

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

PUEBLO OF ZUNI, on behalf of itself)
and all others similarly situated,)
)
Plaintiff,)
)
v.) Case No. CIV 01-1046 WJ/WPL
) Filed Electronically
UNITED STATES OF AMERICA; *et al*)
)
Defendants.)
_____)

JOINT STATUS REPORT

Pursuant to the Court’s Notice Setting Status Conference issued September 2, 2005, the parties, by and through undersigned counsel, hereby submit this Joint Status Report.

1. Summary of the Case.

This putative class action lawsuit arises under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (“ISDA” or “Act”) and the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 601 et seq. It involves the funding of contract support costs (“CSC”) by the Indian Health Service (“IHS”).

Plaintiff’s position. According to the plaintiff, this action seeks damages for the defendants’ continuing implementation of an unlawful systemwide policy, carried out over the course of several years through a succession of “circulars,” that annually underpaid hundreds of Indian Tribes the “contract support costs” that were due under their contracts with the Government. The plaintiff seeks relief on its own behalf and on behalf of a class of tribal contractors that had contracts with the IHS. The plaintiff takes the position that class treatment is

appropriate, in part because the defendants' duties under ISDA contracts are specified in the ISDA, because the ISDA is incorporated into all ISDA contracts, and because the ISDA trumps IHS's policies as well as any provision of any contract that are inconsistent with the ISDA. The plaintiff alleges that the IHS breached tribal contracts by both (1) miscalculating the amount of contract support costs due to Tribes; and (2) failing to pay even the miscalculated amounts. Among other authorities, the plaintiff relies upon *Cherokee Nation v. Leavitt*, 125 S.Ct. 1172 (2005) (awarding damages to two Tribes for IHS's underpayments of contract support costs in four fiscal years, without regard to differing language in the contracts at issue) and *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (finding a similar BIA methodology for miscalculating indirect contract support costs to be contrary to law).

Defendants' position. According to the defendants, the basis of the plaintiff's individual claims as well as its representative claims is that the defendants breached 22 ISDA contracts and/or annual funding agreements. These claims must be individually analyzed to determine, *inter alia*, (1) the specific terms of these agreements, (2) whether any of the agreements' terms have been breached, (3) whether the plaintiff has met the statutory, nonwaivable requirements of the CDA for bringing such claims, 41 U.S.C. § 605, and (4) whether the defendants have contractual defenses that bar the claims. In light of the individualized nature of the claims and defenses in this case, the defendants believe that the elements of a Rule 23 class action cannot be satisfied. Although Defendants have no intention of relitigating the issues that were conclusively decided by the Supreme Court in *Cherokee Nation*, the Court's decision held only that the Secretary could not defend against a claim for breach of an ISDA contract in effect in fiscal years

1994-1997 on the basis of insufficient congressional appropriations and in no way obviates the need to assess, on a case by case basis, Zuni's (and any other contractor's) individual contracts, claim(s), and any applicable defenses. In addition, starting in 1998, Congress included a statutory cap in the congressional appropriations for CSC, a circumstance not addressed by the Supreme Court, but one already decided by two courts of appeal in favor of the government. *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). Finally, in 1998, Congress clarified an ambiguity in the ISDA by passage of a second provision, 25 U.S.C. § 450j-2, which, in effect, overruled the decision of the Tenth Circuit in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997).

2. Case Status.

In September 2001, the Pueblo of Zuni filed the instant class action lawsuit. Dkt. No. 1. In December 2001, further proceedings were stayed pending the outcome of the *Cherokee Nation* litigation. Dkt. No. 8. On March 1, 2005, the Supreme Court issued its decision in *Cherokee Nation v. Leavitt*. On March 10, 2005, the plaintiff filed an unopposed motion to lift the stay. Dkt. No. 25. On the same day, the plaintiff filed a motion to certify a class. Dkt. No. 26. On March 17, 2005, the Court lifted the stay. Dkt. No. 32.

After a scheduling conference on April 19, 2005, Chief Magistrate Judge Garcia issued a Scheduling and Discovery Order that directed the defendants to file an answer or a motion to dismiss within 30 days, directed the plaintiff to withdraw its motion to certify a class, and established a "phase one discovery" program "directed toward the Rule 23 issues of numerosity,

commonality of questions of law or fact, typicality of claims or defenses, and whether the representative parties [*sic*] will fairly and adequately protect the interests of the class.” Dkt. No. 52. The Order established a 90-day schedule for the completion of class discovery, after which time the plaintiff was to renew its motion for class certification. Upon completion of briefing, the Order directed that no further discovery would proceed pending the Court’s consideration and disposition of the Class Motion. In addition, the Court orally instructed the parties to explore potential settlement of the case.

On April 22, 2005, the plaintiff filed a Notice of Withdrawal of its class certification motion. Dkt. No. 51. On May 24, 2005, the defendants filed an Answer to the Complaint. Dkt. No. 58. Also on May 24, 2005, the defendants filed a Motion to Dismiss in Part directed at certain claims of the plaintiff. Dkt. No. 59. By approved stipulation of the parties, briefing on the defendants’ Motion will be completed September 30, 2005. Dkt. No. 94.

For the first 30 days of the 90-day class discovery period the parties negotiated a protocol for the random sampling of Tribal contracts drawn from three different fiscal years (1994, 1997, and 2001). The sampling was an outgrowth of the defendants’ position, opposed by the plaintiff, that there exist differences among contracts such that the Court should deny class certification. During this time the parties also prepared their first wave of written discovery.

On July 1, 2005, the Court extended the initial 90-day class discovery period to September 16, 2005. Dkt. No. 83. From early May 2005 to the present, the parties have served several rounds of document production requests, requests for admissions and interrogatories, and supplemental responses thereto, and have successfully resolved various disagreements regarding

the discovery process. The parties have also reached agreement on the preparation of expert reports and the taking of expert and non-expert depositions, under a schedule involving five weeks of depositions spread across a nine-week period commencing August 29, 2005, with additional depositions to be scheduled and taken prior to November 4, 2005. Although the parties agreed to further amend the April 22, 2005 Scheduling Order to accommodate this extended deposition schedule, the parties could not reach agreement on other discovery-related matters. Thus the defendants filed a partially unopposed Motion for Modification (Dkt. No. 125) to which the plaintiff will be responding shortly.

As of the date of this Report, the parties are in the process of completing class discovery and resolving their disagreements over remaining discovery issues in an effort to minimize the need to involve the Court in the discovery process. Following the completion of class discovery, the plaintiff will file a renewed motion for class certification. Other than the class certification motion, the defendants' pending motion to dismiss in part, and any future discovery or evidentiary motions that may be filed related to the motion for class certification, the parties do not anticipate bringing to the Court any motions until the Court has resolved the issue of class certification.

In addition to the foregoing activities, on May 23, 2005 certain applicant-intervenors filed a motion to intervene in this case, to establish separate classes, and to have their attorney appointed interim class counsel for portions of this case. Dkt. No. 50. Both parties have opposed the motion, partly because applicant-intervenors already have their own litigation

underway in the District of Columbia,¹ and partly because the parties do not believe there is a basis for intervention, much less appointment of interim class counsel. In addition to applicant-intervenors' motion, there are now pending three additional issues arising out of that motion: the defendants' Motion to Compel Service of certain documents that applicant-intervenors filed under seal with their reply memorandum (Dkt. No. 84), the plaintiff's Motion to Strike the applicant-intervenors' reply memorandum (Dkt. No. 86), and the plaintiff's Motion for Leave to File a Surreply to the applicant-intervenors' reply (in the event the Motion to Strike is denied) (Dkt. No. 87). Suffice it to say, the applicant-intervenors' unanticipated and unconventional filings have proven to be a significant distraction for the parties as they seek to comply with the Scheduling Order and the Court's direction to prioritize class discovery proceedings.

3. Settlement Negotiations.

Finally, in April and May 2005, the parties exchanged detailed settlement proposals and discussed in person the potential settlement of this matter but were unable to reach agreement. In late August 2005, the plaintiff proposed developing a fresh comprehensive settlement offer for the defendants' consideration if the defendants were open to further discussions. As of this Report, the defendants are weighing whether to enter into further settlement discussions at this time.

¹ *Tunica-Biloxi Tribe, et al. v. United States*, No. 02-2413(D.D.C.). At the time of briefing the motion, applicant-intervenors also had a separate motion, then pending with the Judicial Panel on Multi-District Litigation (MDL), to transfer their District of Columbia case to New Mexico for consolidation with this case. Applicant-intervenors subsequently changed their position and requested that the MDL Panel instead transfer this action to the District of Columbia. On August 10, 2005 the MDL Panel denied applicant-intervenors' transfer motion in its entirety. Dkt. No. 110.

4. Positions on Earliest Trial Date.

The Court's Order of April 22, 2005, provided that the case would be stayed pending resolution of the plaintiff's renewed motion for class certification. The parties agree that the scheduling of any trial should await this Court's resolution of that motion and of the defendants' motion to dismiss in part. This is because pretrial and trial practice on the merits will vary considerably depending on whether this case proceeds on a class basis or on an individual basis.

Respectfully submitted this 26th day of September 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2005, I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Joint Status Report** to the following attorneys of record (or their co-counsel) for Defendants:

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