

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA,  
and RAMAH NAVAJO SCHOOL BOARD,

INC.,

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA, *et al.*

DEFENDANTS.

No. 1:02CV02413 (RBW)  
Magistrate Judge  
Deborah A. Robinson

RESPONSE AND REPLY RE SUPPLEMENTAL AUTHORITY  
(DKT. NO. 130, 131)

Plaintiffs here respond to Defendants' Notice of Supplemental Authority (Dkt. No. 130), which cites five cases said to be related to their motion for summary judgment. We address the cases *seriatim*.

1. *Greenlee County v. United States*, 487 F.3d 871 (Fed. Cir. 2007), *cert. denied*, 76 U.S.L.W. 3260 (2008). *Greenlee* did not involve the contract authority of a federal agency, but agency "payments in lieu of taxes" (PILTs), an area where considerations of predictability are far less significant. The Federal Circuit made special note of this distinction:

The conclusion that PILT limits the government's liability to the amount appropriated is particularly appropriate because PILT . . . involves a benefits program not a contract, and there is greater room in benefits programs to find the government's liability limited to the amount appropriated.

*Greenlee*, 487 F.3d at 879 (citations and internal edits omitted).

2. *Renda Marine, Inc. v. United States*, 509 F.3d 1372 (Fed. Cir. 2007). This appeal sustained the dismissal of a Contract Disputes Act (CDA) claim because the contractor did not appeal the contracting officer's decision within the deadline for such appeals. No such issue is present in the instant case. Moreover, the jurisdiction of the Court of Federal Claims in *Renda* depended on the CDA itself and 28 U.S.C. § 1491(a), not on the broader grant of jurisdiction in the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450m-1(a), (d).

3. *ConocoPhillips v. United States*, 501 F.3d 1374 (Fed. Cir. 2007). The waiver at issue in *ConocoPhillips* did not involve a provision of law enacted for the contractor's protection. *ConocoPhillips* falls within the category of cases previously cited by Defendants and addressed in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 39 (Dkt. No. 121). *See generally id.*, at 37-40, 42-46.

4. *Southern Ute Indian Tribe v. Leavitt*, No. 05CV988 (D.N.M. June 15, 2007).<sup>1</sup> In this action, the United States had sought to add language to a proposed ISDA contract submitted by the Southern Utes. The language provided that the United States would not be liable for contract support costs in the absence of appropriations. But the United States in the instant case claims that the proviso in 25 U.S.C. § 450j-1(b) already limits the liability of the United States in this manner. Inserting this language in the Southern Ute contract would not be necessary if the proviso in § 450j-1(b) had the meaning the United States contends it has. *See generally*

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<sup>1</sup> Defendants cite the *Southern Ute* opinion of June 15, 2007 (Dkt. No. 50), but attach the opinion of Oct. 18, 2007 (Dkt. No. 66).

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at 22-26 (Dkt. No. 121). The Government's rationale for requiring the challenged language in *Southern Ute* is therefore an admission that the proviso is ambiguous, calling for application of ISDA's rule resolving ambiguities in favor of contractors. *See id.* at 36. In short, the Government's position in *Southern Ute* directly supports Plaintiffs' contention here that, under the rules of statutory construction properly applied,<sup>2</sup> the proviso in § 450j-1(b) does not limit the United States' contractual obligation to pay contract support costs, but only the Secretary's authority to liquidate that obligation.

5. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007). Class certification is not at issue in Defendants' motion for summary judgment. Defendants' citation of *Zuni* as supplemental authority related to that motion seems intended only to bring before this Court the statement that Mr. Gross's motion for appointment as class counsel was "self-serving". A glance at Federal Rules of Civil Procedure Rule 23(g)(a)(1)(A), (B) and (2) demonstrates that any application for appointment as class counsel must set forth the applicant's superior capabilities that justify his or her appointment. To the extent that Defendants intend to foreshadow their arguments in a future motion for class certification in the instant case, it should be noted that the miscalculation of indirect cost rates was not a claim pled or at issue in *Cherokee Nation v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001), ultimately reversed in *Cherokee Nation v.*

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<sup>2</sup> *See Susanville Indian Rancheria v. Leavitt*, U.S.D.C. E.D. Ca. No. 02:07-CV-259-GEB-DAD (attached to Plaintiffs' Notice of Recent Authority, Dkt. No. 128), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S.Ct. 843 (1997).

*Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005), and was an afterthought in *Zuni*. See 467 F.Supp.2d 1099, 1104-1105. In the only previous case in which the miscalculation claim was central, the class was certified. See Dkt. No. 21, att. 1 (class order in *Ramah Navajo Chapter v. Lujan*).

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Defendant assert, Dkt. No. 131, that *GHS Health Maintenance Organization, Inc. v. United States*, 76 Fed. Cl. 339 (2007), should be disregarded because it is contrary to Federal Circuit precedent. That assertion ignores Judge Horn's careful analysis of Federal Circuit precedent and other cases labeled by Defendants as "conflicting". See 76 Fed. Cl. at 368-370 (*Whittaker Elec. Sys. v. Dalton*, 124 F.3d 1443 (Fed.Cir. 1997); *id.* at 372 (*E. Walters & Co. v. United States*, 217 Ct.Cl. 254, 576 F.2d 362 (1978); *id.* at 368 (*Mexican Intermodal Equip., S.A. de C.V. v. United States*, 61 Fed.Cl. 55 (2004)); *id.* at 372 (*Hermes Consol., Inc. v. United States*, 58 Fed.Cl. 3 (2003)).

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