) [*sic*, *i.e.*, §450j(c)(1)(B)] the funding for each such *successor* Annual Funding [agreement] shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. 450j-1(b))." (Emphasis added.) This suit does not concern "successor" AFAs; it seeks payment of CSC for years in which program appropriations have already occurred for which the mandated contract support must be paid pursuant to 25 U.S.C. § 450j-1(g) and corresponding provisions in the Model Agreement. A contrary reading would create internal conflict with the full funding language in § 450j-1(g) which can be avoided.

**C. The Capped Appropriations Are Subject to The Lump Sum Rule.**

As the unanimous Supreme Court holds in *Cherokee*, citing *Ferris*, *supra*, 27 Ct. at 546, *Dougherty*, *supra*, 18 Ct. Cl. at 503, and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 & n. 9 (Ct Cl. 1980):

> [A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations" … "A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects."

543 U.S. at 637-638, 125 S. Ct. at 1177-1178 (emphasis added).

The segregation by Congress of a "capped" appropriation to the IHS for ISDA CSC in 1998 and subsequent years does nothing to change this longstanding rule confirmed by *Cherokee*.

The capped appropriations for CSC are greater by several orders of magnitude than the contract debt owed to either Plaintiff for their CSC. Since it lacks any language amending ISDA, it operates as any separate appropriation would.[33] It was sufficient to pay both Plaintiffs' full CSC funding and therefore comes squarely within the lump sum rule confirmed in *Cherokee.* Such appropriations are qualitatively unlike an appropriation for a specific contract or project where the contractor may be charged with knowledge as in *Sutton v. United States*, 256 U.S. 575, 41 S. Ct. 563 (1921). There is no legislative history stating that the CSC caps are intended to limit or amend 25 U.S.C. §450j-1(g).

Citing *New York Airways, Inc. v. United States*, 369 F.2d 743, 747-748 (Ct. Cl. 1966); the Anti-Deficiency Act, 31 USC §§ 1341(a)(1)(A) and (B); the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Judgment Fund, 31 U.S.C. § 1304, and the GAO Redbook, 2 U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-17 to 6-19 (2d ed. 1992), the *Cherokee* court, 542 U.S. at 642-643, 125 S.Ct. at 1180, points to several alternatives the government may use when its appropriations prove inadequate to pay contract debts:

> [T]he law normally expects the Government to avoid [running out of money to pay its contracts], for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise.

The citation of *New York Airways* is particularly significant. That case involved a statute

[33] *Compare Republic Airlines, Inc. v. United States*, 849 F.2d 1315 (10th Cir. 1988), where Congress in an appropriations Act expressly amended a statute to remove contract authority previously conferred, a situation not presented here or in *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) where a scheme remarkably similar to ISDA was held to contractually obligate the United States in advance of appropriations for helicopter delivery of mail. *See infra* at 43.

very similar to ISDA in that it specified that contracts for mail services were to be "paid out of appropriations". The lawsuit arose because, as here, Congress cut appropriations after the contracted services had been performed. Further, as here, the contract price for the contracts there was determined by a pre-set rate, much like the indirect cost rate used by the IHS to determine ISDA contractors' CSC needs. By not mentioning *RNSB v. Babbitt*, but citing *New York* Airways, which *Oglala* and its line had distinguished, the Supreme Court has decisively rehabilitated those principles.[34]

### D. Secretarial Failure to Seek Adequate Appropriations Negates Defense Of Unavailability Of Appropriations.

Where an agency has not sought adequate appropriations, unavailability of appropriations is no defense *regardless* of an exculpatory clause, unless that clause explicitly places on the contractor the burden of risk that the agency may not request adequate funding. *S.A. Healy v. United States*, 576 F.2d 299, 307 (1978); *C.H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976); *San Carlos Irrig. & Drainage Dist. v. United States*, 23 Cl. Ct. 276, 283 (1991).[35] Defendant IHS has never sought an appropriation sufficient to meet the need for indirect CSC of ISDA contract administration nor does the Model Agreement shift the burden of risk for the Secretary's failure to request sufficient CSC to Plaintiffs. Exh. 21.

## III. SUBSEQUENT LEGISLATION IN § 450j-2 DID NOT ALTER THE UNITED STATES' OBLIGATION TO PAY FULL CONTRACT SUPPORT COSTS.

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[34] *RNSB v. Babbitt* is not contra. The quotation cited by the Court, Amended Opinion, Doc. No. 48, at 25, is ambiguous at best and clearly dicta. Caps were not at issue in that litigation which concerned only apportionment of a limited appropriation.

[35] In its Amended Memorandum Opinion and Order and Order Denying Reconsideration, the Court dismissed a claim based on *S.A. Healy*. But a rebuttal to an affirmative defense of unavailability based on *S.A. Healy* is not barred.

The Tenth Circuit Court of Appeals resolved any ambiguity in the mandatory full funding provisions of 25 U.S.C. § 450j-1(a) in Plaintiffs' favor in *RNC v. Lujan*, 112 F.3d 1455, but Defendants contend that by subsequent "clarifying" legislation at 25 U.S.C. § 450j-2,[36] a later Congress reversed the Court's resolution of that ambiguity.[37] But the meaning and intent of § 450j-2 are anything but clear. The section's literal requirement that no funds from any appropriation whatever, including other agency appropriations, may ever be used to pay costs "associated with" other agencies would destroy the force of the 1988 amendments, a bizarre and unnecessary conflict. The posited mutually-exclusive dichotomy between common costs "directly attributable" to an ISDA contract and contract costs "associated with any entity other than the Indian Health Service" is not valid. *See Arizona v. Thompson*, 281 F.3d 248, 255 (D.C. Cir.

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[36] Section 450j-2 provides: "Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act and *no funds appropriated by this or any other Act* shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service." The section was enacted as a proviso in the 919-page Omnibus Consolidated and Emergency Appropriations Act for FY 1999, Pub. L. 105–277, div. A, § 101(e) [title II], 112 Stat. 2681, 2681–280 (1998) (emphasis added.)

[37] Contrary to Defendants' contention, *Def. Memo*. 43 n. 8, § 450j-2, an appropriations rider, did not render the Tenth Circuit's decision in *RNC v. Lujan* "no longer good law." H.Rep. No. 105-609, at 57, refers only to the settlement of *RNC v. Lujan*, while *id*. at 110 is at best ambiguous because it does not recognize the common nature of indirect costs. *Arizona v. Thompson*, 281 F.3d 248, 255 (D.C. Cir. 2002). A more plausible reading is that § 450j-2 prohibits using IHS direct program moneys to pay other agencies' *direct* CSC. *See infra*, at 32. There is no legislative history explaining what Congress meant by "directly attributable" costs and "associated with" costs (and even if there were, the liberal rule of construction in the contract(s) cannot be abrogated retroactively.

2002).[38] The terms "associated with" and "directly attributable" are undefined and are not addressed by legislative history.

Whatever the true import of section 450j-2, giving it the scope Defendants claim for it would alter contract terms for the years prior to fiscal 1999. Such alteration is not permissible. Congressional power to pass retroactive legislation is subject to strict contractual and Constitutional limits, *INS v. St. Cyr*, 533 U.S. 289, 315-317, 121 S. Ct. 2271 (2001). Its power to thereby impair vested contract rights is highly circumscribed, *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432 (1996) (Congressional attempt to alter prior settlement terms void for unjustified invasion of contract rights), for the United States is bound to its contracts as much as a private party, and no party to a contract can unilaterally declare what the ambiguous terms of a contract mean. [39]

As read by Defendants, the language would be an impermissible repudiation of contractual rights. *United States v. Winstar Corp.*, 518 U.S. 839, 924, 116 S. Ct. 2432 (1996) (Scalia, J.,

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[38] On the one hand, Congress is said to have endorsed the indirect cost rate system, the essence of which is to pool common costs, *i.e.*, costs that are difficult to allocate. But every dollar in the indirect cost pool is "directly attributable" to every program in the base and every dollar in the pool is "associated with" every other dollar in the pool and, thus, with every program in the base.

[39] Well-settled rules are available to the courts for resolving such matters. *See*, *e.g.*, *Javierre v. Central Altagracia*, 217 U.S. 502, 507, 30 S. Ct. 598 (1910) (burden on those "seeking to escape from a contract made by them on the ground of a condition subsequent, embodied in a proviso"); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) (a government-drawn exculpatory provision must be construed narrowly and strictly); *Precision Pine & Timber, Inc. v. United States*, 50 Fed. Cl. 35 (2001) (an exculpatory clause is viewed narrowly and favorably to the contractor); *United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Cl. Ct. 1974) (contractor's reasonable interpretation controls where Government drafted the contract); *Padbloc v. United States*, 161 Ct. Cl. 369, 376-77 (1963)(contracts not construed so that "one party was to be placed at the mercy of the other"); *Winstar*, *supra*; *Franconia Assoc. v. United States*, 536 U.S. 129, 122 S. Ct. 1993 (2002) (the United States does business on business terms).

concurring). *See also Cherokee*, 543 U.S. at 646, 125 S.Ct. at 1182; *Centex Corp. v. United States*, 395 F.3d 1283, 1304-1306 (Fed. Cir 2005) (government breached covenants of good faith and fair dealing by legislation retroactively depriving contractors of benefits of their contracts with Government); *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751, 777-782, 781 (2003) (appropriations rider targeting preexisting Government contract obligations to reduce outlays is impermissible breach of contract under *Winstar* for which Government is liable in damages).

Congress has the undoubted power to retroactively clarify genuine ambiguity in a prior regulatory enactment. But even in the regulatory area there is a close question how far "clarification" can go. "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery Cty., Md.*, 761 F. 2d 998, 1003 (4th Cir. 1985). And in the field of contract, retroactivity is especially problematic. Where there is concern with governmental self-interest, the legislative assessment is suspect and deference is not appropriate. *Winstar* at 896-898. If, as Defendants would have it, section 450j-2 is an implicit reversal of *RNC v. Lujan*, it crosses *Winstar's* sharp line between regulatory legislation that is relatively free of Government self-interest and legislation tainted by a governmental object of self relief. But here the need for any clarification is missing. Each ISDA contract provides a specific rule for clarification of ambiguities, requiring resolution in the contractor's favor. 25 U.S.C. § 450*l*, *Model Agreement* sec. 1(a)(2). Where contract ambiguity, if any, is resolved *ab initio* by the parties' prior contract there is no room, under *Winstar*, for a later Congress to change the rule.

## IV. THE A-87 METHODOLOGY *AS APPLIED BY DEFENDANTS* VIOLATES THE INDIAN SELF-DETERMINATION ACT.

### A. ISDA Requires Full Funding of CSC.

Though they know better, Defendants avoid the distinction in 2 U.S.C. § 622 between the Secretary's contract authority and his expenditure authority as well as the distinction between grant funds and obligations of contract. The A-87 system as applied by Defendants does not comply with the contract mandated by the 1988 amendments to ISDA ("Model Agreement," 25 USC 450*l*(c)) because it does not produce dollar amounts meeting the command of 25 U.S.C. § 450j-1(a)(2)-(3) and (g) to add full CSC sufficient to operate the contracted program at the Secretarial level. *RNC v. Lujan*, 112 F.3d at 1463; *Second Amended Complaint* (Doc. No. 11) ¶¶ 1-4, 14-25; *Menominee; RNSB v. Leavitt*.

CSC funds are not merely incidental, gratuitous, or surplus funds added to the amounts that the agency would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right is contractual as well as statutory. *Appeals of Mississippi Band of Choctaw Indians*, Interior Board of Contract Appeals, Nos. IBCA 4711 through 4715, 2006 WL 1009210 (2006) (IBCA reversed contracting officer's decision on claim by ISDA contractor for reimbursement of CSC from expended cap-year appropriation, holding that error by CO was correctable and reimbursable from Judgment Fund).

Congress specifically amended ISDA in 1988 to address the failure of the BIA and the IHS to pay in full the indirect costs included in the price term of ISDA contracts, explaining its intent as follows:

> . . . Furthermore, . . . the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from direct program costs, which results in decreased amounts of funds for services.

Sen. Rep. No. 100-274, at 12 (1987) (Exh. 62, at 6-7). *See also id*. at 16, 30 (exh. 62, at 8, 19).

Despite this admonition and despite the ruling in *RNC v. Lujan*, the IHS resists full funding.

The government argues that "the terms 'reasonable' and 'allowable,' as used in these funding provisions [25 U.S.C. § 450j-1(a)], are general terms" (emphasis by government), suggesting that the Secretary has discretion in determining the amount of CSC to be added to the contract. *Def. Memo.* 27.

But "reasonable" and "allowable" are carefully defined in OMB Circular A-87.[40] If a cost is reasonable and allowable, the Secretary must include it in the contract support cost amount. There may be room for discussion about whether a particular cost is reasonable or is allowable. But that debate about a particular cost does not give the Secretary general discretion to deviate from the statutory command of adding to the contract the full CSC amount set out at 25 U.S.C. § 450j-1(a)(2). *See RNC v. Lujan*, 112 F.3d at 1463 n. 8 & acc. text.

Based on the 1988 amendments and their legislative history, the Tenth Circuit held in *RNC v. Lujan*:

> . . . By including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.

112 F. 3d at 1463. This is what is pled in the Second Amended Complaint ¶¶ 1-4, 14-25. In *RNC v. Lujan* as here, the government argued that Congress was keenly aware of the OMB indirect cost rate system and endorsed its continued use. The Court rejected the government's contention. *See RNC v. Lujan*, 112 F.3d at 1462.

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[40] OMB Circular A-87, 2 C.F.R. pt. 225, Appx. A, ¶¶ C.1, C.2. Appendix B to Circular A-87 provides principles to be applied in establishing the allowability or unallowability of 43 specific categories of costs. *Id.*, Appx. B.

### B. Common Costs That Benefit ISDA Programs Are Attributable To Those Programs.

Defendants repeatedly argue that Tunica and RNSB are attempting to shift the costs of other programs to the IHS. *Def. Memo. 31-38.* These costs are not the costs of other programs. *By the parties' agreement, they are IHS costs.* The common costs at issue here directly benefit Tunica's and RNSB's IHS programs. That they may also benefit other programs does not change the fact that they are within the definitions and requirements of 25 U.S.C. § 450j-1(a)(2). *See Arizona v. Thompson*, 281 F.3d 248, 255-256 (single federal funding source may pay common costs of other sources supporting achievement of the statutory purpose of the primary source).[41] OMB Circular A-87 does not require pro rata payment of common costs by all programs: allocation of common costs to benefiting programs is an accounting tool; it is not, like 25 U.S.C. §§ 450j-1(a)(2) and (g), a statutory command.[42] *See Arizona v. Thompson*, 281 F.3d at 256. *Accord, Nebraska v. U.S. Dep't of Health & Human Services*, 340 F. Supp. 2d 1, 4, 20 (D.D.C. 2004), *vacated on other grounds*, 435 F.3d 326 (D.C. Cir. 2006) (A-87 does not require payment of common costs by all benefiting programs; State's allocation of common training costs to single program upheld). This cost-shifting argument also was rejected by the Tenth Circuit in *RNC v. Lujan*, 113 F.3d at 1459.

Full payment of indirect CSC by Defendants will not result in ISDA funds being expended on activities that benefit only non-ISDA programs. Rather, full payment of indirect CSC will

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[41] The statutory purpose of ISDA is to improve opportunities for tribal self-government, § 450a(a), (b). Other federal programs operated by tribes further this purpose.

[42] And indeed, Defendants concede that "[i]f a statute passed by Congress prescribes policies or procedures that differ from those in the Circular, the provisions of the statute govern." Exh. 16, at 11-12 ¶ 1.4.

result in ISDA funds being spent on activities that simultaneously benefit ISDA programs and other programs, all of which advance ISDA's stated purpose. If the other programs did not exist, the ISDA program would still incur the same expenses. Indeed, to the extent that indirect cost pools are generally fixed, the indirect costs that some other programs do pay benefit the ISDA programs and in effect subsidize them.[43]

*RNC v. Lujan*, 112 F.3d at 1463, holds the obvious: the entire indirect cost pool must be recovered to allow an ISDA contractor to administer the ISDA programs in the base properly. Failure to recover indirect costs harms all the contractor's programs.

**C. Defendants' Expert Has Fundamentally Misunderstood The A-87 System.**

Most ISDA contractors over time exhibit fairly steady indirect cost pools. They operate hospitals, schools, clinics, and civil services, not businesses.[44] They incur costs no matter whether programs and services are operated in the black. Unless the size or make-up of the direct cost base fluctuates widely, the indirect cost pool remains generally fixed. *Facts* ¶ 19; exh. 62, at 5.

As the Tenth Circuit put it, it is because the indirect cost pool is not readily allocable that it tends to be more fixed than variable. *RNC v. Lujan*, 112 F.3d at 1461. If a cost were readily

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[43] Most ISDA contractors, like Tunica and RNSB, receive the majority of the funds in their direct cost bases from IHS and BIA ISDA contracts. Exh. 2 (list of tribes showing total federal funds received, BIA funds received, and IHS funds received); exh. 11, at 20. Defendants' pie charts, *Def. Memo.* 48, focusing on only one of the two ISDA funding agencies, are misleading. The obligations of the United States are a much larger wedge of the chart.

[44] CPA John Donham, one of Plaintiffs' experts, made this point in his deposition. He noted that Mr. Wilkins' report, discussed *infra*, was written from a business perspective, not a government cost accounting perspective. Unlike businesses, governments must operate basic governmental services regardless of revenues, he noted. This contributes to the generally fixed nature of their administrative costs. *See* Exh. 60, at 2-8.

allocable, it would not be in the indirect cost pool; rather, it would be a direct cost, part of the direct cost base. Exh. 11, at 11, 13-14. As NBC's designated representative, Deborah A. Moberly, correctly testified, a cost that varies directly with program costs is a direct cost, which would not properly be in the indirect cost pool at all. *Id*.

Defendants' principal weapon is a flawed and confusing report by Charles L. Wilkins. *Def. Exh.* 5. Mr. Wilkins' final conclusion, after 16 pages of discussion, is that "Plaintiffs' indirect costs, considered as a whole, are variable." *Id*. at 16. Mr. Wilkins has no experience with indirect cost rates or with ISDA and commits fundamental errors in his analysis.

First, Mr. Wilkins asserts that "[f]ixed costs are costs in which there is little correlation between the indirect costs and revenue." *Id.*, at 4. And, "[v]ariable costs will generally vary in a much closer, more linear relationship with revenue changes." *Id*. at 6. But indirect cost rates in the ISDA context have nothing to do with revenue; they are determined by comparing indirect costs with direct costs, not with revenues.[45] NBC in calculating rates assumes recovery of all indirect costs. Mr. Wilkins' charts that compare Tunica's and RNSB's total revenues with their expenditures for indirect costs, *id.* at 11, 14, compare apples with oranges and do not support his conclusions.. *See also* exh. 38, at 2-3 ¶ 8.

Second, Mr. Wilkins sets up a straw man by mischaracterizing Plaintiffs' arguments. He asserts that "Plaintiffs Allege that their Indirect Costs are Totally Fixed." *Def. Exh. 5*, at 9. But nowhere have Plaintiffs asserted that their indirect costs are "totally fixed," nor did the plaintiff

[45] "Contractors may opt to use one of three bases: total salaries and wages with or without fringe benefits or total modified direct costs less capital expenditures and pass-through." *Def. Exh.* at 3-4 ¶ 14. Each of the permissible bases is composed of expenditures; none is composed of revenues.

class in *RNC v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), on remand *sub nom. RNC v. Kempthorne*, D.N.M. CIV 90-0957 LH.

Certainly, large swings in program expenditures may cause changes in indirect cost pools. *Def. Exh.* 5, at 4. But Mr. Wilkins' contention that Plaintiffs' indirect costs considered as a whole are correlated with Plaintiffs' revenues is disproved by his own charts, *id* at 11, 14.[46] Those charts show fourteen year-to-year changes, covering 1995 through 2003 for Tunica and 1995 through 2002 for RNSB. Four times, revenues went up but indirect costs went down. Six times, revenues went down, but indirect costs went up. In only four of the 14 changes, did revenues and indirect costs move in the same direction. *See* exh. 59.

The variability of indirect costs should be measured against the program expenditures, the direct cost base, not against revenues. That measurement confirms that indirect costs are more fixed than variable. Tunica's indirect pool rose from roughly $694,000 in 1998 to roughly $915,000 in 2004, while its direct cost base rose from roughly $1,845,000 in 1998 to roughly $3,383,000 in 2004. *See* exh. 37, at 97-98, 142; exh. 38, at 3 (¶ 9). *See also* exh. 42. While the program base rose by 84%, the indirect cost pool rose by only 28.5%. Plaintiffs' indirect costs are

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[46] *Compare* Mr. Wilkins' report, at 9 n. 3, repeated at 13 n. 6: "To determine the specific category of semi-fixed or semi-variable I would need to have a more detailed understanding of the nature of each element of costs. However, in assessing the relationship of these two categories relative to changes in revenue, they both act in a similar fashion – they typically increase as revenue increases and they typically decrease as revenue decreases." Tunica's did not.

Even accepting his selection of revenues as the measure for determining the variability of indirect costs, his misinterpretation of Plaintiffs' financial data undermines his central contention. *See* exh. 38 at 1-2 (¶¶ 4-5, 7) 4-5, which shows that Mr. Wilkins based his conclusions on incorrect financial information. Mr. Burke's corrected data is graphed in exhibit 2 to his declaration. The pronounced increase in revenues from 1998 to 2004 is accompanied by a minimal increase in indirect cost expenditures. The relationship between indirect costs and revenues is certainly not "linear".

*generally* fixed in relation to the base.

Mr. Wilkins sees variable costs (*i.e.*, variable with respect to revenue changes) when Tunica's indirect costs change even though revenues don't change or they change in the opposite direction. When he observes that RNSB's costs don't change at all, he still sees variable costs.[47] In the years examined by Mr. Wilkins, Ramah's indirect costs remained virtually the same, while Tunica's varied, *but not in response to changes in revenues.* Mr. Wilkins' point is disproved by the very data he cites.

Neither RNSB nor Tunica recovered their entire indirect cost pools. They therefore could not maintain efficient program administration without diminishing program services or subsidizing indirect costs from other resources. RNSB incurred deficits to cover these shortfalls. Exh. 55, at 2-3 ¶¶ 10-12. Mr. Wilkins' attempt to refute the generally fixed nature of Plaintiffs' indirect cost pools fails because his data refute his conclusions. More importantly, the supposed variability he finds in the pool does not detract from the essential, material fact that the entire pool must be collected to operate the entire base. His evidence for the generally fixed nature of indirect costs does not meet the standard to create a genuine dispute. Even it if did, it is fundamentally immaterial. *See* exh. 39; exh. 56.

## V. THE DEFENSES OF WAIVER AND ESTOPPEL FAIL BECAUSE PLAINTIFFS DID NOT ACQUIESCE IN THE GOVERNMENT'S VIOLATIONS OF THE INDIAN SELF-DETERMINATION ACT.

### A. The United States May Not Rely on Defenses Not Raised by the Contracting Officer.

Defendants assert that Tunica and RNSB acquiesced in Defendants' violations of the ISDA

[47] *See id.*, at 13: "While the relative consistency in RNSB's indirect costs compared to revenue may give the appearance that they are fixed, another explanation is that the constant nature of RNSB's revenue does not facilitate the need for fluctuation in their indirect costs. [*Sic*.]"

and have consequently waived any right to redress of those violations or are estopped from asserting those rights. *Def. Memo* 52-59.

In fact, the record demonstrates no such acquiescence, waiver, or grounds for estoppel. Even if it did, the Court does not have jurisdiction to address these defenses because they were not grounds for the decisions by the Contracting Officers. *See* exh. 35, at 47; exh. 53, at 19 (Contracting Officers' decisions). While this Court exercises *de novo* review over the decisions of the Contracting Officers, 41 U.S.C. § 609(a), the United States may not assert before this Court affirmative defenses that were not considered by the Contracting Officers.

> To allow the government to assert alternate grounds in support of a contracting officer's decision, which were not the subject of that decision, would deprive contractors of the opportunity to choose the forum for that particular claim. Likewise, by failing to rely on these clauses at the contracting-officer stage, the government has circumvented one of the major purposes of the Act – encouraging settlement. *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 981-82 (1985) (discussing the contracting officer's obligation to attempt to negotiate a settlement). Accordingly, we conclude that this court lacks jurisdiction over the government's counterclaims and defenses . . . because they have not been the subject of final decisions by the contracting officer.

*Foley v. United States*, 26 Cl. Ct. 936, 941 (Cl. Ct. 1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993). *See also* this Court's discussion of *Foley*. *Amd. Opinion* (Doc. No. 48), at 14-15.

### B. The United States May Not Now Assert New Defenses That it Could Have Raised in its First Motion to Dismiss.

In presenting an omnibus preliminary attack that could have been presented five years ago, Defendants also violate Rules 12(g) and 12(h)(2), F.R.Cv.P, and prejudice Tunica and RNSB.

The government is precluded from raising in a subsequent motion to dismiss new Rule 12(b)(6) affirmative defenses that it could have raised but did not raise in its first motion to dismiss. *Albany Insurance Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909-11 (5th Cir. 1993)

**(**contract fraud case held defendant could not raise defense of forum selection in a second motion to dismiss**)**; 2 Moore's Federal Practice ¶ 12.21, at 12-24 (3d ed. looseleaf 2005). *See Seretse-Khama v. Ashcroft*, 215 F.Supp.2d 37, 40 n. 8 (D.D.C. 2002) **(**defense of lack of personal jurisdiction waived if not raised in prior motion to dismiss**)**. The government did not raise acquiescence, waiver, or estoppel in its first motion to dismiss.

Waiver and acquiescence are equitable remedies to bar the courthouse door to plaintiffs who have sat on their rights and knowingly and intentionally waived them. In this case Defendants assert that waiver and acquiescence apply because Tunica and RSNB repeatedly "agreed" to annual funding of their contracts in amounts below what they now claim.

The government, however, equally agreed in the contracts to full payment of CSC. As discussed above, section 1(a)(1) of the Model Agreement, 25 U.S.C. § 450*l*(c), expressly incorporates the provisions of Title I of ISDA. Sections 450j-1(a)(2) and (g) of title 25, requiring full payment of CSC, are part of Title I of ISDA. Section 1(b)(4) of the Model Agreement likewise requires full payment of CSC.[48] Therefore, the obligation of the United States to pay full CSC is incorporated into each and every one of Tunica's and RNSB's contracts.

The United States continuously and knowingly acquiesced in the inclusion of this obligation in each of those contracts, which it executed year after year. (Indeed, it enacted the legislation requiring the inclusion of these provisions.) The United States accepted the benefits of Tunica's and RNSB's performance of the Secretary's health-care obligations under those contracts

[48] Model Agreement § 1(b)(4) in combination with § 450j-1(g) requires the Secretary to "add[] . . . to the [Secretarial] amount contract support" determined pursuant to section [450j-1(a)]". In turn, the amount to be added for contract support is "the amount for the reasonable costs which must be carried on" to fulfill the contract. As decided in *RNC v. Lujan*, the A-87-based amount does not correspond to this directive.

year after year. Under these circumstances, the law of waiver and estoppel *as argued by Defendants* would equally prevent the United States from presenting any claim that Tunica and RNSB are not entitled to full payment of CSC.

When there are conflicting provisions within a contract, the rules of construction set out in the contract itself govern: Each provision of ISDA and each provision of the contract "shall be liberally construed for the benefit of the Contractor to transfer the funding . . . ." 25 U.S.C. § 450*l*(c), *Model Agreement*, sec. 1(a)(2). *See also id*., *Model Agreement*, sec. 1(d)(1)(A) (confirming trust responsibility of United States); secs. 1(d)(1)(B) and 1(d)(2) (obligations of Secretary to act in good faith); *RNC v. Lujan*, 112 F.3d at 1461 (applying Indian canon of construction to resolve ambiguity in ISDA).[49]

Even were waiver or estoppel applicable, the agreements were forced on Tunica and RNSB by circumstances and their acceptance in no way rose to the level of indifference, neglect, and knowledge required to apply the doctrines.[50] "A party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract should not ordinarily lead to a waiver of the innocent party's rights." 13 Williston on Contracts § 39.35, at 655 (4th ed. 2000). Acceptance of part payment of contract debt does not waive right to remainder.

### C. Contract Rights Created by Statute for the Benefit of the Contractor

[49] Moreover, the rule of contra preferentum requires that any ambiguity be resolved against the drafting party. *Mastrobuona v. Shearson Lehman Hutton*, 614 U.S. 52, 60, 115 S. Ct. 1212 (1995).

[50] In fact, the Government told Tunica that "the United States Office of the Inspector General has instructed the Indian Health Service to refrain from signing contracts that demonstrate disagreement. . . . *Signing an AFA that does not contain the objectionable language would not affect any statutory claim that Tunica-Biloxi might have*. . . ." Exh. 35, at 20 (emphasis added).

**Cannot Be Waived.**

Tunica's and RNSB's rights to full payment of CSC are set out in ISDA. 25 U.S.C. § 450j-1(a)(2) and (g). Even if Tunica and RNSB had knowingly, intelligently, intentionally, and explicitly waived those rights – and they certainly did none of those things – the equitable doctrine of waiver cannot trump a statutory right. The right of contractors to full CSC is not a mere private right; it is a right that Congress conferred because it is in the public interest. To allow ISDA contractors to waive or bargain away their right to full payment of CSC is contrary to the public interest, as that would reduce the level of health services provided to Indians below the level at which the Secretary would have provided those services. Any such waiver is unenforceable. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704-05, 65 S.Ct. 895 (1945) (employees' written waiver of right to liquidated damages under Fair Labor Standards Act not enforceable).

> . . . In cases in which a breach of law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal. . .

*LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995).[51]

The contracts here were contracts of adhesion and are subject to reform under the CDA. *New Valley Corp. v. United States,* 119 F.3d 1576, 1579-80 (Fed. Cir. 1997) (government contract

[51] *Accord*, *Tompkins v. United Healthcare*, 203 F.3d 90, 98 (1st Cir. 2000) (party cannot waive application of preemption provisions of Employee Retirement Income Security Act); *Carter v. Exxon Co.*, 177 F.3d 197, 210 (3d Cir. 1999) (gas station franchisees cannot waive protections granted by federal Petroleum Marketing Practices Act); *Haghighi v. Russian American Broadcasting Co.*, 173 F.3d 1086 (8th Cir. 1999) (inclusion of statutorily-required language in settlement agreement cannot be waived; applying Minnesota law); *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510, 513 (Ind. Ct. App. 1st Dist. 1991) (employee in employment agreement cannot waive benefits of prevailing-wage statutes; "[a]llowing settlement or release of a claim would permit unscrupulous contractors to force employees to submit to economic pressures and accept lower wages"). *See* 15 Corbin on Contracts § 88.7, at 595 (rev. ed. 2003).

contains implied covenant of good faith and fair dealing and government is under duty to advance reasonable contract expectations of contracting party; contract must be interpreted in a manner that preserves its intent and does not destroy it; exculpatory clause drafted by the government must be strictly and narrowly construed; waiver applies only where government has used its best efforts to fulfill the reasonable expectations of the contractor).

> Whenever the relationships between the parties appear to be of such a character as to render it certain that they do not deal on terms of equality . . . because of superior knowledge of the matter derived from a fiduciary relationship or from overmastering influence on the one side . . . the presumption is that the transaction is invalid." 17A Am. Jur. 2d, CONTRACTS, § 237.

*LaBarge Products, Inc*., 46 F.3d at 1552. In *Appeals of Seldovia Village Tribe*, IBCA 3862 and 3863/97 (Exh. 66), an ISDA IHS contractor succeeded before the HHS Departmental Review Board in recovering CSC funds even though its Annual Funding Agreement limited recovery to the amount in a congressional committee report. The *Seldovia* decision, binding on the Department, cited *MAPCO* and *Beta Systems, Inc. v. United States*, 838 F. 2d 1179, 1185 (Fed. Cir. 1988)(Defense procurement contractor held entitled to benefit of DAR index instruction which government argued Beta should have known "might not track the price of aluminum") or the proposition that "the Government cannot contractually force the Tribe to accept less than full CSCs when the Tribe is entitled to full CSCs by law."

The government not only ignores the plain fact that ISDA is a remedial statute which contains specific commands to *include in each contract* full CSC needed to maintain program levels, 25 U.S.C. § 450j-1(a)(2) and (g), but it does so in the context of a trust responsibility and the prior class-wide adjudication of the same issue. *RNC v. Lujan*, 112 F.3d at 1463.

None of the cases cited by Defendants, in particular *Hermes Consolidated, Inc. v. United*

*States*, 58 Fed. Cl. 409 (2003), *reversed sub nom. Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005), involves any comparable statute making the contractor the beneficiary of the services it is to perform or involves a trust relationship. *See, e.g., LaBarge Products, Inc*., 46 F.3d at 1552 ("However, if the government officials make a contract they are not authorized to make, in violation of **a law enacted for the contractor's protection**, the contractor is not bound by estoppel, acquiescence or failure to protest"; emphasis added). The government places principal reliance on *Hermes Consolidated, Inc.* That decision dealt with a "sophisticated government contractor" which had successfully bid for a series of commercial profit-making contracts to supply military jet fuel over a six year period from 1988 to 1994. The contractor, Wyoming Refining Co., waited 14 years to go to court; presumably earned profits, *id.* at 413; and never complained about the price adjustment clause declared illegal by *MAPCO Alaska Petrol. Co. v. United States*, 27 Fed. Cl. 405 (1992). The court found that the clause in question was "promulgated for the mutual benefit of both the government and the contractor" and that "[w]hile characterized as 'illegal' or 'unlawful'" it was better termed as "unauthorized". *Hermes*, 58 Fed. Cl. at 419. On appeal, the Federal Circuit reversed the *Hermes* decision, overruling the *MAPCO* finding that the clause was illegal (but not *MAPCO*'s holding that a contract clause violating a statute cannot be waived). 405 F.3d at 1348-1349. *See* discussion of *Seldovia, supra*, at 58.

Unlike the Wyoming Refining Co., Tunica and RNSB have vigorously sought reform of their indirect costs to comply with *RNC v. Lujan*. Exh. 37, at 2-3 (¶¶ 7-8), 13-14 (¶¶36-37), 71-84 exh. 55, at 2 (¶¶ 5-7), 6-7.

**D. The Text of ISDA Precludes Contractor Waiver of Statutory Rights.**

Defendants point to no express waiver by Tunica and RNSB of their statutory rights.

Rather, they maintain that Tunica's and RNSB's failure to reject the AFA and its offer of funds at an amount less than the funding required by statute implies waiver of any claim to the statutorily-mandated amount. ISDA does not permit such an implication.

ISDA contains a number of provisions authorizing, and providing a mechanism for, the Secretary to waive applicable regulations *when so requested in writing by a tribe*. In 25 U.S.C. § 450k(e), Congress provided that

> The Secretary may . . . waive regulations if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this subchapter and is not contrary to statutory law. In reviewing each request, the Secretary shall follow [declination procedures].

Similarly, in a section applicable to self-determination compacts, 25 U.S.C. § 458aaa-11(b)(2), ISDA provides that "Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation . . . the Secretary shall either approve or deny the requested waiver in writing." *See also* 25 C.F.R. pt. 900, Subpart K ("*Waiver Procedures*"). There is even authority for tribes to agree to what would otherwise be inapplicable agency rules or policies, provided they do so expressly in the compact or funding agreement. 25 U.S.C. § 458aaa-16(e) (applying to ISDA self-governance compacts).

But there is *no* ISDA provision for tribal contractors to waive *statutory* rights. Because Congress has expressly and thoroughly considered waiver in the statute, and limited it to specific parties and subjects, ISDA must be deemed to preclude its general application beyond those subjects. *See, e.g., Christianson v. Harris County*, 529 U.S. 576, 583, 120 S. Ct. 1655 (2000) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode"); *K.P. Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118, 125 S. Ct. 542 (2004) ("[W]here Congress includes particular language in one section of a statute but

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (Citations and internal editing omitted.))

Importantly, then, the statute does not allow waiver of statutory rights. In those few instances where Congress has allowed waiver, Congress created a procedure requiring the waiver to be expressed in writing by the tribal contractor and the express agreement of the Secretary. If Congress intended to protect tribal contractors from attempts by the Secretary to waive regulations unilaterally or by a contractor to waive regulations inadvertently, then certainly it is a far leap to infer that Congress intended to allow an implicit waiver of the statute itself. Moreover, Congress established a clear test for waiver of regulations. The Secretary may waive regulations only when the "waiver is in the best interests of the Indians served by the contract or is consistent with the policies of the Act, and is not contrary to statutory law." 25 U.S.C. § 450k(e). To imply a waiver of the statute here would go far beyond what is permitted in the statute and would violate the very test Congress set out for the waiver of regulations: it would subject contractors to a waiver that is inconsistent with the statute and with their own best interest.

### E. IHS Was Well Aware of the Nationwide Protest Over Contract Support Costs Generally and the Rate System Specifically.

The Ramah Navajos did not sit on their rights; they have been seeking to enforce the ISDA amendments since they were enacted. In 2001 IHS said:

> Full funding of tribal CSC has not been appropriated and has resulted in four congressional oversight hearings and litigation between several tribal governments and the IHS . . . .

Exh. 20. The litigation referred to includes *RNC v. Lujan*, whose invalidation of the indirect cost rate system had sparked creation of the CSC work group referred to in Judge Hansen's findings on

remand, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1099 (D.N.M. 1999). That work group included IHS.

### F. Neither The Government Nor Non-ISDA Tribes Have Been Harmed; Federal Policy Commands Payment of Contract Support Cost Rate-Based Shortfalls.

Unlike the Wyoming Refining Co. in *Hermes*, neither Plaintiff here has "run up damages" and then "suddenly go[ne] to court". 58 Fed. Cl. at 413. The government in the instant case did not rely on the contractor's acceptance of the dollar amount in choosing a low bidder, as it did in *Hermes* and the other defense procurement and timber-cutting cases cited by Defendants.

The *Hermes* court noted: "The [Government's] conduct indicates good faith in their attempt to abide by the court's decision in *MAPCO* while seeking conforming changes to the [Federal Acquisition Regulations]." *Id.* at 419. By contrast IHS did nothing to bring its practices into line with the law. In fact, it ignored the plain command of OMB Circular A-87:

> The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. **This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate.** The agreed upon rates shall be made available to all Federal agencies for their use.

2 C.F.R.. pt. 225, Appx. E, ¶ E.3 (emphasis added).

Given the nature of ISDA and this specific OMB language, no purposeful intent to waive rights to full CSC can be discerned and no proofs to the contrary have been proffered. Under A-87 it was the government that had an affirmative duty to amend the indirect cost rate agreement following *RNC v. Lujan*. *See, e.g., Centex Corp.*, 395 F.3d at 1310-11 (waiver does not apply where agreement specifically reserves rights).

Neither Plaintiff has caused detrimental reliance since, as shown by *Cherokee*, 543 U.S. at

642-43, 125 S.Ct. at 1180, if the Secretary has expended the entire appropriation, damages are recovered from the Judgment Fund, not from programs of other tribes. *See RNC v. Babbitt*, 50 F. Supp. 2d at 1095 (Judgment Fund payback of approved settlement under 41 U.S.C. § 612(c) would not be required; court would not allow reimbursement of $76 million settlement to Judgment Fund from funds appropriated for current BIA programs: "Such a shell game would clearly be inequitable and the Court will retain jurisdiction to ensure that the Government does not engage in such charlatanism.; *Mississippi Band of Choctaw Indians*, Interior Board of Contract Appeals, Nos. IBCA 4711 through 4715, 2006 WL 1009210*6-7 (2006).[52]

For the lump sum years subject of Plaintiff's concurrent Motion for Partial Summary Judgment the defense of waiver also fails for simple reason the AFAs were all signed well before the May 8, 1997, decision in *RNC v. Lujan*, 112 F. 3d 1455 (10th Cir.),[53] the earliest Plaintiffs could be charged with knowledge of the illegality of the rate system.

The public policy declared by Congress, 25 U.S.C. § 450a(a), (b), to promote Indian self-determination by itself defeats the government's argument.

It defies common sense to infer that Tunica or RNSB intended to abandon or waive their rights for nothing in return. It is outrageous that a trustee should argue waiver and acquiescence

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[52] 41 U.S.C. § 612(c) does not require payback when funds to do so are "not available". In that event the agency must seek additional appropriations. The word "available" is not defined. In a trust context where critical services such as health are involved, "available" must be construed to exclude funds needed for on-going programs. The payback provision is an internal government requirement which has been honored more in its breach than its fulfillment: "During fiscal years 2001, 2002, and 2003, federal agencies reimbursed Treasury for fewer than one of every five dollars owed under [the Contract Disputes Act]." U.S. General Accounting Office, JUDGMENT FUND: TREASURY'S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT 1 (GAO-04-481, April 2004). *And see* Defendants' Amended Response to Interrogatory 10 (exh. 74).

[53] *Def. Exh.* 6, 7, 9, 10.

under the circumstances presented here as well as antagonistic to the "obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities . . ."[54] ISDA is designed to enable Indian tribes to get out from under two ineffectual federal bureaucracies and chart their own course *without sacrificing program levels*.[55]

In any case *Seldovia* – decided almost contemporaneously with *Hermes* – settles the issue. Self-determination contractors cannot be held to contract terms which violate a law for their benefit. Moreover, "a provision in a government contract that violates or conflicts with a federal statute is invalid or void", *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996). The Court should not condone what is clearly not the intentional and voluntary abandonment of a right conferred by ISDA in fulfillment of the statutory scheme.

## VI. FULL PAYMENT BY THE GOVERNMENT OF ITS CONTRACTUAL OBLIGATION DOES NOT REPRESENT A "WINDFALL"

Finally, Defendants argue that any recovery by Plaintiffs will be a "windfall," relying on *Samish Indian Nation v. United States*, 419 F. 3d 1355 (Fed Cir. 2002). Such reliance is misplaced. *Samish* was not a case involving construction of an ISDA contract. When the Samish tribe received long-deferred federal recognition, it sought damages for ISDA contracts it might

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[54] That continued use of an illegal system for determining the contract price is voidable by the beneficiary is firmly established. 76 Am. Jur. 2d, Trusts, § 322: ". . .[I]n all matters connected with the trust, a trustee may not, in dealing with the cestui que trust, gain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind, and where the transaction involves a breach of trust, it is voidable by the beneficiary. . . . The duty of the trustee is to make to the cestui que trust such full disclosure of all facts and circumstances which have come to his knowledge as trustee as to enable the cestui que trust to deal with him on even terms. It is his duty, indeed, to make the beneficiary understand the effect of the transaction." *Id. See also id.* § 341. Defendants waited over three years to raise waiver or acquiescence.

[55] Sen. Rept. 100-274, at 12, 16, 30 (exh. 62, at 6, 8, 19); Sen. Rept. 103-374, at 9.

have operated had it been recognized earlier. But it had never had an ISDA contract and it had never provided services. The court easily held it had no contract rights, but it is just as easily distinguished. Here Plaintiffs had contracts and provided services. They are entitled to contract damages, though a tribe that never had a contract is not.

**CONCLUSION**

For the reasons stated above, the Court should grant Plaintiffs' Motion for Partial Summary Judgment and deny Defendants' Cross Motion to Dismiss or in the Alternative for Summary Judgment.

Respectfully submitted,

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