

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/DAR)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ORDER

**(1) DECLARING THE THIRD PARTIAL SETTLEMENT AGREEMENT
IN *RAMAH NAVAJO CHAPTER V. SALAZAR* BINDING FOR INDIAN HEALTH
SERVICE CONTRACTS THAT USE NATIONAL BUSINESS CENTER RATES
TO DETERMINE INDIRECT COSTS; AND**

**(2) REINSTATING PLAINTIFFS' MOTION FOR CERTIFICATION OF A
RULE 23(b)(2) CLASS FOR EQUITABLE RELIEF.**

INTRODUCTION

This motion seeks to bind the Secretary of Health and Human Services and the Indian Health Service to accept the rate-making reforms recently agreed to by the Department of the Interior's National Business Center in the related class action, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (1997) (*RNC*), when HHS and IHS use indirect cost rates approved by NBC. The motion seeks: (1) a declaration that, when HHS and IHS use NBC rates, they must accept rates

produced by the *RNC* settlement; and (2) certification of a Rule 23(b)(2) class to allow all IHS self-determination contractors that use NBC rates to enforce the declaration.

Granting this motion will eliminate all equitable issues from this case.

The *RNC* agreement is embodied in the Third Partial Settlement in that case (PSA III) approved August 27, 2008, and was introduced as an exhibit by defendants in this case. Notice of New Evidence, Doc. No. 169, exh. A.

The Government has noted that “[T]he PSA anticipates that funding agencies such as IHS will accept indirect cost rates negotiated with NBC under the new policies.” Doc. No. 172, at 8. PSA III, however, does not bind IHS to accept those rates when the NBC rate is used to determine the indirect cost component of the contract price for an IHS Indian Self-Determination Act contractor. Moreover, IHS contractors relying on NBC rates cannot require IHS to accept the NBC rate reforms.

Plaintiffs seek a declaration that HHS ISDA contractors are entitled to the PSA III rate reforms if their indirect cost rates are negotiated with NBC. Class certification under F.R.Cv. P. Rule 23(b)(2) will allow those IHS contractors to enforce those reforms when their indirect cost rates are negotiated with NBC.¹

The Court should simply make what is practice—what is functionally in force—namely, the HHS’ use of NBC-generated indirect cost rates to compute contract support costs, a matter of

¹ Plaintiffs do not seek certification at this time under F.R.Cv. P. Rule 23(b)(3). Nor do plaintiffs seek a determination that PSA III somehow establishes the Government’s liability for damages for past actions. (Section XIX.A of PSA III expressly provides that it is not an admission of liability.)

legal obligation so that HHS ISDA contractors can enforce the NBC rate-making reforms vis-à-vis HHS health contracts in the same way that Interior ISDA contractors can enforce those reforms.

The instant motion is the converse of the government's request to dismiss Secretary of the Interior Salazar, which alleges that he has been released with respect to contracts for health services. Plaintiffs oppose that dismissal because PSA III did not release the Secretary of Interior for contracts other than those issued by his Department. By seeking dismissal of the rate-making agency but not formally accepting the PSA III rates, HHS and IHS are seeking the fruits of that settlement without first nurturing the trees.

But he can be dismissed and indeed further litigation of the equitable claims in this litigation can be avoided if this Court orders the PSA III reforms made applicable to IHS contracts that use NBC rates and certifies a Rule 23(b)(2) class to allow the affected IHS contractors to enforce the reforms.

PROCEDURAL BACKGROUND

This lawsuit was filed as a class action pursuant to F.R.Civ.P. Rules 23(b)(2) and 23(b)(3). Doc. No. 1, at 8-10 ¶¶ 26-33; Doc. No. 11, at 9-12 ¶¶ 26-33.

In April 2003, plaintiffs moved to certify the class under F.R.Civ.P. Rules 23(b)(2) and 23(b)(3). Doc. No. 21. In 2004, this Court *sua sponte* dismissed without prejudice the motion for class certification, stating that “[p]laintiffs will be able to file a pleading re-instating their motion for class certification after the Court has decided that this action may proceed.” Doc. No.

47.

In its September 22, 2008, opinion, this Court dismissed certain claims but allowed the case to proceed on others including, specifically, equitable claims. Doc. No. 160, at 29.

Meanwhile, the *RNC* litigation moved forward. On August 27, 2008, Judge Hansen approved PSA III, agreeing to rate calculation reforms and finally resolving all equitable issues in that case. The new rate-making reforms for BIA ISDA contracts will go into effect for FY 2010.

This Court is already familiar with PSA III, due to defendants' Notice of New Evidence Doc. 169, and its release argument. Pursuant to that Notice, the Court issued its order to show cause why the Secretary of the Interior should not be dismissed. That issue has now been fully briefed, and is pending before the Court. Docs. No. 171-172. That motion and the instant one should be considered together.

I. THE INDIRECT COST RATE METHODOLOGY ESTABLISHED IN RNC'S PSA III SHOULD BE DECLARED BINDING FOR HHS ISDA CONTRACTS THAT USE NBC INDIRECT COST RATES.

The price term of the ISDA contract consists of the "secretarial amount," what the agency would have expended had it operated the program itself, 25 U.S.C. § 450j-1(a)(1), together with "contract support costs", additional overhead needed for a tribe to operate the program without any reduction in service. *Id.* §§ 450j-1(a)(2)-(3), 450j-1(g). The largest component of contract support costs are indirect costs, the common costs needed to operate a multi-program operation that cannot be allocated to a particular program. 25 U.S.C. § 450b(f).

Contract support costs are not merely incidental, gratuitous, or surplus funds added to the

amounts that the agency would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. If tribal contractors do not receive contract support costs, they cannot provide the same services to tribal members that the Secretary provides to non-contracting tribes, thus discouraging tribes from contracting.² S. Rept. 100-274, at 9, 12-13 (Doc. No. 147-90 (Plfs. exh. 62), at 3-4, 6-7). Under ISDA the Secretaries of Interior and HHS enter into contracts as agents of the United States. 25 U.S.C. § 450*l*, Model Agreement sec. 1(a)(1). The ISDA provisions requiring payment of contract support costs, including indirect costs, apply equally to both Secretaries. 25 U.S.C. §§ 450b(i), 450f(a)(1), 450j-1(a), 450j-1(g). The two Secretaries employ a single set of regulations to implement ISDA, and are barred from promulgating new regulations except in a narrow category not relevant here. 25 U.S.C. § 450k; 25 C.F.R. pt. 900. Both Interior and HHS employ the indirect cost rate system to compute a major funding component of self-determination contracts.

Unless the reformed rate-making procedures are confirmed as binding for NBC rates used to determine indirect costs in IHS contracts, there is risk that not all ISDA contractors of Indian health programs using those rates will be able to benefit from or enforce the PSA III rate reforms. *Res judicata* will not extend to HHS ISDA contractors that have Interior as their cognizant agency but are not members of the *RNC* class. The promotion of a uniform system for

² “The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.” 25 C.F.R. § 900.3(b)(5). “It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged.” 25 C.F.R. § 900.3(b)(8).

funding ISDA contracts awarded by both agencies to the benefit of both the government and the tribes is a major purpose of this motion.

HHS, like Interior, has adopted a policy that if an IHS ISDA contractor has an indirect cost rate, that rate must be used to determine the contractor's indirect contract support cost entitlement. U.S. Dep't of Health & Human Services, Indian Health Service, Indian Health Manual ¶ 6-3.2.E(1) (2007), attached as Exhibit A to this memorandum. *See also* U.S. Dep't of Health & Human Services, Indian Health Service Circular 2004-03 (2004) (Doc. No. 146-15, Defs' exh. 34), § 5.A(2)(c)(i). Since most ISDA contractors are required by other federal agencies from which they obtain funding to have indirect cost rates, the HHS and Interior policies as a practical matter make the indirect cost rate system mandatory for obtaining indirect contract support costs. Indirect costs are the major component of contract support costs.

The Secretary of the Interior uses the OMB Circular A-87 rate procedure to determine indirect contract support costs. Declaration of Deborah Moberly, Indirect Cost Coordinator of Indirect Cost Services (Moberly Decl.) ¶ 5, Doc. No. 142-6, Defs' Exh. 3.

Under OMB Circular A-87, each indirect cost rate proposal must be negotiated with and approved by a "cognizant" agency, an agency designated by OMB to act on behalf of all Federal agencies. 2 C.F.R. pt. 225, Appx. A, ¶ B.6.

Interior is the "cognizant" rate-making agency for all Indian tribes and for most tribal organizations, whether they contract with the BIA or IHS. OMB Circ. A-87, 2 C.F.R. pt. 225,

Appx. E, ¶ D.1.b and c.³ Interior's rate-setting responsibilities are carried out by its National Business Center (NBC). The putative class consists of IHS ISDA contractors whose cognizant agency is Interior.

Once NBC approves an indirect cost rate for a tribal contractor, that rate must normally be accepted by all other federal agencies. *Id.*, Appx. E, ¶ E.1. Thus, if an HHS ISDA contractor has Interior for its cognizant agency (and most, but not all, do), HHS must accept the NBC rate if it uses an indirect cost rate to determine the indirect cost component of the HHS ISDA contract price.

PSA III established a comprehensive set of rate-making reforms to be implemented by NBC. ISDA contracts awarded by HHS were not at issue in that case. *See* Doc. No. 171. Although the regulatory circular, OMB Cir. A-87, 2 C.F.R. pt. 225, makes the rates set by any cognizant agency applicable across all federal agencies, and PSA III so recognizes, HHS is practically but not legally required to accept the reformed NBC rates whenever NBC rates are used to calculate indirect cost entitlements for IHS ISDA contracts.

While IHS may, indeed is likely, to accept the reformed indirect cost rates calculated by NBC, it is not bound to do so by PSA III. This motion seeks to afford IHS ISDA contractors whose rates are set by NBC the same enforceable legal right to the reformed NBC rates as are enjoyed by BIA ISDA contractors.

The contractors (and government too for that matter) need repose, which will not be

³ “As of April 2006, the Department of the Interior was the cognizant agency for 448 tribal governments and 23 tribal non-profit organizations, not all of which have ISDA contracts or compacts with IHS.” Moberly Decl. ¶¶ 1, 38.

produced by a one-sided application of PSA III dismissing the Secretary of the Interior from this case without binding the Secretary of HHS, and all HHS contractors need membership in a class in order to enforce the terms of PSA III against HHS.

Even the defendants have pointed out the difficulties that would arise if NBC were to use a rate-making procedure for contracts awarded by HHS different from that used for contracts awarded by Interior. Doc. No. 172, at 9.

As a practical matter, then, for reasons of certainty, finality, and uniform administration of a single statutory scheme, the rate procedure NBC uses to establish rates for ISDA contracts awarded by Interior must also be used for ISDA contracts awarded by HHS whenever NBC is the rate-setting agency. This Court should so declare and do so in a framework of a certified Rule 23(b)(2) class to make the declaration enforceable by any class member, as PSA III does with respect to BIA contracts. Once HHS is bound to the reformed NBC rates for ISDA contractors that have Interior as their cognizant agency, plaintiffs do not object to dismissal of Interior Secretary Salazar from this case.

Under 28 U.S.C. § 2201, this Court “[i]n a case of actual controversy within its jurisdiction, . . . upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought.” The operative second amended complaint cites Section 2201 as a jurisdictional basis and seeks relief under it. Doc. No. 11, at 4 (¶ 6), 15. The granting of declaratory relief is appropriate where it will clarify and settle the legal relations at issue and provide relief from the uncertainty caused by the controversy which gave rise to the proceeding.

Broadview Chem. Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir.1969), *cert. denied*, 397 U.S. 1064, 90 S.Ct. 1502 (1970), *citing* Borchard, *Declaratory Judgments* 299 (2d ed. 1941). The Court is hardly unaware that there is a genuine controversy over the present indirect rate making system between the plaintiffs and the government. Nor is it unaware that this controversy is common to all indirect cost rate holders who contract under ISDA to operate health programs and services administered by HHS and who obtain their indirect cost rates from the Interior Department.

This motion is timely and appropriate. The Court has now ruled that equitable claims are not dismissed. PSA III will go into effect for FY 2010 and the class would benefit from a ruling extending PSA III to HHS ISDA contracts in time for that cycle.

II. PLAINTIFFS' PREVIOUS MOTION FOR CLASS CERTIFICATION SHOULD BE REINSTATED TO THE EXTENT IT SEEKS CERTIFICATION UNDER RULE 23(b)(2); THE COURT SHOULD CERTIFY A RULE 23(b)(2) CLASS TO ALLOW ALL IHS ISDA CONTRACTORS USING NBC RATES TO ENFORCE PSA III.

The Class in *RNC* overlaps the putative class in this litigation. Some members of the putative class in this case are members of the *RNC* Class, others are not. The members of the putative class in this case are not protected or benefited by PSA III unless this Court certifies the class and declares that they are. The instant motion seeks reinstatement of the Plaintiffs' motion for class certification of a Rule 23 (b)(2) class and reserves its right to seek reinstatement of the motion for a Rule 23(b)(3) class.

Rule 23(b)(2) of the Federal Rules of Civil Procedure provides that:

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

“[When] the Rule 23(a) requisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members.”

2 Newberg on Class Actions (“Newberg”) § 4:14, at 94. *See National Treasury Emp. Union v. Reagan*, 509 F. Supp. 1337 (DDC 1981), *remanded on other grounds*, 663 F.2d 239 (DC Cir.1981) (challenge to federal hiring freeze; claim for money damages in addition to that for declaratory relief did not bar certification of 23(b)(2) class).

Rule 23(b)(2) certification is appropriate here, as it usually is in government benefits class actions, because class-wide injunctive relief will affect more persons and have consequences over a greater period of time than the monetary award. 2 Newberg 90 & cases there cited. The Newberg treatise contains an entire subchapter on Rule 23(b)(2) class actions involving government benefits. 7 Newberg § 23:11, at 528-545:

Class suits involving government benefits are most likely to be certified as Rule 23(b)(2) class actions. Civil rights class actions, including actions regarding government benefits, seeking primarily injunctive or declaratory relief which satisfy the prerequisites of Rule 23(a) generally will also satisfy Rule 23(b)(2).

Class actions for injunctive or declaratory relief serve objectives particularly important in government benefit suits, such as institutional changes, the avoidance of mootness, facilitating enforcement of a favorable judgment, and protecting the interests of affected class members from the burden or the economic infeasibility of bringing individual actions to establish the applicability of a decision for their benefit.

Id. at 528-29 (footnotes omitted). Every one of those factors is present here. The rate-making flaws go to the heart of ISDA and will, if reformed, lead to more accurate calculation of indirect costs in the future and increased appropriations accordingly. *See Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975) (Rule 23(b)(2) applied in context of Native American challenge to denial of health care benefits); *Raymond v. Rowland*, 220 F.R.D. 173, 181 (systemic failure of government bodies to fulfill statutory requirements appropriate for Rule 23(b)(2) class certification.)

Unless *res judicata* applies to all ISDA contractors of HHS health programs whose rates are set by NBC, absent members of the putative class will have no way to enforce the rate-making reforms of PSA III.. *Brown v. Giuliani*, 158 F.R.D. 251, 269 (E.D.N.Y. 1994) (“*stare*

decisis does not operate to adequately protect the putative class members” and does not preclude certification of a Rule 23(b)(2) class); *Disability Rights Counsel v. WMATA*, 239 F.R.D. 9, 17 (D.D.C. 2006) (class of disabled persons granted class status for equitable relief on grounds, in part, that not certifying class would cause hardship for those not named as plaintiffs); *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 341 (D.D.C. 2007) (disability rights class certified under Rule 23(b)(2), citing *WMATA*); *Bizjak v. Blum*, 490 F. Supp. 1297, 1301 (N.D.N.Y. 1980) (class of welfare recipients challenging state regulations certified; defendants’ argument that certification unnecessary because ruling on challenged regulation would affect all class members rejected because defendant gave no assurance of continued application of regulation to others).

Further, the Court in its September 28, 2008, order recognized all the elements for application of collateral estoppel to this case except one. That one was the amendment to ISDA effectuated in 25 U.S.C. § 450j-2, a provision the Court found prevented HHS from paying indirect costs of other agencies. That provision is, however, not applicable here, since one of the specific reforms in PSA III is the introduction of so-called special BIA or IHS rates which will not include or extend to other federal agencies or programs. This Court should thus extend collateral estoppel effect to the class ruling in *RNC*.

A declaration that the NBC ratemaking procedures agreed to in PSA III in *RNC* satisfy the requirements of ISDA and also apply to ISDA contracts awarded by HHS is eminently suitable for treatment under Rule 23(b)(2). Without certification of a Rule 23(b)(2) class, ISDA contractors with contracts awarded by HHS will not be able to enforce the rate-making reforms agreed to in PSA III, even though NBC is their cognizant agency. They should be able to

enforce those reforms, just as members of the *RNC* Class of ISDA contractors with contracts awarded by Interior are able to do.

CONCLUSION

For the foregoing reasons, this Court should reinstate plaintiffs' motion for class certification insofar as it seeks certification under Rule 23(b)(2), certify a Rule 23(b)(2) class, and declare that the rate-making reforms in PSA III in *RNC* apply to NBC's determination of rates used to determine contract support cost entitlements for ISDA contracts awarded by HHS to contractors for which Interior is the cognizant agency.

Respectfully submitted,

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EXHIBIT

Exhibit A U.S. Dep't of Health & Human Services, Indian Health Service, Indian Health Manual 6-3.2.E(1) (2007)