

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

RAMAH NAVAJO CHAPTER, )  
OGLALA SIOUX TRIBE, and )  
PUEBLO OF ZUNI, for themselves )  
and on behalf of a Class of persons similarly )  
situated, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
GALE NORTON, Secretary of the United )  
States Department of the Interior, *et al*, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CIV 90-0957 LH/KBM  
Filed Electronically

**PLAINTIFFS’ PROGRESS REPORT ON WORK REGARDING  
“DIRECT CONTRACT SUPPORT COST” EQUITABLE RELIEF CLAIM**

Plaintiffs, by and through undersigned counsel, hereby submit this Report on the progress made in connection with Plaintiffs’ claims for equitable relief associated with the “direct contract support cost” claims presented in this case.

As detailed below, Plaintiffs and Defendants have endeavored to work cooperatively over the past three years to produce a new Bureau of Indian Affairs (BIA) contract support cost policy in which – for the first time ever – the agency recognizes “direct contract support costs” as a required category of all contract support costs that must be paid under the Indian Self-Determination Act, 25 U.S.C. §§ 450 - 458aaa-18 (“ISDA”). A copy of the new policy accompanies this Report. See Ex. 1, BIA Nat’l Policy Mem. No. NPM-SELFD-1 (May 8, 2006). The Policy brings the Bureau’s conduct into closer conformity with the ISDA, and also represents a critical step toward securing

appropriations for the BIA to pay direct contract support cost (DCSC) requirements.

Below we detail the efforts which led to the Bureau of Indian Affairs' new policy, together with Plaintiffs' and Class Counsel's involvement in those efforts.

1. This Court in 2001 described the DCSC claims in the course of approving a partial settlement of those claims:

The DCSC claim[,] filed as a separate case by the Pueblo of Zuni, Pueblo of Zuni v. United States, D.N.M. No. CIV 0[0]-[0365] LH [sic], represents a claim for unpaid direct contract support costs under 25 U.S.C. § 450j-1(a)(2), (3), and (5)[,] and represents contract support costs that are neither included in the indirect cost pool nor in the Secretarial amount portion of a self-determination contract.

Ramah Navajo Chapter v. Norton, 250 F. Supp. 2d 1303, 1305-1306 (D. N.M. 2002). See also id. at 1307 (Fdg. 5) (discussing March 2000 Zuni complaint). The DCSC claim was subsequently merged into this action by amendment to the pleadings (id. at 1309 (Fdg. 15(e)); Dkt. Nos. 633 & 634 (Mar. 27, 2002)), and the original Zuni action was dismissed. Zuni, No. 00-0365, Dkt. No. 30 (Apr. 23, 2002) (Order dismissing complaint without prejudice). Thereafter, the parties completed, and this Court approved, a partial settlement of the DCSC damage claims covering fiscal years 1993-1994. (That settlement also resolved the CSC "shortfall" claims for fiscal years 1992 and 1993.)

The settlement expressly reserved all equitable relief issues associated with the DCSC claims. Second Partial Settlement Agreement ¶ II.B. In their request for an award of fees associated with that settlement, Plaintiffs' Class Counsel committed to continue pursuing the equitable relief claims without incurring additional fees for the class.

2. In 2002 and 2003 the parties, through counsel, conferred at length in person and telephonically to discuss resolution of the equitable relief portion of the DCSC claim (among other

matters). As the Court is aware, the BIA had theretofore never recognized DCSC costs. In the wake of this Court's approval of the Second Partial Settlement Agreement, Plaintiffs were prepared to move the Court for entry of partial summary judgment holding the BIA's failure to recognize and pay DCSC costs to be a violation of the ISDA, and further ordering the BIA to take corrective action. After considerable discussion the parties ultimately agreed that Plaintiffs would defer such motion practice in order to give Defendants (and specifically the BIA) sufficient time to consider developing a new position regarding DCSC costs without court intervention.

3. In late August 2003 the BIA formally commenced an initiative for developing a new position on direct contract support costs. The BIA began by convening four regional meetings across the country with interested Tribal contractors. Co-Plaintiff Pueblo of Zuni attended the Albuquerque regional meeting, and Class Counsel Michael Gross, Bryant Rogers and Lloyd Miller attended three of the four meetings. As a result of these meetings the BIA formed a contract support cost workgroup (CSCWG) comprised of 2 Tribal contractor representatives from each of the 12 BIA Regional Offices, plus several BIA employees knowledgeable in the area.

4. By mid-October 2003 the BIA had failed to convene any CSCWG meetings, and budget constraints had placed the future of the initiative in doubt. The BIA was therefore invited to attend a meeting at the Washington, D.C. offices of the National Congress of American Indians (NCAI) to discuss the BIA's initiative. In attendance were Class Counsel Michael Gross and Lloyd Miller and members of the NCAI National Policy Work Group on Contract Support Costs. As a result of this meeting, NCAI issued a detailed letter drafted by Mr. Miller and Mr. Gross calling for the initiative to go forward on a specific timetable, calling for commencement of a DCSC data

collection effort, and calling upon the BIA to develop a policy that would address all CSC issues (and not strictly DCSC issues) modeled upon the parallel CSC policy then in effect for the Indian Health Service.

5. Between November 13, 2003, and August 19, 2004, the BIA convened five meetings of the CSCWG in various locations across the country (including two meetings with former Assistant Secretary for Indian Affairs Aurene Martin); convened several CSCWG subcommittee teleconferences; and conducted a two-day technical drafting session in Co-Class Counsel Lloyd Miller's office. Class Counsel agreed that Mr. Miller would attend all these proceedings on behalf of the class, and at the first meeting Mr. Miller was appointed to chair the CSCWG Policy Drafting Subcommittee.

In addition, Quinault Nation Finance Director William Parkhurst was appointed to chair the Standards Subcommittee, and Pueblo of Zuni Tribal Administrator Bryceson Pinto was appointed to chair the DCSC Data Collection Subcommittee. Finally, Duck Valley Shoshone-Paiute Tribal Vice-Chairman Dennis Smith was appointed to be Tribal Co-Chair of the overall CSCWG.

6. On August 19, 2004 the CSCWG concluded its formal negotiations in Bloomington, Minnesota, in a meeting attended by outgoing Assistant Secretary for Indian Affairs Aurene Martin. The product of that meeting was a completed compromise CSC policy and accompanying CSC standards document, together known as the "Bloomington Accord." Both of these documents comprehensively addressed DCSC issues within the larger context of all CSC issues. (The larger CSC issues included reforming the manner in which the BIA annually allocates its earmarked appropriation, so that in future years CSC amounts paid under Tribal contracts would generally not

be reduced from one year to the next unless CSC appropriations themselves are reduced. This change conforms with the non-reduction provisions of 25 U.S.C. § 450j-1(b)(1)–(4), but differs from the BIA’s past CSC allocation practice under which CSC payments were commonly reduced to many contractors as part of a national reallocation of the CSC appropriation.) Participants at the Bloomington meeting agreed that all that remained before final agency approval was for the policy language to undergo a final technical review and a pro forma legal review–“pro forma” because the prior and final meetings were all attended by the parties’ legal representatives, including Mr. Miller for the class and Richard Meyers or Sabrina McCarthy from the DOI Solicitor’s office.

7. Following Assistant Secretary Martin’s departure from government service, Co-Class Counsel Lloyd Miller learned in late October 2004 that active efforts had been underway within the lower-level BIA bureaucracy to substantially alter the Bloomington Accord, in effect substituting the Bureau’s pre-existing procedure for annually allocating the CSC appropriation in place of the procedure set forth in the Bloomington Accord discussed herein in Paragraph 6. After receiving an unofficial copy of a BIA staff redraft, Mr. Miller encouraged Tribal members of the CSCWG to commence an intensive letter-writing campaign in opposition. As a result of this effort, numerous written communications, and three follow-on November and December 2004 national teleconferences with the Principal Deputy Assistant Secretary (all attended by Zuni representatives and Mr. Miller), the threat to the Bloomington Accord appeared to have been averted.

8. In February 2005, Co-Class Counsel Lloyd Miller received a new draft CSC policy–this one ready for immediate approval by the Principal Deputy Assistant Secretary–that again substantially departed from the Bloomington Accord. Mr. Miller and the Tribal leadership of the

CSCWG then engaged in intensive efforts to halt the adoption of this alternate policy, including adoption of an emergency Resolution which Mr. Miller drafted for the Winter session of the National Congress of American Indians. These efforts led to another meeting of Tribal CSCWG members and attorneys with the Principal Deputy Assistant Secretary in February 2005. In that meeting, Tribal representatives presented a 7-point plan which Mr. Miller developed to bring the latest draft into conformity with the Bloomington Accord. Ultimately, agreement was reached on 4 points, with 3 other issues reserved for future discussion. In March 2005 there followed five national one-day training sessions on the developing DCSC standards aspect of the draft policy, with Mr. Miller presenting at three of the five meetings. These meetings were convened to familiarize Tribal contractors across the country with the developing new policy's approach to DCSC issues.

9. The February 2005 meetings and teleconferences with the Principal Deputy Assistant Secretary also cleared the way for a critical data collection exercise. As chair of the DCSC Data Collection Subcommittee, Pueblo of Zuni Tribal Administrator Bryceson Pinto had devised a nationwide sampling exercise in which two dozen Tribal contractors would come together in one location to conduct a series of facilitated mock DCSC negotiations. With the BIA's concurrence, the sampling exercise went forward in Phoenix, Arizona for a full week in February 2005. The sampling exercise permitted Tribal contractors and the BIA to test the approach then reflected in the draft policy and accompanying standards, and to arrive at an estimated dollar amount that would be required to pay all annual DCSC requirements associated with BIA contracts.

10. In the wake of the March 1, 2005 Supreme Court decision on CSC issues in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005), CSCWG Tribal Co-Chair Dennis Smith and Co-Class

Counsel Lloyd Miller conferred in early April 2005 with Associate Secretary James Cason (at the time also serving as Acting Assistant Secretary for Indian Affairs). At Mr. Smith's and Mr. Miller's urging, Mr. Cason then took personal charge of the developing CSC policy. Also in April 2005, Pueblo of Zuni Lieutenant Governor Carmelita Sanchez and Mr. Miller met at the White House with the President's Domestic Policy Advisor and with OMB staff to press for movement on this and other CSC-related issues. Following two large CSCWG meetings with Mr. Cason attended by Plaintiff Zuni Tribe, CSCWG Tribal Co-Chair Dennis Smith, Co-Class Counsel Lloyd Miller and Bryant Rogers, and several other Tribal leaders and representatives (as well attorneys from the Office of the Solicitor), in May 2005 Mr. Cason recommitted to adhere to the Bloomington Accord.

11. Following the May meetings a new problem emerged when, as part of the FY 2006 appropriations cycle, the Administration pressed Congress (1) to divert \$5 million in earmarked indirect CSC appropriations to fund a small portion of the newly-recognized DCSC requirements, and (2) to authorize the diversion of an additional \$500,000 in earmarked CSC appropriations to fund the Department's future DCSC negotiations with Tribal contractors. Co-Class Counsel Bryant Rogers and Lloyd Miller met at length with key staff to Appropriations Committee Chairman Thad Cochran, and as a direct result of these efforts and a parallel letter-writing campaign from Tribal leaders, the Committee rejected the Administration's request. SEN. REP. NO. 109-80, at 42 (2005).

12. In late October 2005 the BIA formally released its new draft CSC policy for a 60-day comment period. Tribal comments identified three areas requiring further revision. In February 2006, CSCWG Tribal Co-Chair Dennis Smith and Co-Class Counsel Lloyd Miller reviewed these three remaining areas with Associate Secretary Cason, who agreed to make corresponding changes

in the policy. Mr. Cason formally executed the agency's final CSC Policy on May 8, 2006, and publically released the Policy on May 11, 2006 at a national Tribal-Interior Department meeting convened in Traverse City, Michigan.

13. Among many other changes, the final CSC Policy recognizes DCSC costs as a category of costs which must be identified and funded under the ISDA. See Ex. 1, BIA Nat'l Policy Mem. No. NPM-SELFD-1 § 7(B)(2), at 11. The policy also includes a detailed matrix setting forth the standards for the determination of DCSC amounts. (For FY 2007 the Bureau has also separately requested an appropriations increase to cover a portion of the total anticipated direct contract support cost requirements recognized under the new Policy.)

14. On a closely related note, in February 2005 the President requested, and in May 2006 the House of Representatives approved, a Budget Request for the BIA that includes a \$19 million increase in the BIA's CSC earmark, including \$15 million to begin paying DCSC costs pursuant to the new Policy. H.R. REP. NO. 109-465, at 71 & 74 (2005).

15. The BIA's new Policy was developed outside the strict contours of this litigation. As such, and since it is not reflected in any consent judgment or equivalent order, it remains subject to change by the BIA at any time. Class Counsel will therefore continue to monitor the BIA's implementation of the new Policy and move the Court for appropriate relief in the event circumstances warrant doing so. Otherwise, Class Counsel anticipate addressing the DCSC equitable relief claims in the final judgment that is ultimately entered by the Court at the conclusion of this litigation.

16. The BIA's new Policy does not address the Plaintiffs' equitable relief claims

associated with the miscalculated rate claims. Although the parties through counsel conferred in the 2003-2005 period in an effort to amicably resolve those claims, de facto agreement was subsequently reached to suspend those discussions pending the Court's resolution of the outstanding cross-motions for summary judgment associated with Plaintiffs' cap-year claims. Nothing in this Report should be construed as reflecting Plaintiffs' position that the BIA's new policy addresses in any manner those equitable relief claims. Similarly, nothing in this Report should be construed as affecting in any manner the pending DCSC damage claims involving 'cap' years.

Respectfully submitted this 26th day of June 2006.

/s/ Lloyd B. Miller

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**Certificate of Service**

I certify a true copy of the foregoing  
**PLAINTIFFS' PROGRESS REPORT ON  
WORK REGARDING "DIRECT  
CONTRACT SUPPORT COST"  
EQUITABLE RELIEF CLAIM** was served  
upon counsel of record this 26th day of June,  
2006, by U.S. Mail, postage prepaid, and by  
electronic mail, to:

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