



without prejudice.<sup>2</sup> It is further

**ORDERED** that the plaintiffs' Third Claim for Relief, which alleged that the Secretary breached his duty of trust is dismissed. It is further

**ORDERED** that the defendants' request for dismissal of defendants Charles W. Grim, Earl E. Devaney, and Timothy Vigotsky is granted. It is further

**ORDERED** that the defendants' request for dismissal of the United States as a named defendant is denied. It is further

**ORDERED** that plaintiffs must submit proof that defendant Norton has been properly served with process within ten calendar days of the date of this Order. It is further

**ORDERED** that plaintiffs' motion for oral argument regarding defendants' motion to dismiss [#32] is denied.

**SO ORDERED** on this 20th day of January, 2004.

REGGIE B. WALTON  
United States District Judge

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<sup>2</sup>The Court will issue a scheduling order regarding the briefing schedule for the issues on which rulings have been reserved at the status conference to be held on December 10, 2003.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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TUNICA-BILOXI TRIBE OF  
LOUISIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendants.

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Civil Action No. 02-2413 (RBW)

**AMENDED MEMORANDUM OPINION**

Plaintiffs seek to recover in this lawsuit various costs incurred under self-determination contracts that were entered into by the parties for the provision of health services to Indian tribes pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq. (2000). Currently before the Court is the defendants' motion to dismiss the plaintiffs' claims. For the reasons set forth below, the Court concludes that this motion must be granted in part and denied in part.

**I. Factual Background**

The plaintiffs in this matter are the Tunica-Biloxi Tribe of Louisiana ("Tunica-Biloxi"), a federally recognized Indian tribe, and the Ramah Navajo School Board, Incorporated ("Ramah"), a New-Mexico non-profit corporation that was established by the Ramah Navajo Chapter of the Navajo Nation. Compl. ¶ 9.<sup>1</sup> Plaintiffs brought this

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<sup>1</sup>References to "Compl." are to the Second Amended Class Action Complaint that was filed on March 12, 2003.

lawsuit against several federal defendants<sup>2</sup> for breach of contract and breach of trust regarding contracts for the provision of health services to the tribes' members that were entered into pursuant to the ISDA.

The ISDA was enacted to relinquish federal control of service programs benefitting Indian tribes and to acknowledge "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 . . . ." 25 U.S.C. § 450a(a). Pursuant to the ISDA, "[t]he Secretary<sup>3</sup> is directed, 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 . . . ." Id. § 450(f)(a)(1). Self-determination contracts are contracts "entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law[.]" Id. § 450b(j). A tribe is entitled to receive the same amount of money the Secretary would have received to administer the programs covered under the contract, as the programs at issue are those that traditionally had been administered by the federal government for the benefit of the tribes. Id. § 450j-1(a)(1). These funds are characterized as the "Secretarial amount."

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<sup>2</sup>The defendants include the United States, the Secretary of Health and Human Services, Tommy Thompson, the Secretary of the Interior, Gale Norton, the Interim Director of the Indian Health Service of the Department of Health and Human Services, Charles W. Grim, the Inspector General of the Department of the Interior, Earl Devaney, and the Director of the Department of the Interior's National Business Center, Timothy G. Vigotsky. Compl. ¶¶ 10-13(B).

<sup>3</sup>"Secretary', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both[.]" 25 U.S.C. § 450b(i).

See id. § 450j-1(a)(1); Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C. Cir. 1996).

As related to this case, there are two types of contract support costs ("CSC") incurred in self-determination contracts: direct program costs and indirect costs.<sup>4</sup> Simply stated, direct CSC are the "direct program expenses for the operation of the Federal program that is the subject of the contract[.]" whereas indirect CSC are "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service or activity pursuant to the contract [.]" Id. § 450-j-1(3)(A)(i) & (ii).

Because indirect CSC are shared by several different programs or services, to calculate the amount of indirect CSC a tribe is responsible for paying, an "indirect cost rate" is "arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency[.]" Id. § 450b(f). The Secretary, through the Office of the Inspector General ("OIG"), has utilized a government manual, OMB Circular A-87, to calculate tribes' indirect CSC rates. Compl. ¶¶ 21. At issue in this lawsuit is "whether the OIG's methodology for the calculation of indirect cost rates comports with the ISDA . . ." Id. ¶¶ 29.

Plaintiffs argue that the precise methodology utilized by the OIG to calculate their indirect cost rates has already been declared illegal by the Tenth Circuit in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). Id. ¶¶ 3. Plaintiffs seek to

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<sup>4</sup>In the initial year of a contract, CSC also include "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract . . ." 25 U.S.C. § 450-j-1(a)(5). These costs are not at issue in this lawsuit.

certify a class, which would be "virtually identical to the class certified by the District Court for the District of New Mexico on remand following the decision of the U.S. Court of Appeals in Ramah." Id. ¶ 27. The proposed class would consist of approximately 350 to 400 Indian tribes and tribal organizations, who have contracts with the director of the Indian Health Service (IHS), "whose contracts contain an indirect cost rate determined in negotiation with the . . . OIG[ ] or its successor of the . . . Department of the Interior." Id.<sup>5</sup> In the first two counts of a three-count complaint, plaintiffs allege that the defendants have breached their contract with the plaintiffs by failing to "reimburse contract costs" or, alternatively, by failing "to request . . . sufficient appropriations [from Congress] to meet those obligations," which plaintiffs posit is "a breach of the implied covenant of good faith and fair dealing." Id. ¶ 36.<sup>6</sup> Count three of the complaint asserts that the defendants have breached the duty of trust "[b]y not requesting sufficient funds from Congress to pay Indirect Contractual Support Costs . . . ." Id. ¶ 44.

The defendants have filed a motion seeking dismissal of plaintiffs' complaint on two principal grounds: (1) the Court's lack of subject matter jurisdiction and (2) plaintiffs' failure to state a claim upon which relief can be granted. Regarding the subject matter

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<sup>5</sup>In an Order dated May 6, 2003, the Court granted the defendants' motion to stay a ruling on the plaintiffs' motion for class certification pending resolution of the defendants' motion to dismiss.

<sup>6</sup>Plaintiffs' breach of contract claims are separated into two counts: one for the years prior to fiscal year 1998, which were "lump sum years," meaning the monies for health programs were distributed in lump sums and there was no designation regarding the funds to be used for direct versus indirect CSC. First Claim for Relief, Compl. ¶ 35. For these years, plaintiffs claim that there were appropriations "legally available to reimburse contract costs . . . ." and thus the Secretary breached the contracts by failing to pay these costs. Id. In the years after fiscal year 1997, which plaintiffs term "capped years," appropriations for health programs "contained limitations or caps" that limited the amount of funds that could be used to pay indirect CSC. Second Claim for Relief, id. ¶ 39. However, plaintiffs argue that these limitations "did not limit or reduce the United States' obligation to pay the full contracted and legally required amount of Indirect Contract Support Costs after services were performed." Id. ¶ 40.

jurisdiction challenge, defendants seek dismissal on several grounds. First, defendants argue that this Court lacks subject matter jurisdiction over some of the claims raised in plaintiffs' complaint because plaintiffs have failed to exhaust their administrative remedies regarding these claims. Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defs.' Mem.") at 20. Second, defendants argue that the Court is without subject matter jurisdiction over plaintiffs' claims "for retrospective relief" as these claims "are moot because IHS's authority to obligate the relevant appropriation has lapsed." Id. at 19, 23. Third, defendants posit that some of the claims are barred by the applicable statute of limitations. Id. at 29. Fourth, defendants argue that certain claims are not ripe "because [p]laintiffs have failed to obtain current rates for the last seven years" and, therefore plaintiffs "lack standing to challenge the indirect cost formula . . . ." Id. at 19. Finally, defendants assert that the United States, Charles Grim, Earl Devaney and Timothy Vigotsky should be dismissed because sovereign immunity as to these defendants has not been waived and therefore the Court cannot exercise subject matter jurisdiction over them. Id. at 44. As to plaintiffs' allegation that they are entitled to receive funding for indirect CSC, regardless of the amount of Congressional appropriations the Secretary receives, defendants argue that this claim should be dismissed for failure to state a claim upon which relief can be granted because, "[a]s a matter of law[,] . . . [p]laintiffs (and all other tribes with self-determination contracts) are, and always were, entitled to only a share of the limited amount of CSC funding that Congress appropriated and apportioned to IHS in any given year." Id. at 34. The Court will address each of the defendants' arguments in turn.

## II. Analysis

### A. Defendants' Lack of Subject Matter Jurisdiction Challenges

#### (1) Standard of Review

Defendants seek to dismiss several of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1). A motion for dismissal under "Rule 12(b)(1) presents a threshold challenge to the court's jurisdiction . . . ." Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (citations omitted). Specifically, Rule 12(b)(1) permits dismissal of a complaint if the Court "lack[s] jurisdiction over the subject matter . . . ." Under this rule, "the plaintiff bears the burden of establishing that the court has jurisdiction." Fowler v. District of Columbia, 122 F. Supp. 2d 37, 39-40 (D.D.C. 2000) (citation omitted). The rule also imposes "an affirmative obligation [on the court] to ensure that it is acting within the scope of its jurisdictional authority . . . [and for that] reason, the '[p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than on a 12(b)(6) motion for failure to state a claim." Id. at 40 (citations omitted). When reviewing a challenge pursuant to Rule 12(b)(1), the Court may consider documents outside the pleadings to assure itself that it has jurisdiction. See Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); see also Haase, 835 F.2d at 906 ("In 12(b)(1) proceedings, it has been long accepted that the judiciary may make 'appropriate inquiry' beyond the pleadings to 'satisfy itself on authority to entertain the case.'" (citations omitted); Artis v. Greenspan, 223 F. Supp. 2d 149, 152 (D.D.C. 2002) ("A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of venue, personal jurisdiction, or subject-matter jurisdiction.") (citation omitted).

By considering documents outside the pleadings on a motion to dismiss pursuant to Rule 12(b)(1), the Court does not convert the motion into one for summary judgment; "the plain language of Rule 12(b) permits only a 12(b)(6) motion to be converted into a motion for summary judgment." Haase, 835 F.2d at 905.

As a preliminary matter, plaintiffs argue that the Rule 12(b)(1) and 12(b)(6) issues are "interrelated" and thus, it "will be difficult if not impossible" for the Court to avoid considering the numerous exhibits submitted by the defendants on the 12(b)(1) issues and not the 12(b)(6) issues. Plaintiffs' Opposition to Motion to Dismiss ("Pls.' Opp'n") at 3. Plaintiffs contend that it would not be proper for the Court to grant the motion to dismiss without converting it to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 and providing the parties with time to conduct discovery. Id. at 4. In the alternative, plaintiffs submit that "[e]ven if conversion . . . is not warranted," the Court should defer ruling on the 12(b)(1) issues until plaintiffs have "had adequate time to discover facts supporting the court's jurisdiction." Id. at 4.

"A plaintiff has no right to discovery in opposing a motion under 12(b)(1)." Haase, 835 F.2d at 908.<sup>7</sup> It is well established that when reviewing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court "may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003)

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<sup>7</sup>Specifically, on the issue of standing, the District of Columbia Circuit has held that "[a] motion to dismiss for lack of standing . . . involves an examination of the face of the complaint, which does not depend on discovery." Haase, 835 F.2d at 908.

(citations omitted). While jurisdictional discovery is warranted in some cases, such "discovery should be carefully controlled and limited." Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000) (citation omitted).

In their motion, plaintiffs identify several broad areas in which they believe discovery "may" be required but they fail to specifically identify the precise facts that have been placed in dispute by defendants' motion to dismiss and which they therefore honestly believe need to be the subject of discovery. If factual disputes exist, the Court may authorize limited discovery into those areas before resolving a Rule 12(b)(1) motion. See, e.g., Ignatiev v. United States, 238 F.3d 464, 467 (D.C. Cir. 2001) (holding that district court should have granted limited jurisdictional discovery where plaintiffs sought to discover mandatory policies that may have been binding on the defendant and which would have supported their claims); Artis, 223 F. Supp. 2d at 155 (court granted limited jurisdictional discovery because it was "troubled by the factual disputes" concerning the defendant's argument that the plaintiffs had failed to exhaust their administrative remedies). Accordingly, the Court will address each of the defendants' challenges to the complaint and if discovery on a particular challenge is needed, appropriate relief will be granted.

## **(2) Exhaustion of Administrative Remedies**

Pursuant to section 450m-1(d) of the ISDA, the Contract Disputes Act ("CDA"), 41 U.S.C. § 602, is applicable to self-determination contracts "except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals . . . ." 25 U.S.C. § 450m-1(d). The CDA requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall

be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). As its first basis for dismissal, defendants argue that plaintiffs failed to raise with the contracting officer claims for "any fiscal years prior to 1993 or after 2001 . . . ." and also their claim regarding the defendants' alleged breach of "the implied covenant of good faith and fair dealing . . . [,]" these claims must therefore be dismissed for lack of subject matter jurisdiction due to plaintiffs' failure to exhaust this jurisdictional requirement of the CDA.<sup>8</sup> Defs.' Mem. at 23. In opposition, plaintiffs concede that claims for fiscal years prior to 1995 are not properly before the Court, Pls.' Opp'n at 13,<sup>9</sup> however, they argue that "the content of their notices were sufficient to raise all the claims presented in the Second Amended Complaint." Id.

In its initial claim letter to the contracting officer dated April 2, 2001, plaintiff Tunica-Biloxi claimed it was entitled to compensation dating back to fiscal year 1996 through fiscal year 2001. Exhibits in Support of Defendants' Motion to Dismiss ("Defs.' Ex.") B (Tunica-Biloxi Contract Dispute Claim dated April 2, 2001). In its second claim letter dated September 27, 2001, Tunica-Biloxi claimed amounts it was owed for fiscal year 1995. Defs.' Ex. C (Tunica-Biloxi Contract Dispute Claim dated September 27, 2001). Plaintiff Ramah's contract dispute claim was filed with the IHS on August 31, 2001, and it "relate[d] to fiscal year[s] 1993 through 1996." Defs.' Ex. E (Ramah

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<sup>8</sup>Defendants concede that plaintiffs' claim for breach of trust was not subject to the CDA's exhaustion requirement. Defs.' Mem. at 21 n.12. Therefore, the Court need not address that claim in this section of the opinion.

<sup>9</sup>The CDA requires that all claims "be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). Plaintiffs concede that claims relating to years prior to fiscal year 1995 (which began October 1, 1994, and extended to September 30, 1995) are "outside the claims[]" they may pursue before the Court. Pls.' Opp'n at 13. The Court will limit plaintiffs' request for relief accordingly.

Contract Dispute Claim dated August 31, 2001) at 1 n.1. Neither Tunica-Biloxi's or Ramah's administrative claims addressed claims for fiscal years after 2001; indeed, Ramah's claims ended at 1996. In addition, neither of the plaintiffs' administrative claims explicitly raised the argument made in claims one and two of the second amended complaint, namely, that the Secretary has breached "the implied covenant of good faith and fair dealing" by failing "to request [that] Congress . . . [provide] sufficient appropriations . . . ." Compl. ¶¶ 36, 40.

In the CDA, Congress has provided a limited waiver of sovereign immunity for suits against the government. SMS Data Products Group, Inc. v. United States, 19 Cl. Ct. 612, 614 (Cl. Ct. 1990) (citations omitted). As a prerequisite to filing a suit pursuant to the CDA, section 605(a) requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a) (emphasis added). "Compliance with these requirements is a jurisdictional prerequisite to the filing of a complaint under the CDA." Foley Co. v. United States, 26 Cl. Ct. 936, 944-45 (Cl. Ct. 1992) (citations omitted), aff'd 11 F.3d 1032 (Fed. Cir. 1993); SMS Data, 19 Cl. Ct. at 615 ("The [CDA's] limitations on the waiver of sovereign immunity necessarily restrict the jurisdiction of this court."). The administrative filing requirement serves an important purpose: "Congress required contractors to file all claims with the contracting officer to provide the Government with an opportunity to settle the case or otherwise avoid unnecessary litigation." SMS Data, 19 Cl. Ct. at 614. Thus, the CDA's clear language that

'[a]ll claims . . . shall be submitted to the contracting officer for a decision[.]' . . . does not permit claims discovered after an initial decision to escape contracting officer review. The Act exempts no claims from

contracting officer review. Upon discovery of a new claim, a contractor must submit it to the contracting officer.

Id. at 616 (emphasis in original and emphasis added); see also Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589, 592 (Fed. Cl. 1999) ("A valid final decision by the contracting officer is thus 'a 'jurisdictional prerequisite' to further legal action thereon.") (citation omitted).

As indicated, plaintiffs argue that "their notices were sufficient to raise all the claims presented in the Second Amended Complaint." Pls.' Opp'n at 13. They rely on the Foley decision as support for the proposition that as long as "the claims arise from the 'same set of operative facts' as those presented to the contracting officer for decision[.]" the claims are properly before the Court. Id. (citing Foley, 26 Cl. Ct. at 945). The Court agrees that "[i]f the complaint brought [in this Court] is based on the same set of operative facts underlying the claim presented to the contracting officer, then this court has jurisdiction under the CDA." Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 417 (Cl. Ct. 1987). Thus, in determining whether compensation requested for those years not presented to the contracting officer can be brought to this Court because they are "based on the same set of operative facts[,] . . . [t]he critical test . . . [is] whether the scheme of adjudication prescribed by the CDA is undermined by the [tribes'] claim [it has filed in this Court] --that is, by circumventing the statutory role of the contracting officer to receive and pass judgment on the [tribes'] entire claim." Id. at 418.

In Cerberonics, the court concluded that it had jurisdiction over a claim that had not been presented to the contracting officer because it was based on the same

