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INTRODUCTION

The majority of Plaintiffs' Opposition relies on acceptance of the erroneous proposition that as tribes contracting under the Indian Self-Determination and Education Assistance Act ("ISDA"), Plaintiffs are absolutely entitled to payment of all of their indirect ongoing contract support costs ("CSC") from the Indian Health Service's ("IHS") annual appropriation or the Permanent Judgment Fund. Review of binding D.C. Circuit case law, however, demonstrates that this proposition already has been rejected. The D.C. Circuit and three other courts of appeal have held that neither the ISDA nor any contract entered into thereunder entitle tribes to full CSC funding.

Plaintiffs also challenge the manner of allocating indirect CSC funding by the Secretary of Health and Human Services ("HHS"), as reflected in Plaintiffs' indirect cost rates. (Defs.' Mem. at 8-15) (explaining the formulation of indirect cost rates). Such a challenge, however, must be brought before the annual appropriation from which the CSC funds were distributed lapses. Once the appropriation lapses, neither IHS nor the Court has any power to "revive" the appropriation and order the payment of funds. And under these circumstances, where the requested relief cannot be provided, the claim for review is moot. Plaintiffs' claims of underfunding for fiscal years 1995-2002 are moot because these years' annual appropriations have lapsed as a matter of law.

To the extent that Plaintiffs challenge the allocation on a prospective basis, this claim is unripe. Each year, a contracting tribe must obtain from the U.S. Department of the Interior ("DOI") an indirect cost rate for the coming year. Through negotiation with the tribe, DOI reviews and calculates, inter alia, the tribe's (1) program and CSC funding from two years prior,

including funding received from agencies other than DOI and IHS, and (2) actual indirect costs incurred during the same period. Each year presents new underlying facts that must be reviewed by DOI. DOI then applies a formula, referred to here as the “indirect cost formula,” to the underlying facts to obtain an indirect cost rate. A funding agency, such as IHS, then uses the resulting rate to calculate a tribe’s indirect CSC. Since Plaintiffs have not obtained new rates since 1996, their claim for prospective relief related to their indirect cost rates is unripe. Further, because they have been using old rates, it is unclear whether they have concrete injury in fact sufficient to establish standing to sue in federal court. Any alleged injury may be less than any over-recovery that Plaintiffs might have received due to the use of old rates.

The bulk of Plaintiffs’ Complaint can be dispensed with on mootness, ripeness, and standing grounds. Plaintiffs’ weak attempt to argue that the ISDA creates a trust relationship that requires the Secretary to ask for additional appropriations wholly lacks support and fails as a matter of law. In light of Plaintiffs’ failure to satisfy the jurisdictional prerequisites to suit and to state a cognizable claim, Plaintiffs’ Second Amended Complaint should be dismissed.

ARGUMENT

I. UNDER THE LAW OF THIS CIRCUIT, PLAINTIFF ARE ONLY ENTITLED TO A SHARE OF THE RELEVANT AVAILABLE APPROPRIATION, THE ALLOCATION OF WHICH CAN ONLY BE CHALLENGED PRIOR TO THE LAPSE OF THE RELEVANT APPROPRIATION.

The core of Defendants’ Motion to Dismiss relies on two D.C. Circuit decisions implicating the subject matter jurisdiction of the Court: (1) the court’s holding in Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996), that ISDA contractors have no statutory or contractual entitlement to funds for payment of CSC apart from their share of the

relevant and available annual appropriation, as divided among all contractors under a legal allocation plan, and (2) the D.C. Circuit's recognition that a plaintiff can only challenge a federal agency's allocation of an appropriation before that appropriation lapses; after that, the challenge is moot, see City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1426 (D.C. Cir. 1994); National Ass'n of Reg'l Councils v. Costle, 564 F.2d 583, 588-89 (D.C. Cir. 1977). These three cases mandate dismissal of the majority of Plaintiffs' Complaint, i.e., all claims for CSC underfunding for fiscal year 2002 and earlier, on jurisdictional mootness grounds.¹

A. The ISDA Does Not Create an Absolute Entitlement to CSC Funding or Permit the Secretary to Incur Contractual Obligations to Pay CSC.

In their Opposition, Plaintiffs give cursory treatment to the D.C. Circuit's binding decision in Ramah and ignore three other federal appellate decisions interpreting the ISDA against them. Instead, they argue that the ISDA entitles them to be reimbursed for their full CSC, notwithstanding the amount of funds appropriated by Congress or the allocation of those funds by Secretary Thompson.² Unfortunately, they cannot get around the fact that in Ramah, the D.C.

¹ Plaintiffs' recitation of the judicial review provision of the ISDA coupled with their claim that this ends any jurisdictional inquiry, (Pls.' Opp. at 10), is at best puzzling and at worst demonstrates a lack of understanding of the Article III jurisdictional doctrines of mootness, standing, and ripeness, see Louisiana Env'tl. Action Network v. Browner, 87 F.3d 1379, 1382 (D.C. Cir. 1996), any or all of which can be lacking notwithstanding a perfectly valid judicial review provision.

² In various sections of their Opposition, Plaintiffs argue that they have an entitlement under ISDA to full CSC funding, but in other sections, they argue that they have an entitlement under the terms of their contracts to full CSC or to money damages for breach of this absolute duty. Compare Pls.' Opp. at 21 ("Creating an entitlement to full contract support was the announced legislative purpose [of the ISDA]."), with Pls.' Opp. at 1 ("This case concerns the enforceability of contractual obligations of the United States."). Where both the text of the ISDA and the contracts entered thereunder make funding subject to the availability of appropriations, however, this becomes a distinction without a difference. See Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 664 (9th Cir. 2002) (stating that ISDA plaintiffs have no independent

Circuit held that the ISDA made all CSC funding subject to the availability of appropriations. Because of this language, each contracting tribe has a right “only to the amount of [CSC funding] it would have received under a legal allocation plan.”³ Ramah, 87 F.3d at 1346.

Following the D.C. Circuit, the Tenth Circuit also held that there was no entitlement to funds under the ISDA for indirect CSC ““that exists independently of whether Congress appropriates money to cover it.”” Cherokee Nation v. Thompson, 311 F.3d 1054, 1061 (10th Cir. 2002) (quoting Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 665 (9th Cir. 2002)), pet. for cert. filed, No. 02-1472, 71 U.S.L.W. 3653 (Apr. 3, 2003). The Ninth and Federal Circuits earlier reached the same conclusion that the ISDA and the contracts create no absolute statutory

contractual rights to full CSC funding). In other words, because the ISDA does not grant the Secretary the authority to obligate the government in excess of available appropriations, any entitlement to CSC funding is the same under the statute and the contracts.

³ Plaintiffs attempt to distinguish Ramah by claiming that the plaintiffs in Ramah “sought payment from a discrete corpus under the Secretary’s control, *i.e.*, that year’s appropriation,” whereas they are seeking money damages for breach of contract. (Pls.’ Opp. at 15-16.) But regardless of how the plaintiffs in Ramah pled their case, the D.C. Circuit’s analysis applies to all claims for indirect CSC funding: there is no entitlement separate and apart from the relevant annual appropriation. See 87 F.3d at 1345. If Congress declines to appropriate funds for CSC, then the contracting tribes do not get any CSC funds. See id. The result is the same under an APA-type action or a claim for money damages under the Contract Disputes Act (“CDA”). See also supra n.2. It also should be noted here that, contrary to their claim, Plaintiffs are not, in fact, seeking “money damages” as that term is understood. Their lawsuit seeks funds for CSC to which they claim entitlement under the ISDA. (2d Am. Compl. ¶¶ 1, 15, 16, 19, 35, 40.) “Where a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages.” America’s Community Bankers v. FDIC, 200 F.3d 822, 829 (D.C. Cir. 2000). In contrast, “money damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost” Id.

Once Plaintiffs’ Complaint is properly interpreted as one for statutory entitlement, Defendants’ statute of limitation defense follows. A claim for statutory entitlement must satisfy the six-year general statute of limitations applicable to claims against the federal government. See 28 U.S.C. § 2401(a). Under § 2401(a), claims related to CSC funding prior to December 9, 1996, should be dismissed. This would include fiscal year 1995, 1996, and a part of 1997.

or contractual rights. See Shoshone, 279 F.3d at 665; Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1377-78 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000). In so holding, these federal appellate courts have already rejected the arguments that Plaintiffs recycle here.

First, Plaintiffs argue that the ISDA provisions regarding the payment of CSC in 25 U.S.C. § 450j-1(a)(2) are mandatory, and thus an obligation is incurred for full CSC funding upon execution of contract. (Pls.' Opp. at 21, 34.) The D.C. Circuit and other courts already have considered this provision, along with 25 U.S.C. § 450j-1(b) ("Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . .") (hereinafter referred to as the "availability clause"), and have concluded that there is no entitlement to CSC funding separate and apart from the relevant and available appropriation.⁴ See Ramah, 87 F.3d at 1345; Cherokee, 311 F.3d at 1061; Shoshone-Bannock, 279 F.3d at 664-65; and Oglala, 194 F.3d at 1377-78.

Plaintiffs also argue that the legislative history of the ISDA supports reading the ISDA as creating obligations for payment of full CSC upon execution of contract. (Pls.' Opp. at n.2, 31-33.) But resort to legislative history is to no avail where, as here, a statute is clear. As the Federal Circuit stated:

[I]f we accepted [the plaintiff's] selectively quoted legislative history as a clear congressional statement of intent that ISDA indirect costs must be fully funded, it would render the subject-to-appropriations language of § 450j-1(b) meaningless. It would exceed our judicial function to repeal the unambiguous language of § 450j-1(b) in such a fashion. . . .When the words of a statute are unambiguous,

⁴ Likewise, these decisions refute Plaintiffs' argument at pages 22-24 that the availability clause in both the ISDA and each of their contracts is insufficient to "shift the burden of risk of insufficient appropriations to the contractor."

then judicial inquiry is complete.

Babbitt, 194 F.3d at 1378 (emphasis added) (citations, alterations, and internal quotation marks omitted). The D.C. Circuit likewise found the availability clause clear and unambiguous. See Ramah, 87 F.3d at 1345; see also Shoshone, 279 F.3d at 664-65 (holding that because Congress made all funding under the ISDA subject to available appropriations, “Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it”) (emphasis added); Cherokee, 311 F.3d at 1061 (stating that the availability clause is clear and unambiguous).

Next, Plaintiffs argue that although the ISDA may limit the “provision of funds” by Secretary Thompson to the spending caps in the annual appropriations, the liability of the United States is not so limited. (Pls.’ Opp. at 20-22, 29-33.) Incredibly, they cite Ramah as authority, a case that did not specifically address this point, but contained contrary conclusions. See 87 F.3d at 1346 (holding that “each tribe had a right only to the amount of [CSC] it would have received under a legal allocation plan”). The Cherokee district court, however, did specifically reject this purported distinction. See 190 F. Supp. 2d 1248, 1259 (E.D. Okla. 2001), aff’d, 311 F.3d 1054 (10th Cir. 2002). Plaintiffs fail to recognize that a distinction between the distribution of funds by the Secretary and the liability of the federal government exists only if the authorizing statute creates a statutory entitlement or authorizes the administering agency to incur a fixed contractual obligation without regard to available appropriations. See, e.g., New York Airways, Inc. v. United States, 369 F.2d 743, 745, 746 (Ct. Cl. 1966),⁵ and other cases cited in Plaintiffs’

⁵ In New York Airways, the plaintiffs were “entitled to receive reasonable compensation” for their statutory duty to transport mail whenever directed to do so by the Postmaster General. See 369 F.2d at 745 & n.1 (citing 49 U.S.C. § 1371).

Opposition at 20. Because the ISDA, 25 U.S.C. § 450j-1(b) does no such thing, the cases Plaintiffs rely upon are inapposite. See Cherokee, 311 F.3d at 1065-66 (holding that because “the government’s contractual and statutory obligation to pay CSCs was expressly subject to the availability of appropriations. . . . [t]he doctrine of New York Airways does not [] support the Tribes’ assertion that the government is liable under contract principles despite any shortfall in appropriations”); Babbitt, 194 F.3d at 1379 (explaining that in New York Airways, the plaintiff was “statutorily entitled to receive reasonable compensation,” whereas “[an ISDA contractor’s] situation differs fundamentally in that the ability of [DOI] to bind the Government contractually was expressly conditioned on the availability of appropriations”).

Under the relevant authorities, any claim that the ISDA or the ISDA contracts create an absolute entitlement to payment of full CSC must be rejected. Plaintiffs were only entitled to a share of the relevant appropriation as allocated by the Secretary.⁶

B. To Challenge Their Share of An Appropriation, Plaintiffs Must Sue Before It Has Lapsed.

Although Plaintiffs concede that they were provided CSC funding for all years at issue, they challenge IHS’s allocation of the appropriations. A court cannot review the allocation of an appropriation, however, when: (1) the administering agency’s authority to obligate the funds has lapsed, or (2) the appropriation has been fully obligated. See City of Houston, 24 F.3d at 1426-27. As Defendants’ Memorandum explains, the relevant appropriations for fiscal year 2002 and

⁶ The practical reality of Plaintiffs’ argument demonstrates their error. If Plaintiffs were correct that when the appropriation is limited, the ISDA may bar the Secretary from distributing CSC funds but federal courts could always order payment of CSC from the Judgment Fund, each contracting tribe that did not receive full CSC funding would bring a lawsuit each year to obtain their full CSC or so-called “money damages” for breach of contract, and the intended limitations in the congressional appropriations would become meaningless.

