

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

TUNICA-BILOXI TRIBE OF LOUISIANA;	)	
RAMAH NAVAJO SCHOOL BOARD, INC.,	)	
	)	
Plaintiffs,	)	Case No. 1:02CV02413
	)	Judge Reggie B. Walton
v.	)	Magistrate Judge Deborah A. Robinson
	)	
UNITED STATES of AMERICA;	)	
MICHAEL O. LEAVITT, Secretary of the	)	
United States Department of Health and Human	)	
Services; DIRK KEMPTHORNE, Secretary	)	
of the United States Department of the Interior,	)	
	)	
Defendants.	)	

**DEFENDANTS’ MOTION FOR CLARIFICATION  
OF THE COURT’S OPINION AND ORDER OF SEPTEMBER 22, 2008**

Defendants, by and through undersigned counsel, hereby move for a minor clarification of the Court’s Memorandum Opinion and Order dated September 22, 2008 and docketed as ##160 and 161). In support of this Motion, Defendants respectfully submit:

1. On September 22, 2008, the Court issued a Memorandum Opinion and Order, granting in part and denying in part Defendants’ Motion to Dismiss and For Summary Judgment and denying Plaintiffs’ Motion for Partial Summary Judgment.
2. In the Opinion, the Court specifically addressed Plaintiffs’ claims against Secretary Kempthorne, the Secretary of the U.S. Department of the Interior. The Court concluded that claims against Secretary Kempthorne for monetary relief should be dismissed, but that claims against Secretary Kempthorne for injunctive relief should not be dismissed. (Mem. Opin. at 23-29.)

3. This Motion for a minor clarification concerns only the resolution of the claims against Secretary Kempthorne for monetary relief; it does not concern the Court's conclusion that the claims against Secretary Kempthorne for injunctive relief should remain in the case.<sup>1</sup>

4. In concluding that the claims against Secretary Kempthorne for monetary relief should be dismissed, the Court explained:

Even if the Court were to compel Secretary Kempthorne to recalculate the plaintiffs' indirect cost rates using the methodology preferred by the plaintiffs, this recalculation would not benefit the plaintiffs in the slightest unless the Court also granted relief against Secretary Leavitt because Secretary Kempthorne is not obliged to fund the plaintiffs' indirect cost requirements under the Indian Self-Determination Act or the terms of the plaintiffs' self-determination contracts. . . . Conversely, if the Court were to order Secretary Leavitt to pay the difference between the indirect costs actually funded by the IHS and the indirect cost figures arising from the plaintiffs' indirect cost methodology, there would be no need for the Court to order Secretary Kempthorne to do anything because the plaintiffs would be fully recompensed even by their own definition. In short, the plaintiffs can obtain the monetary relief they seek only from Secretary Leavitt, the satisfaction of which would make any proceedings against Secretary Kempthorne for those same damages unnecessary.

(Mem. Opin. at 26-27.)

5. The Court thus dismissed the claims against Secretary Kempthorne for monetary relief. The Order, however, states that the dismissal is "without prejudice." (Order; Mem. Opin. at 71 n.23.)

6. Claims are generally dismissed without prejudice when the claiming party may, in some manner, cure a defect in the original pleading, either through filing an amended complaint before the same court or by filing the action in some other forum. See In re Interbank Funding Corp. Secs. Litig., 432 F. Supp. 2d 51, 54 (D.D.C. 2006), rev'd on other grounds, Belizan v.

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<sup>1</sup> Defendants respectfully disagree that claims for injunctive relief in this context are cognizable, but do not address this issue in this Motion for Clarification.

Hershon, 495 F.3d 686 (D.C. Cir. 2007); see also Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice,’ we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.”). In contrast, dismissal with prejudice is appropriate when the court determines that “‘the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” In re Interbank Funding, 432 F. Supp. 2d at 54 (quoting Firestone v. Firestone, 76 F.3d 1205, 1209 (D.C. Cir. 1996)).

7. In this instance, the Court’s analysis of this claim leaves no room for further amendment or cure. Where Plaintiffs challenge funding under contracts with Secretary Leavitt, claims for monetary relief against Secretary Kempthorne, who is solely responsible for negotiating indirect cost rates, are simply not cognizable in this forum or in any forum.

8. Moreover, whereas dismissals with prejudice are final and appealable, dismissals without prejudice are not always so, and there is often some confusion when claims are dismissed without prejudice, but with the intent to render them final and appealable. See Ciralsky v. CIA, 355 F.3d 661, 666 (D.C. Cir. 2004).

9. Thus, to avoid any confusion, Defendants seek clarification as to whether the dismissal of claims for monetary relief against Secretary Kempthorne is “with prejudice,” in contrast to “without prejudice,” as stated in the Order.

10. Counsel for Defendants has conferred with counsel for Plaintiffs about this Motion. Counsel for Plaintiffs state that they do not concur in this Motion.

For the foregoing reasons, Defendants’ Motion for Clarification should be granted, and an amended opinion and order should be issued clarifying that all claims for monetary relief against

Secretary Kempthorne are dismissed with prejudice from this lawsuit.

Respectfully submitted,

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