

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|  |   |                                      |
|--|---|--------------------------------------|
| TUNICA-BILOXI TRIBE OF LOUISIANA;                | ) |                                      |
| RAMAH NAVAJO SCHOOL BOARD, INC.,                 | ) |                                      |
|  | ) |                                      |
| Plaintiffs,                                      | ) | Case No. 1:02CV02413                 |
|  | ) | Judge Reggie B. Walton               |
| v.   | ) | Magistrate Judge Deborah A. Robinson |
|  | ) |                                      |
| 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.                                      | ) |                                      |

**NOTICE BY DEFENDANTS OF SUPPLEMENTAL AUTHORITY**

Defendants, by and through undersigned counsel, hereby notify the Court of supplemental authority related to their Motion and Memorandum for Summary Judgment (filed December 21, 2006, and docketed as #111).

First, on May 14, 2007, the Federal Circuit issued a decision in which it held that any obligation on the part of the United States or its agencies to disburse funds under a federal statute is conditioned on the amount of available appropriations if (1) the statute makes funding under it limited to available congressional appropriations, and (2) the relevant appropriations are in fact limited. See Greenlee County v. United States, 487 F.3d 871, 879-80 (Fed. Cir. 2007), cert. denied, 76 U.S.L.W. 3260 (2008). This decision supports Defendants' Memorandum at 26-27.

Second, the Federal Circuit issued another decision reiterating the jurisdictional nature of the presentment requirement under the Contract Disputes Act, which requires that each and every

claim sought to be challenging federal court first be presented to a government contracting officer. See Renda Marine, Inc. v. United States, 509 F.3d 1372, 1380-81 (Fed. Cir. 2007). This decision supports Defendants' Memorandum at 17-19.

Third, the Federal Circuit affirmed that a government contractor may waive a challenge to a statutory right by failing to timely object and/or decline to enter the allegedly objectionable contract. See ConocoPhillips v. United States, 501 F.3d 1374, 1378-80 (Fed. Cir. 2007). This holding supports Defendants' Memorandum at 48-51.

Fourth, a court in the District of New Mexico issued an opinion in a "declination" action under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450m-1(a). See Southern Ute Indian Tribe v. Leavitt, No. 05-988 (D.N.M. June 15, 2007) (attached as Tab A). Under the ISDA, actions challenging contract declinations are different from actions alleging breach of contract, such as in this case. See 25 U.S.C. §§ 450m-1(a), (d). Nonetheless, the Court, in interpreting ISDA's funding provisions, explained that ISDA contracts must set forth a specific, and not "nebulous," amount for contract support costs ("CSC"), and that the Indian Health Service ("IHS") is not required to pay more CSC than is set forth in the contract and annual funding agreement. See Southern Ute, slip op. at 6-10. That there is no statutory right to CSC separate and apart from available appropriations is the import of this decision. See id. This decision supports Defendants' Memorandum at 22-25.

Finally, in a related case brought by the Pueblo of Zuni for breach of contract under the ISDA in the District of New Mexico, the court denied Zuni's motion to certify a class of IHS ISDA contractors. See Pueblo of Zuni v. United States, 243 F.R.D. 436 (D.N.M. 2007). As one of the bases for decision, the court affirmed that each and every ISDA contractor that seeks

additional contract support costs (“CSC”), including all putative class members, must first timely and properly present their claims to an IHS contracting officer. See id. at 442-43. Zuni filed a petition for an interlocutory appeal to the U.S. Court of Appeals for the Tenth Circuit, which the Tenth Circuit denied on June 25, 2007 (attached as Tab B). This decision supports Defendants’ Memorandum at 17-19.

In the same opinion, Judge Johnson denied an application (motion) to certify a sub-class and appoint Michael P. Gross (counsel for Plaintiffs) as class counsel. Zuni, 453 F. Supp. 2d at 452. The Court stated that it believed Mr. Gross’s Motion was “self-serving,” that there was “no reason to create any type of sub-class,” and that “Mr. Gross and Mr. Gallegos should litigate the claims on behalf of their clients in the case they filed and in the forum they chose and that is in the United States District Court for the District of Columbia in the case of Tunica-Biloxi Tribe of La. v. United States.” Id. Two courts have now considered whether a class of IHS ISDA contractors challenging the amount of CSC funding awarded to them under their contracts should be certified (the Zuni court and the court in Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001)), and both courts have concluded that class treatment is not authorized or appropriate.

Respectfully submitted,

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/s/Rachel J. Hines

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