

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' (1) REPLY TO
DEFENDANTS' OPPOSITION (DOC. NO. 176) TO
PLAINTIFFS' MOTION FOR ORDER AND
(2) OPPOSITION TO DEFENDANTS' MOTION
TO STAY BRIEFING (DOC. NO. 177)

I. REPLY TO DEFENDANTS' OPPOSITION (DOC. NO. 176) TO PLAINTIFFS'
MOTION FOR ORDER

The Secretary of Health and Human Services seeks to escape equitable relief because HHS has a policy to use indirect cost rates. But at the same time he claims he is not required to adhere to the rate reforms agreed to in PSA III and that his policy allows him to recalculate the rates set by the cognizant agency. That is precisely why this Court should order HHS to accept the reformed rates whenever an ISDA contractor uses the National Business Center as its cognizant agency.

Defendants state that "IHS generally accepts indirect cost rates negotiated with NBC as a **starting point** for the negotiation of indirect CSC under ISDA contracts." *Opposition* (Doc. No.

176) (*Opp.*), at 7 (emphasis added). Therein lies the crux of this dispute, because OMB Circular A-87 (upon which Defendants rely when it suits their purposes¹) provides that the cognizant agency, here NBC, acts on behalf of **all** federal agencies—including HHS—in negotiating indirect cost rates, 2 C.F.R. pt. 225, Appx. A, ¶ B.6, and that the other agencies **must** accept the rate negotiated by the cognizant agency unless a statute provides to the contrary. *Id.*, Appx. E, ¶ E.1.

Defendants claim that IHS must ensure that “the type of costs sought to be reimbursed through an indirect cost rate are not duplicated by program costs.” *Opp.* 7. IHS makes this claim not just in its opposition but in its policy:

To ensure there is no duplication of costs in the CSC amounts, the IHS will review the CSC request to identify any costs that are duplicative of the amounts that have been incurred by the IHS in the operation of the program and included in the 106(a)(1) program funding to be transferred or that may have been duplicated within the CSC amount. When the PFSAs to be contracted have not previously been operated by the IHS, the identification of duplicative costs will be negotiated based on the program budget submitted by the awardee and a budget from the IHS reflecting the expenditure patters of how the Secretary would have otherwise operated the PFSAs. . . .

For awardees with IDC rates, the IDC agreement and proposal will be analyzed, and costs will be considered duplicative if the amounts historically used for specific categorical purposes under 106(a)(1) are duplicated in the IDC pool.

IHS Circ. 2004-03 (Doc. No. 178-4, Defendants’ exh. C) ¶ 5.A.2, at 7-8.

But all of this is the job of the cognizant agency. It reviews indirect cost proposals and decides whether a listed item in the proposed indirect cost pool is duplicative of costs in the direct cost base. For IHS to redetermine whether “any costs are duplicative [of costs in the base]” is to

¹ *See, e.g.*, Declaration of Deborah Moberly, NBC Indirect Cost Coordinator of Indirect Cost Services (Moberly Decl.) ¶¶ 3, 5, Doc. No. 142-6, Defs’ Exh. 3 (“My office is responsible for ensuring [indirect cost rate] proposals comply with applicable statutory and regulatory requirements, including Office of Management and Budget (OMB) Circulars, which provide principles governing

relegate the cognizant agency to advisory status, defeating the whole purpose of making indirect cost rates uniform across the spectrum of federal agencies.

In short, IHS undertakes to recalculate the indirect cost rate that the contractor has already negotiated with the cognizant agency. That negotiation, including the determination of allowable costs, is for the cognizant agency to make, not IHS. 2 C.F.R. pt. 225, Appx. E, ¶ E.1. *See also id.* Appx. A, ¶¶ B.1, B.6; Appx. E, ¶¶ A.1; D.1.(b) and (c); Declaration of Deborah Moberly, NBC Indirect Cost Coordinator of Indirect Cost Services (Doc. No. 142-6, Defs' Exh. 3) ¶¶ 37-38, 43-44.

Moreover, the IHS policy circular has no legal standing. Although it purports to be otherwise,² it operates as a regulation adopted in violation of 25 U.S.C. § 450(k) as well as of the Administrative Procedure Act. *See United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (“policy that adds a requirement not found in the relevant statute and regulation is a substantive rule that is invalid unless it is promulgated with notice and comment”); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C.Cir.1987)(APA requires agency to utilize notice-and-comment procedures if policy has present, binding effect); *American Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)(“If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administration discretion, it will be taken for what it is, a . . . rule of substantive law”). The policy itself states that if a contractor has a rate, it must be used to calculate the indirect contract support component of ISDA contract funding. Indian Health Manual (Doc. No. 173-3, Plaintiffs' exh.) § 6-3.2.E.1; IHS Circ. 2004-03 (Doc. No. 178-4, Defendants' exh. C),

cost allocation.”)

2 “These instructions are not regulations establishing program requirements” IHS Circ.

§ 5.A.2.c(i). If the policy can govern tribal contractors without promulgation as required by law and in contravention of the procedure set out in the federal government's indirect cost rate manuals, whereby the cognizant agency sets the rate for all federal agencies, OMB Cir. A-87, 2 C.R. Part 225, Appx. A, ¶ B.6, it can just as easily be changed without legal formalities.

Defendants' asserted limitations on their duty to accept NBC rates are sufficient to raise a reasonable apprehension that they will not accept those rates when Circular A-87 says they must, making the issue suitable for declaratory relief.

A. THIS COURT MAY DECLARE THAT THE SECRETARY OF HHS MUST ACCEPT INDIRECT COSTS RATES NEGOTIATED BY THE SECRETARY OF THE INTERIOR FOR HHS ISDA CONTRACTORS FOR WHOM INTERIOR IS THE COGNIZANT AGENCY.

Throughout their opposition, defendants confuse claim with remedy. Plaintiffs seek a practical and easily available remedy for claims that have been in this case since the initial complaint. If the voluminous proofs about the rate-making defects already submitted are not accepted on their face, *see, e.g.*, Docs. No. 147, 150 & acc. exhibits, then a trial should be conducted. But when a coordinate federal agency co-equally charged with implementation of a federal statutory scheme, as here, has adopted a remedial reform urged by the beneficiaries, that should be enough.

1. Plaintiffs' Claim Was Pled in Plaintiffs' Complaint and Is Properly Before the Court.

The operative second amended complaint in this action (Doc. No. 11) declares in its very first paragraph that:

2004-03 (Doc. No. 178-4, Defendants' exh. C) ¶ 1.D.

The suit seeks declaratory and injunctive relief and money damages against the United States and the Indian Health Service of the Department of Health and Human Services (“IHS”) and the Office of Inspector General and its successor, the National Business Center, of the Department of the Interior (“OIG”) for massive violations of the funding provisions of ISDA under which the contracts in question were mandated and issued.

See also id. at 8-9 ¶¶ 20-25 (detailing violations of ISDA); 15 ¶ C (asking that “the Court adjudge the methods employed by the Defendants for computing and paying each class members’ entitlement to Indirect Contract Support Costs to be in violation of the governing statutes and in breach of contract and issue an injunction accordingly.”). Plaintiffs’ exhibits in support of their motions for partial summary judgment document the violations. Docs. No. 147, 150 & acc. exhibits. The Court has not dismissed Plaintiffs’ equitable claims, Doc. No. 160, at 23-29, and has before it Plaintiffs’ motion for leave to file a supplemental complaint on double-dipping, one of the rate-making errors Plaintiffs seek to correct. Doc. No. 163. The fundamental provisions of the IHS policies have not changed since this lawsuit was filed and are encompassed by the second amended complaint.

Six years after filing this action, plaintiffs still seek declaratory and injunctive relief, as well as money damages, for those massive violations.

Plaintiffs do not depend upon 28 U.S.C. § 2201 alone for jurisdiction. The Court’s jurisdiction to grant declaratory and injunctive relief is established under 25 U.S.C. § 450m-1(a). *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (APA action under 25 U.S.C. § 450m-1(a) confers direct access jurisdiction on district court over “any civil action or claim against an appropriate Secretary *arising under [the Act]*” (emphasis in original); held, Secretary’s arbitrary allocation of insufficient contract support costs appropriation violated ISDA; preliminary injunction issued).

2. Plaintiffs Have Standing and Their Claim Is Ripe.

Defendants argue that plaintiffs may not seek relief until one of them has “submitted an indirect cost rate negotiated under the RNC Settlement and . . . IHS [has] refused to accept it.” In other words, defendants argue that an ISDA program, providing vital health services, must be brought to a standstill before a court may begin to adjudicate defendants’ legal duties. Harm has already occurred. The rate-making defects have resulted in lower rates, and higher over-recoveries and lower under-recoveries than permitted by ISDA. Docs. No. 147, 150 & acc. exhibits.

Even if this were not true, the government’s contention simply is not the law. The IHS policy itself confirms the ripeness of the issue. Contractors do not have to wait for the guillotine to drop to complain. *See National Basketball Ass’n v. SDC Basketball Club*, 815 F.2d 562 (9th Cir.1987), *cert. dismissed sub nom. Los Angeles Memorial Coliseum Commission v. National Basketball Assn. et al.*, 484 U.S. 960, 108 S.Ct. 362 (1987) (NBA not required to risk antitrust liability by imposing fine or sanction on Clippers before declaratory relief appropriate); *GTE Directories Publishing Corp. v. Trimien America, Inc.*, 67 F.3d 1563, 1569 (11th Cir. 1995)(declaratory judgment may be “proper even though there are future contingencies that will determine whether a controversy ever actually becomes real”). The declaratory judgment remedy “permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty and it helps avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants.” 10B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* 3d § 2751, at 569-71 (footnotes omitted).

The actual controversy here has two elements: 1) the existence of the rate-making defects shown by proofs already in the record; and 2) the instability and uncertainty caused by the IHS policy. The statute plainly gives this Court power to “order appropriate relief [including] injunctive relief against any action by an officer of the United States or any agency thereof contrary to [ISDA]” 25 U.S.C. § 450m-1(a). IHS’s refusal to accept and apply the new rates issued by NBC is an immediate impediment to successful implementation of the self-determination policy.

The first NBC rates under PSA III will be negotiated for fiscal year 2010, which begins in less than 6 months. PSA III, ¶ III.D (Doc. No. 169, exh. A), at 11. The threat of injury is thus immediate.

In short, “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941).

3. This Court May Declare the Legal Relations of the Parties.

Plaintiffs do not contend that the HHS Secretary was a party to *RNC v. Lujan*. The Secretary is, however, a party in this case. There can be no doubt that PSA III has changed the legal relationship between the Secretary and IHS ISDA contractors that have NBC as their cognizant agency with respect to the rate-making claims at issue in this case.

As noted in plaintiffs’ opening memorandum, 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 Secretaries employ the indirect cost rate system to compute a major funding component of self-determination contracts. The Secretary of the Interior awards ISDA contracts on behalf of the United States, as does the Secretary of HHS. Each Secretary is paymaster, making payments against those contract obligations of the United States when sufficient appropriations are available. Finally, the Secretary of the Interior is the cognizant agent for rate-making for all Indian tribes and most tribal organizations.

One agency delegated the Secretary's authority to award ISDA contracts, the Bureau of Indian Affairs, has agreed to become bound by the new rates issued by the cognizant agency, NBC. The other, the Indian Health Service, delegated the same authority to award ISDA contracts for HHS, has not. This Court not only has the power to declare the legal relations among the parties, including the HHS Secretary and IHS, under these circumstances but should exercise that power.

B. THE COURT SHOULD REINSTATE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND SHOULD CREATE A RULE 23(b)(2) CLASS

Because of PSA III, it is now appropriate to certify a Rule 23(b)(2) class, especially in light of the government's effort to dismiss one of the parties necessary for declaratory and injunctive relief.

Plaintiffs' Second Amended Complaint sought certification of a Rule 23(b)(2) class. Doc. No. 11, ¶ 28. Their motion for class certification, which this motion seeks to reinstate, sought certification under Rules 23(b)(2). Doc. No. 21. (Both filings also sought certification under Rule 23(b)(3), but plaintiffs do not seek the latter certification at this time. Doc. No. 173-2, at 2 n. 1.) Nothing in Rule 23 requires Plaintiffs to make an election between Rule 23(b)(2) certification and

Rule 23(b)(3) certification. “Refusing to certify a Rule 23(b)(2) class action based on request for monetary relief defeats the possibility of ever maintaining an injunctive class action.” *Newberg on Class Actions* § 4:11, at 61-62 (4th ed. 2002), citing *Bradford v. AGCO Corp.*, 152 F.R.D. 101 (W.D. Mich. 1993) (request for monetary relief almost always accompanies request for injunctive relief and does not bar certification under Rule 23(b)(2)). *See also In re Catfish Antitrust Litigation*, 826 F. Supp. 1019, 1041 (N.D. Miss. 1993)(Rule 23(b)(2) class certified along with (b)(3) class where primary relief sought was money damages).

Rule 23(b) should be applied liberally, not restrictively. *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 88-89 (S.D.N.Y. 1998). “If there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.” *Green v. Wolf*, 406 F.2d 291, 298 (2d Cir. 1958), *cert. denied sub nom. Troster, Singer & Co. v. Green*, 395 U.S. 977, 89 S.Ct. 2131 (1969)(quoting *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S. Ct. 1194 (1969). *Accord, Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985), *cert. denied*, 474 U.S. 946, 106 S.Ct. 342 (1985)(court should err in favor of allowing class). Courts have consistently noted that important public policy benefits often arise from class certification. *In re Sumitomo Copper Litig.*, above, 182 F.R.D. at 89.

The requirements of Rule 23(b)(2) are satisfied where “settling the legality of the [opposing parties’] behavior with respect to the class as a whole, is appropriate.” Fed. R. Civ. P. 23, Advisory Committee’s Note, Subdivision (b)(2). As one leading commentator explains:

Subdivision (b)(2) sets forth two basic requirements for the maintenance of class actions thereunder. First, the party opposing the class must have acted or refused to act or

failed to perform a legal duty, on grounds generally applicable to all class members. . . . The second requirement for Rule 23(b)(2) classes is that “final relief of an injunctive nature or a corresponding declaratory nature, **settling the legality of the behavior with respect to the class as a whole** [must be] appropriate.”

NEWBERG ON CLASS ACTIONS § 4.11 (3d ed. 1992) (*quoting* Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 102 (1966)) (emphasis added). The court in *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 434 (E.D. Pa. 1998), stated:

[T]his requirement is almost automatically satisfied in actions primarily seeking injunctive relief What is important is that the relief sought by the named plaintiffs should benefit the entire class.

(*quoting Baby Neal v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994)). These requirements are easily satisfied here.

Without question plaintiffs seek “final relief of an injunctive nature” that settles “the legality of [defendants’] behavior with respect to the class as a whole.”

Further, courts have upheld the applicability of Rule 23(b)(2) where both injunctive relief and damages were important elements of the case. *See, e.g., DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied sub nom. Crehan v. DeBoer*, 517 U.S. 1156, 116 S.Ct. 1544 (1996)(“all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some class members have different mortgage contracts. This declaratory and injunctive nexus is sufficient to establish the requisite commonality”); *Gelb v. American Tel. & Tel. Co.*, 150 F.R.D. 76, 77-78 (S.D.N.Y. 1993)(Rule 23(b)(2) class certified; consideration of damage claims deferred); *Williams v. Lane*, 129 F.R.D. 636, 641-42 (N.D. Ill. 1990)(“many courts have required that the case be bifurcated to allow the injunctive relief to be adjudicated under Rule 23(b)(2) and the damage claims to proceed separately,

either as a class action under Rule 23(b)(3) or as individual claims”); *National Treasury Employees Union v. Reagan*, 509 F. Supp. 1337 (D.D.C. 1981), *remanded on other grounds*, 663 F.2d 239 (DC Cir.1981); *Women’s Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 71 F.R.D. 666, 671 (S.D.N.Y. 1976)(“The fact that money damages are sought, in addition to equitable relief, does not prevent an action from qualifying as a class action under Rule 23(b)(2)”); footnote omitted).

Defendants’ only substantive arguments against certification, *Opp.* 14 n. 4, are directed entirely against the Contract Disputes Act claims for money damages. Section 450m-1 of title 25, U.S.C., provides an independent source of original jurisdiction to grant declaratory and injunctive relief. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). The presentment issues that may (or may not) affect class certification of the money damages claims do not affect the Court’s jurisdiction under section 450m-1 to grant declaratory and injunctive relief for violation of ISDA.

The Committee amendment [§ 450m-1] affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.

S. Rep’t 100-274, at 34 (1987).

Whether Rule 23(b)(3) certification is appropriate for the money damages claims in this litigation does not need to be decided now, and plaintiffs do not now seek Rule 23(b)(3) certification. Rule 23(d)(1) provides the Court extensive flexibility in controlling class litigation. Plaintiffs do not seek to avoid the due-process protections of Rule 23(b)(3) for the class by having

claims for money damages adjudicated without those protections under the rubric of Rule 23(b)(2). Plaintiffs by this motion seek Rule 23(b)(2) certification only for purpose of adjudicating the class's claims for declaratory and injunctive relief, not its claims for money damages.³

Under Rule 23(c)(4), it is entirely appropriate for this Court to treat class certification under Rule 23(b)(2) separately from certification under Rule 23(c). Rule 23(c)(4)(A) provides that "an action may be brought or maintained as a class action with respect to particular issues. . . ." District courts should "take full advantage of this provision to certify separate issues in order to reduce the range of disputed issues in complex litigation" and achieve judicial efficiencies. *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989); internal editing omitted). *Accord, Williams v. Empire Funding Corp.*, above, 183 F.R.D. at 437 (conditionally certifying Rule 23(b)(2) class for declaratory relief while deferring consideration of certification of Rule 23(b)(3) class for money damages).

Finally, defendants' opposition makes no mention of those members of the putative class in this case who are not members of the class in *RNC v. Lujan*. These ISDA contractors must submit their IDC proposals to NBC in short order. PSA III, ¶ III.D (Doc. No. 169, exh. A), at 11. Unless this Court certifies a Rule 23(b)(2) class in this case, those putative class members will be unable to enforce the reforms agreed to by their cognizant agency, NBC, in *RNC v. Lujan*.

³ The Court thus need not address whether the claims for damages in this litigation are "dominant." *Compare Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162-67 (2d Cir.2001), *cert. denied*, 535 U.S. 951, 122 S.Ct. 1349 (2002).

II. PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY BRIEFING (DOC. NO. 177)

Defendants have moved to stay briefing on plaintiffs' motion for an order certifying a class under Rule 23(b)(2) on the same day they filed their opposition to that motion. It is difficult to understand exactly what additional briefing defendants seek to stay.

Plaintiffs do not challenge the Court's power over its own docket or its authority to issue a stay if it sees fit. With respect, however, plaintiffs seek to move this case forward, especially since a new rate-making regime is about to begin and uncertainty as to the Indian Health Service's position exists. The new PSA III system under which NBC will calculate indirect cost rates goes into effect on October 1 of this year, the start of FY 2010.

Defendants once again reveal their basic strategy of delay. Threatening to file another motion to dismiss if plaintiffs' motion for leave to file a supplemental complaint is granted, *Opp.* 12-13, defendants once again show their intent to paper this case to death.

CONCLUSION

As noted in plaintiffs' opening memorandum in support of their motion, 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, the Secretary of HHS can be dismissed and further litigation of the equitable claims in this litigation can be avoided.

This Court should reinstate and grant 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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