

FILED

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

UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

JAN 02 1991

RAMAH NAVAJO CHAPTER,

Plaintiff,

vs.

MANUEL LUJAN, Secretary of the
Interior; EDDIE BROWN, Assistant
Secretary of the Interior; MARVIN
PIERCE, Chief of the Office of
Inspector General, U.S. Department
of the Interior; and THE UNITED
STATES OF AMERICA,

Defendants.

R. Stummach
CLERK
No. CIV 90-0957 SC

FIRST AMENDED COMPLAINT

1. The Ramah Navajo Chapter is a subdivision and tribal organization of the Navajo Nation, a recognized Indian tribe, authorized and sanctioned to contract with the United States Government under The Indian-Self Determination And Education Assistance Act, 25 U.S.C. §§450 et seq., as amended, P.L. 93-638.

2. Defendant Manuel Lujan is the Secretary of the Interior and is charged by law with the responsibility for implementing The Indian Self-Determination And Education Assistance Act, supra, and other laws intended to benefit Indians.

3. Defendant Eddie Brown is the Assistant Secretary of the Interior and is charged by law with the duty and responsibility of implementing The Indian Self-Determination And Education Assistance Act, supra, and other laws intended to benefit Indians and is the

person in charge of the Bureau of Indian Affairs, U.S. Department of the Interior.

4. Defendant Marvin Pierce is the Chief of the Office of the Inspector General, U.S. Department of the Interior and is charged by law with the duty and responsibility of negotiating indirect cost rates with P.L. 93-638 tribal contractors.

Jurisdiction

5. The matter in controversy exceeds \$10,000 exclusive of interest and costs. The controversy arises under one or more contracts by and between the United States Department of the Interior and the Ramah Navajo Chapter, each authorized by The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§450, et seq., as amended (Public Law 93-638). The Court has subject matter jurisdiction by reason of 25 U.S.C. §§450m-1; 28 U.S.C. §1346; 5 U.S.C. §§701, et seq.; 28 U.S.C. §1331; 28 U.S.C. §1361; 41 U.S.C. §609; 28 U.S.C. §1343; and 28 U.S.C. §§2201 and 2202.

Facts

6. For several years the Ramah Navajo Chapter with authority of the Navajo Nation has exercised its self-determination rights under 25 U.S.C. §§450 et seq. to contract for programs formerly operated by the Bureau of Indian Affairs of the Department of the Interior. These contracts have encompassed and presently do encompass real estate programs, natural resources, law enforcement, Aid to Tribal Government, water rights, juvenile services and crime prevention. In fiscal year 1989, the year in question, the direct

federal funding base of these programs totalled \$755,770. Total direct funding from all sources was \$845,000.

7. The Indian Self-Determination Act, supra, mandates that the Secretary of the Interior enter into contracts for programs of this type whenever a qualified tribe or tribal organization applies for them and that he provide funding in an amount no less than he would have provided himself under his direct control of the program.

8. Apart from direct program funds, however, tribal self-determination contractors such as Plaintiff are entitled to additional compensation for indirect costs, also referred to as "contract support." These extra funds are intended to compensate tribal contractors for expenses non-governmental entities typically incur when they assume the responsibility of performing services previously performed directly by the federal government. These indirect costs include such things as insurance, legal fees, audits, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. For many self-determination contractors these additional costs can be and are significant. At Ramah, these costs have traditionally been 50% or more of the direct program base.

9. Under the framework established by the Bureau of Indian Affairs indirect costs are generally computed for each self-determination contractor by a negotiation with the Interior Department's Inspector General (OIG). The negotiation produces a ratio of indirect cost pool costs to direct program revenues. In turn the ratio or percentage is then applied to the direct program

base to produce the actual dollar amount of that contractor's indirect cost reimbursement for a given fiscal year.

10. Before passage of P.L. 100-472 on September 15, 1988, OIG followed a procedure borrowed from other federal agencies encompassed in a document known as OMB Circular A-87. Under it, tribal self-determination contractors were penalized if other federal or state agencies did not pay their fair share of indirect costs. A spiraling series of deficits resulted for many of these tribal contractors sending them into enormous debt either to their governing tribes or to the federal government itself. Along with correcting other problems, P.L. 100-472 was designed to correct this problem by mandating that P.L. 93-638 contractors get 100% of their need for indirect costs regardless whether other federal agencies or states pay their fair share.

Claim

11. In the case of Plaintiff, the fiscal year 1989 negotiation with OIG resulted in agreement as to the size of the indirect cost pool but disagreement as to the size and makeup of the direct cost base. Under the Plaintiff's proposal, the indirect cost rate would have been 51.5% and would have resulted in an indirect cost reimbursement of some \$392,000.00. Under OIG's counter-proposal, the indirect cost rate would have been 40% and resulted in an indirect cost reimbursement of \$302,300.00. In point of fact, Ramah, Navajo Chapter received approximately \$324,000.00 in indirect cost reimbursements during fiscal year 1989 but is still owed approximately \$68,000.00 which has not been paid.

12. The parties have failed to achieve a meeting of the minds as to the indirect cost rate for fiscal year 1989 and Plaintiff has exhausted its administrative remedies by having filed a contract dispute, which was denied August 27, 1990. The disagreement threatens to disrupt each successive year's negotiation.

13. The impasse over the fiscal year 1989 rate results from Defendants' insistence that certain State and other grants to the Ramah Navajo Chapter, which represent flow-through monies from other federal agencies, be taken into account by including them in the direct cost base, the denominator in the ratio producing the percentage called the indirect cost rate.

14. The Defendants' insistence on this procedure directly violates the express provisions of 25 U.S.C. §§450j-1(d)(1) and (2) and has damaged Plaintiff by depriving it of at least \$50,000 badly needed for operation of its programs. This damage resulted from (a) decreasing the indirect cost percentage for fiscal year 1989 applied to the BIA program base, resulting in a smaller indirect cost recovery for BIA-contracted programs; and (b) failing to provide reimbursements mandated by Congress for indirect costs associated with other agencies' programs in the amount determined to be needed reflected in the indirect cost pool (the numerator), namely, the difference between what other agencies paid in indirect costs and the amount generated by the ratio of indirect cost pool divided by the direct program base.

15. Additionally, Ramah Navajo Chapter was not reimbursed its full entitlement to indirect costs in fiscal year 1987 and is due the balance of that year's funding entitlement, which under

Defendants' rules should have been added to the fiscal year 1989 recovery for indirect costs but was not so included. The amount so owed is approximately \$26,000 and this issue was presented in the dispute denied August 27, 1990.

16. The Defendants have refused and continue to refuse to negotiate an indirect cost rate for fiscal year 1989 or any subsequent year without taking account of these state and federal flow through monies in the manner described above and refuse to reimburse the fiscal year 1987 shortfall. In addition, contrary to Congressional intent, Defendants refuse to acknowledge an obligation under the amendments to 25 U.S.C. §§450, et seq., adopted in 1988 (Public Law 100-472) to fund the excess indirect costs needed to fully fund P.L. 93-638 contractors for operation of other federal programs which apply limits on the amount of indirect costs they will pay, or which refuse to pay any indirect costs at all, and a declaration of rights is needed to remedy this problem.

17. Defendants' refusal to implement §450j-1(d) is inexcusable in view of that provision's express wording, which requires no implementing regulations, and directly violates Congress's intent.

Class Action

18. Plaintiff incorporates by reference paragraphs 1 through 16 as though set forth expressly.

19. There exists a class of tribes and tribal contractors who are persons contracting with the United States Department of the Interior under The Indian Self-Determination and Education Assistance Act, supra, and whose contracts have been similarly denied their full indirect cost entitlements under applicable law.

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A significant portion of the Bureau of Indian Affairs' budget is contracted out under 25 U.S.C. §§450 et seq. An unknown but significant percentage (perhaps 100%) of the members of this class are experiencing shortfalls in reimbursement of indirect costs in the same manner as Plaintiff. The class is so numerous that joinder of all members is impractical.

20. There are common questions of law and fact which exist as to all members of the class. The applicability of A-87 to determination of indirect cost rates where tribal contractors also receive state grants is of particular concern and importance to the majority, if not all, Self-Determination Act contractors.

21. The claims of Plaintiff are the same or similar to the claims of the members of the class, who are located all over the United States. In particular, the representative party, Plaintiff, has been damaged in the same way or manner as the other members of the class, although the exact amounts of unreimbursed indirect costs to which each member of the class is entitled vary. In all likelihood, the Defendants' defense as to the representative party's claims would be the same; i.e., that A-87 continues to govern despite the wording of 25 U.S.C. §450j-1(d).

22. The wholesale underfunding of indirect costs to authorized tribal self-determination contractors threatens to destroy the entire self-determination program, which has been the bedrock of Congressional Indian policy since 1975. The representative party's struggle to obtain its full entitlement each year for both program and indirect costs has drained its administrative resources and undermined the quality of its programs, just as it has for the

members of the class. The fact that many if not most members of the class do not have readily available funds to pay lawyers to litigate separate claims for each of them suggests that unless a class action is approved, many otherwise worthy self-determination claims will not be vindicated.

23. This Court should designate this action as a class action, since other inconsistent or varying adjudications with respect to individual members of the proposed class could establish incompatible standards of conduct for the parties opposing the class. Conceivably one court could find A-87 still governs indirect cost determinations while another finds that P.L. 100-472 is self-executing. Further, the common question of law or fact of the members of the class predominate over any questions affecting the individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. A single and final determination concerning the legality of taking state grants into account in fixing indirect cost rates under The Indian Self-Determination Act, supra, would eliminate countless hours of litigation, enormous expense, and the harm created by inconsistent decisions. It would hasten, if successful on the merits, full reimbursement of badly needed monies to Indian tribes and organizations around the country desperate to keep control of vital governmental programs as promised by Congress.

WHEREFORE, Plaintiff Ramah Navajo Chapter, on behalf of itself and the class it represents, prays for compensatory damages against Defendants in the amount which is proven at trial for itself and

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the members of the class it represents; for a declaratory judgment that State grants not be allowed to adversely affect indirect cost rates of tribal contractors under P.L. 93-638; for an order directing that this action proceed as a class action; for an injunction directing development of procedures, as this Court may determine are necessary, to fully implement P.L. 100-472; for a declaratory judgment that Plaintiff Ramah Navajo Chapter's constitutional right to due process of law under the Fifth Amendment to the United States Constitution has been violated with regard to the Aid to Tribal Government program; for an order directing Defendants to pay Plaintiff the costs of this action and reasonable attorney's fees; and for such additional and further relief as the Court deems just and appropriate.

Respectfully submitted:

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