

*Filed in open court  
8/31/98  
as attachment to  
Motion for  
preliminary  
opinion.*

**IN THE DISTRICT COURT  
DISTRICT OF NEW MEXICO**

RAMAH NAVAJO CHAPTER, )  
)  
Plaintiff, )  
vs. )  
)  
BRUCE BABBITT, Secretary of the Interior, )  
KEVIN GOVER, Assistant Secretary for Indian )  
Affairs, ROBERT J. WILLIAMS, Acting )  
Inspector General, U.S. DEPARTMENT OF THE )  
INTERIOR, and THE UNITED STATES OF )  
AMERICA, )  
)  
Defendants, )

No. CIV 90-0957 LH/WWD

**PARTIAL SETTLEMENT AGREEMENT**

This Partial Settlement Agreement is entered into this 31<sup>st</sup> day of August, 1998, by and between Plaintiff Ramah Navajo Chapter, the Plaintiff Class, and all the above-named Defendants as parties to the cause of action captioned Ramah Navajo Chapter v. Babbitt, CIV 90-0957 LH/WWD, United States District Court for the District of New Mexico (hereinafter "this lawsuit"), by and through their respective counsel.

WHEREAS, the Court of Appeals has made certain determinations regarding the claims and defenses in this lawsuit and remanded the matter to the district Court for determination of damages and other relief;

WHEREAS, the parties to this lawsuit each have claims and defenses that have not been finally determined and remain for resolution;

WHEREAS, the parties desire to enter into and to effect a partial settlement whereby, upon Court approval, the Plaintiffs will fully and finally settle and release certain claims, described more particularly below, but will not settle or release certain other claims, also described more particularly below, and will leave those other claims for future resolution;

WHEREAS this Partial Settlement Agreement is intended to contain the essential terms and conditions of the agreement reached by the parties, subject to approval of the Court after notice to the Class and a hearing on the proposed partial settlement;

NOW, THEREFORE, the parties agree as follows, subject to approval of the Court after notice to the Class and a hearing on the proposed partial settlement:

1. Parties

- a. The named Plaintiff and Class Representative is Ramah Navajo Chapter ("Plaintiff RNC").
- b. The Plaintiff Class ("the Class") is defined as follows: Pursuant to the Certification Order entered in this lawsuit, the certified Class consists of those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended ("the ISDEAA"). The parties understand this definition of the Class to consist of all Indian tribes and their entities which meet both of the following conditions: they must have (a) contracted, received grants under, or compacted under the ISDEAA, in any fiscal year after and including FY 1989 and (b) either negotiated indirect cost rates from the Office of Inspector General of the Department of the Interior or entered into lump sum agreements with the Bureau of Indian Affairs for reimbursement of indirect costs (contract support) for any fiscal year after and including FY 1989. Any tribe or other entity which does not meet both of these conditions is not a member of the Class. Upon approval of this Partial Settlement Agreement, the Court shall thereby confirm that the original definition of the Class conforms to the definition contained in this Paragraph. The following four tribes have been recognized by the Court as having effectively opted out of the Class and, regardless of whether any of them otherwise meets the definition of a Class Member set forth in this paragraph, they are therefore not members of the Class for purposes of this Partial Settlement Agreement: the Navajo Nation; the White Mountain Apache Tribe, the Eastern Shoshone Tribe, and the Siletz Tribe, collectively referred to as "the opt-outs".
- c. Plaintiff RNC and the Class are collectively referred to herein as "Plaintiffs."
- d. The Defendants are as follows: United States Department of Interior; Bruce Babbitt, Secretary of the Interior; Kevin Gover, Assistant Secretary for Indian Affairs; Robert J. Williams, Acting Inspector General; and the United States of America, all in their official capacities.

2. The Judgment Amount, the Gross Common Fund and the RNC Fund

- a. In consideration of this Partial Settlement Agreement and the execution by Plaintiffs of the Release attached hereto as Exhibit A, Defendants agree to entry of judgment in favor of Plaintiffs in the amount of SEVENTY-SIX MILLION TWO HUNDRED THOUSAND DOLLARS (\$76,200,000.00). Of this amount, SEVENTY-FIVE MILLION EIGHT HUNDRED THOUSAND DOLLARS (\$75,800,000.00) is for the benefit of the Class and FOUR HUNDRED THOUSAND DOLLARS (\$400,000.00) is for the benefit of Plaintiff RNC, in accordance with Paragraph 4.a.
- b. The sum of \$76,200,000 shall be referred to as "the Judgment Amount." The sum of \$75,800,000, plus interest in accordance with Paragraph 2.c, shall be referred to as "the Gross Common Fund." The sum of \$400,000, plus interest in accordance with Paragraph 2.c, shall be referred to as "the RNC fund."
- c. Prejudgment interest on the Judgment Amount shall accrue at the rate set by the Contract Disputes Act from July 1, 1998, until the date of entry of the order or judgment approving this Partial Settlement Agreement. Thereafter, post-judgment interest shall accrue at the rate set by 28 U.S.C. Sec. 1961, on the combined sum of the Judgment Amount plus accrued pre-judgment interest, until paid pursuant to subparagraph d of this paragraph 2.
- d. The Defendants shall pay the Judgment Amount, plus interest in accordance with Paragraph 2.c to the Clerk of the United States District Court for the District of New Mexico promptly after the judgment referred to in Paragraph 3.c has become final and not subject to further review by appeal or by writ of certiorari. All amounts so deposited, together with all accrued interest, shall be deposited or invested as agreed by the clerk and Class Counsel.

3. Judgment and Release

- a. For purposes only of this Partial Settlement Agreement, the following definitions apply:
  - i. "Plaintiffs' Cause of Action" is the Plaintiffs' claim stated in the First Amended Complaint filed January 2, 1991. The claim sought monetary and equitable relief based on shortfalls in payment of indirect costs associated with contracts entered into under the ISDEAA arising from Defendants' use of a method based on OASC-10 and OMB Circular A-87 for determining indirect cost rates or their equivalent and payments thereon which: (a) included funding provided by Other Federal Agencies in the direct cost base (b) resulting in a lower indirect cost rate which was then

(c) applied only to the BIA's portion of the direct cost base resulting in (d) determination of BIA contract support (indirect cost) entitlements which were lower in amount than required by ISDEAA because (e) Other Federal Agencies did not fully pay, and were known not to fully pay, supplemental indirect costs (f) which caused lower contract support (indirect cost) recoveries by the Class.

- ii. "Other Federal Agencies" means all federal agencies, including the Department of Health and Human Services and the Department of Interior, but does not include the Indian Health Service or the BIA.
- iii. "The Settled Claims" are any and all claims, demands, rights, and causes of action of whatsoever kind and nature for Fiscal Years 1989 through 1993, including that portion of Plaintiffs' Cause of Action for money damages for those years, which Plaintiffs may have against all Defendants and all federal agencies, which arise out of shortfalls in funding for contract support costs (also known as indirect costs) under the ISDEAA, except the Reserved Claims.
- iv. The "Reserved Claims" are as follows:
  - (1) any and all claims against the Defendants within Plaintiffs' Cause of Action for prospective declarative, injunctive or other equitable relief; and
  - (2) any and all claims against the Defendants and all federal agencies arising for Fiscal Year 1994 and forward;
  - (3) any and all claims against IHS for underpayments of indirect costs or contract support under ISDEAA except those claims arising for FY 1989 - FY 1993 that are based on the indirect cost method described in paragraph 3.a.i., above developed by BIA and the Department of Interior Office of the Inspector General (DOI-OIG) and used by IHS for those years;
  - (4) any and all claims based on shortfalls in funding for contract support costs (indirect costs) under the ISDEAA caused by any of the following: an assertion by the BIA of insufficiency of appropriations; an individual methodological or computational error by the BIA; or the failure of BIA to pay indirect costs obligations that have been approved or otherwise acknowledged in writing by the BIA;

(5) any and all individual claims which could not be maintained as class action(s) under Rule 23 of the Federal Rules of Civil Procedure.

b. Upon payment of the Judgment Amount plus accrued interest as set forth in Paragraph 2 to the clerk, Plaintiffs shall release and discharge the Defendants, the United States and all federal agencies, including the BIA and the Indian Health Service, from the Settled Claims by signing a Release substantially in the form attached as Appendix A.

c. The order or judgment approving this Partial Settlement Agreement shall be substantially in the form attached hereto as Appendix B.

4. Separate Partial Settlement for Plaintiff RNC.

a. In recognition of its valuable contribution to the Class in filing this action, taking part of the risk of non-recovery, paying a portion of the costs and fees since 1990 in order to achieve this partial settlement, and upholding the public policy of the ISDEAA, Plaintiff RNC shall be paid the sum of \$400,000 in accordance with Paragraph 2.a, plus interest in accordance with Paragraph 2.c. This sum shall be in lieu of any right Plaintiff RNC would otherwise have to receive a share of the Gross Common Fund as a member of the Class.

b. The clerk shall pay to Plaintiff RNC the \$400,000, plus accrued interest, within 10 days of the date on which the final judgment approving this Partial Settlement Agreement becomes final and not subject to further review by appeal or by writ of certiorari or 10 days after the date on which Defendants make the deposits required by Paragraph 2, whichever date is later.

c. Defendants agree that Plaintiff RNC shall be permitted, consistent with its organic documents, to expend any or all of the sums it receives hereunder as authorized by the ISDEAA.

5. Parties Bound by this Partial Settlement Agreement. This Partial Settlement Agreement binds each and every Defendant, Plaintiff RNC, and each and every member of the Class. New Class Members who first became eligible for Class Membership on and after the date of the first notice to the Class, April 12, 1994, and who do not opt out of the Class and out of this settlement by filing notice of decision to opt out within thirty (30) days of receiving notice of this proposed settlement, shall be included in the Class for all purposes including being bound by this Partial Settlement Agreement and for the allocation and distribution of shares of the Net Common Fund and all future proceedings in this case. Existing Class Members who previously received notice of this law suit may not opt out. Any new Class Members who opt out shall not share in the distribution from the common fund or any future common fund derived from any future judgment or settlement arising from this lawsuit.
6. Preliminary Approval, Access to Information and Settlement Notice.
- a. Within seven days of the execution of this Partial Settlement Agreement, the parties shall jointly move for preliminary approval of this Partial Settlement Agreement and for an Order that the Settlement Notice substantially in the form attached hereto as Appendix C be sent to the Class, together with notice of the hearing on the Partial Settlement Agreement at a date, time and place to be set by the Court. Defendants' approval of Appendix C is as to form only and is not to be construed as an admission or waiver of any of their rights or defenses.
  - b. Within thirty days of preliminary approval, Defendants, to the extent not already provided, shall use best efforts to provide Class Counsel (1) the current names and addresses of all federally-recognized Indian tribes, (2) which of those Indian tribes have entered into agreements (self-determination contracts and self-governance annual funding agreements) under the ISDEAA for FY 1998, (3) the names and addresses of all tribal organizations that have contracted or received grants under the ISDEAA for fiscal year 1998, and (4) the current names and addresses of all tribal organizations currently operating schools under Tribally-Controlled Schools Act (Pub.L. 100-297) grants.
  - c. As soon as practical, but no later than sixty days after the Court gives preliminary approval of this Partial Settlement Agreement and the Settlement Notice, Class Counsel shall send the Settlement Notice to all federally-recognized Indian tribes and to the known members of the Class by first-Class mail, and cause it to be published in the newspaper known as Indian Country Today and one other broad media or e-mail outlet reaching Indian country. For their part, Defendants agree to publish the Settlement Notice and any supplemental notices deemed necessary in the Federal Register as soon as practical at Defendants' expense.

7. Management and Distribution of the Gross and Net Common Funds.

- a. From the Gross Common Fund, the following amounts shall be deducted and paid as provided for herein:
  - i. \$250,000 into a separate interest-bearing account for the study by National Congress of American Indians ("NCAI") as provided in Paragraph 7.c;
  - ii. the amount awarded to Class Counsel for attorney's fees and expenses as set forth in Paragraph 9; and
  - iii. \$1 million for the Reserve as provided in Paragraph 7.c, 7.d, 7.d.
- b. The amount remaining after the deduction and payment of the amounts set forth in Paragraph 7.a shall be the "Net Common Fund."
- c. The sum of \$250,000.00 shall be deducted from the Gross Common Fund and placed in a separate account for the benefit of NCAI ("the NCAI Account") for the purpose of conducting a study of indirect costs and contract support issues surrounding the ISDEAA. The NCAI Account shall be established and funded within 10 days of the date on which the final judgment approving this Partial Settlement Agreement becomes final and not subject to further review by appeal or by writ of certiorari or 10 days after the date on which Defendants make the deposits required by Paragraph 2, whichever date is later. This arrangement shall be memorialized in the form of a contract whose terms and conditions shall be subject to reasonable negotiation between Plaintiffs and NCAI but shall include the right of Plaintiffs to audit the expenditures of NCAI. The study shall be completed within a reasonable time and distributed to Class Counsel, Defendants' counsel, and relevant committees of Congress. Any funds remaining after the study is completed shall be paid into the Reserve Account established under paragraph 7.d.
- d. The sum of \$1,000,000.00 shall be deducted from the Gross Common Fund and placed in a separate interest-bearing account ("the Reserve Account").
  - i. The Reserve Account shall be established and funded within 10 days of the date on which the final judgment approving this Partial Settlement Agreement becomes final and not subject to further review by appeal or by writ of certiorari or 10 days after the date on which Defendants make the deposits required by Paragraph 2, whichever date is later.
  - ii. The Reserve Account shall be used for the payment or reimbursement of expenses and claims associated with the implementation of the Allocation and Distribution Methodology as set forth in Appendix D. Those expenses

and claims may include, but are not limited to, the costs and fees of the Independent Certified Public Accountant, the Class's expert accountant and statistician, mailing, payment of claims made by individual Class members arising from the distribution and allocation procedure, and such other expenses and claims including correction of errors as to share amounts as may be reasonably incurred in connection with the allocation and distribution process. Class Counsel may apply periodically to the Court, upon notice to the Defendants, for reimbursement or advance payment of such expenses and claims and, upon approval by the Court, they shall be paid from the Reserve Account.

- e. The Net Common Fund shall be managed in accordance with the agreement between the clerk and Class Counsel pursuant to Paragraph 2.d. Interest earned on the investment of the Net Common Fund, after deduction of bank, broker and custodial charges, shall be transferred on a monthly basis to the Reserve Account.
- f. Each Class Member shall receive a share of the Net Common Fund according to the procedure and formula in Appendix D. The procedures for determining and distributing the Net Common Fund to the class shall be commenced within 10 days of the date on which the final judgment approving this Partial Settlement Agreement becomes final and not subject to further review by appeal or by writ of certiorari or 10 days after the date on which Defendants make the deposit(s) required by Paragraph 2, whichever date is later.
- g. The parties recognize that, after reasonable efforts at implementation have been made, the methodology described in Parts I through IV of Appendix D may prove to be excessively difficult, costly, time-consuming, of dubious reliability, or otherwise unsuitable for purposes of arriving at an equitable allocation of the Net Common Fund among the Class Members (or may suffer from one or more of these or other defects). Therefore, upon an application, notice to the class and Defendants and showing at a hearing on the application satisfactory to the Court that the proven or reasonably anticipated defects associated with implementation of the methodology in Parts I through IV of Appendix D would outweigh the benefit to the Class from using that methodology, the Court may, upon such further notice to the Class as the Court directs, authorize the implementation of some other allocation formula or modification of the existing formula in the discretion of the Court. The procedures governing such application, including responses and objections from Class members, shall conform to procedures in paragraph 9.b. However, a decision to modify or replace the distribution methodology shall in no way undermine or affect the releases executed in this case; nor shall any class member have the right to challenge or reopen this settlement agreement because of dissatisfaction with the distribution methodology or a class member's share thereunder.

8. Provision Regarding Readmitted Opt-Outs, If Any.

- a. Because the opt-outs are not now members of the Class, they are not parties to this Partial Settlement Agreement.
- b. If one or more opt-outs are allowed to be readmitted as members of the Class, then Defendants hereby agree not to enter into a settlement agreement with any such readmitted opt-out unless any such settlement (i) recognizes that such readmitted opt-out shall not share in the distribution of the Net Common Fund and will instead be compensated by supplemental sums not part of the Gross Common Fund, (ii) is on terms no more favorable to any such readmitted opt-out than the terms of this Partial Settlement Agreement are to the Class, (iii) provides for proportionate sharing by the readmitted opt-out in the costs, fees and expenses of this action including the distribution costs associated with the Net Common Fund, and (iv) is approved by Class Counsel on behalf of the Class.

9. Hearing on Approval of the Partial Settlement Agreement.

- a. At the hearing on the approval of the Partial Settlement Agreement, the parties will request such approval and will present such evidence and/or arguments as appropriate to that end.
- b. Any Class Member who, within thirty days of the date of mailing of the notice to the members of the Class or date of newspaper publication, whichever is later, timely files a written objection or written objections to the Settlement Agreement and serves those written objections on counsel for the Class and for Defendants at the addresses listed in Paragraph 20 shall have the opportunity to appear and to be heard at the hearing set for final approval of the Settlement Agreement. Any Class Member who has timely filed a written objection or written objections to the approval of the Settlement Agreement and who desires and intends to appear, with or without counsel, at the hearing on the approval of the Settlement Agreement shall file with the Court and serve on counsel for the Class and for Defendants a Notice of Intention to Appear no later than twenty days before the date scheduled for the hearing. In order to appear and be heard at the hearing, a Class Member must both (a) timely file with the Court clerk and serve a written objection or written objections to the approval of the Settlement Agreement and (b) timely file with the Court clerk and serve a Notice of Intention to Appear at that hearing. However, any Class Member who has timely filed an objection shall have that objection considered by the Court. If no such written objections are timely filed or served on counsel for the Class and for Defendants, Class Counsel shall file a notice to that effect in the Court file. If Class Counsel or defense counsel desires to file a response to any such objection, such response shall be filed at or before the hearing.

