IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENOMINEE INDIAN TRIBE OF WISCONSIN, Plaintiff, v. UNITED STATES OF AMERICA, KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, and YVETTE ROUBIDEAUX, Director of the Indian Health Service,[1] Defendants.	)	Case Number: 1:07cv00812 Hon. Rosemary M. Collyer

DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants hereby move to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56. The reasons for this motion are set forth in the accompanying memorandum of law.

Dated: April 29, 2011

Respectfully submitted,

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INTRODUCTION

Plaintiff Menominee Indian Tribe of Wisconsin entered into contracts with the government to provide certain health care services to tribal members pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* ("ISDA"). After executing these contracts and accepting funds under them for many years, Plaintiff now challenges the amount that the parties agreed the Indian Health Service ("IHS") would pay to it for indirect contract support costs ("indirect CSC"). Not only are these claims brought years after Plaintiff negotiated, executed, performed, and accepted funding under its contracts, some claims (1996 through 1998) fall outside of the applicable statute of limitations. Moreover, Plaintiff released IHS from any claims for additional funding, including indirect CSC, from 1996 through 1998. Aside from these threshold issues, IHS has paid all of the money due to Plaintiff under each of the applicable contracts. IHS followed the ISDA and all relevant policies in entering into contracts with Plaintiff. Binding Supreme Court precedent dictates that the ISDA contracts entered into form the basis of liability between the parties. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005). The contracts at issue here are unambiguous, and IHS is not liable to pay Plaintiff any more than it already has for indirect CSC for all years at issue in this lawsuit. Additionally, starting in 1998, Congress capped the amount of funds that IHS could spend on CSC. IHS largely spent these amounts, and any minor remaining funds are no longer available as a matter of law.

STATUTORY BACKGROUND

Congress enacted the ISDA to allow Indian tribes to contract with the federal government to operate many of the programs that the government previously operated for the benefit of

Indians, through what is termed a self-determination contract. The ISDA has the stated purpose to "permit an orderly transition from 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." 25 U.S.C. § 450a(b). To achieve these policy objectives, the ISDA provides a framework for the orderly transfer of the administration and operation of traditionally government-run programs to the Indian tribes. A primary means for achieving this transfer is the self-determination contract.

Section 450f(a)(1) of the ISDA directs the Secretary of Health and Human Services ("the Secretary" or "HHS"), "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . ." 25 U.S.C. § 450f(a)(1).[2] Each ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, in recent years, annual funding agreements ("AFAs"). *See id.* § 450*l* (providing for a model contract); id. § 450*l*(c)(e)(2) (providing for written modifications to the contract); *id.* §§ 450*l*(c)(b)(4), (c)(f)(2) (providing for an AFA). The funding levels for an ISDA contract are generally described in the AFA.

Although many self-determination contracts remain in effect for more than one year, Tribal contractors must submit AFA proposals each year, which are then subject to individualized negotiations between the Secretary and the contractor. *See id.* § 450j-1(a)(3)(B);

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[2] The statute also applies to certain (non-healthcare) services provided to Native Americans by the Department of Interior and the Secretary of Interior by the Interior's Bureau of Indian Affairs ("BIA"). Because BIA contracts are not at issue in this case, this Memorandum does not discuss the Secretary of Interior's role under the ISDA.

25 C.F.R. § 900.12. If the parties are unable to agree on the appropriate funding level, the Secretary can decline the proposal in part or in full, on one of the statutorily dictated grounds. *See* 25 U.S.C. § 450f(a)(2). The Tribal contractor has the right either to seek review of a declination through the administrative appeals process or by a direct federal court action. *See* 25 U.S.C. § 450f(b).

There are two types of funding for each ISDA contract. First, the tribal contractor receives the amount the Secretary "would have otherwise provided for the operation of the programs" ("Secretarial amount"), which "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs." 25 U.S.C. § 450j-1(a)(1). Second, it receives contract support costs ("CSC"). *Id.* § 450j-1(a)(2).

CSC can be broken down into four categories. First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance. *See id.* § 450j-1(a)(3)(A)(i); *id.* § 450b(c). Second, in the initial year of a contract, CSC may include "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis." *Id.* § 450j-1(a)(5). Third, CSC may include "[c]osts incurred before the initial year that a self-determination contract is in effect," if the tribe provides "written notification of the nature and extent of the costs prior to the date on which such costs are incurred." *Id.* § 450j-1(a)(6). Finally, there are indirect CSC, which are administrative costs that are shared by several different programs or services. *See id.* § 450j-1(a)(3)(A)(ii); *id.* § 450b(f). Indirect CSC are the only funds at issue in this lawsuit. *See* Compl. ¶¶ 2, 3, 17.

The ISDA permits payment for CSC only for those costs that the Secretary does not incur in her direct operation of the program (or funds through sources other than those under the

contract), and only for costs that are reasonable in light of the activities to be conducted. *See id.* § 450j-1(a)(2)-(3). IHS's payment of CSC, like *all* funding under the ISDA, is subject to the availability of appropriations. *See id.* § 450j-1(b); *id.* § 450j(c).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a federally recognized Indian tribe that has contracted with the United States pursuant to the ISDA to provide health care services to members of the tribe and other beneficiaries. Compl. ¶ 10. Plaintiff has contracts under which AFAs are negotiated pursuant to the ISDA. *Id.* Plaintiff filed this action on May 3, 2007, pursuant to the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* ("CDA").[3] *Id.* ¶ 1.

Plaintiff's First Claim for Relief asserts that, in from 1994 through 2004, the ISDA required IHS to agree to pay it under its contract the sum of Plaintiff's indirect cost rate for that year multiplied by its program base. This claim is referred to as a "shortfall claim." Compl. ¶¶ 22-25; 37-41. Plaintiff's Second Claim for Relief asserts that, during the same years, IHS applied a rate for indirect CSC that was based on a miscalcuation. This claim is referred to as a "miscalculation claim." *Id.* ¶¶ 26-33; 42-44. Plaintiff's Third Claim for Relief asserts that IHS failed to pay Plaintiff a proper amount for indirect CSC in 1997, and had it payed the proper amount to Plaintiff for that year, it would also have paid higher amounts from 1998 through 2000. *Id.* ¶¶ 34-36; 45-46. This claim is referred to as a "stable funding claim." Plaintiff's Fourth Claim for Relief is a breach of trust claim.

[3] Pursuant to the CDA, which requires that contract claims against the government first be submitted to the contracting officer for a decision, *see* 41 U.S.C. § 605(a), Plaintiff submitted its claims to the Indian Health Service in September 2005 for fiscal years 1995 through 2004. *See* Compl. ¶ 8. IHS denied the claims for all years. *Id.* ¶ 9.

On August 15, 2007, Defendants moved to dismiss the case on several grounds. Defendants asserted that Plaintiff's claims related to funding in 1995 through 1998 were time-barred; the 1995 claim due to laches and the 1996-1998 claims due to applicable statutes of limitations. *See* Defs.' Mot. to Dismiss [Doc. No. 6]. Defendants also argued, with respect to all years at issue, that because IHS had paid Plaintiff pursuant to the terms of the contracts at issue, there was no breach of contract. *Id.* On March 14, 2008, the Court dismissed Plaintiff's claims from 1995 through 1998. *See* Order [Doc. No. 15]. The Court determined first that laches applied to Plaintiff's 1995 claim. Second, the Court determined that the applicable statute of limitations, 41 U.S.C. § 605(a), barred Plaintiff's claims from 1996 through 1998. Mem. Op. at 2-3 [Doc. No. 14]. In so holding, the Court rejected Plaintiff's argument that § 605(a) was non-jurisdictional and thus could be tolled, either under an equitable tolling theory or pursuant to a pending class action. *Id.* at 2 n.2. The Court allowed the remainder of Plaintiff's claims to move forward, as it denied the Defendants' motion based on full performance under the contract. *Id.* at 3-4. Specifically, the Court pointed out that "[n]o information is provided to the Court concerning how the Secretary 'follow[ed] as closely as possible the allocation plan Congress designed,' when there were insufficient appropriations to allow funding." *Id.* at 4.

After receiving the Court's opinion, the parties agreed to a stipulation to dispose of the remainder of the case and allow Plaintiff to appeal the Court's decision. The parties interpreted the Court's decision as dismissing all of Plaintiff's claims from 1995 through 1998, and Plaintiff's Third Claim for Relief, which was premised on actions taken in 1997, in its entirety. *See* Joint Stipulation and Proposed Order [Doc. No. 26] at 1. Plaintiff agreed to voluntarily dismiss with prejudice the remaining claims in the case. *Id.* at 2. In entering the stipulation,

Plaintiff reserved its right to appeal the Court's Order as it applied to the First Claim for Relief for 1995 through 1997, and the Third Claim for Relief, which addressed funding in 1998 through 2000. *Id.* On November 24, 2008, the Court endorsed the parties' stipulation, entered an order dismissing Plaintiff's Third Claim based on the March 14, 2008 Order, and dismissed with prejudice Plaintiff's remaining claims not disposed of by the Order. *See* Nov. 24, 2008 Order [Doc. No. 27].

Plaintiff appealed the Court's opinion and, on July 30, 2010, the D.C. Circuit issued an opinion in this case. The circuit court ruled that the statute of limitations period was not jurisdictional for the purpose of extending equitable tolling, if applicable. *Menominee Indian Tribe v. United States*, 614 F.3d 519, 526, 529 (D.C. Cir. 2010). The court also ruled that § 605(a) was not subject to class action tolling. *Id.* at 529.

On remand, the remaining claims before the Court are Plaintiff's "shortfall claim" for years 1995 through 1997 (First Claim for Relief) and its "stable funding claim" for fiscal years 1998 through 2000 (Third Claim for Relief).

STANDARD OF REVIEW

Defendants move to dismiss Plaintiff's claims for fiscal years 1996 through 1998 under Fed. R. Civ. P. 12(b)(6) as untimely due to the statute of limitations under the Contract Disputes Act, 41 U.S.C. § 605(a).[4] Defendants, in the alternative, move for summary judgment with

[4] "[W]hen a party seeks to sue the United States pursuant to a waiver of sovereign immunity, the expiration of the limitations period has traditionally been construed as a bar to jurisdiction, and thus a proper subject for a motion to dismiss under Rule 12(b)(1)." *Bigwood v. Defense Intelligence Agency*, 699 F. Supp.2d 114, 115 n.3 (D.D.C. 2010) (internal quotations and citation omitted). Defendants recognize, however, that the D.C. Circuit has held that the statute of limitations applicable to this case is not jurisdictional. *Menominee*, 614 F.3d at 529. As a result, Defendants move under Rule 12(b)(6), which is the standard generally used for non-

respect to the statute of limitations. Defendants also move to dismiss Plaintiff's claim on the merits under Rule 12(b)(6), or in the alternative for summary judgment, with respect to 1995 - the only year at issue that is not barred by the statute of limitations – as well as for all other years in the event the Court denies Defendants' motion with respect to the statute of limitations.

A court may grant a Rule 12(b)(6) motion when a complaint does not contain allegations that support recovery under a viable legal theory. *Bell Atlantic Corp. v. Twombly*, 550 U.S.544, 562 (2007). In considering a motion to dismiss under Rule 12(b)(6), the Court can consider "the facts alleged in the complaint, any documents either attached or incorporated in the complaint, and matters of which [it] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). In making its ruling, a court can may also consider documents referred to in the complaint and integral to a plaintiff's claim. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). Because the contract documents, including the release signed by Plaintiff, are incorporated into, and integral to, Plaintiff's claim, the Court may properly consider Defendants' motion under Rule 12(b)(6).

A party is entitled to summary judgment if the pleadings and affidavits demonstrate that there is no genuine issue of material fact in dispute for trial and that the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the "initial responsibility of informing the court of the basis for [its] motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party, in response to the motion, must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." *Id.* at

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jurisdictional statutes of limitations. *See Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

324 (internal quotations omitted). The existence of a factual dispute, by itself is not sufficient to bar summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). While the movant bears the initial responsibility of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to "come forward with 'specific facts showing there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). If the non-movant fails to properly address the movant's assertion of fact, the court may consider the fact undisputed and may "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

ARGUMENT

I. THE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIMS FOR ADDITIONAL INDIRECT CSC FUNDING IN 1996, 1997, AND 1998.

The Contract Disputes Act governs Plaintiff's claims. *See* Compl. ¶ 7; 25 U.S.C. § 450m-1(d); 41 U.S.C. § 609(a). In 1994, Congress enacted a six-year statute of limitations for Contract Disputes Act claims, which provides, "[e]ach claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). Because Plaintiff did not raise claims related to its 1996 through 1998 CSC funding within six years of their accrual, these claims must be dismissed.

Plaintiff signed contract number 239-96-0030, which covered contract years 1996 through 1998, on December 21, 1995, *see* Ex. B at 15, and subsequently signed AFAs in 1996,

1997, and 1998. *See id.* at 17-29; Exs. C, D. Each AFA was in effect from January through December of the pertinent year. *Id.* Plaintiff's contract claims accrued by December 31 of each year. *See Oceanic S.S. Co. v. United States*, 165 Ct. Cl. 217, 225 (1964) (per curiam) ("A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action. Therefore, where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract.") (internal citations omitted).[5]

Specifically, Plaintiff's claims under its 1996 AFA accrued, at the latest, by December 31, 1996, and the statute of limitations on these claims expired, at the latest, December 31, 2002. Similarly, Plaintiff's claims under its 1997 AFA accrued no later than December 31, 1997, and the statute of limitations on these claims expired December 31, 2003. Plaintiff's claims under its 1998 AFA accrued no later than December 31, 1998, and the statute of limitations on these claims expired December 31, 2004. By its own admission, Plaintiff did not submit any of its claims for 1996 through 1998 to the contracting officer until September 7, 2005. *See* Compl. ¶ 8. This falls well outside of the CDA's six-year statute of limitations period. Consequently, the Court lacks jurisdiction over those claims.

While the circuit court determined that § 605(a) may be equitably tolled, it did not state whether equitable tolling is applicable in this case. *Menominee*, 614 F.3d at 531. In fact, equitable tolling is invoked "only sparingly," *Norman v. United States*, 467 F.3d 773, 775 (D.C.

[5] The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret government contracts almost exclusively. *See* 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein.

Cir. 2006). As applied to this case, Plaintiff has not pled, and is unable to prove, the type of due diligence and extraordinary factual circumstances necessary to apply equitable tolling to its claims that were presented to the contracting officer outside the generous six-year statute of limitations.

The "hurdle is high" to demonstrate that equitable tolling should apply, as "[t]he court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances." *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 579-80 (D.C. Cir. 1998) (internal quotations and citation omitted). As the Supreme Court has recently reiterated, "a 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Proper diligence for equitable tolling requires active involvement in pursuing legal rights. Equitable tolling has been allowed "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). For example, the Supreme Court determined that a prisoner exhibited appropriate diligence for equitable tolling in pursuing his habeas petition when he:

> not only wrote his attorney numerous letters seeking crucial information and providing direction, he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have [his attorney] – the central impediment to the pursuit of his legal remedy – removed from his case. And, the *very day* that Holland discovered

> that his AEDPA clock had expired due to [his attorney's] failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Holland, 130 S. Ct. at 2565. In contrast to the myriad of steps taken to demonstrate due diligence in *Holland*, Plaintiff did nothing to preserve its rights in a timely manner. A simple letter to the contracting officer would have preserved Plaintiff's claim, *see Arctic Slope v. Sebelius*, 583 F.3d 785, 797 (Fed. Cir. 2009) ("submissions to the contracting officer need not be elaborate"), *cert. denied*, 130 S. Ct. 3505 (2010); there were no procedural obstacles in Plaintiff's way. Plaintiff did not file a defective pleading; it did not file anything at all. Rather than demonstrating due diligence, Plaintiff simply waited until September 2005 to administratively exhaust its claims for all of the years at issue. This is simply too late to invoke the "carefully circumscribed" relief of equitable tolling. *See Norman*, 467 F.3d at 776 (rejecting litigant's argument for due diligence when he failed to take all necessary steps to preserve his claim).[6]

Even if Plaintiff could demonstrate due diligence, which it cannot, Plaintiff cannot meet the other element necessary for equitable tolling, which is demonstrating that extraordinary circumstances exist. Plaintiff has not pled that any extraordinary circumstance stood in its way of presenting its claims to the contracting officer. *See, e.g., Holland*, 130 S. Ct. at 2564 (attorney abandonment may constitute an extraordinary circumstance); *Smith-Haynie*, 155 F.3d at 580 (extraordinary circumstances could be shown by a disability of *non compos mentis*, such as being "unable to engage in rational thought and deliberate decisionmaking").

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[6] Plaintiff, in fact, demonstrated the *opposite* of due diligence, as it affirmatively released the government from any liability on its contracts while the statute of limitations was running, as described in Part II, *infra*.

Because Plaintiff did not plead in its Complaint any fact supporting equitable tolling and because Plaintiff cannot meet the stringent requirements necessary for equitable tolling, its claims for fiscal years 1996 through 1998 must be dismissed.

II. PLAINTIFF RELEASED IHS FROM CLAIMS FOR ANY FURTHER FUNDING FOR 1996, 1997 AND 1998

Even if Plaintiff's claims for 1996 through 1998 are not dismissed on statute of limitations grounds, Plaintiff could not recover for those years because it released IHS from any claims for additional payment.

Once a contract term has expired, IHS Area Offices routinely take steps to "close out" the contract. One step in this process was to submit a release form to the Tribe. *See* Declaration of William F. Fisher, dated April 28, 2011, ¶ 27 (Ex.G). Such releases usually include the total amount of funding that IHS awarded under the contract, seek the Tribe's concurrence that it has been paid all amounts due under the contract, and solicit the Tribe's agreement to release all claims under the contract or to notify IHS of the claims that the Tribe wishes to reserve. *Id.* IHS imposes no penalty on Tribes for the failure to execute a release. *Id.*

On May 26, 1999, Plaintiff executed a release for contract no. 239-96-0030, which covered fiscal years 1996, 1997 and 1998. Fisher Decl. ¶ 29 & Ex. 6. This release specifically noted the amounts that were paid under its contracts for each fiscal year; amounts that included indirect CSC paid. *Id.* Ex. 6. The release also states that the Tribe "does remise, release, and discharge by Government, its officers, agents, and employees, of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract," except those specifically delineated. *Id.* Nothing is listed as an exception to this release. *Id.* Plaintiff

has "released" all claims for additional CSC for those fiscal years. *See Braza v. Office of Personnel Mgmt.*, 598 F.3d 1315, 1319 (Fed. Cir. 2010) ("the voluntary signing of a government form for the purpose of evidencing agreement with the terms of the form is binding, and the government is entitled to rely on the act of signing absent a showing of fraud, duress, or mental incompetence"); *Do-Well Machine Shop, Inc. v. United States,* 870 F.2d 637, 640-641 (Fed. Cir. 1989) (upholding contract provision that imposed one-year limit on contractor's ability to file a CDA claim, on the basis that "[t]he United States can enforce the waiver of, or agreement to, a given limitations period with the same force as a private party, notwithstanding its superior bargaining power"); *McCall v. United States Postal Service*, 839 F.2d 664, 667 (Fed. Cir. 1988) (the mere possibility of intimidation cannot invalidate all waivers of statutory rights; parties are often forced to make difficult choices which effectively waive statutory or even constitutional rights). As such, Plaintiff's claims for additional CSC funding for 1996, 1997, and 1998 must be dismissed. Such a dismissal also dismisses Plaintiff's "stable funding" claim, which is premised on recovery for 1997. *See* Nov. 24, 2008 Order [Doc. No. 27].

III. PLAINTIFF CANNOT RECOVER UNDER ITS SHORTFALL CLAIM

The only remaining claim is Plaintiff's shortfall claim for 1995. Plaintiff cannot recover on its 1995 shortfall claim because IHS fully complied with its statutory and contractual obligations to pay indirect CSC. Defendants thus move to dismiss Plaintiff's 1995 shortfall claim. Because the basis for dismissal of 1995 also provides an alternate ground for dismissal of Plaintiff's claims for additional CSC funding in 1996-2000, Defendants move in the alternative to dismiss these claims as well.

Count I of Plaintiff's complaint is premised on a mis-understanding about the statutory requirements for indirect CSC funding. Plaintiff alleges that, irrespective of any other statutory mandate, IHS must pay indirect CSC equal to a negotiated rate multiplied funding by the direct cost base for the programs run by the Tribe.[7] Compl. ¶ 23. Plaintiff then alleges that, under *Cherokee Nation v. Leavitt*, 543 U.S. 631, 642-43 (2005), IHS should have reprogrammed funds from its 1995 lump sum appropriation to pay this "rate times base" amount. Compl. ¶ 24. In fact, Plaintiff is wrong on both counts. There is no statutory requirement to apply a rate times base formula for awarding indirect CSC. The statute requires the parties to negotiate the amount of indirect CSC to be included in the funding agreements. Nor does *Cherokee* stand for the proposition that IHS is liable to the Tribes for the amount of rate times base. In fact, it stands for the *opposite* proposition; namely, that the agency must adhere to the terms of the *contract* it entered. Here, IHS negotiated an indirect CSC amount with the Tribe and paid it the amount

[7] Indirect cost rates are not issued by IHS, but by federal government agencies designated by the Office of Management and Budget ("OMB") to negotiate the rates (called a "cognizant agency"). Fisher Decl. ¶ 18. Indirect cost rates are the result of a negotiation that is independent from contracting under the ISDA. *See* 2 C.F.R. Pt. 225, App. A, § B.6. The National Business Center, an agency within the Department of Interior, is Menominee's cognizant agency. Fisher Decl. ¶ 20. The indirect cost rate negotiation is guided by general cost principles set forth in circulars developed by the OMB, OMB A-21, 2 C.F.R. Pt. 220 (for educational organizations), OMB A-87, 2 C.F.R. Pt. 225 (for State, Local, and Tribal governments), and OMB A-122, 2 C.F.R. Pt. 230 (for nonprofit organizations). Although the Circulars provide guidance for different types of organizations, the principles are the same: indirect costs must be equitably allocated among the programs that benefit from the costs. The Circulars provide a means to determine the maximum amount of indirect costs that can be charged to a federal award, unless more or less is permitted by law. *See* 2 C.F.R. pt. 225, App. A § A.1. However, the Circulars, and thus the indirect cost rates, are not intended "to identify the circumstances or dictate the extent of Federal or [contractor] participation in the financing of a particular program or project." *Id.*; *see also Maine v. Shalala*, 81 F. Supp. 2d 91, 96 n.4 (D. Me. 1999) (noting that provisions of law explicitly supercede general cost principles in circulars).

stated in the contract. This fully complies with statutory mandates, as well as controlling case law.

A. The ISDA Requires that the Parties to an ISDA Contract Negotiate the Amount of Indirect CSC.

The ISDA, per 25 U.S.C. § 450j-1(g), requires IHS upon approval of a self-determination contract to add the full amount of funds negotiated per 25 U.S.C. § 450j-1(a), which includes contract support costs. However, the ISDA does *not* mandate the payment of a "specific amount" of indirect CSC or that a specific formula be included in the contract. Instead, the amount of indirect CSC must be "determined." *See* 25 U.S.C. § 450*l*(c)(b)(4).[8]

Thus, there must be a determination of the amount of CSC funding to be paid under a contract. This determination, under individual self-determination contracts, is based on application of a variety of factors including: a tribal contractor's funding requests, each contractor's annual indirect cost rate if it has one;[9] any duplication of costs in the contractor's proposal that have already been included in the Secretarial amount; the amount of funding made

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[8] Plaintiff is simply in error when it asserts that 25 U.S.C. § 450j-1(c)(2)-(6) establishes "a rate times base formula for indirect CSC. Compl. ¶ 23. This statutory provision requires IHS to submit to Congress a yearly report that details, among other things, an accounting in the deficiency of funds available to pay CSC. Fisher Decl ¶ 30. The existence of this reporting requirement, in and of itself, indicates that Congress was fully aware that there may be insufficient funding to pay all CSC requests. Moreover, this report is intended as a planning and budget estimating tool for Congress; nothing in the ISDA suggests that these reports are to be used as a basis for future claims, or that Tribal contractors could receive the amounts included in the reports at a later date. H.R. Conf. Rep. No. 106-479, at 495 (1999) ("Any shortfall does not create an unfunded liability for the Federal government."); Fisher Decl. ¶ 32. To the contrary, funding for ISDA contracts is subject to appropriations. 25 U.S.C. § 450j-1(b); *id.* § 450j(c).

[9] Not all contractors have negotiated an indirect cost rate with their cognizant agency; some simply negotiate a sum certain for indirect CSC with IHS. Fisher Decl. ¶ 20. This is yet another reason why there could be no statutory requirement for the "rate times base" formula, as it would preclude such contractors from receiving indirect CSC through such negotiations.

available by Congress in the annual IHS appropriation; and IHS policies and procedures for the calculation and distribution of indirect CSC. *Id.* § 450j-1(a)(3)(A) and (B); 25 C.F.R. §§ 900.6 and 900.8(h)(3); *see also* Fisher Decl. ¶¶ 11-12, 16-19, 21-26 & Ex. 3 (ISDM 92-2 § 5B).

The ISDA calls for a negotiation whereby the parties can agree to a specified amount of CSC funding. *See id.* § 450j-1(a)(3)(B) (providing the tribe or tribal organization the ability to negotiate with IHS on an annual basis the amount of funds that it is entitled to receive). The important role of negotiations is also emphasized in the ISDA in § 450*l*(a) (self-determination contracts shall contain or incorporate the model contract and "such other provisions as are agreed by the parties"), § 450*l*(c)(f)(2)(A) (requiring the AFA to identify, among other things, "the funds to be provided, and the time and method of payment"), and 450f(b) (requirement that IHS work with tribe or tribal organization to overcome objections to the proposal).

To begin negotiations of the amount of funds to be included in the contract, the tribe or tribal organization must propose specific funding levels and funding terms. 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h). In the negotiation, IHS must ensure that total funding promised in self-determination contracts does not exceed available appropriations and that the tribe does not receive duplicative funding. 25 U.S.C. §§ 450j-1(a)–(b); 450j(c); *see generally Cherokee*, 543 U.S. at 641-43; *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996). The Secretary also must ensure that she does not reduce funding for ongoing contracts unless certain conditions are met, *see* 25 U.S.C. § 450j-1(b)(2), and she need not "reduce fuding for programs, projects, or activities serving a tribe to make funds available to another [contractor]." *id.* § 450j-1(b).

If, upon receipt of a contract proposal from a tribe or tribal organization, IHS agrees to the proposed terms, the contract will be executed without further review. 25 U.S.C. § 450f(a)(2). On the other hand, if IHS declines the proposal, in full or in part, the ISDA gives the tribe or tribal organization two statutory options: (1) appeal IHS's full or partial determination to an administrative tribunal or to federal court as inconsistent with the ISDA, or (2) acquiesce in the terms offered by IHS and accept the contract and funding thereunder. *Id.* §§ 450f(b); 450m-1(a). In providing these two statutory options, the ISDA recognizes that the tribe or tribal organization is in the best position to know the amount of funding that it needs in order to perform under the contract. The availability of the generous judicial review provisions in the ISDA demonstrate Congress's intent that if there is a dispute between the parties regarding the funding level or funding terms, the tribe or tribal organization must take advantage of the judicial review procedures and challenge the funding levels proposed by the Secretary before contract execution.

As mentioned above, one of the key negotiating parameters for indirect CSC is how much Congress appropriates to IHS each year for this purpose. From 1995 through 1997, Congress provided IHS with a lump-sum appropriation to run its entire agency, and of this amount, IHS allocated a portion for CSC based on the amounts that Congress had designated for this purpose in accompanying committee reports. Fisher Decl. ¶ 12. Starting in 1998, when Congress imposed a statutory cap on CSC funding, IHS allocated CSC funding in accordance with the statutory caps. *Id.* Throughout all of the years at issue in this lawsuit, the amount allocated for CSC was insufficient to fulfill all requests for CSC. *Id.* ¶ 13. Instead, IHS allocated CSC to individual contracts via a contract negotiation that fully comported with ISDA and IHS's relevant guidance. *Id.* ¶ 24. Because all funding is subject to the availability of appropriations, reading

into these funding provisions a requirement to fund a specific amount or to use a specific formula is contrary to the explicit terms of the statute. Moreover, it is notable that Plaintiff does not allege that it was treated differently or unfairly in relation to other tribes with respect to IHS under-funding; Plaintiff merely seeks additional compensation added to its contracts, based on a rigid formula found nowhere in the statute or in practice.[10]

B. *Cherokee* Does Not Dictate Funding of Rate Times Base; It Treats ISDA Contracts Consistently With Other Contracts.

In an effort to bolster its shortfall claim, Plaintiff erroneously relies on Supreme Court precedent in an effort to recover according to a formula that is not mandated by statute nor

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[10] IHS's interpretation of the ISDA is consistent with the D.C. Circuit's decision in *Ramah Navajo School Board*, 87 F.3d at 1338, a case that involved BIA's CSC policy for 1995 (IHS was not a party), a year in which BIA had a capped CSC appropriation. Ramah Navajo stands for two propositions. The first is that a capped CSC appropriation limits the amount that both IHS and the Court can award for CSC: "[T]he Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-[CSC] purposes under the ISDA in order to meet his responsibility to allocate [CSC]." 87 F.3d at 1345. This holding is fully consistent with IHS's interpretation that the ISDA does not require the payment of a sum certain without any consideration of the amount of the available funding. The second holding is that the Court can review the allocation of a limited appropriation (at least prior to its lapsing) in a manner consistent with the ISDA. As to this second part of the decision, the court believed that BIA had failed to allocate CSC in a manner consistent with the ISDA. Rather than following its standard negotiation procedures for fiscal year 1995, the Department of Interior announced a policy that Tribes failing to submit proposals for their 1995 indirect cost rates to their cognizant agency by June 20, 1995 would receive only 50% of the amount generated by their 1994 indirect cost rates due to an under-funding of appropriations for that year. *Id.* at 1342. The court struck down the policy, finding that it exceeded the Secretary's statutory authority regarding the promulgation of regulations or non-regulatory requirements. *Id.* at 1350. As applied to this case, Plaintiff does not challenge the methodology under which IHS allocated CSC to each contractor, and thus *Ramah Navajo* is inapplicable to these claims. In any event, the facts of *Ramah Navajo* stand in stark contrast to the instant case, where, as described above, IHS allocated it limited CSC in these years based on individual contractor requests, indirect cost rates submitted by contractors, and other factors, and under no circumstances could be said to have imposed "a rule that smacks of punishment." *Id.* at 1348; *see also* Fisher Decl. ¶¶ 12, 16-25.

included in the parties' contracts. Plaintiff alleges that, under *Cherokee*, "IHS should have reprogrammed funds to pay tribal contractors the full CSC due under their contracts for FY 1994 through 1997 when Congress appropriated a lump sum for the IHS without earmarking an amount for CSC."[11] Compl. ¶ 24. Plaintiff's assumption that *Cherokee* dictates a statutory entitlement to CSC funding as "rate times base" is incorrect. To the contrary, *Cherokee* stands for the proposition that contracts under the ISDA do *not* get special treatment, and that the government is bound by the explicit contractual promises made in ISDA contracts.

Cherokee involved ISDA contracts entered into by the government and in which the government did not live up to its contractual promises. *Id.* at 636. Notably, in that case, "[t]he government [did] not deny that it promised to pay the relevant contract support costs." *Id.* The government conceded that if the contracts would have been ordinary procurement contracts, the payment requirements would have been legally binding. *Id.* It argued, however, that the ISDA, with its "subject to availability" language, warranted special treatment of contracts entered thereunder. *Id.* at 640-41. The Supreme Court disagreed. The Court concluded that, when Congress issues a lump-sum appropriation, the government cannot rely on language in a committee report to avoid its contractual promises for ISDA contracts, but instead, is bound in the same manner it is bound by other contracts. *Id.* at 639, 644-47.

Therefore, as recognized by the Supreme Court, once the parties have negotiated and executed an ISDA contract, the contract governs the rights and duties of the parties. The

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[11] Plaintiff's request for reprogramming fiscal year 1995 funds ignores the fact that those funds have lapsed as a matter of law. *See Dep't of the Interior and Related Appropriations Act, 1995*, Pub. L. No. 103-332, 108 Stat. 2499, 2536 (1994) ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly provided herein.").

Supreme Court has stated, "Congress, *in respect to the binding nature of a promise*, meant to treat alike all promises made under the [ISDA] and ordinary contractual promises (say, those made in procurement contracts)." *Cherokee*, 543 U.S. at 639 (emphasis in original). *See also* 25 U.S.C. § 450m-1(a) (granting jurisdiction to district courts and the court of claims "over any civil action or claim against the Secretary for money damages arising under contracts"); *id.* § 450m-1(d) (directing that the CDA applies to self-determination contracts). Here, there can be no dispute that IHS lived up to its promise to pay the CSC contained in the executed contracts.[12] *Compare* Compl. ¶ 25 (indicating amounts paid) *with* Exs. A-F (indirect CSC amounts promised in AFAs). To hold that IHS was required to pay a different amount contradicts Supreme Court precedent on this issue.

IV. PLAINTIFF CANNOT RECOVER ADDITIONAL CSC FUNDING ASSOCIATED WITH ITS 1998 THROUGH 2000 AGREEMENTS BECAUSE CSC FOR THESE YEARS IS NO LONGER AVAILABLE

As explained above, Plaintiff's claims from 1996 through 1998 should be dismissed as barred by the statute of limitations. Plaintiff's stable funding claim is premised on actions taken for fiscal year 1997. Once fiscal year 1997 is dismissed, Plaintiff's stable funding claim must also be dismissed. *See* Nov. 24, 2008 Order [Doc. No. 27]. Even if the Court were to address Plaintiff's stable funding claim on the merits, Plaintiff cannot succeed because, starting in fiscal year 1998, Congress explicitly capped the amount that IHS could spend on CSC, IHS largely spent these amounts, and any minor remaining funds are no longer available as a matter of law.

[12] Plaintiff has made no such claim, nor has it offered any proof, that it incurred additional costs above the amounts promised and paid.

A. Congressional Caps on CSC Appropriations Limit IHS's Ability To Pay Additional CSC.

In fiscal year 1998, Congress appropriated $1,841,074,000 to the IHS to carry out its mandate, but provided that "not to exceed $168,702,000 shall be for payments to tribes and tribal organizations for contract support costs . . ." *Dep't of the Interior & Related Agencies Appropriations Act*, Pub. L. No. 105-83, 111 Stat. 1543, 1582-883 (1997). In fiscal year 1999, Congress appropriated $1,950,322,000 to the IHS to carry out its mandate, but `provided that "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . ." *Omnibus Consol. & Emergency Supp. Appropriations Act 1999*, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79 (1998). In fiscal year 2000, Congress appropriated $2,078,967,000 to IHS to carry out its mandate, but provided that "not to exceed $228,781,000 shall be for payments to tribes or tribal organizations for contract or grant support costs . . . " *Consol. Appropriations Act, 2000*, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82 (1999). The phrase "not to exceed" is a standard phrase Congress uses to place a limit on the amount of funds an agency may spend on a particular program. *See* Principles of Federal Appropriations Law (GAO Redbook), Vol. II, Ch. 6 at 6-8 (2nd ed. 1992) ("the most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than' . . . . These are all phrases with well-settled plain meanings."). *See also Thompson v. Cherokee*, 334 F.3d 1075, 1084 (Fed. Cir. 2003) ("Congress generally uses standard phrases to impose a statutory cap."), *aff'd*, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

Two federal courts of appeals, including the D.C. Circuit, already have concluded that a statutory cap, such as the one imposed by Congress in IHS's appropriation since 1998, limits the total amount of funds available for ISDA contracts and thus conditions each individual ISDA

contractor's right to CSC funding on the availability of appropriations. *See Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1302 (Fed. Cir. 2010); *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d at 1378-79; *Ramah Navajo*, 87 F.3d at 1345. As the Federal Circuit recently noted, "the 'not to exceed' language in the appropriations acts . . . imposes a statutory cap on funding for contract support costs, such that the Secretary is not permitted to make payments beyond the maximum specified in the appropriations acts." *Arctic Slope,* 629 F.3d at 1302.

The capped amount set by Congress in fiscal years 1998 through 2000 was not sufficient to pay 100 percent of the CSC requested by all tribal contractors. Fisher Decl. ¶ 13; Declaration of Elizabeth Fowler, dated April 28, 2011, ¶ 9 (Ex. H). However, in these years, IHS legally allocated the amount Congress designated for CSC to award CSC in accordance with applicable federal law and policy. Fisher Decl. ¶ 12, 16-24; Fowler Decl. ¶ 9. Despite the fact that Federal law prohibited the IHS from allocating additional funds for CSC in those years, Plaintiff now seeks additional CSC funding for 1998 through 2000. Since Congress capped the CSC amount for these three years, Plaintiff's claim must fail because Plaintiff cannot recover funds from those years above the amount appropriated by Congress.

Nor can Plaintiff obtain a court order re-allocating indirect CSC funding for fiscal years 1998 through 2000 as an equitable matter, since the appropriations have largely been spent and, for the small amounts not spent, the funds have lapsed as a matter of law. *See* Fowler Decl. ¶¶ 10-24. The CSC appropriations for each of the fiscal years at issue in this claim include language that the funds are available to be obligated by IHS for one year only. *See* Pub. L. No. 105-83, 111 Stat. at 1582-83, 1589 (appropriating an amount not to exceed $161,202,000 for

ongoing CSC[13] to be available to IHS for obligation for one year); Pub. L. No. 105-277, 112 Stat. at 2681-278-79, 2681-286 (appropriating an amount not to exceed $203,781,000 for ongoing CSC to be available to IHS for one year); Pub. L. No. 106-113, 113 Stat. at 1501A-181-82, 1501A-190 (appropriating $228,781,000 for CSC, to be available to IHS for one year). *See also* 31 U.S.C. § 1301(c). Because the funds have lapsed as a matter of law, and because Plaintiff did not file suit while the funds were available to IHS, it cannot recover additional CSC for these years. *See City of Houston v. Dep't of Housing and Urban Dev.*, 24 F.3d 1421, 1427 (D.C. Cir. 1994) (finding that a court cannot order the re-allocation of appropriations because, if "budget authority has lapsed before the suit was brought there is no underlying congressional authority for the court to preserve") (internal quotations and citation omitted); *Arctic Slope Native Ass'n Ltd. v. HHS*, CBCA 294-ISDA, 295-ISDA, 296-ISDA, 297-ISDA at (Board of Contract Appeals, Oct. 1, 2009) (holding that Tribe could not recover additional CSC for 1999 or 2000 because "[o]nce the appropriations lapsed, the funds were no longer available with which to pay any claims.") (attached as Ex. I); *Metlakatla Indian Community v. HHS*, CBCA 282-ISDA (Board of Contract Appeals Oct. 1, 2009) (same) (attached as Ex. J).

[13] In FY 1998, Congress imposed an overall cap of $168,702,000 for CSC for "payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants entered into with the Indian Health Service prior to fiscal year 1998 . . . ." Pub. L. No. 105-83, 111 Stat. at 1583-833. Congress also earmarked $7.5 million for the "Indian Self-Determination Fund" (ISD Fund), which is used to fund CSC related to new and expanded contracts. *Id.* IHS construed these provisions together as appropriating $161,202,000 for ongoing CSC and $7,500,000 for the ISD Fund, which was consistent with congressional committee reports. See also H.R. Rep. 105-163 at 103 (1997) (chart showing total amount of $168,702,000 for CSC); *see also id.* at 104 (recommending $168,720,000 for CSC, including the ISD Fund). Therefore, IHS allocated $161,202,000 for ongoing CSC. See Fowler Decl. ¶ 10.

B. The Statutory and Policy Provisions Regarding Stable Funding Do Not Provide for Future Contract Damages.

The fact that Plaintiff is seeking recovery under a "stable funding" theory does not change the analysis. Plaintiff alleges that Section 106(b) of the ISDA, incorporated into its contracts and IHS Circular No. 96-04, includes a stable-funding requirement. Compl. ¶ 36. The ISDA provides that the amount of funds provided for self-determination contracts "shall not be reduced by the Secretary in subsequent years except pursuant to" five exceptions. 25 U.S.C. § 450j-1(b)(2). The same section also states that "the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." *Id.* § 450j-1(b). Both the statute and the implementing IHS policies speak only to funding provided from one fiscal year to the next out of IHS appropriations. IHS Circular 96-04 provides:

> The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as 'recurring' to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If the funds available in the Area's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.

Fisher Decl. Ex. 4 p. 13.

The statutory provision, and the policy implementing it, anticipate that all tribes may not receive the full amount of CSC requested. Accordingly, the statute and policy both assure stable funding and protect against reductions unless the limited, statutory criteria are met. These provisions do not support Plaintiff's efforts to assert damages and increase IHS's contractual

obligation ten years after the fact. There is no promise or duty to take potential damage awards from ten years into the future into account. Such a requirement would be untenable, and would adversely affect the funds each area had available to pay the other contracting tribes, especially when there is a statutory cap on the total amount of CSC to be awarded.

The stable funding rule does not mandate the recurring application of damages awarded many years after the fact. Damage awards, such as that sought here, are substitute relief, not contract funding. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief – which may include an order providing for the reinstatement of an employee with backpay, or for the 'recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'") (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). As a practical matter, Plaintiff simply cannot go back and readjust funding under a capped appropriation over a decade later.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted and Plaintiff's claims should be dismissed. In the alternative, Defendants' motion for summary judgment should be granted and judgment should be entered in favor of Defendants.

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Respectfully submitted,

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