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

PUEBLO of ZUNI, Plaintiff, v. 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.	No. CIV 01-1046 LH/LEG

DEFENDANTS' MOTION AND INCORPORATED MEMORANDUM TO STAY BRIEFING ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND TO STAY DISCOVERY

INTRODUCTION

Defendants, by and through undersigned counsel, hereby move to stay briefing on Plaintiffs' Motion for Class Certification, filed on March 9, 2005, and to stay merits discovery, as outlined in the Court's Order of March 11, 2005, pending an opportunity for Defendants to answer or otherwise respond to the First Amended Complaint as described herein.

This lawsuit involves the Pueblo of Zuni's ("Zuni") challenges to the amount of funding that it received from the Indian Health Service ("IHS") under self-determination contracts it entered into with the Secretary of the U.S. Department of Health and Human Services ("HHS"), as authorized by the Indian Self-Determination and Education Assistance Act ("ISDA"). (Am. Compl. ¶ 4.) Shortly after this lawsuit was filed, Plaintiff moved for a stay of proceedings

pending final resolution of a related case, Cherokee Nation v. Leavitt. (Docketed as #6.) On March 1, 2005, the Supreme Court issued a decision in Cherokee Nation. See 125 S. Ct. 1172 (2005). The Supreme 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 these years on the basis of insufficient congressional appropriations. See id. at 1181.

Defendants recognize that the Cherokee Nation decision unquestionably will have some impact on this case and have no intention of relitigating the issues that were conclusively decided by the Supreme Court. Nonetheless, Defendants have identified certain issues in the First Amended Complaint that may preclude this Court's jurisdiction over some or all of the claims in the action on entirely different grounds than those rejected by the Supreme Court. These issues merit further review and, as appropriate, briefing and resolution. The Supreme Court has directed that subject matter jurisdiction must be determined in all cases as a threshold matter, see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998), and a stay pending resolution of any jurisdictional motion is the most efficient and appropriate way to proceed in this circumstance. Following this course of action also satisfies the directive of Federal Rule of Civil Procedure 1, which is that the Federal Rules should be constructed "to secure the just, speedy, and inexpensive determination of every action." To the extent that the Court does ultimately determine that it lacks jurisdiction over some or all of the claims, the case would either be dismissed, obviating the need for any further proceedings, or narrowed, in which the class certification and merits issues could be more efficiently resolved with the appropriate focus. For these reasons, merits discovery and class certification briefing should be stayed until the parties

and the Court resolve whether the Court has jurisdiction over some or all of the claims in the First Amended Complaint.

FACTS RELEVANT TO THIS MOTION

Zuni is a party to self-determination contracts with the Secretary of HHS, as authorized by the ISDA. (Am. Compl. ¶ 4.) In its First Amended Complaint, (docketed as #5), Zuni challenges the amount of funding it received from IHS, an agency of HHS, under various self-determination contracts on behalf of themselves and other contracting tribes. (Am. Compl. ¶ 1.) They appear to seek monetary relief related to the alleged underpayment of indirect contract support costs[1] ("CSC") on three grounds: First, Zuni alleges that the IHS failed to pay Zuni the full amount of indirect CSC because IHS failed to adjust Zuni's indirect cost rate to take into account the full amount of indirect CSC associated with IHS's programs. (Am. Compl. ¶¶ 66-73.) Second, Zuni alleges that IHS failed to pay the full amount of indirect CSC associated with Zuni's contracts in effect during fiscal years 1993-1998, even when using the purportedly incorrect indirect cost rate. (Am. Compl. ¶¶ 75-80.) Third, Zuni alleges that IHS failed to pay all of the indirect CSC associated with Zuni's new and expanded ISDA contracts in effect during fiscal years 1993-1998. (Am. Compl. ¶¶ 81-87.) Finally, Zuni seeks a declaratory judgment that a particular statutory provision, called § 314, does not bar some or all of the claims at issue in this lawsuit. (Am. Compl. ¶¶ 88-92.)

On December 28, 2001, the Court stayed this case pending the resolution of Cherokee Nation v. Leavitt, a case that was then pending before the Tenth Circuit and later before the

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[1] Indirect CSC are administrative costs that benefit more than one program or service under contract. See 25 U.S.C. § 450j-1(a)(3)(A)(ii); id. § 450b(f).

Supreme Court. (Docketed as #8.) On the same day, the Court also ordered that Defendants would have twenty (20) days from the date the stay was lifted to file an answer. (Docketed as #9.)

On December 9, 2002, two other IHS contractors, Tunica-Biloxi and Ramah Navajo School Board, filed a class action lawsuit in the District of Columbia challenging the underpayment of indirect CSC to them by IHS.[2] See Tunica-Biloxi Tribe et al. v. United States et al., No. 02-2413 (D.D.C.). This case was assigned to The Honorable Reggie B. Walton. On March 31, 2003, the United States filed a motion to dismiss many of the Tunica plaintiffs' claims under Rules 12(b)(1) and 12(b)(6). On May 6, 2003, Judge Walton stayed class certification pending resolution of the motion to dismiss, and also stayed discovery pending the resolution of the motion to dismiss. See Ord. of May 6, 2003 (attached as Tab 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 one of the jurisdictional defenses raised. See Mem. Opin of Dec. 9, 2003, as amended Jan. 20, 2004 (attached as Tab B). While the parties were engaged in jurisdictional discovery, the Supreme Court granted certiorari in the Cherokee Nation case, and soon thereafter, Judge Walton stayed the Tunica matter pending the Supreme Court's decision.

On March 1, 2005, the Supreme Court issued an opinion in the Cherokee Nation case, holding that, because Congress had appropriated a lump-sum appropriation for the Indian Health Service in fiscal years 1994-1997, IHS could not defend a claim for breach of an ISDA contract

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[2] The case was originally filed in this district, but was voluntarily dismissed shortly thereafter. See Tunica-Biloxi Tribe et al. v. United States et al., No. 02-1465 (D.N.M.).

in effect during these years on the basis of insufficient congressional appropriations. See 125 S. Ct. at 1181. Thus, on March 9, 2005, Zuni filed an unopposed motion to lift the stay in this case. (Docketed as #25.) On the same date, Zuni also filed a motion for class certification. (Docketed as #26.) On March 11, 2005, Magistrate Judge Garcia issued an Initial Scheduling Order, setting a date by which the parties must meet and confer, submit a joint proposed scheduling order, make their initial disclosures, and appear for a Rule 16 scheduling conference. (Docketed as #29.) On March 17, 2005, the Court lifted the stay and ordered the parties to confer about when a status conference should be held.[3] (Docketed as #32.) Therefore, the case schedule at this time is as follows:

March 28:	Defendants' Opposition to Plaintiff's Motion for Class Certification Due (per Local Rule 7.6)
April 1:	Meet and Confer (per March 11, 2005 Scheduling Order)
April 6:	Defendants' Answer or Dispositive Motion Due (Per Order of the Court dated December 28, 2001)
April 15:	Joint Scheduling Report/Initial Disclosures Due (Per March 11, 2005 Scheduling Order)
April 20:	Rule 16 Conference in Albuquerque (Per March 11, 2005 Scheduling Order)
Unscheduled:	Status Conference (Per Order of the Court dated March 17, 2005).

[3] As of the date of this filing, the stay has not yet been lifted in the Tunica case.

ARGUMENT

I. DEFENDANTS SHOULD HAVE AN OPPORTUNITY TO RAISE ANY JURISDICTIONAL DEFENSES AVAILABLE BEFORE EITHER CLASS CERTIFICATION OR MERITS BRIEFING COMMENCES.

Defendants seek a stay of briefing and resolution of Plaintiffs' Motion for Class Certification as well as a stay of merits discovery. It is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

Defendants seek an orderly and manageable schedule at the outset of the case in order to carefully and thoroughly address the claims raised in the First Amended Complaint, particularly in light of the Supreme Court's recent decision in Cherokee Nation v. Leavitt. In this respect, Defendants seek an opportunity to answer or otherwise respond to the First Amended Complaint before briefing the motion for class certification or commencing discovery. Defendants have identified certain issues in the First Amended Complaint that may deprive this Court of jurisdiction over some or all of this action, issues that were not before the Supreme Court in the Cherokee Nation case. Because a court must determine that it has jurisdiction before proceeding to other matters, it serves judicial economy to brief and rule on the scope of the subject matter jurisdiction in this case before it proceeds any further. Defendants thus request that briefing on class certification as well as merits discovery be stayed for forty-five (45) days in order to give Defendants an opportunity to file an answer or a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

A. Courts Must Determine Their Subject Matter Jurisdiction As a Threshold Matter.

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. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Id. Thus, until a court determines that it has jurisdiction over a claim, "[a] defendant should not be put to the trouble and expense of any further proceeding[s] . . . ." United Transp. Serv. Employees v. Nat'l Mediation Bd., 179 F.2d 446, 454 (D.C. Cir. 1949); 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 (2000)); Payton v. USDA, 337 F.3d 1163, 1167 (10th Cir. 2003) ("The jurisdictional issue must be resolved first. 'Jurisdiction is a threshold question that a federal court must address before reaching the merits . . . .'") (quoting Steel Co., 523 U.S. at 94-95).

Another court in Delaware explained it this way:

> There can be little question but when the jurisdiction of the Court is challenged or denied, it is the duty of the Court, on application of a party or on its motion, to determine the question of jurisdiction before proceeding with other aspects of the case. If the Court has no jurisdiction, it can take no further action . . . .

Allied Poultry Procs. Co. v. Polin, 134 F. Supp. 278, 279-80 (D. Del. 1955).

Even beyond the explicit directive from the Supreme Court that courts must consider their jurisdiction at the outset of every case, courts have specifically stayed class certification and discovery pending the resolution of Rule 12(b)(1) motions. See, e.g., United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79-80 (1988) ("It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters."); Marcus v. Kan. Dep't of Revenue, 170 F.3d 1305, 1308 (10th Cir. 1999) (noting that district court stayed both class certification and discovery pending the resolution of dispositive motions); Tunica-Biloxi Tribe v. United States, No. 02-2413, slip op. at 2 (D.D.C. May 6, 2003) (staying class certification pending resolution of motion to dismiss); Roshan v. Smith, 615 F. Supp. 901, 905 n.3 (D.D.C. 1985) (reciting that the defendants' motion to stay consideration of class certification until after ruling on the defendants' dispositive motion was granted); United Mine Workers v. Arch Mineral Corp., No. 07-0742, 1992 WL 392598, *4 (D.D.C. Sept. 18, 1992) (staying discovery related to class certification pending resolution of defendant's motion to dismiss); Ladd v. Equicredit Corp., No. 00-2688, 2001 WL 175236, at *1 (E.D. La. Feb. 21, 2001) (declining to entertain motion for class certification or to permit related discovery until resolution of dispositive motions).

Recent amendments to the Federal Rules of Civil Procedure also relax the timing of class certification decisions. The December 2003 revision to Rule 23(c)(1)(A) deleted the previous requirement that a decision on certification be made "as soon as practicable," recognizing that such a decision should be made instead "at an early practicable time" to allow for consideration of motions to dismiss. See Fed. R. Civ. P. 23(c)(1)(A) & advisory committee's note. This is

necessary so that an initial decision can be made as to "how the case will be tried" by the parties, and so that an informed decision can be made regarding whether the class mechanism is a preferable to individual adjudication. See id. The Note recognizes that a "party opposing the class may prefer to win dismissal or summary judgment" before class certification and approves of this practice. See id.

Postponing resolution of Plaintiff's Motion for Class Certification and merits discovery also will not prejudice Plaintiff in pursuit of its claims. In fact, it will preserve Zuni's resources in the event that the Court determines that it lacks jurisdiction over some or all of the claims. For example, if Defendants successfully raise jurisdictional defects in the First Amended Complaint such that the Court dismisses some or all of the claims, any work by Zuni on briefing class certification as well as taking merits discovery on these claims will have been an unnecessary expenditure of their time, as well as that of the Court and Defendants. Moreover, a dismissal of certain claims will sufficiently alter the issues such that rebriefing of the class certification issues–and even redefinition of the class–may be necessary.

Moreover, proceeding as requested herein not only promotes judicial economy, it best serves the members of the putative class (and may even prove to the detriment of Defendants notwithstanding the fact that they make this request). For example, if the Court stays class certification pending the resolution of any jurisdictional defects, a judgment in Defendants' favor would be binding only on Zuni and not on other potential class members. On the other hand, the putative class members might be prejudiced if a class were certified before any claims were dismissed. All of these reasons direct that a stay of class certification and merits discovery pending an opportunity for Defendants to answer or otherwise respond is most appropriate.

B. Defendants Have Identified Possible Jurisdictional Defects in the First Amended Complaint That Merit Further Investigation.

The First Amended Complaint was reactivated on March 17, 2005 upon the lifting of the stay. Defendants have not yet filed an answer, but Plaintiff has already moved for class certification and an Initial Scheduling Order has been entered. Under the normal rules of procedure, the United States would have sixty (60) days in which to file an answer or otherwise respond. See Fed. R. Civ. P. 12(a)(3). In this instance, Defendants are only asking for forty-five (45) days in order to review the allegations in the complaint, investigate whether there are threshold jurisdictional defects with the complaint, and then either file a motion to dismiss or an answer.

Some examples of possible jurisdictional defects in the First Amended Complaint are as follows. Plaintiff has raised Contract Dispute Act ("CDA") claims alleging insufficient indirect CSC funding dating back to fiscal year 1993. (Am. Compl. ¶ 70.) The Contract Disputes Act ("CDA") is incorporated into the ISDA for all claims for monetary relief. See 25 U.S.C. § 450m-1. The CDA requires, inter alia, 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. This requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim. See SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 614 (1990). Therefore, claims that were not presented to a contracting officer must be dismissed for lack of subject matter jurisdiction. Similarly, the CDA has very explicit timeliness requirements, see 41 U.S.C. §§ 605, 606, 607, 608, 609, the violation of which also renders the reviewing court without subject matter jurisdiction. See, e.g., SMS Data Prods. Group, 19 Cl.

Ct. at 615. Thus, Defendants must review Zuni's claims to ensure that the timeliness and presentment requirements of the CDA have been satisfied such that this Court has subject matter jurisdiction over these claims. Moreover, if Zuni has failed to satisfy the prerequisites to the CDA, not only must its claims be dismissed, but Zuni would not be an adequate representative of the putative class of contractors that it purports to represent. It should be determined, prior to considering class certification, exactly which of Plaintiffs' claims are viable. Notably, the United States successfully challenged similar claims brought in the Tunica case under the CDA, and some of the plaintiffs' claims in that case were dismissed at the outset of the case. See Tunica Mem. Opin. at 8-16.

Second, Defendants also must investigate whether Zuni has been seeking indirect CSC from the IHS on the basis of an out-of-date indirect cost rate. Under the applicable regulations, ISDA contractors must secure new indirect cost rates each year. See 60 Fed. Reg. 26,484, 26,506 (1995) (Attachment E, §§ D.1.a, D.1.d). Any failure to obtain new rates may render Zuni's claims unripe or not yet final. In addition, if Zuni has have been seeking and obtaining funding for indirect CSC based on rates that actually overcompensate it, Zuni may not have suffered any financial injury. As such, Zuni may not be able to allege Article III injury-in-fact. Ripeness and standing are jurisdictional requirements, see Morgan v. McCotter, 365 F.3d 882, 887-91 (10th Cir. 2004), and thus also should be decided at the outset of litigation, see Steel Co., 523 U.S. at 94-95. These are just some of the jurisdictional defenses that need to be further investigated, raised if appropriate, and resolved at the outset of the case, before the parties and the Court invest significant amounts of time in this litigation.

C. The Schedule Also Should Be Modified to Brief and Resolve Class Certification Before Merits Discovery Commences.

Just as the proper course is for a court to consider jurisdiction before class certification, it is often the best course to consider class certification before commencing merits discovery, and courts have entered orders approving this structure. See, e.g., Cronin v. Midwest Okla. Dev. Auth., 619 F.2d 856, 863 (10th Cir. 1980) (noting that the district court stayed merits discovery pending resolution of the class certification issue); Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 420 (D.N.M. 1988) (court stayed merits discovery pending resolution of class certification). Defendants thus also seek modification of the schedule to allow them to take any necessary class certification discovery and then file a response to Plaintiff's Motion for Class Certification before merits discovery commences. By way of example, it is expected that Defendants will need class certification discovery into the putative class members' compliance with the CDA as well as the putative class members' possible use of out-of-date rates as set forth above in Part B. It is also possible that Defendants will need class certification discovery into whether, in fact, the individualized nature of each ISDA contractor's contract militates against certification of a class.

D. Defendants' Proposed Schedule.

For the reasons set out above, Defendants request forty-five (45) days to review the First Amended Complaint and determine whether to file a motion to dismiss for lack of subject matter jurisdiction or whether to file an answer. Defendants request that briefing on class certification be stayed until Defendants either file an answer or the Court rules on any then-filed jurisdictional motion. Defendants also request sixty (60) days after the filing of an answer or the resolution of

a Rule 12(b)(1) motion to dismiss, whichever is earlier, to conduct class certification discovery,[4] and then twenty (20) days thereafter to file a response to Plaintiff's Motion for Class Certification. In the alternative, if the Court declines to stay class certification until either Defendants file an answer or the Court rules on any then-filed jurisdictional motion, Defendants request sixty (60) days to conduct class action discovery and twenty (20) days thereafter to file a response to Plaintiff's Motion for Class Certification.

Finally, Defendants request that merits discovery commence after the resolution of Plaintiff's Class Certification Motion. Defendants propose that within thirty (30) days of the date of the resolution of Plaintiff's Motion for Class Certification, the parties be ordered to meet and confer, file a proposed scheduling order, and request a Rule 16 Status Conference. All of these steps will ensure an orderly, manageable, and efficient proceeding in this matter.

Undersigned counsel proposed this schedule to Plaintiff's counsel on March 22, 2005. On March 24, 2005, Plaintiff's counsel indicated that he would oppose this Motion although he indicated that he will not oppose a 30-day enlargement of time to respond to the Motion for Class Certification.

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[4] Sixty days is necessary for class certification discovery because (1) Defendants must prepare discovery requests and serve them on Plaintiff, (2) Plaintiff has 30 days under Federal Rules to respond to written discovery requests, (3) Defendants must have an opportunity to review the requests and follow-up as necessary, and (4) Defendants must have an opportunity to take any necessary depositions.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Stay Briefing on Plaintiff's Motion for Class Certification and to Stay Discovery should be granted. A proposed order is attached for the Court's consideration and convenience.

Respectfully submitted,

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Dated: March 25, 2005

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2005, I sent via first class mail, postage pre-paid, a copy of Defendants' Motion and Incorporated Memorandum to Stay Briefing on Plaintiff's Motion for Class Certification and to Stay Discovery, with exhibits and proposed order, addressed to:

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