

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 LH/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS IN PART
FOR LACK OF SUBJECT MATTER JURISDICTION**

INTRODUCTION

The plaintiff in this case, the Pueblo of Zuni, is a party to self-determination contracts with the Secretary of the Department of Health and Human Services (“HHS”), as authorized by the Indian Self-Determination and Education Assistance Act (“ISDA”), 25 U.S.C. §§ 450 *et seq.* (Am. Compl. ¶ 4; docketed as #5.) These ISDA contracts provide that Zuni will deliver health care services to its members that would otherwise be provided to Zuni’s members by the Indian Health Service (“IHS”), a component of HHS. In its First Amended Complaint, Zuni challenges the amount of funding it received from IHS under its ISDA contracts in fiscal years dating back to 1993. (Am. Compl. ¶ 1.)

Relevant to this Motion, the ISDA explicitly incorporates the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 601 et seq., and its mandatory administrative exhaustion scheme for monetary claims for relief arising under the ISDA and ISDA contracts. Because the ISDA and the CDA constitute waivers of the sovereign immunity of the United States, the CDA’s exhaustion requirement, and Plaintiff’s compliance therewith, define this Court’s jurisdiction over the First Amended Complaint. As such, ISDA claims that have not first been exhausted through the CDA administrative process must be dismissed for lack of subject matter jurisdiction.

A side-by-side review of Zuni’s claims in the First Amended Complaint and its administrative claims demonstrates that Zuni did not properly present all of its claims for monetary relief that it seeks to have this Court adjudicate. First, all claims for relief arising out of the funding of its ISDA contracts in fiscal years after 1998 have not been exhausted. Further, claims for relief arising out of the funding of its ISDA contracts in fiscal years after 1995 under one of Plaintiff’s legal theories also have not been exhausted. Because of this, the Court lacks subject matter jurisdiction over these unexhausted claims, and they must be dismissed from this action. The First Amended Complaint is limited to those claims that Plaintiff presented to an IHS contracting officer pursuant to the ISDA and the CDA.

STATUTORY BACKGROUND

The Indian Health Service has as its principal mission the provision of health care to American Indians and Alaska Natives throughout the United States. See Lincoln v. Vigil, 508 U.S. 182, 185 (1993). IHS operates under the authority of the Snyder Act, which authorizes it to “expend such moneys as Congress may from time to time appropriate” for the conservation of

the health of Indians. See 25 U.S.C. § 13 (providing that BIA will expend funds as appropriated for, inter alia, the “conservation of health” of Indians); 42 U.S.C. § 2001(a) (transferring to IHS BIA’s responsibility for Indian health care).

The Indian Self-Determination and Education Assistance Act. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDA”), which was designed to encourage Indian self-government by permitting the transfer of certain federal programs, including health care programs, to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs both the Secretary of HHS and the Secretary of the Department of the Interior (“DOI”), upon the request of an Indian tribe, to enter into “self-determination contract[s].” See id. § 450f(a)(1); id. § 450b(i) (defining “Secretary”). A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by IHS or DOI] to Indian tribes and their members pursuant to Federal law.” Id. § 450b(j).

A self-determination contract’s funding under ISDA includes two components--the “Secretarial amount” and contract support costs (“CSC”). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of, in the case of IHS, health care services. See id. § 450j-1(a)(1) (the “amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program”). Because some of the costs of running a federal program, however, may be borne by federal agencies outside of IHS, the Secretarial amount does not necessarily cover all of the administrative or operating expenses of a particular program. See id. § 450j-1(a)(2). Thus, a self-determination contract also includes funding for CSC. See id.

Contract support costs can be further broken down into three categories. See id. § 450j-1(a)(3)(A). First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance. See id. § 450j-1(a)(3)(A)(i);¹ id. § 450b(c). Second, in the initial year of a contract, CSC include "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis." Id. § 450j-1(a)(5).²

Finally, and most relevant here, there are indirect CSC, which are administrative costs that are shared by several different programs or services. See id. § 450j-1(a)(3)(A)(ii);³ id. § 450b(f). The ISDA defines indirect CSC as "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." Id. For example, the salary for an accountant that provides accounting services for multiple programs cannot easily be allocated to any of the contracts because of the difficulty in determining exactly how much of the accountant's time is attributable to work on any of the programs. Because calculating the specific indirect costs related to a particular contract is not cost effective, federal law sets out a formula for allocating indirect costs. See Office of Mgmt. & Budget A-87, 60 Fed. Reg. 26,484 (1995). The formula in turn yields a rate that is applied to each contract. See id.; see also 25 U.S.C. § 450b(g) (defining indirect cost rates). An indirect cost rate is the ratio,

¹ Congress added this provision in 1994. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 1457-58 (1994).

² See supra n.1.

³ See supra n.1.

expressed as a percentage, of the total indirect costs incurred by the tribe to the total amount of program funding received by that tribe. See 60 Fed. Reg. at 26,504 (Attachment E, § B.2).

The ISDA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See 25 U.S.C. § 450j-1(a)(2). Congress also provided that “[n]otwithstanding any other provision in [the ISDA], the provision of funds under [the ISDA] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization” Id. § 450j-1(b); see also id. § 450j(c) (“The amounts of such [self-determination] contracts shall be subject to the availability of appropriations.”).

IHS’s funding of indirect CSC under individual self-determination contracts, which is at issue in this lawsuit, is based on a variety of factors, including the provisions of the ISDA, the specific terms of each negotiated ISDA contract, each contracting tribe’s annual indirect cost rate, if it has one, the amount of funding made available by Congress in the annual IHS appropriation, and IHS policies and procedures for the calculation and distribution of indirect CSC.

In fiscal years prior to 1998, Congress provided IHS with a lump-sum appropriation for the majority of its operations and made a recommendation, in the pertinent congressional committee reports, about the amount that IHS should expend on CSC. See, e.g., Dep’t of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (appropriating a lump-sum appropriation for IHS for fiscal year 1994); H.R. Rep. No. 103-158, at 100 (1993) (recommending allocation of the lump-sum appropriation, including an allocation for CSC), S. Rep. No. 103-114, at 107 (1993) (same). IHS set aside this

recommended amount for CSC and then allocated it among the ISDA contracts in effect in that year. Some IHS contractors, including the Cherokee Nation of Oklahoma, sued IHS for additional indirect CSC, alleging that IHS had breached its contracts by giving them only a share of the CSC allocation.⁴ See Cherokee Nation v. Leavitt, 125 S. Ct. 1172, 1176-77 (2005). IHS defended this claim on the basis that, inter alia, IHS did not have sufficient appropriations to pay each and every ISDA contractors' full CSC requests as well as fund its other statutorily mandated programs and functions. See id. The Cherokee Nation litigation reached the Supreme Court, and on March 1, 2005, the Court held that because Congress had appropriated lump-sum appropriations for the Indian Health Service in fiscal years 1994-1997, the Secretary could not defend against a claim for breach of an ISDA contract in effect during those years on the basis of insufficient congressional appropriations. See id. at 1181.

Starting in the fiscal year 1998 appropriation, however, Congress explicitly limited the amount that IHS could expend on CSC by imposing a "cap" directly in the appropriations act. For example, in fiscal year 1998, Congress appropriated \$1,841,074,000, together with various collections, to IHS to carry out its mandate under certain health care statutes, but provided that "not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts" Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997).

Two federal courts of appeal already have concluded that a statutory cap, such as that imposed by

⁴ Cherokee Nation also unsuccessfully moved to certify a class largely identical to that sought to be certified here, see Cherokee Nation v. United States, 199 F.R.D. 357, 366 (E.D. Okla. 2001), a decision that was not appealed.

Congress in IHS's appropriation since 1998, limits the total amount of funds available for ISDA contracts and thus conditions each individual ISDA contractor's right to CSC funding on the availability of appropriations. See Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378-79 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000); Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996).

The Contract Disputes Act. Relevant to this Motion, the ISDA also provides that the Contract Disputes Act ("CDA") "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). The CDA itself is found at 41 U.S.C. §§ 601 et seq. and provides a mandatory administrative exhaustion scheme applicable to contract disputes between government contractors and the United States. The first step in the CDA process is that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a); see also 25 C.F.R. §§ 900.215-900.230 (explaining the exhaustion requirement for contract dispute claims brought under the ISDA). For claims under \$100,000, the contracting officer shall issue a decision within 60 days, and for claims over \$100,000, the contracting officer shall issue a decision within 60 days or notify the contractor when a decision will be issued (and it must be within a reasonable time, given the nature of the claim). See 41 U.S.C. § 605(c). The CDA explains further that "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim" Id. § 605(c)(5).

The ISDA contractor thereafter has the option of appealing a contracting officer's decision to: (1) the Interior Board of Contract Appeals (within 90 days of the decision), see id.

§ 606; 25 U.S.C. § 450m-1(d), (2) the United States Court of Federal Claims (within 12 months of a decision), see 41 U.S.C. § 609, or (3) a federal district court (within 12 months of a decision), see id. § 609; 25 U.S.C. § 450m-1(a). Finally, the CDA provides that “a contracting officer’s decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter.” 41 U.S.C. § 605(b).

FACTUAL BACKGROUND RELEVANT TO THIS MOTION

Since before fiscal year 1993, which is the first year at issue in the First Amended Complaint, Plaintiff has had multiple ISDA contracts with the Secretary of HHS, by and through the Albuquerque Area Office of IHS. (Am. Compl. ¶¶ 4, 48.) On April 16, 2001, Zuni notified IHS contracting officer Diego Lujan of twenty-two contract disputes related to its contracts in effect during fiscal years 1993-1998. (Exh. A.) A summary of the CDA claims Zuni presented is attached as Exhibit B. The legal basis for Zuni’s claims was that IHS allegedly had failed to pay the full amount of Zuni’s indirect CSC need, as calculated under Zuni’s indirect cost rate (hereinafter referred to as “Claim 1”). Zuni sought a total of \$324,213.36 in additional funding. (Exh. B.)

On September 28, 2001, Zuni amended its CDA claims to include a new legal theory of recovery for additional indirect CSC, which it described as:

“[Employing] the same illegal calculation of the Pueblo’s indirect cost requirements associated with this contract that was struck down by the Tenth Circuit in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). Specifically, IHS failed to adjust the indirect cost rate issued by the Department of the Interior Office of Inspector General to account for the dilution in IHS’s responsibility for indirect costs under the ISDA caused by the OIG’s erroneous assumption in its rate that all agencies funding the Pueblo contribute to the

Pueblo’s indirect cost pool at the full OIG-determined rate. By failing to adjust the OIG rate to calculate IHS’s full responsibility to pay indirect costs under the ISDA, IHS violated its contractual and statutory obligations to the Pueblo of Zuni.

(Exh. C.) This legal theory is hereinafter referred to as “Claim 2.” A summary of the Claim 2 CDA claims that Zuni presented is attached as Exhibit D. Zuni’s total amended claims, including the original amount claimed on April 16, 2001, was \$339,933.44. (Exhs. B, D.)

A specific breakdown of Zuni’s presented claims, identified by legal theory and amount of claim, is as follows:

Contract Number/Fiscal Year	Claim 1 (April 16, 2001)	Claim 2 (September 28, 2001)	Total Amount of Claim
242-87-0032/FY93	\$2,587.86	\$463.00	\$3,050.86
242-88-0030/FY93	\$14,736.82	\$2,184.43	\$16,921.25
242-93-0003/FY93	\$7,734.21	\$893.27	\$8,627.48
242-93-0074/FY93	\$14,382.13	\$625.13	\$15,007.26
242-93-0074/FY96	\$9,068.24		\$9,068.24
242-88-0031/FY93	\$38,828.87	\$3,273.69	\$42,102.56
242-93-0072/FY94	\$56,217.94	\$5,447.34	\$61,665.28
242-93-0072/FY96	\$54,309.07		\$54,309.07
242-93-0072/FY97	\$43,343.52		\$43,343.52
242-93-0072/FY98	\$19,339.47		\$19,339.47
242-95-0019/FY95	\$16,546.03	\$2,833.23	\$19,379.26
242-95-0019/FY96	\$3,651.31		\$3,651.31
242-95-0019/FY98	\$895.83		\$895.83
242-96-0022/FY96	\$4,222.32		\$4,222.32
242-96-0022/FY98	\$5,472.81		\$5,472.81
242-96-0021/FY96	\$7,084.52		\$7,084.52
242-96-0021/FY97	\$2,595.37		\$2,595.37

242-96-0021/FY98	\$2,080.74		\$2,080.74
242-96-0008/FY96	\$6,178.65		\$6,178.65
242-96-0008/FY98	\$4,758.53		\$4,758.53
242-97-0050/FY97	\$9,066.26		\$9,066.26
242-97-0050/FY98	\$1,112.85		\$1,112.85
TOTAL	\$324,213.35	\$15,720.09	\$339,933.44

Mr. Lujan did not respond to these claims within the requisite time period and thus, under the CDA, they were deemed denied. See 41 U.S.C. § 605(c)(5). On September 10, 2001, Zuni initiated this action by filing a complaint, which it amended on December 12, 2001.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER SOME OF PLAINTIFF’S CLAIMS.

Plaintiff’s failure to follow the procedures specified in the Contract Disputes Act (“CDA”) with respect to many of the claims it seeks to raise in this action requires dismissal of those claims for lack of subject matter jurisdiction. The Supreme Court has unequivocally stated that a court’s jurisdiction is a threshold inquiry that should be resolved before proceeding to the merits of an action. See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94-95 (1998) (citations and internal quotation marks omitted). “The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.” Id. “Without jurisdiction the court cannot proceed at all in any cause.” Id.; see also United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1048 (10th Cir. 2004) (“Questions of jurisdiction, of course, should be given priority--since if there is no jurisdiction there is no authority to sit in judgment of anything

else.”) (quoting Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000)); Payton v. USDA, 337 F.3d 1163, 1167 (10th Cir. 2003) (“The jurisdictional issue must be resolved first.”).

A. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a claim on the ground that the court lacks jurisdiction over the subject matter. “When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint’s factual allegations.” Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). “A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).” Id. Accordingly, a motion to dismiss for lack of subject matter jurisdiction that relies on matters outside the pleadings generally should not be converted to a Rule 56 motion for summary judgment. See id.; see also 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1366 at 484-85 (2d ed. 1990) (explaining that attaching documents to a Rule 12(b)(1) motion does not convert it to one for summary judgment).

The only facts necessary to this Court’s determination of Defendants’ Motion to Dismiss for lack of subject matter jurisdiction are Zuni’s CDA claims, attached as Exhibits A-D.

B. The Court Has Jurisdiction Over Only Those Claims that Plaintiff Properly Exhausted.

By this lawsuit, Plaintiff has sought monetary relief against the United States for the alleged breach of many of its ISDA contracts under two legal theories related to the payment of indirect CSC. (Am. Compl. ¶ 1.) First, Zuni alleges that IHS underfunded its indirect CSC

because IHS failed to adjust Zuni's indirect cost rate to take into account the full amount of costs associated with the IHS programs under contract (Claim 2). (Am. Compl. ¶¶ 66-73.) Second, Zuni alleges that IHS failed to pay the full amount of indirect CSC incurred by Zuni's contracts even when using the allegedly incorrect indirect cost rate (Claim 1). (Am. Compl. ¶¶ 74-87.)

“It is elementary that ‘[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” Weaver v. United States, 98 F.3d 518, 520 (10th Cir. 1996) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)). Moreover, “[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” Id. (quoting Mitchell, 445 U.S. at 538).

The ISDA directs that, for all claims by contractors against the government for monetary relief, the CDA applies. See 25 U.S.C. §§ 450m-1(a), (d). The ISDA thus conditions its waiver of sovereign immunity for monetary claims against the government on the application of the CDA. See id.; see also Demontiney v. United States, 255 F.3d 801, 806 (9th Cir. 2001) (explaining limited waiver of sovereign immunity found in the ISDA); Tunica-Biloxi Tribe v. United States, No. 02-2413, slip op. at 8-10 (D.D.C. 2004) (explaining jurisdictional prerequisite to litigate breach of an ISDA contract) (attached as Exh. E). See generally Cherokee Nation, 125 S. Ct. at 1176-77 (reciting that the plaintiffs, Cherokee Nation and Shoshone-Paiute, had presented their ISDA claims to an IHS contracting officer pursuant to the CDA).

The CDA itself operates as a limited waiver of sovereign immunity for claims arising under contracts with the United States. See 25 U.S.C. §§ 450m-1(a), (d). In waiving sovereign immunity under the CDA, however, Congress put specific conditions on that waiver. Most

relevant here, the CDA requires that before any CDA claim may be brought in federal court, the claim must be presented to a contracting officer. See 41 U.S.C. § 605(a) (“All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.”). This “presentment” requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim.⁵ See James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 614 (1990); Mendenhall v. United States, 20 Cl. Ct. 78, 82 (1990); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985); Tunica-Biloxi, slip op. at 10.⁶

The parameters of a CDA “claim” are determined by reference to the operative facts underlying the claim and the policies behind the exhaustion requirement--notifying the agency of a dispute and allowing the agency the first opportunity to review the claim and attempt to resolve it without litigation. See SMS Data, 19 Cl. Ct. at 614-16. The notice requirement is very specific; a new legal theory cannot be raised in court that was not originally presented to the contracting officer. See id. at 614-15; J.C. Equip. Corp. v. England, 360 F.3d 1311, 1318-19 (Fed. Cir. 2004) (barring contractor from raising new legal theory on review because claim was

⁵ The CDA also has very explicit timeliness requirements, see 41 U.S.C. §§ 605, 606, 607, 608, 609, the violation of which renders a reviewing court without subject matter jurisdiction, see, e.g., SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990).

⁶ The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret and apply the CDA almost exclusively, see 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein. It is only by virtue of 25 U.S.C. § 450m-1(a) that Plaintiff can bring these CDA claims in this Court or any federal district court, where there exists very little case law on the CDA.

not presented to the agency contracting officer); Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238, 243 (2000) (“The relevant determination is whether the claim [the plaintiff] submitted was a clear and unequivocal statement that put the agency on sufficient notice of the basis for the claim currently before the court.”); Tunica-Biloxi, slip op. at 11-14.

Moreover, the failure to properly present a CDA claim cannot be excused by a reviewing court. As stated above, the CDA’s requirements are jurisdictional. Because Congress has limited the Court’s jurisdiction over CDA claims by such conditions, these conditions cannot be waived or excused. See, e.g., Thoen, 765 F.2d at 1116 (rejecting contractor’s argument that presentment could be excused because submission of CDA claim would be futile); Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991) (refusing to read exceptions or tolling provisions into the CDA that Congress did not authorize); Made in the U.S.A. Found. v. United States, 51 Fed. Cl. 252, 255-56 (2001) (refusing to excuse on futility grounds the failure to present a claim). See generally Booth v. Churner, 532 U.S. 731, 741 & n.6 (2001) (refusing to excuse the failure to exhaust when exhaustion requirement was statutory); McNeil v. United States, 508 U.S. 106, 111 (1993) (declining to excuse a violation of the specific statutory administrative exhaustion process by stating, inter alia, “[w]e are not free to rewrite the statutory text.”); McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required.”); McGraw v. Prudential Ins. Co., 137 F.3d 1253, 1263 (10th Cir. 1998) (explaining that only when exhaustion is not statutorily mandated may a court excuse the failure to exhaust on the basis of futility or because the administrative process lacks an adequate remedy); 2 Am. Jur. Admin. Law § 478 (explaining that courts may waive exhaustion requirements on the basis of futility only “[i]n cases where exhaustion of administrative remedies

is not required by statute.”).

In 1993, in the context of a motion for class certification, this Court addressed whether the CDA’s presentment requirement could be excused. See Ramah Navajo Chapter v. Lujan, No. 90-957 (D.N.M. 1993) (attached as Exh. F). The issue before the Court was whether an ISDA contractor’s claims, properly presented, were typical of the claims of putative class members, not properly presented, such that the plaintiff could represent a class of ISDA contractors who had not properly presented claims. See id. at 2. This Court held that, even if exhaustion under the CDA were jurisdictional, it would not require exhaustion by each of the putative class members because the lawsuit challenged the policies and practices of the agency and sought to make systemwide reforms. See id. at 4.

To the extent that the Court’s decision involved only the legal issue of whether Ramah Navajo Chapter was a proper representative for a class of ISDA contractors, the Court’s ruling on the CDA’s exhaustion requirement is distinguishable from the situation presented here, where Defendants have moved to dismiss Zuni’s (the proposed class representative) individual claims for monetary relief on jurisdictional grounds. Nonetheless, to the extent that the ruling addressed whether the CDA’s exhaustion requirements may be excused in any context, Defendants submit that this ruling (which was not appealed) was error and respectfully point out that the conditions on the waiver of sovereign immunity for monetary relief in the CDA are mandatory and cannot be waived. See James M. Ellett, 93 F.3d at 1541-42; Reliance Ins. Co., 931 F.2d at 866; SMS Data, 19 Cl. Ct. at 614; Mendenhall, 20 Cl. Ct. at 82; Thoen, 765 F.2d at 1116.

In addition, the Court’s ruling in Ramah relied on two cases in which the Supreme Court and the Tenth Circuit had, respectively, recognized that the failure to exhaust administrative

remedies under the Individuals with Disabilities Education Act (“IDEA”), formerly known as the Education for the Handicapped Act and the Education for All Handicapped Children Act, could be excused under certain circumstances. See Ramah Navajo Chapter, slip op. at 3-4 (citing Honig v. Doe, 484 U.S. 305 (1988), and Ass’n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040 (10th Cir. 1993)). In Honig, however, the Supreme Court specifically explained that the IDEA and its legislative history made clear that exhaustion was not mandatory and permitted a reviewing court to excuse the exhaustion requirement when fulfilling it would be futile or otherwise inadequate. See 484 U.S. at 326-27; see also Ass’n for Cmty. Living, 992 F.2d at 1044 (citing Honig). In contrast, the text of the CDA and the case law interpreting it establish that exhaustion of the CDA’s administrative process cannot be waived by a reviewing court.⁷

⁷ A mandatory administrative exhaustion scheme such as that found in the CDA is wholly distinguishable from prudential exhaustion requirements, as aptly explained in Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004):

[E]xhaustion now describes two distinct legal concepts. The first is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court. We will call this doctrine ‘non-jurisdictional exhaustion.’ Non-jurisdictional exhaustion serves three functions: giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies’ expertise, and compiling a record adequate for judicial review. Occasionally, exhaustion will not fulfill these ends. There may be no facts in dispute, the disputed issue may be outside the agency’s expertise, or the agency may not have the authority to change its decision in a way that would satisfy the challenger’s objections. Also, requiring resort to the administrative process may prejudice the litigants’ court action, or may be inadequate because of agency bias. In these circumstances, the district court may, in its discretion, excuse exhaustion if the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further. The second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to judicial review. This ‘jurisdictional exhaustion’ is rooted, not in prudential principles, but in Congress’ power to control the jurisdiction of the federal courts. Whether a statute requires exhaustion is purely a question of

Moreover, since this Court's ruling in 1993, the Supreme Court has issued a decision that is directly applicable to the issue raised here. In Shalala v. Illinois Council on Long Term Care, the Supreme Court strictly construed a statutory exhaustion process and refused to excuse the plaintiffs' compliance with it, notwithstanding the fact that the plaintiffs only sought to make a prospective, non-monetary challenge to agency regulations on broad constitutional and statutory grounds. See 529 U.S. 1, 15 (2000). Both Illinois Council and the cases interpreting the CDA strictly and without exception demonstrate that presentment under the CDA, as with any statutory exhaustion requirement, is a mandatory requirement that cannot be waived.⁸

In summary and without exception, the ISDA and the CDA require that all claims sought to be litigated in federal district court must first have been presented to the relevant contracting officer, specifically setting forth both the legal theory underlying the dispute and the amount in dispute. This Court lacks jurisdiction to review any claims that do not satisfy this criteria.

C. Zuni's Claims That Have Not Been Presented Must Be Dismissed.

This Court lacks jurisdiction over some of the claims in the First Amended Complaint. Under the authorities described above, each "claim" that Zuni seeks to litigate in this Court first

statutory interpretation. If the statute does mandate exhaustion, a court cannot excuse it.

(Emphasis added but internal citations, quotation marks, alterations and footnotes omitted).

⁸ It is also notable that in the Ramah case, as here, the plaintiff sought not only to challenge an agency policy, but to obtain monetary relief on its specific claims of breach of contract. That the claims in this case seek monetary relief militates in favor of strict application of the presentment requirement as the policy behind the presentment requirement is to put the government on notice of the specific claims made and the amounts in dispute. Waiving the presentment requirement in a case in which every contractor has an individualized claim of breach of contract undercuts this congressionally-imposed mandate.

must have been presented to the appropriate IHS contracting officer. See 41 U.S.C. § 605(a). A claim is defined in this context as an allegation of underfunding for one fiscal year (e.g., 1993), on one basis (e.g., miscalculation of the tribe’s indirect CSC need or Claim 2), which yields an amount in dispute (e.g., \$463 in additional indirect CSC).⁹ To make the determination of which claims this Court has jurisdiction to review, the First Amended Complaint (docketed as #5) must be compared with the claims that Zuni presented (Exhs. A-D).

Zuni’s First Amended Complaint is not entirely clear as to which claims it seeks to have this Court review. In parts of its Complaint, Zuni seeks relief on both Claim 1 (IHS’s alleged failure to pay the full amount of indirect CSC associated with Zuni’s contracts) and Claim 2 (IHS’s alleged failure to calculate and pay Zuni the full amount of indirect CSC associated with IHS’s programs under contract) arising in fiscal years 1993 to December 12, 2001. (Am. Compl. ¶¶ 1, 69-73, 74-75, 76-80, 81-82, 83-87.) In other parts of the First Amended Complaint, Zuni does not specifically state the fiscal year or legal theory for which it seeks monetary relief. (Am. Compl. ¶¶ 66-68.) And in yet other parts, Zuni appears to recognize that its lawsuit must be limited to the claims that it presented. (Am. Compl. ¶¶ 50, 51.)

⁹ Each fiscal year claim and each legal theory asserted as a basis for relief involves distinct operative facts and thus comprises a separate “claim” for purposes of the CDA. Each fiscal year claim is separate because Zuni received different amounts of funding for CSC in each year, under the terms of its contracts, contract modifications, and annual funding agreements. In addition, Zuni has a new indirect cost rate for each year. Each legal theory also sets forth a separate claim because each requires reference to separate operative facts. For example, Zuni’s allegation that IHS failed to properly calculate Zuni’s indirect CSC need (Claim 2) requires examination of the particular set of programs Plaintiff operated in that year and any restrictions such programs may have had on indirect cost recovery. In contrast, Zuni’s allegation that IHS failed to pay even the amount that IHS miscalculated as its need (Claim 1) involves reference to the appropriation act and the terms of Zuni’s specific ISDA contracts in effective during that year.

In contrast to the allegations in the First Amended Complaint, the fact that Zuni has not properly presented each of their claims for all years at issue in the First Amended Complaint is clear. Zuni presented claims under Claim 1 only for fiscal years 1993-1998, for a total of \$324,213.35, (Exhs. A, B), and under Claim 2 only for fiscal years 1993-1995, for a total of \$15,720.09, (Exhs. C, D). As such, Claim 2 claims for funding in fiscal years after 1995 and all claims for additional funding of Zuni's ISDA contracts in fiscal years after 1998 have not been exhausted. Thus, this Court lacks subject matter jurisdiction over these claims, and they must be dismissed from this suit.¹⁰

¹⁰ Because of the timeliness requirements of the CDA, see supra n.5, any claims that Zuni sought to exhaust at this time would need to be analyzed for compliance with these strict requirements, but it certainly appears that some of these claims would be time barred.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss in Part For Lack of Subject Matter Jurisdiction should be granted, and all claims not properly presented under the CDA should be dismissed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DAVID C. IGLESIAS
United States Attorney

JAN MITCHELL
Civil Chief
United States Attorney Office
P.O. Box 607
Albuquerque, NM 87103
(505) 224-1455

/s/Rachel J. Hines

SHEILA M. LIEBER
Deputy Director
RACHEL J. HINES
Trial Attorney
Federal Programs Branch, Room 7314
Civil Division
Mailing Address
P.O. Box 883
Washington, DC 20044
Delivery Address
20 Massachusetts Avenue, NW
Washington, DC 20001
(202) 514-5532

Counsel for Defendants

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