UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENOMINEE INDIAN TRIBE OF WISCONSIN,	)	
PLAINTIFF,	)	Case No.: 1:07cv00812
v.	)	Hon. Rosemary M. Collyer
UNITED STATES OF AMERICA, KATHLEEN SEBELIUS, Secretary of the Department of Health & Human Services, and **YVETTE ROUBIDEAUX**, Director of the Indian Health Service,	)	
DEFENDANTS.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, the Menominee Indian the Tribe of Wisconsin ("the Tribe"), respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), for summary judgment as to the liability of the Government in failing to carry out its duty to fully fund contract support costs as required by statute and contract. As detailed in the accompanying memorandum of law, and in the accompanying Statement of Material Facts Not in Genuine Dispute, the Tribe is entitled to judgment as a matter of law. FRCP 56(c). The documentary record in this case provides indisputable evidence that Defendants paid less than the full contract support costs agreed to in their contracts with the Tribe and required by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*. ("ISDA"). Thus, there is no genuine issue of material fact.

The ISDA and the contract provisions incorporating it required Defendants to pay the full indirect cost funding as calculated under the indirect cost rate agreements which were fully incorporated into the contracts. The Indian Health Service ("IHS") received lump-sum

appropriations for FYs 1995 through1997, and failed to pay the Tribe the entire amount of indirect costs it agreed the Tribe was entitled to be paid under the contracts, as determined in part by the indirect cost rate agreements. Rather it paid some of the funds owed and placed the remaining amounts owed on "shortfall" lists. When it failed to pay the total amount of funding due, the Government breached the express terms of the contracts and violated the express requirements of the ISDA. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

The Tribe further claims that those breaches, in turn, caused underpayments in 1998, 1999, and 2000, in violation of the stable-funding provisions of the contracts and the ISDA, 25 U.S.C. § 450j-1(b)(2). Under the law, the contracts, and IHS policy, the Tribe would have been entitled to recurring funding of the FY 1997 contract support cost amount in the succeeding contract years. IHS had sufficient unexpended funds available in each year to pay the Tribe's recurring 1997 amount in 1998, 1999, and 2000.

Therefore, the Tribe requests that this Court grant this motion for summary judgment as to liability in the amount specified in the Complaint.

The Tribe requests an oral hearing on this motion pursuant to Local Rule 7(f).

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DATED: June 3, 2011.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. ("ISDA"), allows Indian tribes and tribal organizations to assume responsibility, and associated funding, for federal programs for the benefit of Indians that the Secretary of Health and Human Services ("Secretary"), through the Indian Health Service ("IHS"), would otherwise have been obligated to provide. Recognizing the inherent reluctance of the Department to cede its resources and authority to tribes, Congress mandated that the Secretary fully fund ISDA contracts to the extent of available appropriations. 25 U.S.C. §§ 450j-1(a), (g). In particular, the statute requires the Secretary to fund, to the greatest extent possible, contract support costs ("CSC"), including indirect costs. 25 U.S.C. § 450j-1(a)(2), (3); *Menominee Indian Tribe of Wisconsin v. United States*, 539 F. Supp. 2d 152, 155 (D.D.C. 2008) ("*Menominee I*").

In 1995-2000, the Plaintiff Menominee Indian Tribe of Wisconsin (the "Tribe") provided health care programs, functions, services, and activities ("PFSAs") to tribal members and other beneficiaries under its contracts with IHS. The contracts incorporated the full funding requirement of the ISDA. To determine the full amount of indirect costs to be awarded under the contracts, the Tribe and the Government entered another series of agreements that determined the indirect cost rate to be applied to the direct cost base each year. *See* Pl. Ex. C.

Defendants acknowledge that they did not pay the Tribe's indirect costs in accordance with the indirect cost rate agreements. In fact, Defendants disavow those agreements entirely and assert they are irrelevant to the amount of indirect costs owed. Def. Reply Mem., Doc. 11, at 14-18.[1] Ironically, Defendants concede that the amount owed is to "be set through a

[1] *See also* Memorandum of Law in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Def. MTD/MSJ"), Doc. 35, at 14-19.

negotiation," *id*. at 14, yet ask the court to ignore the documents memorializing the only indirect cost negotiations between the parties: the rate agreements for each year. Defendants' failure to pay full indirect costs, as determined by the negotiated rates, when ample funds were available under IHS's unrestricted lump-sum appropriations in 1995-1997, violates the full-payment requirement of section 106 of the ISDA and the contract provisions incorporating it. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Menominee I*, 539 F. Supp. 2d at 155.

In addition, the ISDA prohibits reductions in funding from one year to another unless one of five narrow exceptions applies. *Id*. § 450j-1(b)(2). Had IHS paid the Tribe its full indirect costs in 1997, as required by section 106 of the ISDA as interpreted in *Cherokee*, IHS would have been required by statute and contract to pay that same amount, to the extent justified, in 1998, 1999, and 2000. IHS's failure to pay these recurring amounts violated the ISDA and breached the contracts. The Tribe is entitled to judgment as a matter of law on all of its claims for 1995-2000. *See* Complaint, ¶¶ 37-41 (First Claim for Relief—Shortfall Claims for 1995-1997); *id*. ¶¶ 45-46 (Third Claim for Relief—Stable-Funding Claims for 1998-2000).[2]

Defendants do not pursue on remand their laches defense to the 1995 claim, and they acknowledge that the claim is not subject to the statute of limitations or the purported release. The sole ground for Defendants' motion to dismiss the FY 1995 claim is that "IHS fully complied with its statutory and contractual obligations to pay indirect CSC." Def. MTD/MSJ, Doc. 35, at 13. The court should again reject this rehash of the "full performance" argument from Defendants' first motion to dismiss. Thus, the Tribe is entitled to summary judgment as to liability for FY 1995 whatever the court decides on the other claims.

[2] Because the claims for 1998-2000 under the Third Claim for Relief were premised on wrongs allegedly committed in 1997, and because the claim for 1997 was held time-barred in *Menominee I*, the court dismissed the Third Claim for Relief as time-barred as well. Order, Doc. 27, at 1 (Nov. 24, 2008). With the D.C. Circuit having reinstated the 1997 claim (along with those for 1995 and 1996), the 1998-2000 claims under the Third Claim for Relief were likewise reinstated, as Defendants acknowledge.

Defendants argue that the 1996-1998 claims are barred by the statute of limitations in the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(a), but as discussed in the Tribe's opposition brief, the statute should be held equitably tolled due to the Tribe's reasonable reliance on the CSC class actions and the lack of prejudice to the Government. Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Pl. Opp.") at 14-33. Defendants also argue that the 1996-1998 claims are barred by a release the Tribe signed in 1999, but the purported release is invalid for a number of reasons. *See id.* at 9-14. Finally, Defendants argue that the Tribe cannot recover for 1998-2000 because the appropriations have lapsed and no more CSC is available for those years, but the Tribe seeks damages for breach of contract from the Judgment Fund, not a larger share of the specific monies appropriated for CSC years ago. *Id.* at 33-43.

The Tribe now moves for summary judgment as to liability. IHS did not comply with its statutory and contractual obligation to fund indirect costs as fully as possible in any of the years at issue, so the Tribe is entitled to summary judgment on all its claims.

STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); *Moore v. Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009). The movant bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (court's emphasis). A "material fact" is one that will "affect the outcome of the suit under the governing law." *Id*. at 248.

An appeal from a contracting officer's decision under the Contract Disputes Act ("CDA") is reviewed *de novo*. 41 U.S.C. § 609(a)(3); *id*. § 605(a); *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987).

RULE OF CONSTRUCTION

The ISDA and the Tribe's contracts must be liberally construed for the benefit of the Tribe. Def. Ex. B at 005 (Menominee contract provision requiring that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . ."); 25 U.S.C. § 450*l*(c), § 1(a)(2) (same provision in statutory model agreement). *See also Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58-59 (D.C. Cir. 1991) (statutes for benefit of Indians to be construed liberally in favor of tribes, even when contrary interpretation of agency would otherwise be entitled to deference); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005) (applying liberal construction rule to ISDA); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (same).

ARGUMENT

This court has held that the ISDA mandates payment of full CSC to the extent of available appropriations, a ruling fully supported by the Supreme Court's *Cherokee* decision as well as other binding precedents. *Menominee I*, 539 F. Supp. 2d at 155 (citing *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996)). The parties agreed that the "full" CSC requirement was to include indirect costs calculated by multiplying the direct cost base by

the agreed-on indirect cost rate. *See, e.g.*, Def. Ex. A at 004 ("indirect costs shall be reimbursed at the provisional fixed rate of 12.73% percent [sic] of the direct costs chargeable to this contract"); Pl. Ex. C (indirect cost rate agreements between Menominee and United States). IHS had funds available from its unrestricted lump-sum appropriation to pay the Tribe's full CSC in 1995, 1996, and 1997, as confirmed by *Cherokee*. Even in 1998-2000, years in which Congress "capped" CSC appropriations, IHS had additional unexpended funds sufficient to fully fund the Tribe's recurring CSC requirements without reducing any other tribe's funding. Yet, as the documentary record in this case shows, IHS failed to honor the statutory requirement and contractual promise of full payment to the extent of available funds. IHS violated the ISDA and breached the contracts, and the Tribe is entitled to damages.

I. The ISDA and the Contracts Mandate Payment of Full CSC to the Extent of Available Appropriations.

This court has already interpreted the controlling statutory provisions in this case: "ISDA mandates the payment of *full* indirect CSC and ISDA itself establishes that entitlement." *Menominee I*, 539 F. Supp. 2d at 155 (court's emphasis). In so ruling, the court followed the D.C. Circuit in *Ramah Navajo*, where the court cited the mandatory language of section 106(a) and (g) and noted that ISDA refers to CSC as an "entitlement." *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (citing 25 U.S.C. §§ 450j-1(a), (g)).[3] This court noted that the Secretary cannot distribute funds in excess of limitations set by Congress, but "he still has the obligation to fund indirect CSC to the greatest extent possible inasmuch as the statutory promise is full funding." *Menominee I*, 539 F. Supp. at 155.

[3] Ironically, the *Ramah Navajo School Board* case involved a challenge to the Secretary of the Interior's policy of penalizing tribal contractors that were late in submitting proposals for indirect cost rate agreements—the very agreements Defendants in this case dismiss as irrelevant to determining the full amount owed under section 106 of the ISDA. Compounding the irony, Defendants cite *Ramah Navajo* for the proposition that the "rigid formula" of rate-times-base is "found nowhere in the statute or in practice." Def. MTD/MSJ, Doc. 35, at 18.

This court's holding on the statutory full-funding requirement accords with many other rulings in ISDA cases, both before and after *Menominee I*. Like the D.C. Circuit in *Ramah Navajo*, the Federal Circuit affirmed that section 106(a) "require[s] that the Secretary provide funds for the full administrative costs to the tribes." *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1081 (Fed. Cir. 2003), *aff'd sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Recently, Judge Roberts of this court echoed the *Menominee I* reasoning in rejecting a Government motion to dismiss based on the same argument put forward in this case: that the ISDA does not mandate payment of any particular amount of indirect costs. Judge Roberts disagreed, holding that the ISDA requires payment of *full* indirect costs insofar as possible. *Council of Athabascan Tribal Govts. v. United States*, 693 F. Supp. 2d 116, 120 (D.D.C. 2010) ("*CATG*").[4] And just last month, the Tenth Circuit affirmed the statutory duty of full payment: "Congress has mandated that all self-determination contracts provide full funding of CSCs, see [25 U.S.C.] § 450j-1(g)…." *Ramah Navajo Chapter v. Salazar*, No. 09-2262 (10th Cir. May 9, 2011), 2011 WL 1746138 at *1. The courts are unanimous in upholding the plain language of section 106.

II. Full CSC Includes Indirect Costs Calculated by Using the Agreed-on Rate.

The parties do not dispute the amounts paid in the years at issue; these amounts are recorded in the final contract modification for each year. The dispute is over the amounts owed,

[4] The Federal Circuit has joined the *Menominee I* and *CATG* courts, at least implicitly, in rejecting the Government's argument that payment of the amount identified in the contract absolves the Government of liability when the full CSC requirement is greater. In *Arctic Slope Native Association v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) ("*ASNA*"), it was undisputed that IHS paid the amount of CSC identified in the contract documents. 629 F.3d at 1300-01 ("ASNA does not claim that the Secretary failed to pay . . . the contract support costs specified in the Annual Funding Agreements . . . ."). This fact was not dispositive, however; the court went on to address a question of law: "whether the ISDA and the contracts entered into pursuant to that Act require payment of ASNA's contract support costs shortfall"—i.e., the difference between what was paid and what was owed. *Id*. at 1301. Although the court ultimately ruled against ASNA on the basis that the CSC spending "caps" limited available funds, the court would not have had to reach this issue if payment of the contract amount precluded liability, as the Government argues here, and as it did in *Ramah Navajo Chapter* and *CATG*.

and how those amounts are determined. The Tribe has presented abundant documentary evidence that the indirect cost requirement for each contract year was to be determined—as it is for most government contactors—by application of a negotiated rate to the direct cost base. To recap:

- The rate agreements themselves conclusively bind the "Federal Government" to the rate system with respect to all "Public Law 93-638"—i.e., ISDA—contracts. *See* Pl. Ex. C (so stating on page 1 of each year's agreement).
- The ISDA regulations require tribal contractors to determine indirect costs in accordance with OMB Circular A-87, which in turn requires use of indirect cost rates (with limited exceptions). 25 C.F.R. § 900.45(e); Pl. Opp. Mem. at 15-16.
- ISDA itself requires IHS to report annually on each contractor's indirect cost rate, direct cost base, resulting indirect cost need, and shortfall (if any). 25 U.S.C. § 450j-1(c).
- IHS's published CSC policies prescribed payment of indirect costs via the rate method for all ISDA contractors with negotiated rates. Pl. Ex. A at 6 (agency policy circular ISDM 92-2, requiring IHS to award indirect costs "by applying the negotiated rate(s) to the direct cost base amount for this purpose"); Pl. Ex. B at 7 (same requirement in IHS Circular No. 96-04); *see also* discussion in Pl. Opp. Mem. at 15.
- IHS's own CSC shortfall reports to Congress calculate indirect cost requirements by applying the negotiated rates, as required by the statute. *E.g.*, Pl. Ex. D at 3 & 4.
- The 1995 contract requires that "indirect costs shall be reimbursed at the provisional fixed rate of 12.73% percent [sic] of the direct costs chargeable to this contract…." Def. Ex. A at 4.

To counter this documentary evidence that the parties agreed to the rate system to determine the full amount of indirect costs under section 106(a), Defendants present only the bare assertion that the rates are irrelevant. What alternative method do Defendants propose was agreed on to determine full funding? They say only that ISDA requires the amount to be set through "negotiations," Def. Reply at 14; Def. MTD/MSJ at 14, yet they ignore the negotiated indirect cost rate agreements. Instead, Defendants argue, the "negotiated" amount is that amount the IHS chooses to pay by including it in the contract, and there is no statutory entitlement to any funding beyond that amount. But as this court has held, in rejecting this argument for purposes of the Defendants' initial motion to dismiss, "[t]hese statements represent a troubling misapprehension of the statute. ISDA mandates the payment of *full* indirect CSC and ISDA itself establishes that entitlement." *Menominee I*, 539 F. Supp. 2d at 155. *See also* discussion *supra*, pp. 6-7.

The Government's contention that "full" funding is precisely the amount IHS paid in the contract each year is contradicted by the ISDA, by the documentary evidence cited above, and by this court's ruling in *Menominee I*, a ruling supported by several other decisions and contradicted by none. The Tribe was entitled to be paid its full indirect costs, to the extent of available appropriations, as determined by the negotiated indirect cost rates.

III. IHS Underpaid the Tribe Each Year, Despite Additional Available Funds.

Although "the statutory promise is full funding," this court has cautioned that "the Secretary cannot disburse funds he does not have or amounts in excess of limitations set by Congress." *Menominee I*, 539 F. Supp. 2d at 155. Here, it is clear that, as a matter of law and fact, the Secretary did have sufficient funds available to pay the Tribe's full indirect costs in

1995-1997 as claimed in the First Claim for Relief, and the Tribe's stable-funding requirement for 1998-2000, as claimed in the Tribe's Third Claim for Relief.

A. The 1995-1997 Claims Are Controlled by Cherokee, which Held that IHS's Entire Multi-Billion-Dollar Lump-Sum Appropriation Was Available to Reprogram to Pay Tribes' Full CSC.

Prior to FY 1998, the appropriations acts did not limit the amount of IHS's lump-sum appropriation available for CSC payments to tribal contractors. The House and Senate appropriations committees recommended limiting CSC spending to specified amounts, but "such committee report language as such is not binding on the Secretary." *Thompson*, 334 F.3d at 1087; *Cherokee*, 543 U.S. at 637 ("These appropriations Acts [for FYs 1994-1997] contained no relevant statutory restriction.").[5]

Given the lack of statutory restrictions on CSC spending, IHS had a duty to reprogram funds to meet its statutory and contractual obligation to pay the Tribe's full indirect cost requirement in 1995, 1996, and 1997. *See Thompson*, 334 F.3d at 1086 ("[I]n the absence of a statutory cap or other statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations.") (court's emphasis); *ASNA*, 629 F.3d at 1300 (quoting *Thompson* in reaching same conclusion); *Cherokee*, 543 U.S. at 642 (in absence of statutory earmark, agency must use unrestricted funds to fulfill contractual obligations).

Defendants concede they did not pay the Tribe's indirect costs in accordance with the rate agreements, and instead paid a lesser amount. *See* Answer ¶ 23 (denying that negotiated rates determined indirect cost requirements); Def. Reply Mem., Doc.11, at 15-17 (disclaiming rate system and IHS circulars incorporating it); Def. MTD/MSJ, Doc. 35, at 14-20. As a result, the

[5] *Thompson* involved the IHS appropriations acts for FYs 1994, 1995, and 1996; *Cherokee* involved those three years plus the act for FY 1997. *See* 543 U.S. at 635 (case concerns Shoshone-Paiute contracts for FYs 1996 and 1997 and Cherokee contracts for FY 1994-1996).

Tribe suffered significant shortfalls each year. Pl. Ex. L, Wakau Decl. ¶ 13; Complaint ¶ 25. The Secretary had funds available under section 106 of the ISDA and the appropriations acts, as interpreted by the Supreme Court in *Cherokee*, sufficient to *fully* fund the Tribe's indirect costs as determined by the agreed-on rate system. The Tribe is entitled to summary judgment as to liability on its shortfall claims for 1995-1997.

B. The Government Breached the Statutory and Contractual Promise of Stable Funding in 1998, 1999, and 2000.

The Tribe's claims for 1998, 1999, and 2000 are based on section 106(b)(2) of the ISDA, which provides that the amount of funds required by section 106(a), including CSC, "shall not be reduced by the Secretary in subsequent years" unless one of five narrow exceptions applies. 25 U.S.C. § 450j-1(b)(2). The recurring nature of the funding promotes predictability and stability in tribal contractors' provision of services to their members and other beneficiaries. Congress made this a key point in the 1988 amendments. "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." S. Rep. No. 100-274 at 30 (Dec. 21, 1987).

The IHS adopted a policy reflecting the recurring nature of CSC funding in IHS Circular 96-04. Pl. Ex. B. Under the Circular, CSC funding recurs to the Area *and to each tribe*, provided that a tribe's CSC requirement does not drop below the previous year's level. Direct CSC "shall be awarded on a recurring basis." *Id*. at 5. Indirect costs are designated as non-recurring and may be reduced if, for example, a tribe's indirect cost rate drops. But indirect costs cannot be reduced from one year to another if the prior year's level remains "justified"—i.e., is not above 100% of the subsequent year's need. *Id*. at 13 ("Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS except as

authorized in section 106(b) of the ISDA."). If a tribe's total CSC requirement drops below the prior year's level, payment could be reduced to that extent.

The stable-funding rule was incorporated into the Tribe's contracts with the Secretary, as required by the statutory model agreement. *See* 25 U.S.C. § 450*l*(c), § 1(b)(14)(A) (funding for successor annual funding agreements "shall only be reduced pursuant to section 106(b) of [the ISDA]"); Def. Ex. B at 012 (same provision in section (b)(14)(A) of Menominee contract that remained in effect in 1998); Def. Ex. E at 011 (same provision in section (b)(14)(A) of Menominee contract in effect for 1999 and 2000).

Because of the recurring nature of CSC, the IHS's underpayments in 1995-1997 cascaded into 1998 and every year thereafter. Had IHS paid the full indirect cost requirement of $404,938 in 1997, as it should have under section 106 as interpreted in *Cherokee*, the Tribe would have been entitled to that same amount in 1998 if still justified by the Tribe's rate and base. As it turned out, the Tribe's indirect cost rate dropped, so that its indirect cost need dropped to $383,176. *See* Complaint ¶ 25. Under section 106(b)(2) and the Circular, the Tribe should have been paid that full amount, and at least that same amount in 1999 and 2000. But IHS paid far less than that each year. Def. Ex. D at 016 ($319,698 for "CSC/IDC" in 1998); Def. Ex. E at 021 ($319,200 for "CSC IDC" in 1999); Def. Ex. F at 021 ($338,147 for "CSC/IDC" in 2000); *cf*. Complaint ¶ 25.

Defendants point out in their Answer that in FYs 1998-2000 Congress "capped" the amounts available to IHS to pay CSC. Answer at 1-2 (Fifth Defense). But Defendants do not indicate that the entire capped amount was spent—and in fact acknowledge that it was not. *See* Def. Mem., Doc.6, at 18 n.6 ("IHS has already obligated all but minor amounts of the capped funds"). In *Menominee I*, this court quoted Defendants' earlier concession and pointed out that

the Secretary "has the obligation to fund indirect CSC *to the greatest extent possible* inasmuch as the statutory promise is full funding." 539 F. Supp. 2d at 155 (emphasis added).

In its recent filing, IHS again acknowledges it did not spend its entire CSC appropriation, stating that it "largely spent these amounts." Def. MTD/MSJ, Doc. 35, at 1, 20. Defendants' own evidence confirms that in each year the agency had additional funds available—funds that were never obligated or were deobligated, refunded, or recovered by other means—to meet the Tribe's indirect cost requirement under the stable-funding rule.

- For the FY 1998 CSC account, IHS recovered an unobligated balance of $1,063,719. Fowler Decl. ¶ 13. The agency never spent the funds, and when the account closed on September 30, 2003, IHS returned all $1,063,719 to Treasury. *Id*.
- For the FY 1999 CSC account, IHS recovered $179,539, which again was left unspent and returned to Treasury on September 30, 2004. *Id*. ¶¶ 16-18.
- For the FY 2000 account, IHS never did obligate $80,797 by year's end—more than enough to cover the Tribe's stable-funding claim. *Id.* ¶ 21. Thanks to correction of errors, deobligations, and refunds, the balance grew to $137,014 by the time the funds were withdrawn. *Id*. ¶ 23.

All this being the case, and the Tribe being underpaid each year, IHS breached its statutory and contractual duty to fully fund CSC to the limit of available appropriations, and is thus liable for damages each year. *Menominee I*, 539 F. Supp. 2d at 155.

The Secretary violated the contractual and statutory stable-funding requirements in 1998, 1999, and 2000 by perpetuating the artificially low indirect cost funding levels established by its breaches in previous years.[6] The IHS's failure to fund the 1998-2000 AFAs at the appropriate

[6] For this reason, in the alternative the damages claimed for 1998-2000 could be conceived as foreseeable consequential or "expectancy" damages attributable to the breach of the 1997 contract. *See Energy Capital Corp. v.*

level based on 1997 funding breached section (b)(14)(A) of the contracts for those years and violated section 106(b)(2) of the ISDA. Failure to permit recovery for the effects of the IHS's historic and continuing mistakes would allow the Government to profit from its own breaches, which it may not do. *Brush v. Office of Personnel Mngmt.*, 982 F.2d 1554, 1563 (Fed. Cir. 1992) (government agency not permitted to breach statutory duty then profit by its own failure); *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1579 (Fed. Cir. 1987) ("The government cannot take advantage of its own failure to perform its statutory obligations.").

CONCLUSION

The Secretary breached the Tribe's contracts for 1995-1997 by failing to pay full indirect costs as determined by the approved rates. The Secretary breached the Tribe's contracts for 1998-2000 by failing to pay even that portion of indirect costs established by the contractual and statutory stable-funding rule. There are no material facts in dispute and the law is clear and settled. The Tribe therefore asks this Court to grant the accompanying Motion for Summary Judgment, and award the Plaintiff monetary relief in the total amount claimed in the complaint for 1995-2000.

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United States, 302 F.3d 1314, 1324 (Fed. Cir. 2002) ("One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred. The benefits that were expected from the contract, 'expectancy damages,' are often equated with lost profits, although they can include other damage elements as well."). The Secretary's 1997 breach of the full-funding provision directly and foreseeably caused measurable damage to the Tribe not only in 1997, but in 1998, 1999, and 2000 as well.

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