

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

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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RAMAH NAVAJO CHAPTER,

Plaintiff,

vs.

No. CIV 90-0957 LHM/WWD
CLERK-ALBUQUERQUE

BRUCE BABBITT, Secretary of the
Interior; **KEVIN GOVER**, Assistant
Secretary of Indian Affairs; **ROBERT J.
WILLIAMS**, Acting Inspector General;
U.S. DEPARTMENT OF THE INTERIOR;
and **THE UNITED STATES OF AMERICA**,

Defendants.

**AMENDMENT TO FIRST AMENDED COMPLAINT BY INTERLINEATION
(Approved For Filing By Order Of the Court Entered September 30, 1999)**

**CLAIM FOR UNDERPAYMENT OF INDIRECT COSTS
FOR ALLEGED INSUFFICIENCY OF APPROPRIATIONS**

26. Paragraphs 1 through 25 are incorporated by reference as though fully restated herein.
27. Starting in FY 1994, in Pub. L. 103-138, and continuing in each successive fiscal year since then (Pub. L. 103-332, Pub. L. 104-134, Pub. L. 104-208, Pub. L. 105-83, and Pub. L. 105-277), Congress inserted the phrase "not to exceed" in front of a specific dollar amount for contract support under Indian Self-Determination Act (ISDA) contracts or compacts.
28. In each fiscal year since FY 1994, the amount which defendants contend was available from each annual appropriation has been below the level of need acknowledged by the Bureau of Indian Affairs to reimburse each ISDA contractor's or compactor's need for indirect costs (IDC).

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29. Shortfalls in payments of IDC to the Class caused by this alleged insufficiency of appropriations are different from but also encompasses the underpayment of IDC to the Class caused by under-calculation of IDC rates as pled and litigated to this point. *See* 112 F.3d 1455 (10th Cir. 1997).

30. At all material times, the Bureau of Indian Affairs has published and sent a notice to each contractor and compactor late in the federal fiscal year, and therefore late in the contract year for most contractors including the named Plaintiff, stating a level of “need” below 100% which each of them would receive.

31. The Plaintiff and the Class have a statutory right to negotiate an indirect cost rate for determination of the contractor’s indirect costs requirements for that period or a lump sum for contract support in lieu of an indirect cost rate. This method has been followed by the vast majority of P.L. 93-638 contractors and compactors.

32. ISDA requires the Secretary to add the full amount of contract support to each contractor’s contract or annual funding agreement under 25 U.S.C. §§450j-1(a)(2) and (3), (g) and 450j, ¶c(2).

33. At all material times, the Secretary has stated that the lack of sufficient appropriations has extinguished his legal liability and that of the United States to pay 100% of the indirect costs acknowledged as needed by Plaintiff and the Class it represents.

34. In the Omnibus Consolidated and Emergency Supplemental Appropriations Act for FY 1999, Pub. L. 105-277, 112 Stat. 2618 (Oct. 21, 1998), Congress inserted in Section 314 a provision which the Secretary has interpreted as a further basis for extinguishing any legal liability to pay indirect costs in excess of the “not to exceed” language inserted since FY 1994.

35. The Secretary's stated position as to his legal liability or that of the United States to pay more than the "not to exceed" level of contract support during material times conflicts with the position and interests of the named Plaintiff and each Class member and a declaration of the rights and obligations of the parties is required.

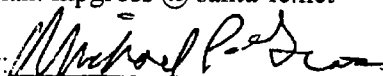
36. The United States owes to Plaintiff and the members of the Class the difference between the contract amount for contract support set by each contractor's or compactor's contract or annual funding agreement for each fiscal year since the beginning of 1994 and the level of reimbursements received.

37. The Plaintiffs have exhausted their administrative remedies under 41 U.S.C. §605.

WHEREFORE, Plaintiffs pray for judgment for money damages for breach of contract in such amount as may be shown at trial; for a declaratory judgment establishing the Plaintiff's and Class's right to payment of 100% of need for contract support; for prejudgment and post-judgment interest as allowed by 41 U.S.C. §611; and for such other and further relief as the Court deems just and meet.

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