

**IN THE UNITED STATES DISTRICT COURT
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,

vs.

No. CIV 90-0957 LH/WWD ACE

**GALE NORTON, Secretary of the
Interior, in her official capacity,
UNITED STATES DEPARTMENT OF
INTERIOR, NEIL McCALEB, Assistant
Secretary of Interior for Indian Affairs,
in his official capacity, EARL DEVANEY,
Inspector General, in his official capacity,
and UNITED STATES OF AMERICA,**

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW APPROVING SECOND PARTIAL
SETTLEMENT AGREEMENT, AND AWARDED
ATTORNEY'S FEES AND COSTS**

THIS MATTER COMES before the Court on the parties' Joint Motion for Preliminary and Final Approval of Second Partial Settlement Agreement and Order that Notice be Sent to the Class (Docket No. 678), filed September 9, 2002, and the Application of Class Counsel for an Award of Attorney's Fees and Costs (Docket 688) filed September 30, 2002. Having considered the relevant pleadings, the arguments of counsel, the absence of any objections either to the proposed second partial settlement agreement or to the application for an award of attorney's fees and costs, and the applicable law, the Court finds that the Second Partial Settlement Agreement is in the best interest

of the class and will be approved, and that the Application for Attorney's Fees is well-taken and will be granted.

BACKGROUND

This matter was originally filed in this Court in 1990. The named class representative, the Ramah Navajo Chapter of the Navajo Nation (RNC), and the Class were seeking reimbursement for unpaid indirect costs incurred while providing services under Indian Self-Determination Act contracts. The Plaintiffs alleged that the formula the Bureau of Indian Affairs used to calculate these indirect costs resulted in serious underpayments which the tribal entities had to absorb in their already strapped budgets. As to this claim, "the calculation claim," this Court granted summary judgment in favor of the Defendants, finding that the BIA formula conformed to the applicable statutes. This holding was reversed by the Tenth Circuit. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Thereafter, the parties entered into a Partial Settlement Agreement (First PSA) proposing to settle the claim for money damages arising under the calculation claim for fiscal years 1989 through 1993. Claims after FY 1993 were not released. Notice was sent to the class, and some class members objected to the fairness of the settlement agreement or to the application for an award of attorney's fees and costs, or both. After a hearing, this Court approved the First PSA and granted, in part, the Application for an Award of Attorney's Fees and Costs associated with that settlement. *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp. 2d 1091 (D.N.M. 1999) (*Ramah I*). No one appealed that ruling.

Thereafter, Plaintiffs added two additional claims, namely, "the Shortfall claim" and the direct contract support costs or "DCSC claim." The Shortfall claim represents a claim for the difference between the indirect cost rate multiplied by the BIA direct base for all class members (as set by the

previously-used methodology, declared unlawful by the Tenth Circuit, for calculating indirect costs rates) and what was actually paid. The DCSC claim filed as a separate case by the Pueblo of Zuni, *Pueblo of Zuni v. United States*, D.N.M. No. CIV 01-1046 LH, 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.

Under the Second Partial Settlement Agreement (Second PSA), the parties propose to settle these two new claims, the Shortfall claim and the DCSC claim, for the so-called "lump sum years" which occurred before Congress limited the appropriations for contract support costs through "cap" language ("not to exceed") in each annual appropriations Act. The parties are settling the Shortfall claim for FY 1992 and 1993, and the DCSC claim for FY 1993 and 1994. Shortfall claims after FY 1993 and DCSC claims after FY 1994 are not released.

On September 9, 2002, the parties filed a Joint Motion for Preliminary Approval and Final Approval of Second Partial Settlement Agreement and for Order Authorizing Class Notice. Also on September 9, 2002, the Court heard the motion for preliminary approval and entered an Order Granting Preliminary Approval of Second Partial Settlement Agreement and Directing Notice to the Class, setting the joint motion for hearing on December 5, 2002. Notice was sent to the class on or before October 8, 2002. The deadline for filing objections to the proposed Second PSA or to the Application for Attorneys Fees and Costs was November 8, 2002. No objections were filed either to the Second PSA or to the application.

On December 5, 2002, the Court held a hearing on the approval of the Second PSA and the Application for an Award of Attorney's Fees and Costs. The Court has carefully considered the

arguments presented at the hearing and all documents filed in support of the approval of the Second PSA and the Application for Award of Attorney's Fees and Costs.

In regard to the Application for Award of Attorneys fees and Costs, in *Ramah I*, at 1095-97, the Court determined that in this circuit, "the recent trend has been toward utilizing the percentage method in common fund cases," citing *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). The Court also noted that "courts do not blithely grant the percentage requested by prevailing counsel," and that "[m]ost courts select a percentage in the 20% to 30% range, and that the Ninth Circuit has indicated that 25% is the 'benchmark' award." *Id.* at 1096. The Court noted that the Tenth Circuit has directed that in determining what percentage would be reasonable, courts should review the twelve factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors are:

- (1) the time and labor involved;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) any prearranged fee – this is helpful but not determinative;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the undesirability of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

Ramah I at 1096.

The Court further noted that these factors do not necessarily have equal weight and that, in this case, the time and labor involved is to be given less weight and:

the other *Johnson* factors – most significantly the novelty and difficulty of the questions, the skill required, and the custom of contingency fee arrangements in similar cases – would help the Court

more accurately determine a reasonable percentage of the fund to award in attorneys' fees.

Id. at 1097.

FINDINGS OF FACT

1. The Findings of Fact and Conclusions of Law contained in the Court's Memorandum Opinion and Order approving the First PSA, *Ramah I* at 1097-1109, are incorporated herein by reference.

2. Following the approval of the First PSA, the Shortfall claim was added as a class claim to the instant case in September 1999, by a motion to intervene filed by the Oglala Sioux Tribe and a motion to amend by the Ramah Navajo Chapter. The government filed and later withdrew objections to the motion and ultimately consented to the motion to intervene and amendment of the complaint.

3. In the spring of 1999, the Pueblo of Zuni began inquiring into the facts which ultimately gave rise to the DCSC claim.

4. In the fall of 1999, the parties began discussing a settlement of all outstanding contract support cost claims against the Interior Department.

5. In March 2000, the Pueblo of Zuni filed a class action in this Court asserting the DCSC claim for FY 1993 forward. *Pueblo of Zuni v. United States*, D.N.M. No. CIV 01-1046 LH. Ultimately, counsel for the Pueblo of Zuni, Lloyd D. Miller and his firm, entered into a joint prosecution agreement with Class Counsel in the *Ramah* case to prosecute both cases together.

6. The parties took sharply divergent positions as to liability and damages on the DCSC claim and the Shortfall claim.

7. In the spring of 2000, formal negotiations between the parties on these claims began with two meetings in Washington, DC, on March 27 and June 22, and several telephone conferences and exchanges of position papers.

8. During the initial sessions, the Judgment Fund issue reappeared (*see, Ramah I* at 1095). Ultimately, the parties agreed to deal with the Judgment Fund issue in the same manner as they did under the First PSA, and negotiations continued.

9. During the early negotiations, the government advised that it wanted the settlement negotiations to encompass all three claims for all remaining years, i.e., the remaining calculation claims, the Shortfall claim, and the DCSC claim. In addition, as to the DCSC claim, the government required a statistically valid sampling of all self-determination contractors having contracts with the BIA, such sampling to consist of data from at least 51 tribes randomly selected by the government. Class Counsel and Co-Counsel, particularly Mr. Miller, developed and promulgated the survey required by the government. That work consumed the summer and fall of 2000. Despite every effort by Plaintiffs' counsel to meet the government's requirements, only 20 of the 51 tribes returned completed survey forms. The Class supplemented these responses with data from 10 additional tribes. Although not statistically valid, the survey results assisted the parties in reaching settlement of the DCSC claim.

10. During 2000, the parties agreed to try to engage a mediator to facilitate the negotiations. Everyone's first choice was Senator George Mitchell. Ultimately Senator Mitchell was engaged as the mediator.

11. Between November 2000 and June 2001, Senator Mitchell conducted four mediation sessions: three in Washington, D.C., and the last one in Los Angeles, California.

12. At the last session, June 21-22, 2001, the government removed from the table all claims except the Shortfall claim for FY 1992 and 1993, and the DCSC claim for FY 1993 and 1994. The government then provided a detailed response to the Shortfall and DCSC claims, together with supporting analysis. Ultimately, the government made a final offer of \$29,000,000 for those claims. After intense consultation with named Plaintiffs' representatives, the representative from the National Congress of American Indians, and consultants both in person and by telephone conference, Class Counsel conditionally accepted the offer of \$29,000,000, subject to Defendants' furnishing satisfactory proof that they had paid a portion of certain DCSC costs for FY 1993 and 1994 as part of the Secretarial funding amount. All other claims were specifically reserved for future litigation. Two documents were signed in Los Angeles embodying these understandings. (*See*, Attachment F to Affidavit of Class Counsel Michael P. Gross) Such information was ultimately furnished and deemed acceptable by Class Counsel, thus removing the conditional nature of the settlement.

13. In Class Counsel's judgment, the proposed settlement of \$29,000,000 represents approximately 60% of the maximum reasonably provable damages for the Class on these two claims for these settlement years, if the Class prevailed on all legal and factual issues.

14. In the absence of a settlement, the trial of the issues would be difficult and risky for the class.

a. It is estimated that a trial on these issues would last between ten and thirty days;

b. Extensive additional discovery would be necessary covering many years of government and tribal records from all over the country;

c. Class certification of the DCSC claims would be resisted by the government;
and

d. Decertification of the Shortfall claim is a possibility as is the possibility that the DCSC might not be certified as a class claim.

e. There now exists a significant body of case law adverse to the position of the Class on these claims.

15. The settlement was fair and reasonable to the Class when it was agreed upon in June of 2001 and has, if anything, become more advantageous with the passage of time.

a. A number of decisions have been announced (some of which were decided after the agreement in principle was reached on the settlement on June 22, 2001), which are harmful to the Class' claims. *See, e.g., Cherokee Nation and Shoshone-Paiute Tribes v. United States*, 190 F.Supp.2d 1248 (E.D. Okl. 2001) *aff'd*, ___ F.3d ___ (10th Cir. Nov. 26, 2002), Slip Opinion No. 01-71106; *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000); *Shoshone-Bannock v. Secretary of Dept. Health & Human Services*, 279 F.3d 660 (9th Cir. 2002)

b. The documentation provided by the government before the the Los Angeles session began and after the conditional settlement in June of 2001 supported its position on a number of key factual issues that underlie the parties' differences with regard to the DCSC claim and Shortfall claim. For example, the documentation tended to show that funds covering a portion of employee fringe benefit costs for BIA employees had been included in the Secretarial funding level. In addition, the government's documentation indicated that the pass-through percentage of funds excludable from the BIA funds comprising the direct cost bases used for the Class' IDC rate calculations for the

settlement years was larger than initially contended by Plaintiffs. Finally, the government's documents tended to show that higher indirect CSC amounts were actually paid by the Defendants for FY 1992 and 1993 than the Plaintiffs' initially contended. All of these factors further highlighted the substantial legal and conceptual differences separating the parties as to the measure of damages for, and other definitional underpinnings of, the Shortfall claims and the DCSC claims, none of which has been resolved by binding judicial precedent.

16. During the fourteen months between the conditional settlement reached in Los Angeles on June 21, 2001, and the filing date of the proposed Second PSA, there were significant additional difficulties to overcome.

a. As noted, the parties had to exchange and analyze factual information to remove the conditional nature of the settlement.

b. The parties had difficulty agreeing on the exact terms of the settlement agreement; over 20 drafts of or amendments to the settlement agreement were prepared before agreement of a final draft was reached.

c. The 2002 change of administration and the attendant change of personnel at various levels of the appropriate government agencies, significantly increased the difficulty of finalizing the settlement.

d. Negotiations were further delayed by the events of 9-11.

e. To secure finality for the government, the government initially insisted on retaining a post-approval right to withdraw from the settlement if even one tribe opted-out of the new DCSC claim. However, this was an unsatisfactory resolution for the Class. Class Counsel overcame this problem by obtaining leave of the Court to add the DCSC as a new class claim in *Ramah* (and

consolidating the Zuni DCSC claims in the *Ramah* action) before finalizing the proposed settlement (while at the same time giving the Class notice that a settlement in the amount of \$29 million was being sought), and publishing notice to the Class with a right to opt-out of the DCSC claim. Pleadings and orders carrying out this strategy were filed and approved by the Court on March 27, 2002. On May 10, 2002, the opt-out period for the DCSC claim passed without any tribe opting-out (a process which consumed several months). A portion of this problem nevertheless resurfaced in September 2002, with regard to the single tribe that had opted out of the Shortfall claim two years earlier. Class Counsel obtained a release from this single opt-out from the Shortfall claim which resolved all issues concerning this subject.

17. The Second PSA reserves and does not release significant claims for the Class for the years after the lump sum years.

18. As in the case of the single named plaintiff in the First PSA, the Ramah Navajo Chapter, all three named plaintiffs in this settlement deserve and are entitled to an incentive award, as set out in ¶¶ VI.A and VI.C.2.a of the Second PSA. This award will be 1.2 times the base share percentage calculated as are the share percentages of each absent class member under Appendix F of the Second PSA. This share percentage will then be multiplied by the settlement amount less the Reserve Fund (\$500,000) and the NCAI Fund (\$150,000). The named plaintiffs will also share in the residual distribution on the same basis as other class members.

19. This Court approved the incentive award for the Ramah Chapter in the First PSA, which was stated as a lump sum and worked out to approximately a 33-1/3% increase over the amount it would have received as an unnamed class member. The incentive award to named plaintiffs in this Second PSA is an increase of approximately 20% over the share they would otherwise be

entitled to receive as unnamed class members, further enhanced by their exemption from sharing in the burden of attorneys' fees and costs. Each of the three named plaintiffs contributed significantly to the outcome. Each sent representatives to all negotiating sessions at their own costs and conferred frequently with counsel. Each participated, through their financial managers and accountants, in developing the theories of recovery which produced this settlement. Each shared extensive documentation of the claims with counsel. Besides the authority represented by this Court's approval of the First PSA, additional cases support incentive awards. These include *Lachance v. Harrington*, 965 F. Supp. 630 (E.D. Pa. 1997); *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins.*, 1993-2 Trade Cases (CCH) §70,310 (W.D. Okla. June 8, 1993); *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); and *Whitford v. First Nationwide Bank*, 147 FRD 135 (W.D. Ky. 1992). *See generally*, 3 H. Newberg and A. Conte, NEWBERG ON CLASS ACTIONS, §11.38.

20. The Second PSA was the result of years of hard-fought, extensive, arms-length negotiation by counsel for all parties.

21. The Second PSA as a whole is fair, reasonable and adequate.

22. Class Counsel, Michael P. Gross (M. P. Gross & Associates, P.C.) and his Co-counsel, C. Bryant Rogers (Roth, VanAmberg, Rogers, Ortiz, Fairbanks, & Yepa, LLP), Steven L. Tucker (Tucker Law Firm, P.C.), and Eric Treisman have been the attorneys representing named Plaintiff Ramah Navajo Chapter and, along with Marvin Amiotte, the named Plaintiff Oglala Sioux Tribe. Class Co-Counsel Lloyd B. Miller (Sonosky, Chambers, Sachse, Endreson & Mielke of Albuquerque, NM) and William Perry (Sonosky, Chambers, Sachse, Endreson & Perry of Washington, DC) have been the attorneys representing the named Plaintiff Pueblo of Zuni.

Collectively all named counsel have been representing the interests of the Class under a joint prosecution agreement, and for purposes of this Memorandum Opinion and Order will be referred to as Class Counsel.

23. Class Counsel have applied for an award of attorney's fees in the amount of \$5,800,000, which is 20% of the Settlement Amount of \$29,000,000, plus applicable gross receipts tax. In initial and supplemental filings, Class Counsel have also applied for the reimbursement of costs in the amount of \$243,496.07.

24. The foregoing general findings are hereby incorporated by reference into each of the following sub-topics.

TIME AND LABOR INVOLVED

25. The services rendered by Class Counsel are reflected in their uncontradicted affidavits which have been filed in this action. As of September 30, 2002, Class Counsel had expended approximately 7,514.57 hours since the approval of the First PSA, excluding time spent on the fee application. That is approximately twice the number of hours spent through the approval of the First PSA. This work directly or indirectly gave rise to this second settlement. The quality and efficiency of the services leading to the First PSA have previously been noted. *Ramah I*. The path leading the Second PSA required a greater breadth, depth, and quantity of skills and services including lobbying skills, creative use of the internet, negotiating skills, management of statistical information, imagination and creativity in analyzing and dealing with numerous arcane substantive issues as well as many crucial procedural issues, and maintaining the balance between applying pressure to complete the settlement and patience while the government approval process continued.

26. The Court has reviewed the information submitted by Class Counsel and finds that the time spent was both reasonable and necessary to achieve the Second PSA.

NOVELTY AND DIFFICULTY OF THE QUESTIONS PRESENTED

27. The novelty and difficulty of the questions presented is best illustrated by the decisions handed down on similar issues by the courts after June 22, 2001. These include the *Cherokee* decisions; and the ruling of the Ninth Circuit in *Shoshone-Bannock*. Had this settlement not been agreed to in principle on June 22, 2001, and had Counsel not been persistent in finalizing the settlement, there is significant doubt whether this settlement would have been concluded. The settlement concerns the lump sum years for the two new claims in this case: the Shortfall and the DCSC claims. Plaintiffs' position on liability, citing e.g., *Blackhawk Heating & Plumbing Co. v. U.S.*, 622 F.2d 539, 547, n. 6, 548 (Ct. Cl. 1980), is that an unrestricted appropriation is legally available for the payment of the contract debts of the United States, even when the agency's internal budget or Congressional committee reports limit the amount which may be spent for the stated purpose and even when the agency has otherwise obligated the appropriation. On the other hand, Defendants take the position that their obligation to pay CSC is expressly limited by the final sentence of 25 U.S.C. §450j-1(b) and by Section 314 of each year's appropriations act for the Department of the Interior. Further, the Defendants take the position that documentary proof shows that all amounts constituting the Shortfall claim have been paid. Plaintiffs did not consider this documentation to be conclusive. Further, the parties differed as to how much was due for those two years for unpaid CSC and how to define the measure of damages for the Shortfall claim. Plaintiffs contend that a larger amount of CSC was left unpaid for FY 1993 and 1994 than asserted by the government. However,

