

**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)**

**RESPONSE TO ORDER TO SHOW CAUSE  
(DOC. NO. 170)**

Plaintiffs here respond to the Court's January 15, 2009, Order to Show Cause (Doc. No. 170), based on the representations set forth in defendants' Notice of New Evidence (Doc. No. 169).

Defendants state that the Release signed by the plaintiffs in [*Ramah Navajo Chapter v. Kempthorne (RNC)*] released the Secretary of the Interior from all claims for equitable or injunctive relief related to the indirect cost rate methodology" and that those claims against that Secretary in this case "are now subject to dismissal." *US Notice*, at 2. This is not true. The Release applies only to claims arising out of Indian Self-Determination Act contracts awarded by the Secretary of Interior. It does not relate to equitable claims arising out of contracts awarded

by the Secretary of Health and Human Services, the only claims at issue in this litigation.

The intention of the parties to the release is absolutely clear from its language and that of the Third Partial Settlement Agreement, *US Notice*, exh. A (PSA III), approved in *RNC*, pursuant to which the release was executed. Neither the release nor PSA III applies to equitable claims against Secretary of the Interior arising out of contracts administered by the Secretary of Health and Human Services.

The release executed in conjunction with PSA III released and discharged the defendants in *RNC* “from all Settled Claims as defined in Section VI.A. of PSA III.” *US Notice*, exh. C, at 1.

The only part of Section VI.A. of PSA III that addresses equitable relief is paragraph 1:

Plaintiffs agree that this PSA III resolves and extinguishes any and all claims, demands, rights, causes of action and counts for any type of equitable relief (including, but not limited to, injunctive or declaratory relief) under any theory of recovery encompassed in the Calculation Claim, the Shortfall Claim and the Direct CSC Claim, as defined in subsection II.F, above, that were or could have been raised by the Class in this action against Defendants.

There are thus three conditions necessary for the resolution and extinguishment of a claim for equitable relief. Each of those conditions must be satisfied.

- It must be “encompassed in the Calculation Claim, the Shortfall Claim and the Direct CSC Claim, as defined in subsection II.F” of PSA III; and
- It must have been raised by the Class, or have been susceptible of being raised, in *RNC*; and
- It must be capable of being raised against the defendants in *RNC*.

**“Encompassed in the Calculation Claim, the Shortfall Claim and the Direct CSC**

**Claim.”** The definition of each of these claims for relief, as set out in paragraphs 1, 2, and 3 of subsection II.F of PSA III, includes the qualifier that the claim must be “in connection with an ISDA contract awarded by the Secretary of the Interior.” The ISDA contracts in this litigation are awarded by the Secretary of Health and Human Services, not by the Secretary of the Interior. Claims in connection with ISDA contracts awarded by the Secretary of Health and Human Services are thus not among the claims that are covered by the PSA III release.

Paragraph II.F.1 of PSA III also includes within the definition of the Calculation Claim “any asserted or unasserted claims challenging NBC’s or DOI Office of Inspector General’s carryforward templates, policies, and practices previously in effect or in effect as of the date of execution as of the date of execution of this PSA III.” Extending this language to include claims arising out of ISDA contract awarded by the Secretary of Health and Human Services would go impermissibly beyond the specific reservations and limitations incorporated into the release. *See* 66 AM JUR. 2D, *Release* §§ 30-31 (1973). It would also violate the canon of construction that ambiguities in the legal relationships between the federal government and American Indians must be resolved in favor of the Indians. *See Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207 (1908) (“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians”). *See also RNC v. Lujan*, 112 F.3d 1455, 1461-1462 (10<sup>th</sup> Cir. 1997) (to similar effect). *See generally* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 119-120 (2005 ed.). Moreover, defendants’ expansive reading would also apply to NBC’s templates, policies, and practices in connection with non-ISDA contracts.

Even if this inclusion in the definition of the Calculation Claim were read to embrace claims arising out of ISDA contract awarded by the Secretary of Health and Human Services, the other two conditions required for release remain unsatisfied.

**Raised by the Class, or have been susceptible of being raised, in *RNC*.** The Class, as defined in paragraph II.C.1 of PSA III was defined to include the named plaintiffs and “all Indian Tribes and organizations that have contracted or compacted with the Secretary of the Interior under the ISDA, and whose cognizant agency, as defined by OMB Circular A-87, 2 C.F.R. Part 225, or other applicable OMB Circular, is the Department of the Interior.” The Class was thus defined and delimited by the condition that each member of the Class “have contracted or compacted with the Secretary of the Interior under ISDA.” The Class as so defined had no standing to bring claims in connection with ISDA contracts or compacts awarded by the Secretary of Health and Human Services, and no capability of releasing those claims, which were not at issue in the *RNC* litigation.<sup>1</sup> That the settlement was satisfactory to BIA contractors does not necessarily mean it was, or would be, satisfactory to IHS contractors.

Defendants would have the *RNC* court approving settlement of a class action that extinguished claims of entities not within the class, entities that would have been unable to object to the settlement. The representative plaintiffs in *RNC* were empowered to represent the *RNC* class solely with respect to the contracts in which all members of the class had a common

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<sup>1</sup> See Defendants’ Exh. 61, as quoted in Defendants’ *Combined Opposition to Plaintiffs’ Motion for Partial Summary Judgment and Reply in Support of Motion to Dismiss and for Summary Judgment* (Doc. No. 148), at 15 (where it is misidentified as Exh. 62): “It does not seem appropriate to us to include in the settlement a waiver of potential claims which were not raised in the case (no claim was made against IHS.” (Internal editing omitted).

interest: contracts awarded by the Secretary of the Interior. *See National Super Spuds Inc v. New York Mercantile Exchange*, 660 F.2d 9, 16, 18 (2d Cir. 1981) (“The most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with other members of the class. . . . If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action should not be able to do so either.”)

**Capable of being raised against the defendants in RNC.** The only equitable claims against the Secretary of the Interior released and dismissed pursuant to PSA III are claims that could have been brought in *RNC*. The Secretary of Health and Human Services was not a defendant in *RNC*, and was not so defined in PSA III. *See* ¶ III.C.2.<sup>2</sup> Consequently, claims arising in connection with an ISDA contract awarded by that Secretary could not have been brought in *RNC*.

\* \* \*

Subsection VI.B. of PSA III specifically provided:

**Reserved Claims and Defenses**

Notwithstanding any other provision in this PSA III, the parties agree that the following claims and defenses are not settled, dismissed, released or otherwise extinguished, and are expressly reserved:

. . .

**3. Interior CSC Policy Challenges**

Except for the Calculation Claim, the Shortfall Claim, and the

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<sup>2</sup> The Indian Health Service and its parent agency, the Department of Health and Human Services, did not want to be included in PSA III. *See* PSA III § XIX.

Direct CSC claim, as defined in Section II.F of this PSA III, all claims, including claims for monetary or equitable relief, brought in any forum or proceeding which has jurisdiction and which (i) challenge any aspect of the Interior CSC Policy or (ii) challenge the legality of any rescission, amendment or change of that policy, are reserved.

**4. Other Reserved Claims**

...

(b) All claims relating to contracts awarded by the Secretary of DHHS and involving an indirect cost rate established or issued by NBC or DOI are reserved, subject to the conditional waiver of claims described in subsection A of this Section.

...

The claims in the *Tunica* litigation are “claims relating to contracts awarded by the Secretary of DHHS and involving an indirect cost rate established or issued by NBC or DOI,” and are thus not part of the “Calculation Claim, the Shortfall Claim, and the Direct CSC claim”, as shown at pages 2-3, above. Those claims are explicitly reserved. (The conditional waiver of claims to which reference is made has to do with monetary claims, not claims for equitable relief. *See* PSA III ¶ VI.A.3.)

Counsel for the Government in this case come from the same office in the Department of Justice that negotiated PSA III. Defendants are perfectly aware that PSA III was carefully crafted to preserve all claims in the *Tunica* litigation and to protect the rights of Indian tribes and tribal organizations that contract with the Secretary of Health and Human Services rather than the Secretary of the Interior.

The Second Amended Complaint in this action should not be dismissed against the defendant Secretary of the Interior.

Respectfully submitted,

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