IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA;
RAMAH NAVAJO SCHOOL BOARD, INC.,

Plaintiffs,

v.

UNITED STATES of AMERICA;
CHARLES E. JOHNSON, Acting Secretary of the United States Department of Health and Human Services; KEN SALAZAR, Secretary of the United States Department of the Interior,

Defendants.

Case No. 1:02CV02413
Judge Reggie B. Walton
Magistrate Judge Deborah A. Robinson

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER AND DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY BRIEFING ON CLASS CERTIFICATION

INTRODUCTION

There is no legal basis upon which the Court may direct the Secretary of the U.S. Department of Health and Human Services ("HHS") to follow a settlement agreement to which he was not a party. In fact, the terms of the settlement agreement at issue specifically preclude its application to the HHS Secretary. In addition, the relief that Plaintiffs appear to seek would conflict with the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450 et seq., and the settlement agreement itself. The Court need not reach the merits of Plaintiffs' claim regarding the application of the settlement agreement to the HHS Secretary, however, because, as a threshold matter, this new claim was not raised in any of Plaintiffs' Complaints and may not be raised for the first time in a motion. Plaintiffs are also unable to satisfy the requisite Article III requirements of standing and ripeness as to this new claim. For

all of these reasons, Plaintiffs' Motion should be denied. Plaintiffs' ceaseless attempts to add new claims and new purported causes of action to this case should not be countenanced.

If Plaintiffs' new claim is rejected, the Court need not consider Plaintiffs' untimely and piecemeal Motion for Class Certification. In the alternative, Defendants have moved to stay briefing of class certification pending the resolution of Plaintiffs' pending Motion for Leave to File Second Supplemental Complaint. Thus, if the Court is willing to entertain Plaintiffs' Motion for Class Certification, Defendants move to stay briefing on it until after the Court determines the scope of the claims remaining in this case. A Motion to Stay is filed along with this Opposition.

ARGUMENT

I. THERE IS NO LEGAL BASIS UPON WHICH THE COURT MAY ORDER THE HHS SECRETARY TO FOLLOW A SETTLEMENT AGREEMENT ENTERED INTO BY THE INTERIOR SECRETARY.

In May 2008, a plaintiff class of Tribal contractors that contract with the Bureau of Indian Affairs ("BIA"), represented by Plaintiffs' counsel, entered into a partial settlement agreement ("PSA" or "RNC Settlement") with the Secretary of the U.S. Department of the Interior ("Interior") as part of a case called Ramah Navajo Chapter ("RNC") v. Kempthorne, No. 90-957 (D.N.M.) (attached as Ex. A). On August 27, 2008, the RNC Court, Judge Leroy Hanson, approved the PSA (attached as Ex. B), and, pursuant to PSA § II.E, the Agreement went into effect on October 27, 2008. As part of the PSA, the Interior Secretary agreed to make certain modifications to the methodology that the National Business Center ("NBC"), an agency of Interior, uses to develop indirect cost rates for Tribal contractors.

Plaintiffs now ask the Court to order the Indian Health Service ("IHS") to accept indirect

cost rates negotiated under the RNC Settlement by a different agency. It is unclear whether Plaintiffs seek an order that IHS (a) pay indirect contract support cost ("CSC") funding based on the indirect cost rate multiplied by the direct program funding without any adjustment; or (b) accept indirect cost rates as the starting point for negotiating indirect CSC funding. Regardless, there is no basis to enter either order. Plaintiffs' Motion is addressed to a new claim never raised in any of their Complaints filed in this action. Plaintiffs are not permitted to circumvent Rule 15(a) by attempting to amend their Complaint with a motion, and thus this new claim is not properly before the Court. Plaintiffs also lack standing to raise this claim, and their claim is unripe for judicial determination at this time. Finally, there is no basis in the RNC Settlement or under the ISDA to issue the order sought by Plaintiffs.

A. Plaintiffs' New Claim Is Not Properly Before the Court Because It Was Not Pled in Any of Plaintiffs' Complaints.

Plaintiffs' Motion asks the Court to issue an order directing IHS to accept indirect cost rates negotiated by NBC under the RNC Settlement. (Pls.' Mem. at 4-9). This new claim does not appear in any of Plaintiffs' Complaints (in fact, in the Second Amended Complaint, ¶¶ 21-23, Plaintiffs challenge IHS's use of NBC's rates). Plaintiffs may not attempt to amend their Complaint in a brief or motion. See Nat'l Treasury Employees Union v. Helfer, 53 F.3d 1289, 1295 (D.C. Cir. 1995); Del Monte Fresh Produce Co. v. United States, 565 F. Supp. 2d 106, 110-11 (D.D.C. 2008); Youssef v. FBI, 541 F. Supp. 2d 121, 162-63 (D.D.C. 2008); Sharp v. Rosa Mexicano, DC, LLC, 496 F. Supp. 2d 93, 97 n.3 (D.D.C. 2007); see also Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996). In order to amend their Complaint to include this new claim, Plaintiffs must file a motion under Federal Rule of Civil Procedure 15 and include as an attachment the

proposed amended pleading. Plaintiffs have not done this, notwithstanding the fact that they have had ample opportunity to amend their Complaint, have done so three times, and currently have pending a motion to supplement their Complaint with a plethora of new claims. Plaintiffs should not be permitted to raise an entirely new claim through a "Motion for Order."[1]

B. Plaintiffs Lack Standing and Their Claim Is Unripe.

Even if the Court were to hear Plaintiffs' new claim without directing Plaintiffs to seek leave to amend their Complaint, the new claim still must be dismissed for lack of subject matter jurisdiction. Plaintiffs lack standing to raise this claim for two reasons, and it is not ripe for judicial consideration.

Article III of the Constitution confines the federal courts to adjudicating "cases or controversies." U.S. Const., art. III, § 2. The case or controversy requirement is a "bedrock" requirement. See Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 758 (1982); see also Tunica-Biloxi Tribe v. United States, 577 F. Supp. 2d 382, 400 (D.D.C. 2008). The Supreme Court has stated: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37, 96 S. Ct. 1917, 1924 (1976); see also Tunica, 577 F. Supp. 2d at 400 (quoting Raines v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 2317 (1997)).

A key element of the case-or-controversy requirement is that the plaintiff must establish that he or she has standing to sue. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.

[1] Amendment of the Complaint to add Plaintiffs' new claim would be futile in any event for the reasons discussed herein. See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

Ct. 2130, 2136 (1992). The irreducible minimum of Article III standing constitutes three elements. See Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136. Relevant here, the first is that the plaintiff must have suffered an injury-in-fact, which is defined as the invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. See id. "Allegations of possible future injury do not satisfy the requirements of Art. III." Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 1724 (1990). Similarly, a claim is not constitutionally ripe for adjudication unless there is an "injury in fact" that is "certainly impending." Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996).

First, Plaintiffs do not allege anywhere in their Motion that they submitted an indirect cost rate negotiated under the RNC Settlement and that IHS refused to accept it. Without alleging any concrete and particularlized injury, Plaintiffs lack standing to raise this claim, and it is not ripe. If, as part of a future contract or annual funding agreement ("AFA") negotiation, IHS declines to accept an indirect cost rate negotiated under the RNC Settlement that one of the Plaintiffs submits to IHS as part of its contract or AFA proposal, Plaintiffs may challenge that "declination" and seek judicial review at that time. See 25 U.S.C. §§ 450f(a)(2); 450f(b); 450m-1. In other words, if and when this claim becomes ripe, Plaintiffs will have a full opportunity to raise it. Their preemptive challenge should be rejected.

Second, to the extent that Plaintiffs seek an order that IHS accept indirect cost rates negotiated by NBC under the RNC Settlement as the starting point for negotiating indirect CSC funding, Plaintiffs fail to allege an injury-in-fact because IHS's CSC policy already provides that IHS will accept indirect cost rates negotiated by NBC. IHS policy specifies that IHS will accept

indirect cost rates negotiated between Tribal contractors and the contractors' cognizant agencies as the starting point for negotiating indirect CSC funding. The applicable IHS policy, IHS Circular No. 2004-03, Contract Support Costs, § 5.A(2) (attached as Ex. C), provides:

> Throughout the operation of the program by the awardee, total contract costs (including CSC) are eligible to be paid as either direct or indirect costs. Since Tribes often operate more than one program, many of the costs incurred by the awardee are paid through an indirect cost allocation process, usually negotiated by the "cognizant Federal agency" as identified under the applicable Office of Management and Budget (OMB) Circular.

IHS Circular 2004-06 § 5.A(2). Further:

> The amount of IDC [indirect costs] expected to be incurred by awardees using rates negotiated with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the appropriate direct cost base amount subject to special provisions relating to any [T]ribal shares included in the direct cost base . . . .The amount determined as the awardee's CSC requirement will be consistent with the individual awardee's rate agreement, reflecting any exclusion required by the IDC Agreement.

Id. § 5.A(2)(c)(i).[2]

In addition, since this case began, Defendants have explained that IHS does not issue indirect cost rates. Indirect cost rates are issued by federal government agencies designated by the Office of Management and Budget ("OMB") to negotiate rates (called a "cognizant agency"). Indirect cost rates are the result of a negotiation that is independent from contracting under the ISDA. See 2 C.F.R. pt. 225, App. A, § B.6. The indirect cost rate negotiation is guided by general cost principles set forth in Circulars developed by OMB. And Defendants have explained that although the Circulars provide guidance for different types of organizations, the

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[2] IHS policy also provides for alternate methods to negotiate indirect CSC, such as direct negotiation of indirect-type costs and several different pilot projects. See IHS Circular 2004-03 §§ 5.A(2)(c)(ii); 5.A(3); 6.C(2).

principles are the same: indirect costs must be equitably allocated among the programs that benefit from the costs. The Circulars provide a means to determine the maximum amount of indirect costs that can be charged to a federal award, unless more or less is permitted by law. See id. § A.1.

Defendants have also explained that IHS generally accepts indirect cost rates negotiated with NBC as a starting point for the negotiation of indirect CSC under ISDA contracts. The reason that the rates are the starting place only, however, is because the ISDA directs IHS to take into account additional mandates related to indirect CSC funding. For example, IHS must ensure that the type of costs sought to be reimbursed through an indirect cost rate are not duplicated by program costs. See 25 U.S.C. § 450j-1(a)(3)(ii). Second, IHS must ensure that all funding, including indirect CSC funding, does not exceed available appropriations. See id. § 450j-1(b). Third, IHS must ensure that it does not fund the indirect CSC of non-IHS programs. See id. §§ 450j-1(a)(2), 450j-1(a)(3)(A), 450j-2. IHS policy recognizes that these adjustments must be made, and adds another: if an indirect cost rate submitted by a Tribal contractor is more than three years old, IHS policy directs that the rate should not be accepted. See IHS Circular 2004-03 § 5.A(2)(c)(i).

Nothing has changed since the RNC Settlement was signed. In fact, Plaintiffs cite to the IHS policy provisions quoted above and readily admit that IHS accepts indirect cost rates negotiated with NBC. In their Motion, they state: "Both Interior and HHS employ the indirect cost rate system to compute a major funding component of self-determination contracts[.]" (Pls.' Mem. at 5); see also Pls.' Mem. at 6 ("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.”). For this reason, to the extent Plaintiffs seek an order that IHS accept NBC rates as the starting point for negotiating indirect CSC funding, they fail to allege an actual injury.

C. The RNC Settlement Does Not Bind the HHS Secretary, and No Other Legal Basis Exists Under Which the Court May Order the HHS Secretary to Follow the RNC Settlement and Accept Indirect Cost Rates.

On the merits of their claim, Plaintiffs cannot prevail. The RNC Settlement, by its express terms, does not bind the HHS Secretary. First, the HHS Secretary was not a party to the RNC Settlement. See PSA § II.C.2. More directly, the RNC Settlement states that it does not have “collateral estoppel or res judicata effect in any case in which IHS or [HHS] is a party.” Id. § XIX.B. The Settlement also specifies that it “may not be offered, taken, construed, or introduced as evidence of liability, as an admission of fact or legal proposition or statement of wrongdoing by either party . . . in any other action in which an agency or department of the United States Government is a party . . . .” Id. §§ XIX.A, XIX.C. Plaintiffs, as members of the RNC Class, and Plaintiffs’ counsel here, as class counsel in RNC, cannot now ignore the very words that they negotiated in the RNC Settlement to exclude HHS from the Agreement.

Moreover, Plaintiffs and Plaintiffs’ counsel had the option to bring the RNC case against HHS as well as against Interior or to attempt to join HHS as a defendant at a later time. They did not do so. Because of their affirmative decision not to sue HHS in RNC, it would be inequitable to bind HHS to a settlement agreement negotiated in that case. On the basis of the plain language of the RNC Settlement and for reasons of equity and fairness, Plaintiffs’ Motion must fail.

Furthermore, as Plaintiffs acknowledge, IHS is not “legally required to accept the [NBC

rates]" at all. (Pls.' Mem. at 7.) There is no mandate in the ISDA that requires IHS to accept NBC rates when negotiating indirect CSC funding.[3] Similarly, the OMB Circulars do not require a funding agency to accept indirect cost rates negotiated by NBC. The rate methodology therein provides a means to determine the maximum amount of indirect costs that can be charged to a federal award, unless more or less is permitted by law. See 2 C.F.R. pt. 225, App. A § A.1; see also Maine v. Shalala, 81 F. Supp. 2d 91, 96 n.4 (D. Me. 1999) (noting that provisions of law explicitly supercede general cost principles in circulars). A funding agency may or may not use an indirect cost rate as the basis for the actual reimbursement for or award of indirect costs, and there is no right to or expectation of actual recovery of those costs created by the rate methodology. See 2 C.F.R. § 225.20. The amount actually recoverable from any government agency is determined by reference to the law and requirements of the underlying program's contractual documents. See id.

Finally, the RNC Settlement itself does not mandate that any funding agency, including IHS, accept a rate negotiated under the Settlement Agreement:

> The parties agree that, for all Plaintiffs whose cognizant agency . . . is the Department of the Interior, the indirect cost rates issued by NBC or its successor established pursuant to the methodology approved in this PSA III shall constitute the indirect cost rates applicable to all federal and non-federal agencies pursuant to [OMB Circulars and other law] to the same extent that the rates previously issued by NBC prior to this PSA III were applicable to those federal and non-federal agencies.

PSA § III.E (emphasis added). In other words, the RNC Settlement changed the methodology that NBC will use to negotiate those rates, but did not alter the legal landscape to require a

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[3] Congress was, however, well aware of indirect cost rates and expected that IHS would use indirect cost rates negotiated under the OMB Circulars as the starting point for negotiating indirect CSC funding.

funding agency to accept indirect cost rates negotiated by NBC. Nor could it. As explained above, NBC did not have the authority to require a funding agency such as IHS to accept an indirect cost rate under the OMB Circulars, and thus NBC could not, under the RNC Settlement, require a funding agency to accept an indirect cost rate. To avoid running afoul of the ISDA and other laws, the RNC Settlement made clear that its methodologies were applicable to the same extent that the methodologies set forth in OMB Circulars were applicable. See PSA § III.E. Plaintiffs' Motion appears to go beyond even what the RNC Settlement provides and asks the Court to direct IHS, a funding agency, to accept an indirect cost rate negotiated by NBC. Neither the ISDA, the OMB Circulars, nor the RNC Settlement permit this result.

In their Motion, Plaintiffs do not cite to the ISDA, IHS policy, or even to the RNC Settlement as a basis upon which the Court could order the HHS Secretary to follow the RNC Settlement and accept indirect cost rates negotiated thereunder. Indeed, even Plaintiffs must acknowledge that no statute or regulation (or the RNC Settlement itself) requires IHS to incorporate the relief provided in that Settlement (or to accept any changes the Interior Department makes pursuant to the RNC Settlement or otherwise into its own policies). The only law to which Plaintiffs point is 28 U.S.C. § 2201. Section 2201, however, has no bearing on the issue of whether IHS must accept rates negotiated by NBC. It is well-established that § 2201 "'is not an independent source of federal jurisdiction.'" C&E Servs., Inc. v. Dist. of Columbia Water & Sewer Auth., 310 F.3d 197, 201-02 (D.C. Cir. 2002) (quoting Schilling v. Rogers, 363 U.S. 666, 677, 80 S. Ct. 1288, 1296 (1960), citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950)). "Rather, 'the availability of declaratory relief presupposes the existence of a judicially remediable right.'" Id. Plaintiffs have no judicially remediable right to

demand that IHS accept NBC rates, and § 2201 does not provide Plaintiffs with any substantive legal entitlement or even a cause of action.

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO REINSTATE THEIR CLASS CERTIFICATION MOTION OR, IN THE ALTERNATIVE, SHOULD STAY BRIEFING ON CLASS CERTIFICATION PENDING A RULING ON PLAINTIFFS' MOTION TO SUPPLEMENT THEIR COMPLAINT.

Plaintiffs asks the Court to "reinstate [their] motion for class certification insofar as it seeks certification under Rule 23(b)(2)[.]" (Pls.' Mem. at 13.) They also ask the Court to "reserve [their] right to seek reinstatement of the motion for a Rule 23(b)(3) class." (Pls.' Mem. at 9.) Finally, they ask the Court to "certify this case as a Rule 23(b)(2) class for purposes of" their requested declaratory judgment ordering the HHS Secretary to accept rates negotiated under the RNC Settlement. (Pls.' Mem. at 9-13.) If the Court denies Plaintiffs' Motion on the grounds set out in Part I, the Court need not reach the issues of class certification. If the Court deems the Class Certification Motion to be presented, Defendants oppose it for several reasons.

First, as to Plaintiffs' request to "reinstate" their initial motion for class certification filed in 2003, it must be acknowledged that Plaintiffs' Motion did not seek certification on the basis that they seek here. In addition, none of their Complaints to date request a class on the basis they now assert. There is thus nothing to "reinstate." The Court should deny Plaintiffs' Motion on this basis alone.

Second, as to Plaintiffs' request that the Court allow them to "reserve its [sic] right to seek reinstatement of the motion for a Rule 23(b)(3) class," Defendants also object. Defendants should not be forced to brief class certification more than once in this case, and the Court should not be forced to rule on piecemeal class certification motions. Plaintiffs should be given no more than one opportunity to attempt to establish the requirements for a Rule 23 class, either under

23(b)(2) or 23(b)(3), and as to all claims for relief for which they seek class certification. Anything else is duplicative, inefficient, and does not serve the purposes of Federal Rule of Civil Procedure 1. The Court should deny Plaintiffs' piecemeal Motion on this basis as well.

Finally, the Court should not rule on a motion for class certification (as currently pled or as rewritten to include all possible grounds for certification) until after the Court rules on Plaintiffs' Motion for Leave to File Second Supplemental Complaint (dated October 6, 2008, docketed as #163, and hereinafter referred to as "Plaintiffs' Motion to Supplement"). At this time, all that remains in this case is a single claim, called the "shortfall column carry-forward" claim, raised by Tunica under its 1995-2001 contracts and AFAs and by the Ramah Navajo School Board under its 1999-2003 contracts and AFAs. In the Motion to Supplement, however, Plaintiffs have sought to amend their Complaint to add a host of new claims. Because Defendants presume that Plaintiffs would seek certification as to any claims that the Court allows them to supplement, any motion for class certification should be stayed until after the Court rules on this Motion.

For these reasons, Defendants have filed along with this Opposition a Motion to Stay Briefing on Class Certification until after the Court rules on the Motion to Supplement. If the Court denies the Motion to Supplement, Defendants will propose that the Court rule on the sole remaining issue before ordering briefing on class certification. If anything remains of the case after a final merits decision, Plaintiffs would then have the opportunity to move for class certification. If Defendants prevail on the remaining merits issue, class certification will be moot. Conversely, if the Court grants the Motion to Supplement, Defendants will propose that the Court enter a new scheduling order for the case that takes into account: (1) Defendants'

anticipated motion to dismiss for lack of subject matter jurisdiction; (2) Defendants' anticipated motion to dismiss for failure to state a claim; (3) Plaintiffs' anticipated motion for class certification; (4) Any discovery that is necessary for either class certification or the merits of the new claims; and (5) The parties' anticipated cross-motions for summary judgment. See Fed. Rs. Civ. P. 16(b)(3), 26(f).

Federal district courts have ample authority to determine the order of proceedings in the cases pending before them. See Fed. R. Civ. P. 16. In the interests of justice and efficiency, a court may stay proceedings in a case or may stay the resolution of one issue in a case pending the resolution of another. See Landis v. North Am. Co., 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936) (explaining that it is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). In this respect, numerous courts, including this one, have stayed briefing and resolution of class certification pending resolution of a dispositive motion or other determination. See Tunica Ord. of May 6, 2003 (docketed as #26); Curtin v. United Airlines, Inc., 275 F.3d 88, 92-93 (D.C. Cir. 2001) (explaining that "the order of disposition of motions for summary judgment and class certification [is] a question of discretion for the district court"); Berriochoa Lopez v. United States, 309 F. Supp. 2d 22, 23 n.1 (D.D.C. 2004) (explaining that the district court has wide latitude in deciding dispositive motions without deciding issues of class certification); Garcia v. Veneman, 211 F.R.D. 15, 19 n.2 (D.D.C. 2002) ("A court may certainly decide dispositive motions prior to determining whether the case can be maintained as a class action[.]") (citing cases); Ladd v. Equicredit Corp., No. 00-2688, 2001 WL 175236, at *1 (E.D. La. Feb. 21, 2001)

(staying class certification pending resolution of motion for summary judgment); Roshan v. Smith, 615 F. Supp. 901, 905 n.3 (D.D.C. 1985) (staying the plaintiff's motion for class certification pending resolution of the defendant's dispositive motion).

In this case, it would be most efficient and orderly for the Court first to determine whether there are one or many claims left to be adjudicated in this case. If, as Defendants believe, there is just one claim remaining before the Court, class certification should be stayed until this final merits determination is made. If, contrary to Defendants' arguments in Opposition to Plaintiffs' Motion to Supplement, there are many remaining claims, the Court should treat the case as if it is a new case and establish a schedule that includes briefing of class certification. Once the Court has resolved the Motion to Supplement currently pending, the parties and the Court will be in a better position to assess at which stage of the proceedings class certification should be briefed, if doing so remains necessary.[4]

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[4] Plaintiffs' claims are at bottom contract claims--they challenge the amount of funds that were awarded under individual ISDA contracts. This type of claim is fact-intensive and individualized to such a degree that no efficiencies would be served by proceeding as a class action. In fact, the two courts to consider whether ISDA claims by IHS contractors could be considered in the class action concluded that they could not. See Pueblo of Zuni v. United States, 243 F.R.D. 436, 452-53 (D.N.M. 2007); Cherokee Nation v. United States, 199 F.R.D. 357, 366 (E.D. Okla. 2001). These courts determined that class certification was inappropriate because, inter alia, the Contract Disputes Act ("CDA") requires individualized presentment of each claim, that the claims themselves lack commonality and typicality, and that the individual issues related to each ISDA contractor's claim predominated over any class issues. This factor also militates in favor of resolving the merits before turning to class certification. Notably, counsel for Plaintiffs in this case sought to certify a sub-class in Zuni and be appointed class counsel, a request that the Zuni Court denied. See 243 F.R.D. at 452. To the extent that Plaintiffs will point to the RNC Class as a basis for certification, it is distinguishable. First, the RNC Class involved BIA contractors. Second, the RNC Court did not analyze the Rule 23 factors in its (unpublished) class decision, nor did it recognize that the CDA's administrative requirements are mandatory for each and every contractor and claim. See James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); Tunica, 577 F. Supp. 2d at 407-08.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Order should be denied.

Respectfully submitted,

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