

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re: Indian Tribes Contract
Support Cost Litigation

MDL Docket No. 1690

**BRIEF IN OPPOSITION TO MOTION TO TRANSFER AND CONSOLIDATE OR
JOINTLY MANAGE FOR PRETRIAL PROCEEDINGS BY UNITED STATES, HHS
SECRETARY LEAVITT, AND IHS DIRECTOR GRIM**

INTRODUCTION

Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board, Inc. (hereinafter “Movants”) seek to invoke the multidistrict litigation (“MDL”) statute, 28 U.S.C. § 1407, to obtain a forum change to the District of New Mexico without even attempting to satisfy the three statutory factors that must be present before a transfer may be authorized. Instead, Movants rely on conclusory statements about both the “common questions of fact” present in the three cases that are the subject of their Motion and “the convenience to the witnesses”--all notably left unnamed--should the cases be consolidated. Their silence on these critical factors speaks volumes about the merits of their Motion.

A review of the posture and claims in the three cases, however, easily demonstrates their

inappropriateness for multidistrict litigation: First, the case brought against the Bureau of Indian Affairs (“BIA”), Ramah Navajo Chapter et al. v. Norton et al., is not at all suitable for multidistrict litigation. It has been pending for fifteen years, has been the subject of two settlements, involves claims not present in the IHS cases, is well past any pretrial proceedings, and, in fact, appears close to resolution. Consolidating this case with any other case would serve only to impose new inefficiencies into the case and complicate its final resolution. Movants admit as much when they attempt to explain that this MDL Motion is not “intended to derail or delay amicable resolution” of the equitable claims in that case.

Second, the two cases brought against the Indian Health Service (“IHS”), Pueblo of Zuni v. United States et al., and Tunica-Biloxi Tribe et al. v. United States et al., are also not suitable for multidistrict litigation. They are, at bottom, cases for money damages arising out of individual contracts, each with unique factual circumstances that must be explored during discovery and ultimately briefed by the parties. There is no added efficiency in transferring these cases to the same district, and thus the MDL Motion should be denied in full.

Although the United States, Health and Human Services (“HHS”) Secretary Michael O. Leavitt, and IHS Director Charles W. Grim (hereinafter “the IHS Defendants”) all strongly oppose transfer and consolidation under § 1407, if the Panel ultimately determines that transfer is appropriate, the most appropriate transferee forum is unquestionably the District of Columbia.

BACKGROUND

The MDL Motion before the Panel involves three cases, two brought against the U.S. Department of Health and Human Services’s Indian Health Service (“IHS”) and one brought against the U.S. Department of the Interior’s Bureau of Indian Affairs (“BIA”). The claims in all

three cases arise under the Indian Self-Determination and Education Assistance Act (“ISDA”), 25 U.S.C. §§ 450 et seq., and individual ISDA contracts entered into between the plaintiff Indian tribes and the respective Executive Branch Secretary.

In brief, the ISDA, enacted in 1975, was designed to encourage Indian self-government by permitting the transfer of certain federal programs to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs the Secretarys of the respective federal agencies to enter into self-determination contracts. See id. § 450f(a)(1). 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. The Secretarial amount includes expenses for a broad array of functions and activities that support the program under contract. See id. § 450f(a)(1); 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 are 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 funds for administrative support of the program under contract (called “contract support costs”). See id.

Contract support costs (“CSC”) can be 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); id. § 450b(c). Second, there are indirect CSC, which are administrative costs that are shared by several different programs or services, such as accountants or shared facilities. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). Finally, 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). The ISDA only permits payment of CSC that are reasonable in light of the activities to be conducted. See id. § 450j-1(a)(2).

Relevant to the cases subject to the MDL Motion, the ISDA creates a cause of action for claims for money damages arising out of breach of contract by incorporating the requirements of the Contract Disputes Act, 41 U.S.C. §§ 601 et seq., into the statute. See id. § 450m-1(d). It is only under this provision that claims for monetary relief related to breach of an ISDA contract can be brought. As explained by Movants, all three cases subject to the MDL Motion involve allegations that either the BIA or the IHS "failed to calculate and pay contract support costs in the manner prescribed by contract and statute." (MDL Br. at 3.) This is where the similarity among the three cases, at least for purposes of § 1407, ends.

The three cases that are the subject of this MDL Motion are:

1. Tunica-Biloxi Tribe of Louisiana & Ramah Navajo School Board v. United States, Secretary Leavitt, & Secretary Norton, No. 02-2413 (D.D.C.) (hereinafter referred to as "Tunica"). On November 21, 2002, two contracting tribes filed a lawsuit against the IHS Defendants (along with Department of the Interior Secretary Gale Norton) in the District of New Mexico, and the case was docketed as 02-1465. On behalf of themselves and a putative class of IHS contractors, the plaintiffs alleged that IHS had breached the plaintiffs' contracts by

underpaying the amount of indirect CSC that IHS was required to pay under the ISDA and their individual contracts. Before the defendants had answered the complaint, a decision unfavorable to the plaintiffs was decided in the Tenth Circuit and thus the plaintiffs voluntarily dismissed their complaint. (MDL Br. at 2 n.1.) On December 9, 2002, they refiled their complaint in the United States District Court for the District of Columbia. (Second Amended Complaint attached as Exhibit 2 to MDL Motion.)

The case was assigned to the Honorable Reggie B. Walton. After additional amendments to the complaint, the defendants filed a motion to dismiss many of the plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). On May 6, 2003, Judge Walton stayed class certification and merits discovery pending resolution of the motion to dismiss. See Ord. of May 6, 2003 (attached as Exhibit A). On December 9, 2003, Judge Walton issued a memorandum opinion, dismissing some of the plaintiffs' claims, ordering limited jurisdictional discovery at the request of the plaintiffs, and ordering further briefing on the jurisdictional defenses raised. See Mem. Opin of Dec. 9, 2003, as amended Jan. 20, 2004 (attached as Exhibit B).

While the parties were engaged in jurisdictional discovery, the Supreme Court granted certiorari in two other cases brought by IHS tribal contractors against IHS, see Cherokee Nation v. Thompson, 541 U.S. 934 (2004), and soon thereafter, Judge Walton stayed Tunica pending the Supreme Court's decision. On March 1, 2005, the Supreme Court issued a decision in Cherokee Nation, (see discussion infra), but the stay in Tunica has not yet been lifted. Pursuant to this MDL Motion, the Tunica plaintiffs now seek to have their case transferred to the District of New Mexico.

2. Pueblo of Zuni v. United States, Secretary Leavitt, & Director Grim, No. 01-1046 (D.N.M.) (hereinafter "Zuni"). On September 10, 2001, the Pueblo of Zuni brought a lawsuit against the IHS Defendants claiming that IHS had breached its contracts by underpaying the amount of indirect CSC that IHS was required to pay under the ISDA and Zuni's individual contracts. (First Amended Complaint attached as Exhibit 3 to MDL Motion.) On December 28, 2001, and before the IHS Defendants had answered the first amended complaint, the district court stayed the case pending the resolution of Cherokee Nation, which was then pending before the Tenth Circuit and later before the Supreme Court. Once the Supreme Court issued its decision in Cherokee Nation (see discussion *infra*), the district court lifted the stay, and on April 21, 2005, entered a case management order for both class certification and merits discovery (attached as Exhibit C).

3. Ramah Navajo Chapter et al. v. Secretary Norton, Inspector General Devaney, and the Assistant Secretary of the Department of the Interior for the Bureau of Indian Affairs, No. 90-957 (D.N.M.) (hereinafter "Ramah"). This lawsuit, filed in 1990 by the Ramah Navajo Chapter on behalf of it and all other similarly situated BIA tribal contractors involves the alleged underpayment of CSC. (Complaint attached as Exhibit 1 to Movants MDL Motion.) Although the specific procedural history of this case is described in detail in Defendants Gail Norton and Earl Devaney's Memorandum in Opposition to Plaintiffs' Motion to Transfer and Consolidate or Jointly Manage for Pretrial Proceedings, also filed with the Panel on this day, the case has progressed through class certification, discovery, dispositive motions, appeal, remand, and two settlements, and appears close to final resolution.

Although not subject to the MDL Motion, also relevant to these three cases is Cherokee

Nation et al. v. United States. Cherokee Nation was originally brought in the Eastern District of Oklahoma by two IHS contractors, Cherokee Nation and the Shoshone-Paiute Tribes of the Duck Valley Reservation, on behalf of themselves and all other IHS contracting tribes similarly situated. (Complaint attached as Exhibit D.) Like Movants and the Pueblo of Zuni, the plaintiffs in Cherokee also sought money damages for the alleged breach of their respective ISDA contracts. The district court first denied the plaintiffs' motion for class certification, primarily on the basis that each IHS contractors' claim for breach would depend on the specific contract terms and conditions and thus that there was insufficient commonality of claims to satisfy Federal Rule of Civil Procedure 23. See 199 F.R.D. 357, 366 (E.D. Okla. 2001). Thereafter, the district court held that IHS had not breached its contracts with the plaintiffs because IHS's promise to pay indirect CSC was limited by the amount of appropriations made available by Congress. See 190 F. Supp. 2d 1248, 1259-61 (E.D. Okla. 2001). The Tenth Circuit affirmed. See 311 F.3d 1054 (10th Cir. 2002).

On March 1, 2005, however, the Supreme Court reversed the Tenth Circuit, holding that, because IHS had a lump-sum appropriation in fiscal years 1994-1997, IHS could not defend a claim for breach of an ISDA contract in effect during these years on the basis of insufficient congressional appropriations as long as the non-earmarked lump-sum appropriation would have covered the CSC claims. See 125 S. Ct. 1172, 1181 (2005). In essence, the Supreme Court rejected a legal defense raised by IHS for the underpayment of indirect CSC in years in which Congress did not specifically limit the amount of the appropriation that could be used to pay CSC. The Supreme Court did not rule on any other legal or contractual defenses available to the IHS, and did not rule on whether, when Congress does in fact restrict IHS's appropriation to a

specific amount of CSC as it did starting in fiscal year 1998 forward, IHS can defend against a breach of contract claim on the basis of insufficient appropriations. These legal issues remain to be resolved as necessary in the various pending cases involving the payment of indirect CSC under ISDA contracts.

ARGUMENT

I. TRANSFER OF THIS ACTION DOES NOT SATISFY THE STATUTORY MANDATES OF § 1407.

In order to satisfy the statutory mandates of 28 U.S.C. § 1407, three factors must be present. First, the cases sought to be transferred under § 1407 must involve common questions of fact. See 28 U.S.C. § 1407(a). Second, the transfer must be for the “convenience of parties and witnesses.” Id. And third, the transfer must “promote the just and efficient conduct” of the actions. Id. Each of these factors must be met before transfer is deemed appropriate. See In re Highway Accident Near Rockville, Conn., 388 F. Supp. 574, 575 (J.P.M.L. 1975).

A. The Ramah Case is Not Suitable for Multidistrict Litigation and Should Not Be Consolidated with Either Zuni or Tunica.

There is absolutely no basis on which to consolidate the Ramah case against BIA with Tunica or Zuni, the two IHS cases.¹ Ramah has been ongoing since 1990, the time for discovery has come and gone, the parties have entered into two settlement agreements and continue to engage in settlement negotiations to this day. It is, in fact, entirely unclear what pretrial proceedings Movants even contemplate with respect to Ramah, and they go so far as to concede

^{1/} The BIA has filed a separate brief in opposition to the MDL Motion, which sets forth in more detail the procedural history of Ramah as well as the numerous reasons why transfer and consolidation of this case is entirely inappropriate.

that they do not intend their MDL Motion to impact the ongoing settlement negotiations in the case. (MDL Br. at 6 n.3.) When a motion to transfer under § 1407 involves a case that is procedurally advanced from the others that are the subject of the motion, the Panel has declined to include such a case in an otherwise appropriate transfer or consolidation order. See In re Asbestos Sch. Prods. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.L. 1985); In re Eli Lilly & Co. “Oraflex” Prods. Liab. Litig., 578 F. Supp. 422, 423 (J.P.M.L. 1984); In re Westinghouse Elec. Corp. Employment Discrimination Litig., 438 F. Supp 937, 939 (J.P.M.L. 1977); In re Harmony Loan Co., Inc. Sec. Litig., 372 F. Supp. 1406, 1407 (J.P.M.L. 1974); In re Protection Devices & Equip. & Cent. Station Prot. Serv. Antitrust Cases, 295 F. Supp. 39, 40 (J.P.M.L. 1968).

As is obvious, Ramah, Tunica, and Zuni also involve two different federal executive branch agencies, HHS and Interior, and thus involve agency-specific CSC policies and guidance, compare Cherokee Nation, 311 F.3d at 1058 (describing IHS’s CSC distribution policy), rev’d by 125 S. Ct. 1172 (2005), with Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1348-49 (D.C. Cir. 1996) (explaining the pro rata CSC distribution policy later implemented by BIA), and different agency witnesses. In addition, Congress appropriates funding for the IHS and the BIA separately, and the appropriations are made in different amounts and subject to different requirements. Compare e.g., Dep’t of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) with Dep’t of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1389 (1993). For example, as provided in the fiscal year 1994 appropriations act, Congress limited the amount that BIA could expend on CSC by explicit cap, whereas in the same year, Congress did not put an explicit cap in the IHS appropriation. In addition, Congress made BIA’s fiscal year 1994 funding available for

obligation for a two-year period of time, whereas IHS's fiscal year 1994 appropriations were available for obligation for just one year. These examples are merely illustrative of the individualized nature of the two government programs and consequently, why these cases should not be consolidated. In sum, the existence of the Ramah case provides no basis for transfer and consolidation of the Tunica case in the District of New Mexico.

B. The Two IHS Cases Are Not Suitable for Multidistrict Litigation.

Although the Tunica and Zuni cases are both brought against IHS, at their core, they seek to recover money damages based on breach of contract. Breach of contract actions are, almost by definition, individualized actions in which specific terms and conditions govern the relationships between the specific parties and define any subsequent breaches of those terms and conditions. As such, the majority of the questions of fact are specific to the individual IHS contractor and no efficiency is served by aggregating these individualized claims. In implicit recognition of this fact, Movants do not even attempt to analyze the factors under § 1407. A review of the factors, however, amply demonstrates that the cases are not suitable for multidistrict litigation.

1. Common Questions of Fact.

Movants have failed to identify even a single common question of fact shared by the two cases beyond making conclusory statements that such common questions of fact exist. Instead, Movants focus on how the cases involve various issues of statutory and regulatory interpretation, *i.e.*, questions of law. (MDL Br. at 5-7.) But even assuming, arguendo, that there are questions of law common to the two cases, common questions of law do not provide a basis for transfer and consolidation under § 1407. See, e.g., In re Env'tl. Prot. Agency Pesticide Listing Confidentiality Litig., 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (involving interpretation of the

Federal Insecticide, Fungicide, and Rodenticide Act); In re Natural Gas Liquids Regulation Litig., 434 F. Supp. 665, 667-68 (J.P.M.L. 1977) (involving interpretation of the Economic Stabilization Act of 1970, the Emergency Petroleum Allocation Act of 1973, and the Federal Energy Administration Act of 1974).

Although Movants fail to set forth any questions of fact, let alone common ones shared by the two IHS cases, the IHS Defendants set forth what they believe to be the primary and predominant factual issues in the two IHS cases:

- (1) What each individual contractor was promised under its respective contract for any challenged fiscal year.
- (2) Whether this promise was breached.
- (3) Whether, for each of the claims sought to be adjudicated in federal court, each individual contractor first presented (exhausted) its claim to a contracting officer in a timely manner, as required by the Contract Disputes Act and the ISDA.
- (4) Whether each individual contractor filed its lawsuit within the pertinent statute of limitations.
- (5) Whether the IHS has any specific contractual or other legal defenses against any individual contractor based on the specific contract (release, abandonment, etc.) or based on prior litigation (res judicata, etc.).
- (6) The basis on which each individual contractor is paid indirect CSC, i.e., through use of a fixed carryforward indirect cost rate, a provisional final indirect cost rate, or by some other method.
- (7) Whether each individual contractor that is paid indirect CSC on the basis of an

indirect cost rate has a current indirect cost rate.

- (8) For each individual contractor that is paid indirect CSC on the basis of an indirect cost rate, the basis for that rate (i.e., the amount of overall funding received by that specific contractor for programs and for contract support).

Although the questions are the same in both cases, the facts necessary to resolve these questions are unique to each IHS contractor, involve different documents and testimony, and are not shared by any two IHS contractors. In other words, although the legal questions may be the same, the facts that answer these questions are not. Thus, the majority of the merits discovery in the two IHS cases will not be duplicative.

Although not identified by Movants, there do appear to be several common questions of fact present in the two IHS cases. First, it is possible that the issue of whether a class of IHS contractors should be certified may raise some common questions of fact in the two cases (e.g., whether the claims of the named plaintiffs and the putative class share common questions of law and fact such that the commonality requirement of Federal Rule of Civil Procedure 23 is satisfied). Second, it is possible that the cases share a common question of fact on the merits related to the allocation, obligation, and distribution of IHS's appropriation in fiscal years 1998 forward, which is relevant to the determination of whether IHS expended all of the funds that they were permitted by Congress to spend on CSC. Notwithstanding these possible common question of fact, the individualized questions of fact that go to the merits of the claims, identified above, predominate. When individualized questions of fact predominate over common ones, transfer and consolidation under § 1407 is not appropriate. See, e.g., In re Asbestos, 606 F. Supp. at 714; In re Eli Lilly, 578 F. Supp. at 423; In re Sears, Roebuck & Co. Employment

