

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA,)
a Federally recognized Indian Tribe,)
and **RAMAH NAVAJO SCHOOL BOARD, INC.,**)
a New Mexico non-profit corporation,)
individually and on behalf of a class)
of persons similarly situated,)

PLAINTIFFS,)

vs.)

No. 1:02CV02413 (RBW)

UNITED STATES OF AMERICA;)
TOMMY G. THOMPSON, Secretary of the United)
States Department of Health and Human Services;)
GALE A. NORTON, Secretary of the United States)
Department of the Interior; **CHARLES W. GRIM,**)
Interim Director of Indian Health Services, United States)
Department of Health and Human Services;)
EARL E. DEVANEY, Inspector General, United States)
Department of the Interior; and)
TIMOTHY G. VIGOTSKY, Director, National)
Business Center, United States Department of the Interior,)

DEFENDANTS.)
_____)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

This case concerns the enforceability of contractual obligations of the United States.

Plaintiffs will show:

(1) the Court's subject matter jurisdiction is clear, never doubted by any of the courts, including four federal circuits, examining related claims and sovereign immunity has been waived;

(2) Defendants' failure to request sufficient appropriations bars all contract defenses based on insufficiency of appropriations. *S.A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978). Even if it did not, the defenses fail because:

- (a) as to years through 1997, in which Congress made lump sum appropriations, appropriations were in fact sufficient under the rule in *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980); and
- (b) specific "caps" imposed in Congressional appropriations for 1998 and subsequent years did not, per *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), and constitutionally could not, per *United States v. Winstar*, 518 U.S. 839, 116 S. Ct. 2432 (1996), retroactively alter contract price terms.

(3) Defendants have a trust obligation to the Plaintiff class incorporated into these contracts, and the elements for a breach of trust claim are alleged. *United States v. White Mountain Apache Tribe*, 537 U.S. ___, 123 S. Ct. 1126, 71 USLW 4125. (No. 01-1067, March 4, 2003).

The illegality of Defendants' rate system for determining contract overhead is *res judicata* under *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Ramah v. Lujan*").

POSTURE

Defendants' motion attacks the complaint both on jurisdictional grounds and on the merits. As in many situations, "the matter[s] in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure." RESTATEMENT (SECOND) OF JUDGMENTS §11, comment *e*; see *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000). This is the case here as concerns the argument on lapse of appropriations and the status of Plaintiffs' indirect cost rates. Defendants have also attached numerous exhibits containing extrinsic materials.¹ These include an affidavit (declaration) and two contracting

¹ The attachments include 10 and 11 page contracting officers' decisions. Def. Exs. D and F. These documents are lengthy statements of mixed fact and law largely outside the complaint. The decisions deny the claims because of alleged unavailability of appropriations. But the contracts themselves and the appropriations acts attached as Def. Exs. P-Y obligate the appropriations at the time the contracts are executed. Tunica's decision also claims that "recurring obligations" prevent the one billion dollar plus appropriations from being available. Def. Ex. D, at 7. Yet these recurring obligations are nowhere recited, defined, explained or justified. Nor is there any statement as to when in the annual cycle the Plaintiffs were notified that their full contract amounts for indirect contract support costs (CSC) would not be paid. Plaintiffs are entitled to discovery on these points especially relating to unobligated balances, the reports to Congress of deficiencies required by 25 U.S.C. §450j-1(c), and the requests for appropriations for CSC. Defendants' contention concerning the Government's failure to request appropriations also bears on both jurisdiction and merits.

The Declaration of Inge Montich, Def. Ex. A, raises similar issues intertwining jurisdiction and merits. On the basis of her Declaration, Defendants argue that Plaintiffs lack standing for claims after certain years. They argue that because Plaintiffs have not finalized their rates for those years, they cannot prove damages. Yet the Declaration omits mention of the carry forwards process which effectively corrects rates in later years and the fact that many if not most contractors do not have current year rates. It fails to mention that use of prior year rates is

officers' decisions. Initially the Court must "scrupulously avoid", *Tele-Comm. of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985), considering these attachments in relation to the 12(b)(6) portions of Defendants' Motion. But in view of the interrelated nature of the 12(b)(1) and 12(b)(6) issues, this will be difficult if not impossible. As in *Herbert v. National Academy of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992):

[T]hough the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer the jurisdictional decision until the merits are heard. (Citing *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 1009 (1947). . . [S]hould the trial court look beyond the pleadings it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties.

If the Court considers and does not exclude the attachments, the motion to dismiss converts to one for summary judgment per Rule 56. Since the parties have not yet had a chance to take discovery, however, conversion implicates Rule 56(f). *Paley v. Estate of Ogus*, 20 F. Supp. 2d 83, 89 (D.C.D.C. 1998) ("reasonable opportunity to present all material made pertinent to such a motion by Rule 56" must be afforded if court considers "any written or oral evidence that provides some substantiation for [the motion] and does not merely restate what is said in the

recognized in the regulations of the Secretary. See 25 C.F.R. §900.8(h)(3), requiring for initial contract proposals: "(i) a copy of *the most recent* negotiated indirect cost agreement; or (ii) an estimated amount requested for indirect costs, pending timely establishment of a rate or negotiation of administrative overhead costs." And see 25 C.F.R. §900.32 (successor annual funding agreements), which fails to mention indirect cost rates at all.

Defendants deny the existence of contractual obligations to Plaintiffs and, from that, argue that Plaintiffs lack standing and the Court therefore lacks subject-matter jurisdiction. Exhibits I through O to Defendants motion is a voluminous collection of contracts with Plaintiffs. The attachment of these contracts alone is sufficient to convert their motion to one for summary judgment. *General Guaranty Insurance Co. v. Parkerson*, 369 F.2d 821 (5th Cir. 1966).

pleadings."); Wright & Miller, Federal Practice and Procedure: Civil §1366 n. 22 ("Wright & Miller"). See *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1227-28 (D.C. Cir. 1993) (Mikva, C.J. dissenting); *Sacks v. Reynolds Securities*, 593 F.2d 1234, 1239 (D.C. Cir. 1978) (the *Sacks* court converted to summary judgment; dismissal was affirmed because "each side...had a full and fair opportunity to offer both oral and written evidence in support of their position..."). Here there has been no such opportunity. Moreover, if a motion to dismiss raises affirmative defenses (e.g., lapse of appropriations and lack of current year indirect cost rates) and attaches extrinsic materials, "there is considerable authority to the effect that the conversion provision applies." Wright & Miller, at §1366 n. 28. Plaintiffs may in fairness require discovery as to (1) customary procedures for rate-setting; (2) the availability of appropriations considering what is mean by "recurring obligations"; (3) Defendants' role in securing capped appropriations in amounts significantly under need; (4) the extent to which unobligated balances existed which could have been used to pay Plaintiffs' their full contracted amounts; and (5) related matters as set forth in the pleadings.

Even if conversion to Rule 56 is not warranted, a Rule 12(b)(1) jurisdiction motion must be deferred until Plaintiff has had adequate time to discover facts supporting the court's jurisdiction. *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (without discovery, appellants have no way to know essential facts).

It would be proper to deny the Motion to Dismiss based on the points and authorities in this memorandum but not proper to grant it without first converting to Rule 56 and allowing discovery.

NATURE OF CONTROVERSY

Until the 1970s, the vast majority of governmental services to Indians, however diverse, however remote, were centrally administered from Washington. This bureaucratic one-size-fits-all approach was found wanting, and the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. §§450 *et seq.* (“ISDA”), was developed as a cure, devolving local control of provision of services to the Tribes through enforceable contracts.

Under ISDA, the United States, through the Secretaries of Health and Human Services (HHS) and Interior, contracts with Indian tribes and tribal organizations to provide health and social services to which those tribes and organizations are entitled by treaty and statute. Contractors are entitled to the “secretarial amount”, what it would have cost the respective Secretary to administer the contracted program, *plus* “contract support costs,” the reasonable additional expense to preserve program levels.

Local control means shrinking the central bureaucracy. There has been institutional resistance from the outset. On a variety of pretexts, the Secretaries declined to make full payments on ISDA contracts particularly for contract support. In 1988, Congress passed an amendment package, P.L. 100-472, 102 Stat. 2285, emphasizing the contractual nature of contract support, conferring broad jurisdiction on this Court over “any civil action or claim against the appropriate Secretary arising under [ISDA]”, and allowing recourse under the Contract Disputes Act (CDA), 41 U.S.C. §§601 *et seq.* See Sen. Rept. No. 100-274, at 19, 1988 USCCAN 2620, at 2638, 2653-2656.²

² Senate Report 100-274, at 37: “The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these

