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**BEFORE THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION**

IN RE INDIAN TRIBES CONTRACT SUPPORT )  
COSTS LITIGATION )

) MDL Docket No. 1690  
)

**DEFENDANTS GAIL NORTON AND EARL DEVANEY'S  
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO TRANSFER AND  
CONSOLIDATE OR JOINTLY MANAGE FOR PRETRIAL PROCEEDINGS**

**INTRODUCTION**

The movants, Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc. have requested that this Panel order the transfer and consolidation of three actions for pretrial proceedings under 28 U.S.C. § 1407, based almost exclusively on the fact that three actions have been brought under the same statute, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* Two of the actions, Tunica-Biloxi Tribe of Louisiana et al v. United States et al., Civ. Act. No. 02-2413 (D.D.C.) and Pueblo of Zuni v. United States et al., No. 01-1046 (D.N.M.), are recently-filed putative class actions in the District of New Mexico and the District of Columbia against the United States Department of Health and Human Services ("HHS") and concern contracts that certain Indian tribes have with HHS and the Indian Health Service ("IHS"), a component of HHS. The third

action, Ramah Navajo Chapter et al v. Norton et al, No. 90-957 (D.N.M.), is a certified class action in the District of New Mexico that was brought over fifteen years ago against the United States Department of Interior ("DOI") by other Indian tribes who have contracts with the Secretary of the Interior and the Bureau of Indian Affairs ("BIA"). The movants apparently seek to exploit the multi-district litigation statute in the hope that obtaining class certification and a favorable ruling on the merits in the Pueblo of Zuni and Tunica-Biloxi cases (hereinafter "IHS cases") will be easier in the District of New Mexico, where the district court had already certified a class of Indian tribes who had contracts with BIA, and the Tenth Circuit at one time issued a ruling favorable to DOI tribal contractors on one of the underlying legal issues.

However, pursuant to the plain language of 28 U.S.C. § 1407, the transfer of actions is only allowed for consolidated pretrial proceedings when the actions involve common questions of fact, not for final adjudication of common questions of law. Because the sole basis described in the movants' request for transfer and consolidation of the three actions at issue here is to adjudicate ultimate questions of law, their request for a transfer and consolidation must be denied.

In addition, the class action against DOI, Ramah Navajo Chapter v. Norton (hereinafter the "BIA case"), has been ongoing for over fifteen years and, as such, is in a vastly different procedural posture than the two IHS cases, which are putative class actions filed relatively recently in 2001 and 2002. It would hardly promote "the just and efficient conduct" of the actions or serve the convenience of the parties and witnesses to consolidate these actions for pretrial proceedings, but would instead merely delay final resolution of these matters for the DOI defendants.

As set forth more fully below, this Judicial Panel should conclude that these three cases are

inappropriate for transfer and consolidation under 28 U.S.C. § 1407, and deny the plaintiffs' motion.

### **BACKGROUND**

#### A. The Indian Self-Determination and Education Assistance Act

All three of the actions that are the subject of plaintiffs' motion to transfer arise under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq., a statute authorizing the BIA (a component of the DOI) and the IHS (a component of HHS) to contract with and fund Indian tribes and tribal organizations that choose to take over the direct operation of programs and services formerly operated by BIA or IHS.<sup>1</sup> See 25 U.S.C. § 450f. ISDA requires the respective Secretary of each agency to provide to a tribe entering into a self-determination contract with that agency various types of funding for programs and services, the amount of which is set forth in an appended annual funding agreement, and is subject to limitations of each agency's annual appropriation. Id.

Pursuant to their ISDA contracts with the tribes, the agencies provide, among other things, funds to the self-contracting tribe for so-called "contract support costs." These contract support costs consist of an amount for the reasonable costs of activities that must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which normally "are not carried on by the respective Secretary in his direct operation

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<sup>1</sup> The BIA provides numerous services and programs for American Indians and Alaska Natives. For example, BIA provides law enforcement, park management, child welfare protection, among many other services. IHS, on the other hand, provides for health care services for American Indians and Alaska Natives throughout the United States.

of the program” or “are provided by the Secretary in support of the contracted program from resources other than those under contract.” 25 U.S.C. § 450j-1(a)(2). The ISDA provides for the payment of two types of contract support costs: (1) direct contract support costs, such as initial startup expenses, unemployment taxes, or workers compensation insurance – costs that are directly attributable to a particular agency program, *id.* § 450j-1(a)(3)(A)(i), and (2) indirect contract support costs such as overhead expenses for facilities and equipment or accounting, costs not necessarily attributable to one federal program but which may derive from the operation of multiple federal agency programs. *Id.* § 450j-1(a)(3)(A)(ii).

The BIA and IHS finance their ISDA self-determination contracts, as well as all of their directly operated programs, through funds derived from their respective annual appropriations. Beginning in fiscal year 1994, Congress began setting statutory caps directly in the appropriations acts specifically limiting the amount of contract support costs that BIA could pay to tribal contractors under their ISDA contracts. See, e.g., Department of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1391 (1993) (setting aside funds "not to exceed \$91,223,000 . . . for payments to tribes and tribal organizations for indirect costs associated with contracts .... authorized by the [ISDA]") (attached hereto as Exhibit A). By contrast, however, Congress did not begin imposing statutory appropriations caps on IHS's payment of contract support costs until 1998. See Department of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997) (attached hereto as Exhibit B).

With respect to the BIA, the amounts needed by BIA tribal contractors for contract support costs each year have exceeded the amount of appropriated funds that Congress set aside each year for

that purpose. In every year since 1994, BIA has been limited by the appropriations caps and has only been able to pay approximately 77% to 92%, annually, of the tribal contractors' contract support costs. See United States General Accounting Office Report to Congressional Committees: Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed, pg. 80 (Relevant Page attached as Exhibit C). Because of these funding shortfalls each year, BIA distributes contract support costs on a pro rata basis to all tribal contractors who incurred such costs. See Ramah Navajo School Board v. Babbitt, 87 F.3d 1338, 1348-1349 (D.C. Cir. 1996) (explaining how a pro rata reduction scheme would effectuate the original statutory scheme of the ISDA and comply with congressional intent behind the appropriations statute). The Indian Health Service has also experienced shortfalls in CSC appropriations, but has adopted different policies and guidance for its distribution. See, e.g., Cherokee Nation v. Thompson, 311 F.3d 1054, 1058 (10th Cir. 2002), rev'd by 125 S. Ct. 1172, 1181 (2005).

B. Ramah Navajo Chapter v. Norton (the "BIA case")

In 1990, tribes who had ISDA contracts with BIA brought a class action against officials of the BIA and DOI alleging that DOI and BIA exceeded their statutory authority under the ISDA by failing to fully fund the tribes' contract support costs. The original claim in Ramah Navajo Chapter v. Norton (D. NM) related to a dispute over the formula that DOI's Office of Inspector General (OIG) (and its successor, the National Business Center ("NBC")) used to calculate the indirect contract support costs owing to tribes from all of the agencies that were to share those costs. Specifically, the plaintiffs in the Ramah Navajo Chapter case (hereinafter "RNC plaintiffs") challenged OIG's inclusion in the indirect cost rate calculation those costs associated with other agencies that fail to pay their share of a tribes'

indirect costs, which resulted in a concomitant reduction in the BIA's share of the indirect contract support cost obligation. See First Amended Complaint, at ¶¶ 9-10, 13-14 (attached as Exhibit 1 to Plfs' Mot. to Transfer). In other words, although indirect costs are, by their nature, costs shared by agencies to keep the overall costs down, the RNC plaintiffs alleged that if one agency failed to fund their share of the indirect costs incurred, BIA had to make up the difference even though those costs were attributed to that other agency. Id. at ¶ 13.

The district court certified a class of BIA tribal contractors in 1993. See Class Certification Order filed October 1, 1993 (attached hereto as Exhibit D). The district court later upheld the validity of the indirect cost formula, but the Tenth Circuit reversed and remanded, rejecting DOI's and BIA's argument that BIA should be liable only for its proportionate share of the indirect costs and concluding that BIA was responsible for paying for the contract support costs of other agencies that failed to pay their full share of indirect costs.<sup>2</sup> See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1463 (10<sup>th</sup> Cir. 1997).

On remand, the parties in the BIA case entered a partial settlement in 1998 on certain monetary claims arising prior to 1994 based on BIA's use of this formula for calculating a tribe's indirect cost rate. See Ramah Navajo Chapter v. Babbitt, 50 F. Supp.2d 1091 (D. N.M. 1999). For the claims

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<sup>2</sup> In response to the Tenth Circuit's ruling, Congress amended ISDA in 1998 to clarify that IHS was prohibited from expending its contract support cost appropriations for any contract support costs that were not directly attributable to IHS contracts. See 25 U.S.C. § 450j-2. The next year, Congress passed a similar amendment for contract support cost funds expended by the DOI and BIA. See 25 U.S.C. § 450j-3. Thus, even in light of the Tenth Circuit's ruling, DOI no longer has the authority to adjust the indirect cost rates to require BIA to pay costs that are attributable to other federal agencies.

involving years 1994 forward, defendants in the BIA case decided to proceed with the litigation because, since 1994, Congress placed statutory caps on the amount of funding that the Secretary of the Interior and BIA is permitted to pay tribal contractors for contract support under their ISDA contracts, thereby limiting the government's liability to pay additional amounts of contract support costs.

The RNC plaintiffs in the BIA case subsequently moved to amend their complaint in 1999 to include a new class representative and a new claim that the BIA violated the ISDA by failing to fully fund indirect contract supports costs on BIA's own contracted programs even under the "illegal" contract support formula due to the insufficiency of appropriations since FY 1992. See Stipulated Order Allowing Intervention and Amendment of the Amended Complaint, dated September 30, 1999 (attached hereto as Exhibit E). In other words, the RNC plaintiffs claim that, even using the challenged indirect cost rate formula, BIA failed to fully fund indirect contract support costs on its own contracted programs. In 2002, the RNC plaintiffs again moved to amend their complaint to include a new class representative and a new claim alleging that the BIA has violated the ISDA by failing to pay any direct contract support costs to tribes for fiscal years 1993 to the present.<sup>3</sup> See Stipulated Order Granting Ramah Navajo Chapter's Motion To Amend Complaint To Add New Class Claim dated March 27, 2002 (attached hereto as Exhibit F).

In 2002, the district court approved another partial settlement of all of the RNC plaintiffs' additional monetary claims for years in which there were no appropriation caps on the payment of contract support costs (1992-1994). See Ramah Navajo Chapter v. Norton, 250 F. Supp.2d 1303

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<sup>3</sup> The claim relating to the payment of direct, as opposed to indirect, contract support costs is not included in the two IHS actions.

(D.N.M. 2002). The parties in the BIA case agreed that the claims for money damages relating to years affected by the appropriations caps (1994 to the present) were to be resolved on the merits. Id. at 1307. The parties have filed cross-motions for summary judgment on the issue of whether the appropriations caps limit the federal government's liability to pay additional contract support costs. Consideration of those motions was stayed pending the Supreme Court's decision in Cherokee Nation of Oklahoma, et al. v. Leavitt, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1172 (2005).<sup>4</sup> Since the stay was imposed, the parties in the BIA case have been engaged in settlement discussions concerning the RNC plaintiffs' claims for equitable relief relating to both direct and indirect contract support costs.<sup>5</sup>

In short, the only issues remaining in the BIA case are (1) whether, as a matter of law, BIA's appropriations caps preclude the monetary relief that the RNC plaintiffs are seeking for 1994 forward; (2) whether, as a matter of law, the RNC plaintiffs are entitled to any equitable relief on their claim relating to the indirect contract support rate formula where the 1999 amendment of the ISDA, codified at 25 U.S.C. § 450j-3, specifically precludes the BIA from paying contract support costs directly attributable to other non-paying agencies; and (3) whether, as a matter of law, the RNC plaintiffs are

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<sup>4</sup> The Cherokee case involved claims against IHS for contract support costs in years in which there were no appropriations cap limiting IHS' liability to pay additional contract support costs. It is the defendants' position in the BIA case that the Cherokee decision has no relevance to the legal issues remaining in the BIA case because the Cherokee ruling was limited to years in which IHS had no capped appropriation for contract support costs. Because there are no "uncapped" year claims remaining in BIA's case, Cherokee will have no impact on the underlying issues remaining in the BIA case.

<sup>5</sup> As the movants indicated in their motion to transfer, the parties in the BIA case are currently engaged in settlement negotiations on the equitable claims. See Brief in Support of Plfs' Motion to Transfer at pg. 3, n.3. The movants note that they do not intend their transfer motion to impact the ongoing settlement negotiations in the BIA case.

entitled to equitable relief as to the direct contract support cost claim (a claim that is not at issue in the IHS cases).

### ARGUMENT

#### **I. BECAUSE THE ONLY COMMONALITY BETWEEN THE THREE ACTIONS INVOLVES ULTIMATE QUESTIONS OF LAW, NOT PRE-TRIAL QUESTIONS OF FACT, TRANSFER AND CONSOLIDATION IS UNWARRANTED**

The multi-district litigation statute provides that, “[w]hen civil actions involving one or more common questions of fact are pending in different districts,” actions may be transferred to any district for “coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a). Thus, a transfer will not be appropriate merely because one or more actions involve common questions of law. See, e.g., In re American Home Products Corp. “Released Value” Claims Litigation, 448 F. Supp. 276, 278 (J.P.M.L. 1978) (transfer denied because “the predominant, and perhaps only, common aspect in these actions is the legal question of what measure of damages is applicable.”); In re Oklahoma Insurance Holding Company Act Litigation, 464 F. Supp. 961, 965 (J.P.M.L. 1979) (transfer inappropriate where the questions presented were “at best, a mixed question of fact and law, and that the legal aspects of these questions clearly predominate”).

The movants here acknowledge that Ramah Navajo Chapter v. Norton (the BIA case) “has been significantly litigated,” but allege that the “remaining claims involve the same questions of fact and law as the two cases involving IHS contracts.” See Brief in Support of Plaintiffs’ Motion to Transfer, at 3. However, plaintiffs have failed to identify any common questions of fact that exist between the fifteen-year-old BIA case and the two IHS cases. The reason for the omission is obvious. First, the definition of the plaintiff class in the BIA case is entirely different from the definition of the putative

classes in the IHS actions. The BIA class consists of tribal contractors who contract with the Secretary of the Interior. See Class Certification Order filed October 1, 1993 (attached hereto as Exhibit D). By contrast, the putative classes in the IHS cases consist of tribal contractors who contract with IHS. See Second Amended Class Action Complaint, Tunica-Biloxi Tribe of Louisiana, et al. v. United States, at ¶ 27 (attached as Exhibit 2 to Plfs' Motion to Transfer); First Amended Complaint, Pueblo of Zuni v. United States, at ¶ 53 (attached hereto as Exhibit 3 to Plfs' Motion to Transfer).

Second, even if there is some overlap between actual class members in the BIA case and putative class members in the IHS cases, the claims raised in the BIA and IHS cases are based on different contracts with different agencies. In other words, one tribe who is both a contractor with both BIA and IHS would still have two separate contracts; one with BIA and one with IHS. Thus, even if the parties are allowed discovery in the IHS cases on the issues relating to class certification or on the merits of the contract claims against IHS, that discovery would not involve any facts relating to the BIA contracts. Moreover, because the IHS cases involve different putative classes from the BIA case, there is no chance of inconsistent class certification rulings. A transfer in these circumstances is inappropriate. See, e.g., In re Airline "Age of Employee" Employment Practices Litigation, 483 F.Supp. 814, 816 (J.P.M.L. 1980) (transfer unwarranted because the "[e]mployment practices of eight different airlines are involved in this litigation and it appears, on the basis of the record before us, that the principle factual issues will be different as to each airline."); In re American Home Products Corp. "Released Value" Claims Litigation, 448 F.Supp. at 278 (transfer denied where "the factual issues presented are primarily, if not entirely, unique questions pertaining to the numerous distinct shipments involved in each action").

Third, IHS and BIA receive funds from Congress through two separate appropriations with different statutory limitations. Compare e.g. Department of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (IHS' 1994 appropriation) (attached hereto as Exhibit G) with Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1389 (1993) (BIA's 1994 appropriation) (attached hereto as Exhibit A). Thus, resolution of the question of whether the agencies are liable to fully fund their contractors' contract support costs beyond the amount appropriated by Congress for that purpose actually would involve two different legal inquiries in the BIA and IHS cases.

Finally, the fact that both IHS and BIA tribal contractors use the same rates calculated by DOI's OIG (and its successor NBC) under a formula challenged in all three actions does not mean that the three cases have common questions of fact that would justify a consolidation of pretrial proceedings. For example, in In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving IBM, 302 F. Supp. 796, 799 (J.P.M.L. 1969), the Judicial Panel on Multidistrict litigation held that “[i]f only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witnesses or promote judicial efficiency.”), quoting the legislative history of Section 1407, Senate Report 454 to accompany F159, pages 4 & 5. In the circumstances presented here, there is even less reason to transfer and consolidate for pretrial proceedings given that the only questions to be resolved are whether, as a matter of law, the indirect cost rate formula is contrary to existing law, see 25 U.S.C. §§ 450j-2, j-3 (statutory provisions enacted after the Tenth Circuit's ruling in the Ramah case), and whether the agencies under their respective appropriations are liable to fully

