

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' RESPONSE TO
DEFENDANTS' MOTION FOR CLARIFICATION
OF THE COURT'S OPINION AND ORDER OF SEPTEMBER 22, 2008

Defendants move the Court to change the dismissal of Plaintiffs' damages claims against Defendant Kempthorne from "without prejudice" to "with prejudice."

Defendants' Motion for Clarification of the Court's Opinion and Order of September 22, 2008 (Doc. No. 162) ("*Defs. Mo.*").

The damage claims in this action are brought against the United States, pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, not against the individual defendant Secretaries.

Nonetheless, Plaintiffs' believe as a matter of law the Court is correct in dismissing the claims without prejudice.

Plaintiffs understand the Court to have dismissed damage claims against Defendant Kempthorne on the ground Plaintiffs lacked standing because those claims were not redressable. *Memorandum Opinion* (Doc. No. 160) ("*Opinion*"), at 25-27. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130 (1992) (redressability

is element of standing). Without standing, the Court lacked subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003 (1998).

It is axiomatic that a dismissal for lack of subject-matter jurisdiction is a dismissal without prejudice. Once a court determines that it lacks subject matter jurisdiction over a claim, it can proceed no further with respect to that claim. *National Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 544, 209 U.S.App.D.C. 280 (D.C. Cir. 1981); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2d Cir.1963); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir.1981); *Novell, Inc. v. United States*, 109 F. Supp. 2d 22, 25, 27 (D.D.C. 2000).

Lacking subject-matter jurisdiction, this Court could no more rule in favor of the Defendant Secretary than against him. *Simpkins v. District of Columbia Government*, 108 F.3d 366, 371, 323 U.S.App.D.C. 312 (1997). *See Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248, 334 U.S.App.D.C. 280 (1999) (directing district court to change prejudicial dismissal for lack of jurisdiction to dismissal without prejudice); *DiMaio v. Democratic National Committee*, F.3d (11th Cir. 2008), *quoting Boda v. United States*, 698 F.2d 1174, 1177 n.4 (11th Cir. 1983) (“Where dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds. This dismissal is without prejudice.”). *Cf. F.R.Cv.P. Rule 41(b)* (dismissal for lack of jurisdiction not an adjudication on the merits).¹

¹ None of the cases cited by Defendants involved dismissal of a claim for lack of subject-matter jurisdiction under FRCvP Rule 12(b)(1). *See In re Interbank Funding Corp. Secs. Litig.*, 432 F. Supp. 2d 51 (D.D.C. 2006), *rev'd on other grounds, Belizan v. Hershon*, 495 F.3d 686 (D.C. Cir. 2007) (dismissal for failure to state claim); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021 (2001) (dismissal because

Accordingly, Plaintiffs submit that the Court need not change its order as requested by Defendants, and suggest the Defendants' motion should be denied.

Respectfully Submitted,

DAN MACMEEKIN, ATTORNEY AT
LAW

/s/ Daniel H. MacMeekin

DANIEL H. MACMEEKIN

Co-Counsel for Plaintiffs

1776 Massachusetts Avenue, NW, Suite
801

Washington, DC 20036

Telephone: (202) 223-1717

Fax: (202) 223-1459

D.C. Bar No. 393035

M.P. GROSS LAW FIRM, P.C.

/s/ Michael P. Gross

MICHAEL P. GROSS

Counsel for Plaintiffs

460 St. Michael's Drive, Suite 401

Santa Fe, New Mexico 87505

Telephone: (505) 995-8066

Fax: (505) 989-1096

New Mexico Bar No. 1027

GALLEGOS LAW FIRM, P.C.

J.E. GALLEGOS

Co-Counsel for Plaintiffs

460 St. Michael's Drive, Bldg. 300

Santa Fe, New Mexico 87505

Telephone: (505) 983-6686

Fax: (505) 986-1367

New Mexico Bar No. 897

ERIC TREISMAN

Co-Counsel for Plaintiffs

460 St. Michael's Drive, Suite 402

Santa Fe, New Mexico 87505

Telephone: (505) 988-9750

Fax: (505) 992 3381

New Mexico Bar No. 2744

statute of limitations had run, *i.e.*, under Rule 12(b)(6)); *Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996) (same); *Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) (dismissal of amended complaint as unnecessarily prolix).