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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
RESPONSE TO AVERMENTS IN PLAINTIFFS' MOTION TO TRANSFER AND
CONSOLIDATE OR JOINTLY MANAGE FOR PRETRIAL PROCEEDINGS**

Pursuant to Rule 7.1(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Gail Norton, the Secretary of the Interior, Earl Devaney, Inspector General, U.S. Department of the Interior ("DOI"), and the Assistant Secretary of the Interior (collectively "DOI Defendants"), by and through undersigned counsel, hereby respond as follows to the correspondingly numbered paragraphs of the plaintiffs' Motion to Transfer and Consolidate or Jointly Manage for Pre-trial Proceedings filed by Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board (hereinafter "Movants"):

1. The first sentence is denied except to admit that a putative class action captioned Tunica-Biloxi Tribe of Louisiana & Ramah Navajo School Board v. United States, Secretary Leavitt, & Secretary Norton, No. 02-2413, has been filed and is pending in the United States District Court for the District of Columbia (hereinafter referred to as "Tunica") and to admit that

a putative class action captioned Pueblo of Zuni v. United States, Secretary Leavitt, & Director Grim, No. 01-1046, has been filed and is pending in the United States District Court for the District of New Mexico (hereinafter referred to as "Zuni"). The remaining allegations in the first sentence contain Movants' characterization of the claims raised in these two putative class action complaints. The complaints speak for themselves, and the DOI Defendants respectfully refer the Panel to those complaints for a full and accurate statement of the claims contained therein. The second sentence is denied except to admit that a class action captioned Ramah Navajo Chapter et al. v. Gail Norton, Secretary of the Interior, Earl Devaney, Inspector General, the Assistant Secretary of the Department of the Interior, and the United States, No. 90-957, brought by tribal contractors who contract with the Bureau of Indian Affairs ("BIA"), a bureau of DOI, is currently pending in the United States District Court for the District of New Mexico (hereinafter referred to as "Ramah"). The remaining allegations in the second sentence contain Movants' characterization of the claims raised in the Ramah complaint. The complaint speaks for itself, and the DOI Defendants respectfully refer the Panel to that complaint for a full and accurate statement of the claims contained therein. The third sentence is denied, except to admit that the Secretary of the U.S. Department of Health and Human Services ("HHS") and the Secretary of the Interior both administer the Indian Self-Determination and Education Assistance Act (hereinafter referred to as "ISDA"). The Panel is referred to the provisions of the ISDA, 25 U.S.C. §§ 450 et seq. for a full and accurate statement of its contents.

2. This paragraph is admitted.

3. The first sentence of this paragraph is denied, except to admit that Zuni and Tunica were brought on behalf of Indian Tribes and Tribal Organizations that contract with the

Secretary of HHS and the Indian Health Service ("IHS"), a component of HHS, and that Ramah was brought on behalf of a class of Indian Tribes and Tribal Organizations that contract with the Secretary of the Interior and BIA. The remaining allegations in the first sentence contain Movants' characterization of the claims raised in Zuni, Tunica, and Ramah. The Complaints filed in those actions speak for themselves and the DOI Defendants respectfully refer the Panel to those complaints for a full and accurate statement of those three actions. The second sentence is admitted. The third sentence is denied, except to admit that a motion for class certification in Zuni was filed on March 9, 2005, and then withdrawn by notice on April 20, 2005. With regard to the fourth sentence of this paragraph, the DOI Defendants admit that a motion for class certification was denied without prejudice in Tunica, but are without knowledge or information with respect to the remaining allegation in this sentence. Footnote one is admitted, except to deny that the Tunica complaint filed in the District of New Mexico was unserved.

4. The first sentence of this paragraph is denied, except to admit that the complaints in Ramah, Zuni, and Tunica raise some common questions of law. The Panel is referred to the complaints of the three actions for a full and accurate statement of their contents. The second sentence is denied, except to admit that (1) the Ramah complaint involves the alleged underpayment of indirect CSC and the alleged nonpayment of direct CSC by the DOI and BIA, (2) the Zuni complaint alleges that IHS breached Zuni's contracts by underpaying the amount of indirect CSC that IHS was required to pay under the ISDA and Zuni's individual contracts, and (3) the Tunica complaint alleges that IHS underpaid the amount of indirect CSC that IHS was required to pay under the ISDA and the plaintiffs' individual contracts. The Panel is referred to the three complaints for a full and accurate statement of their contents. The third sentence is

denied, except to admit that all three of the cases appear to involve the legal issue of whether an express limitation (a “cap”) in an appropriations statute that directs an agency not to expend funds beyond a certain amount for a particular purpose would be a legally sufficient basis for a federal agency to deny the liability of that agency or the United States to pay in excess of that amount.

5. This paragraph is denied on the basis that the cases do not raise common questions of fact.

6. The first clause of this paragraph is denied on the basis that transfer and consolidation or joint management of the three actions will not serve the interests of the parties and the witnesses. The second clause of this paragraph is denied on the basis that in either district, the District of Columbia or the District of New Mexico, witnesses will still be required to give depositions in disparate forums. The third clause of this paragraph is denied on the basis that, even if transfer is denied, any discovery in Tunica and Zuni will not be duplicative of discovery already provided in Ramah.

7. The first sentence is admitted. The second sentence is denied, except to admit that some tribal contractors who have contracts with BIA and are class members in the Ramah case may also have contracts with the IHS and thus be putative class members in the cases against IHS. The Panel is referred to the complaints filed in the three actions for a complete and accurate description of the proposed class definitions. The third sentence is denied on the basis that the class already certified in Ramah has a different class definition than that proposed in either Tunica and Zuni and thus a single class notice or supplementary notice could not be issued to the existing Ramah class in the event that a class was certified in either Tunica or Zuni. The

fourth sentence is denied on the basis that the class in Ramah consists of Indian tribes or tribal contractors that have contracts with the Secretary of the Interior and BIA, whereas the putative classes in the Tunica and Zuni cases consist of Indian tribes or tribal contractors that have contracts with the Secretary of HHS and IHS, so that adjudication by a single court will neither promote judicial efficiency, promote “coordination or symmetry” with the class already certified nor is it needed to prevent competing or conflicting claims for class certification. The fifth sentence is denied, except to admit that the Secretaries of HHS and Interior both administer the ISDA and that 25 C.F.R. Part 900 are regulations of the BIA and the IHS. This denial is based on the fact that Congress appropriates funding for the two agencies separately, which are made in different amounts and subject to different requirements.

8. The first sentence of this paragraph is denied, except to admit 25 C.F.R. Part 900 are regulations of BIA and IHS and to admit that 61 Fed. Reg. 32,482 (1996), states, inter alia, “The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) hereby issue a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103-413, the Indian Self-Determination Contract Reform Act of 1994. This joint rule, as required by section 107(a)(2)(A)(ii) of the Act, will permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation[,]” and to admit that the Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I of the Indian Self-Determination and Education Assistance Act quotes from 25 C.F.R., Part 900 by stating, inter alia, “It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act.” The Panel

is referred to the regulations and the Internal Agency Procedures Handbook for a full and accurate statement of their contents.

9. This paragraph is denied on the basis that consolidation or joint management will not conserve judicial resources in light of the various procedural postures of the three cases and the individualized nature of the questions of fact presented by the merit claims made in each of the cases.

10. This paragraph is denied on the basis that the three cases do not satisfy the statutory requirements of 28 U.S.C. § 1407.

11. The first sentence of this paragraph is denied, except to admit that the United States Court of Appeals for the Tenth Circuit in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), considered, inter alia, a challenge to the methodology used by the National Business Center of the DOI (and its predecessor, the Office of the Inspector General) to calculate indirect cost rates for BIA contractors and held that although the ISDA was ambiguous with respect to whether this methodology was valid, the Court would apply a canon of construction to construe the ambiguity in the plaintiffs' favor. The DOI Defendants further admit that the claims in Tunica and Zuni have posed similar, although not identical, challenges. The Panel is referred to Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), and the three complaints for a full and accurate statement of their contents. The second sentence is admitted. The third sentence is denied, except to admit that some tribal contractors who have contracts with the Secretary of the Interior and BIA and are class members in the Ramah case also have contracts with the IHS and be putative class members in the Zuni and Tunica cases, and to admit that there may be some common questions of law, but no common questions of fact, between the BIA and

IHS cases.

12. Denied on the basis that the Honorable C. Leroy Hansen, unlike the Honorable Reggie B. Walton, has not adjudicated many of the legal defenses expected to be raised in the Tunica and Zuni cases, except to admit that Judge Hansen is well acquainted with the Ramah case and the issues presented therein.

13. The DOI Defendants are without sufficient knowledge to assess the accuracy of the representation made in the first sentence. The second, third, and fourth sentences are admitted. The DOI Defendants are without sufficient knowledge to admit or deny the representation made in the fifth sentence.

14. This paragraph is admitted.

15. This paragraph contains a characterization of Movants' intention to which the DOI Defendants are without sufficient knowledge or information to admit or deny.

The DOI Defendants deny every averment in the Motion not specifically addressed above.

WHEREFORE, having fully responded, the DOI Defendants pray that the Motion be denied.

Respectfully submitted,

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Dated: April 27, 2005

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**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE INDIAN TRIBES CONTRACT)
SUPPORT COST LITIGATION)

MDL Docket No. 1690

PROOF OF SERVICE

I, Karen K. Richardson hereby certify that on this 27th day of April, 2005, I caused the following documents to be served on the counsel of record in this action:

1. Defendants Gail Norton and Earl Devaney's Memorandum In Opposition To Plaintiffs Motion To Transfer And Consolidate Or Jointly Manage For Pretrial Proceedings, and exhibits in support thereof; and

2. Defendants Gail Norton and Earl Devaney's Response to the Averments in Plaintiffs' Motion to Transfer and Consolidate or Jointly Manage for Pre-trial Proceedings.

Copies of these documents were sent via Federal Express mailing to:

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Judicial Panel on Multidistrict Litigation - Panel Attorney Service List

Docket: 1690 - In re Indian Tribes Contract Support Costs Litigation

Status: Pending on / /

Insuffree District:

Judge:

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BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re: Indian Tribes Contract
Support Cost Litigation

MDL Docket No. 1690

**EXHIBITS IN SUPPORT OF BRIEF IN OPPOSITION BY UNITED STATES, HHS
SECRETARY LEAVITT, AND IHS DIRECTOR GRIM**

- Exhibit A Tunica Order of May 6, 2003.
- Exhibit B Tunica Memorandum Opinion of December 9, 2003, as amended
January 20, 2004.
- Exhibit C Zuni Scheduling and Discovery Order, and Rulings on Pending
Non-Dispositive Motions of April 21, 2005.
- Exhibit D Cherokee Nation Complaint of March 5, 1999.
- Exhibit E Zuni Initial Pretrial Report of April 15, 2005.

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF
LOUISIANA,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 02-2413 (RBW)

ORDER

Currently before the Court is the Defendants' Motion to Stay Plaintiffs' Motion for Class Certification Pending the Resolution of Defendants' Motion to Dismiss [#22]. On March 31, 2003, the defendants filed a motion to dismiss the complaint in this matter. Plaintiffs' response to this motion is due May 19, 2003. On April 10, 2003, plaintiffs filed a motion for class certification. Defendants thereafter filed the instant motion seeking to stay the Court's decision regarding plaintiffs' motion for class certification, pending resolution of defendants' motion to dismiss.

"[T]he Court may properly refuse to entertain motions for class certification and related discovery until dispositive motions have been resolved." Ladd v. Equicredit Corp., No. Civ.A. 00-2688, 2001 WL 175236, at *1 (E.D. La. Feb. 21, 2001) (citation omitted). In Ladd, the Court granted the defendant's motion to "stay discovery on all class certification issues pending resolution of its Motion for Summary Judgment[.]" Id. The Court noted that the motion for summary judgment could potentially dispose of plaintiffs' claims and "[s]ince a decision on

merits may render all class certification issues moot, the Court may properly refuse to entertain motions for class certification and related discovery until dispositive motions have been resolved." Id. (citation omitted). In addition, the court noted that because "the merits of a case have no impact on whether a class may be properly maintained, and a court may decide the merits of a case regardless of whether it is certified as a class action[,]" the interests of justice and judicial economy favored staying "all class certification issues until it [was] determined whether Ladd ha[d] any valid claims against EquiCredit . . ." Id. See also United Mine Workers of America v. Arch Mineral Corp., No. Civ.A. 92-0742, 1992 WL 392598, at *1 (D.D.C. Sept. 18, 1992) (staying all discovery relating to class certification pending court's decision on the motion to dismiss).

In this case, the Court concludes that the interests of justice and judicial economy favor staying the Court's decision on the class certification issue until a ruling on the defendants' motion to dismiss is rendered.¹ Accordingly, it is hereby

ORDERED that Defendants' Motion to Stay Plaintiffs' Motion for Class Certification Pending the Resolution of Defendants' Motion to Dismiss [#22] is granted.

SO ORDERED on this 6th day of May, 2003.

REGGIE B. WALTON
United States District Judge

¹The Court held the initial scheduling conference in this matter on April 30, 2003, and at that time stated its intention to issue a ruling regarding defendants' motion to dismiss no later than October 24, 2003.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF
LOUISIANA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 02-2413 (RBW)

AMENDED MEMORANDUM OPINION

Plaintiffs seek to recover in this lawsuit various costs incurred under self-determination contracts that were entered into by the parties for the provision of health services to Indian tribes pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq. (2000). Currently before the Court is the defendants' motion to dismiss the plaintiffs' claims. For the reasons set forth below, the Court concludes that this motion must be granted in part and denied in part.

I. Factual Background

The plaintiffs in this matter are the Tunica-Biloxi Tribe of Louisiana ("Tunica-Biloxi"), a federally recognized Indian tribe, and the Ramah Navajo School Board, Incorporated ("Ramah"), a New-Mexico non-profit corporation that was established by the Ramah Navajo Chapter of the Navajo Nation. Compl. ¶ 9.¹ Plaintiffs brought this

¹References to "Compl." are to the Second Amended Class Action Complaint that was filed on March 12, 2003.

lawsuit against several federal defendants² for breach of contract and breach of trust regarding contracts for the provision of health services to the tribes' members that were entered into pursuant to the ISDA.

The ISDA was enacted to relinquish federal control of service programs benefitting Indian tribes and to acknowledge "the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities" 25 U.S.C. § 450a(a). Pursuant to the ISDA, "[t]he Secretary³ is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct and administer programs or portions thereof" Id. § 450(f)(a)(1). Self-determination contracts are contracts "entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law[.]" Id. § 450b(j). A tribe is entitled to receive the same amount of money the Secretary would have received to administer the programs covered under the contract, as the programs at issue are those that traditionally had been administered by the federal government for the benefit of the tribes. Id. § 450j-1(a)(1). These funds are characterized as the "Secretarial amount."

²The defendants include the United States, the Secretary of Health and Human Services, Tommy Thompson, the Secretary of the Interior, Gale Norton, the Interim Director of the Indian Health Service of the Department of Health and Human Services, Charles W. Grim, the Inspector General of the Department of the Interior, Earl Devaney, and the Director of the Department of the Interior's National Business Center, Timothy G. Vigotsky. Compl. ¶¶ 10-13(B).

³"Secretary', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both[.]" 25 U.S.C. § 450b(i).

