

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**TUNICA-BILOXI TRIBE OF LOUISIANA  
and RAMAH NAVAJO SCHOOL BOARD,  
INC.,**

**PLAINTIFFS,**

**vs.**

**UNITED STATES OF AMERICA;  
TOMMY G. THOMPSON, Secretary of the  
United States Department of Health and  
Human Services; GALE A. NORTON,  
Secretary of the United States Department of  
The Interior; CHARLES W. GRIM, Interim  
Director of the Indian Health Service, United  
States Department of Health and Human  
Services; EARL E. DEVANEY, Inspector  
General, United States Department of the  
Interior; and TIMOTHY G. VIGOTSKY,  
Director, National Business Center, United  
States Department of the Interior,**

**DEFENDANTS.**

Civil Action No. 02-2413  
(RBW)

**PLAINTIFFS' MOTION TO CERTIFY CLASS  
UNDER RULE 23(b)(2) and (b)(3)  
AND INCORPORATED MEMORANDUM OF LAW**

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## INTRODUCTION

Plaintiffs Tunica-Biloxi Tribe of Louisiana (Tunica) and Ramah Navajo School Board, Inc. (RNSB or Ramah), by and through their counsel, respectfully move under Rule 23(b)(2) and (b)(3), Federal Rules of Civil Procedure, for certification of a class action.

Concurrence of opposing counsel has been requested but denied.

The class sought to be certified consists of

All entities contracting with the United States through the Secretary of Health and Human Services and the Director of the Indian Health Service (IHS) as agents for the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, 25 U.S.C. §§450-450n, as amended (“ISDA”), and comparable sub-titles for compacting tribes, whose contracts contain an indirect cost rate determined in negotiation with the Office of the Inspector General (OIG) of the United States Department of the Interior, or its successor, the National Business Center (“NBC”) of the Department of the Interior.

This is essentially the same class certified in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997) with regard to ISDA contracts with the Secretary of the Interior. *See*, USDC N Mex No. CIV 90-0957 LH/WWD, October 1, 1993 (Attachment 1 to this Motion). (Although the District Court subsequently ruled against the Ramah Navajo Chapter on the merits in that action, Memorandum and Order, Nov. 4, 1993, the Tenth Circuit reversed that decision.) The Secretary of the Interior and the Secretary of Health and Human Services share identical obligations under ISDA. This case seeks to apply the same rule of law to ISDA contracts entered by the Secretary of Health and Human Services (“IHS contracts”) that applies to the ISDA contracts of the Secretary of the Interior.

If necessary following Defendants' response to this motion, Plaintiffs intend to move for leave to conduct class action discovery.

## **I. STANDARD FOR CERTIFICATION**

In determining whether the class should be certified, the Court does not consider the merits of the complaint but takes as true the allegations therein. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140 (1974) (Rule 23 does not give court authority to conduct a preliminary inquiry into merits of suit to determine whether it may be maintained as class action); *McReynolds v. Sodexo Marriott*, 208 F.R.D. 428, 431 (D.D.C. 2002) (allegations in complaint presumed true for purposes of class certification); *In re Lorazepam & Clorazepate Antitrust Litigation*, 202 F.R.D. 12, 21 (D.D.C. 2001), *review denied*, 351 U.S. App. D.C. 223, 289 F.3d 98 (2002) (same).

It is nonetheless the obligation of Plaintiffs to establish that the requirements of Rule 23 have been met. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct.2231 (1997) (in addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show action maintainable under Rule 23(b)(1), (2), or (3)); *In re Lorazepam & Clorazepate Antitrust Litigation, supra*, 202 F.R.D. at 21 (plaintiffs bear burden of showing class requirements met).

Because the Court retains the power under Rule 23(c)(4) to modify the initial certification of the class as the case progresses, any error should be in favor of and not against allowing the case to proceed as a class action. *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985), *cert. denied sub nom. Wasserstrom v. Eisenberg*, 474 U.S. 946, 106 S. Ct. 342 (1985) (“any error, if there is to be one, should be committed in favor of allowing a class action”); *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied sub nom. Troster, Singer &*

*Co. v. Green*, 395 U.S. 977, 89 S.Ct. 2131 (1969) ("if there is to be an error made, let it be made in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require"); *Esplin v. Hirschi*, 402 F.2d 94, 99 (10<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194 (1969) (to similar effect).

## II. NATURE OF THE CASE

The claim in this case arises from the United States'<sup>1</sup> failure to calculate the proper amount of contract support costs (CSC) which the Indian Self-Determination Act (ISDA) mandates be added to Plaintiffs' contracts under 25 U.S.C. §450j-1(a)(2) and §450j-1(g).

ISDA is not a grant program; it especially is not a discretionary grant program. Rather, it is a program whereby the United States contracts with tribes and tribal organizations to operate federal programs and carry out federal responsibilities. If a tribe or tribal organization seeks to operate a program and meets criteria set out in the statute, the Secretary of Health and Human Services "is directed" to enter into these contracts. 25 U.S.C. §450f(a)(1). As set forth in its findings, the ISDA is designed to eliminate "prolonged Federal domination of Indian self-determination programs" and give Indian tribes and their communities an "effective voice in the planning and implementation of programs for the benefit of Indians." 25 U.S.C. §450(a)(1). In 1968, the Special Senate Subcommittee on Indian Education issued a landmark report "INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. Rept. No. 91-501<sup>2</sup>. In July

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<sup>1</sup> Under 25 U.S.C. §450l(c) Model Agreement §1(a)(1), the United States is the contracting party; the Secretary acts as the United States' agent.

<sup>2</sup> The Report found that "the dominant policy of the Federal Government towards the American Indian has been one of coercive assimilation. The policy has resulted in:

1970, President Nixon addressed Congress on Indian Affairs<sup>3</sup>. Both proposed new legislation to end federal paternalism and institute a policy of Indian self-determination. The ISDA is a direct response to those proposals.

To this end, the Act's mandatory language obliges the Secretary to fund each contract or compact in an amount "not less than the appropriate Secretary would have otherwise provided for the operation of programs or portions thereof for the period covered by the contract." 25 U.S.C. §450j-1(a)(1) ("the Secretarial Amount"). In 1988, in Public Law 100-472, Congress amended the Act to add to the contract price the additional funding needed for so-called "contract support costs":

There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management but which --

- (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
- (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. §450j-1(a)(2) and 1(g). The Secretary is permitted to reduce the mandated contract price only in limited, specified circumstances, Sec. 450j-1(b), which also prevents him from paying, i.e., "providing", the contract amount if appropriations for that purpose do not exist.

This provision does not alter the contract obligation of the United States. 25 U.S.C. §450j(c)-

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(A) the destruction and disorganization of Indian communities and individuals; (B) a desperately severe and self-perpetuating cycle of poverty for most Indians; (C) the growth of a large, ineffective, and self-perpetuating bureaucracy which retards the elimination of Indian poverty; and (D) a waste of federal appropriations." *Id.*, at 21.

<sup>3</sup> "MESSAGE TO CONGRESS ON INDIAN AFFAIRS", [1970] Pub. Papers 564,

§1(a)(1). Congress added the 450j-1(a) requirement to ensure that program levels would not decline under tribal control. *See also* 25 U.S.C. §450j-1(c)(6), requiring the Secretary to annually “account [for] any deficiency of funds needed to maintain the preexisting level of services. . . .”<sup>4</sup>

The contract support costs at issue in this case are indirect contract support costs, the largest category of CSC. U.S. General Accounting Office, Report to Congressional Committees, “INDIAN SELF-DETERMINATION ACT—SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED” 6 (June 1999) (“GAO Report”, Attachment 2 to this Motion). Indirect contract support costs are determined for Plaintiffs and class members through an indirect cost rate negotiated through the Office of Inspector General (“OIG”) of the Department of the Interior.

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Attachment 11 to this Motion.

<sup>4</sup> “. . . [T]he term ‘contract costs’ is intended to insure that the Federal government provides an amount of funds to a tribal contractor that will enable the contractor to provide at least the same amount of services as the Secretary would have otherwise provided.” S. Rept. No. 100-274, at 16(1987), 1988 USCCAN 2620, at 2635, accompanying Pub. L. 100-472 (Attachment 3 to this Motion).

“A new section 106 is needed to clarify provisions of funding self-determination contracts, including indirect costs. This section protects the contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for the costs incurred by the federal government. The protection of contract funding will provide year-to-year stability for tribal contractors, and will contribute to better tribal planning, management, and service delivery.” *Id.* at 30, 1988 USCCAN, at 2649.

“The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian Affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.” *Id.* at 12-13, 1988 USCCAN, at 26.

This function of the OIG was transferred to the National Business Center (“NBC”) in November 2002. The Secretary adopted the negotiation of an indirect cost rate as the means for determining the amount to be included for indirect CSC, as mandated by 25 U.S.C. §450j-1(g). The rate calculation follows guidelines set forth in government circulars OMB A-87, OMB A-122, and OASC-10. Affidavit of Marcel Kerkmans, Attachment 3 to this Motion; GAO Report (Att. 2), at 6.

### **III. THE PROBLEMS ADDRESSED IN THIS LAW SUIT**

#### **A. Calculation of Indirect Cost Rates**

The issue in this case arises when Indian ISDA contractors supplement their IHS programs with funds from other federal agencies. This is a perfectly legitimate practice and its legality and efficacy are not in question.

The problem created by other agencies’ programs would not exist had the Secretary<sup>5</sup> not decided, along with his counterpart, the Secretary of the Interior, to use the indirect cost rate system of federal cost accounting in OMB Circulars A-87 and A-122 as the means for computing the mandatory indirect contract support costs component of ISDA funding. The choice was fateful because of the coincidence of three factors:

1. The indirect cost rate system requires inclusion of all programs in the base, including those of agencies which do not pay indirect costs;
2. The fact all other federal agencies do not pay or heavily restrict payment of indirect costs; and
3. The fixed or inelastic nature of most ISDA contractors’ indirect cost pools

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5 Except where specifically indicated otherwise, references to “the Secretary” in

ensures diminution of contractors' rates.

The OMB circulars were designed for cost accounting purposes, not for computing statutorily-mandated contract funding levels.<sup>6</sup> Because funds for most contractors come from a variety of sources, a category of administrative expenses called indirect costs was created for those expenditures that cannot be easily allocated to discrete programs. The indirect cost rate is calculated by dividing the contractor's total indirect cost pool – those costs of administration not easily allocated to discrete programs<sup>7</sup> – by the contractor's total direct program costs from all sources in the direct cost base. The ratio between the pool and the direct base is the indirect cost rate. The Secretary multiplies the indirect cost rate by the IHS program base to compute the contractor's indirect contract support costs under 25 U.S.C. §450j-1(a)(2) – (5), just as the Secretary of the Interior did in *Ramah v. Lujan*, 112 F.3d at 1457-1459.

The problem stems from the methodology's assumption that each contractor has recovered allocated shares of the indirect cost pool from each funding source in the direct cost base. If a contractor receives one tenth of its base from a particular agency, the system assumes that the contractor actually recovers one tenth of its indirect costs from that agency in addition to its program base. Most agencies prohibit or generally restrict payment of indirect costs from

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this motion refer to the Secretary of Health and Human Services.

<sup>6</sup> There are three types of indirect cost rates. The most prevalently used is the "fixed with carry forward method" described in President's Council on Integrity and Efficiency. "AUDIT OF METHODS OF REIMBURSING INDIAN ORGANIZATIONS FOR INDIRECT COSTS INCURRED", September 1987 ("President's Council Audit"), at 5 (Attachment 6 to this Motion). Although most contractors employ fixed with carry forward rates, the next largest category is "provisional-final". The rate-setting methodology for provisional rates is identical to the fixed rate methodology with respect to including other federal programs in the base.

<sup>7</sup> 25 U.S.C. §450b(f)

their grants. So, for ISDA contractors, the methodology's assumption is false, as the Secretary well knows. President's Council Audit, Att. 4, at 1, 34.

Under 25 U.S.C. §450j-1(g), the Secretary is required to "add to the contract the full amount of funds to which the contractor is entitled under subsection [450j-1(a)]". But by assuming, incorrectly, that each agency actually pays its fair share, the Secretary assures recovery by the contractor of less than the amount needed to run the contracted HIS program. Indirect cost pools of ISDA contractors are generally fixed. *Ramah v. Lujan*, 112 F.3d at 1461 ("As the Act itself recognizes, and as the facts in this case demonstrate, indirect costs are not readily allocable to a particular grant or program, and therefore tend to be fixed rather than variable."). By dividing a more-or less fixed numerator (the pool) by addition of (non-paying) agencies to the base, the rate goes down.

For example, if an ISDA contractor has programs totaling \$1,000 from the IHS, no funds from other agencies, and a negotiated indirect cost pool of \$500, its indirect cost rate is 50% ( $500 \div 1000 = .5$ ). IHS is obligated to add \$500 to the program base for a total contract price of \$1,500. If this same contractor adds programs of other federal agencies to its base in the amount of \$250, the fixed nature of the pool means that the pool will remain at or near \$500. (The contractor still needs only one CEO; and its insurance costs, facilities, phone, and legal costs, etc. will not vary appreciably.) The methodology adopted by the Secretary therefore produces an indirect cost rate of 40% ( $500 \div 1250 = .4$ ). Following the circulars' procedures, IHS then computes its indirect contract support cost obligation to be only \$400 ( $1000 \times .4 = \$400$ ). But since the other agencies do not pay indirect costs, the contractor actually recovers only \$400 of the \$500 needed to operate the IHS programs. The contractor winds up \$100 short of the §450j-

1(a)(2) amount.

The result is that the contract price computed by the Secretary does not comply with the mandate of the statute in 25 U.S.C. §450j-1(g) to “add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section [25 U.S.C. §450j-1(a)]”. This phenomenon affects each ISDA contractor which receives grants or contracts from other federal agencies. The problem is generally discussed in the GAO Report (Att. 2), at 44-45, and in Senate Report No. 100-274 (Att. 12), at 12 (accompanying Public Law 100-472). *See also* President’s Council’s Audit (Att. 4). The problem is also the basis for the Tenth Circuit’s ruling in *Ramah v. Lujan*, 112 F.3d at 1463:

We therefore agree with plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts . . . We further conclude defendants unreasonably interpreted the Act by applying the pre-amendment indirect costs formula to determine the amount of indirect costs funding plaintiff would receive for fiscal year 1989. In applying the pre-amendment formula, defendants included in the direct costs base the funds plaintiff received from [other federal agencies]. *Although inclusion of these funds in the direct cost base would have been proper if those programs included funding for their apportioned share of the indirect costs pool, the uncontroverted facts indicate that they did not. By including the [other agencies’] funds in the direct cost base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.*

(Emphasis added.) This suit seeks to apply the same findings and conclusions to the Secretary’s identical use of indirect cost rates.

## **B. Carry-forward Adjustments**

Most contractors choose the “fixed with carry forward” option for indirect costs rates (see footnote 6) because it promises adjustments in succeeding years for under-recoveries of indirect costs in the base year, reducing the risk that the contractor will fail to recover its full administrative costs. The second problem in this suit, not directly presented in *Ramah v Lujan*, has to do with these carry-forward adjustments. See Kerkmans Affidavit (Att. 3); Declaration of Jim Hooper, Jr. (Hooper Declaration), Attachment 5 to this Motion; Declaration of Douglas Burke (Burke Declaration), Attachment 6 to this Motion.

Here, OIG violates the methodology of Circulars A-87 and A-122 to the Plaintiffs’ detriment by carrying forward over-recoveries but not under-recoveries. Over-recoveries depress the indirect cost rate in the succeeding year; under-recoveries increase the rate. *Id.* By not carrying forward under-recoveries, OIG deprives contractors of the benefits contemplated by the fixed with carry-forward method.

OIG also defines carry-forwards inconsistently with ISDA. Program funds – which the contractor, by necessity, often is forced to divert to pay for indirect costs – are treated as “indirect cost recoveries” which lead to adverse carry-forward adjustments. Both the under-over recovery problem and this one have a snowball effect, increasing the contractor’s shortfalls in succeeding years and causing the contractor to spend even more of its program monies for administrative costs. GAO Report (Att. 2), at 49-50. This is contrary to the ISDA’s central purpose to maintain program levels. *See* S. Rept. No. 100-274 (Att. 12), at 16. Moreover, contrary to the prohibitions in 25 U.S.C. §450j-1(d), the Secretary and OIG treat the estimated recovery of indirect costs, namely, the negotiated indirect cost pool, as actually having been

recovered, even though the contractor may have recovered only a fraction of the negotiated pool amount. *See* Kerkmans Affidavit (Att. 3), Hooper Declaration (Att. 5); and President’s Council Audit (Att. 4), at 6. How carry-forwards are supposed to be calculated is touched upon in the GAO Report (Att. 2), at 74-76. By not carrying forward under-recoveries and by treating program funds used for indirect costs as recoveries of contract support costs, OIG and the Secretary deprive contractors of the benefits of the “fixed with carry forward” method and exacerbate the original rate-calculation error.

#### **IV. THE EFFECTS OF THE INCORRECT RATE CALCULATIONS**

Unless the United States pays the true cost of running these programs to the contractor, Plaintiffs and other contractors are forced to reduce programs, go into debt, or eschew other federal programs altogether.

The problem has another dimension as well. Money not paid to IHS contractors for contract support remains in the Secretary’s control and is thereby available to pay his in-house administrative costs. One of the main intentions of Congress in passing ISDA—to reduce the federal bureaucracy managing Indian programs—is thereby defeated. *See* S. Rept. No. 100-274 (Att. 12), at 7-8. The Secretary’s indirect cost rate system provides an unauthorized means for shoring up the bureaucracy at the expense of tribes and tribal organizations. This consequence of the indirect cost rate system is not mentioned in the GAO Report but stands as a principal feature of the present controversy, bearing directly on the expected defense that the agency does not have available funding from Congress to pay full indirect contract support costs to Plaintiffs or the Class.

In RNSB's case, for the years FY 1993-FY 1996, the loss of contract support by reason of the inclusion of other federal agencies in the direct cost base resulted in a loss of approximately \$37,000 per year. Hooper Declaration (Att. 5). In Tunica-Biloxi's case, the inclusion of other federal agencies in the base caused a shortfall in recovery from IHS of nearly \$15,500 per year from FY 1996 through FY 2001. Burke Declaration (Att. 6). Tunica-Biloxi's claim for indirect carry forwards is \$49,765 per year starting in 1995. *Id.* Both the Ramah Navajo community and the Tunica-Biloxi community are small. These perennial losses of needed overhead funds threaten to destroy their ability to contract and thus work contrary to Congress' stated goal to turn over to Indians the administration of their own programs.

The funding provisions of ISDA require the Secretary to include in each contract the full amount of contract support costs needed by tribes and tribal organizations to operate contracted health programs of the IHS at the same level the Secretary would run them and, ultimately, for the United States to pay that amount.<sup>8</sup> The Secretary, however, refuses to amend the rate calculation process to produce the true dollar amount required for inclusion in the contract by the statute.<sup>9</sup>

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<sup>8</sup> In 1999, Congress amended the ISDA to prohibit the Secretary from paying the indirect costs of other federal agencies. Interior and Related Appropriation Act, 1999, Pub L. 105-277, Div. A, §101(e) [Title II], Oct. 21, 1998, 112 Stat. 2681-280. This provision does not affect earlier obligations of the United States. In any case, the funds at issue here are those needed to operate the IHS programs quite apart from the operation of other programs.

<sup>9</sup> The IHS has refused to join a reform agreed to on a pilot basis by BIA and OIG called Benchmarking. This reform seeks to harmonize the 1999 Appropriations rider with section 106(a) of Public Law 100-472, 25 U.S.C. §450j-1(a). Kerkmans Affidavit (Att. 5).

## V. THE CLASS

Over three hundred of the 556 tribes recognized by the federal government as of December 1998 negotiate indirect cost rates with Interior's Office of Inspector General. GAO Report (Att. 2), at 77. This figure includes both BIA and IHS contractors. In 1998, approximately \$800,000,000 of IHS funding for that year was contracted to tribes under ISDA. *Id.*, fig. 2.2, at 28. This represented about half the IHS appropriation for FY 1998. *Id.*, at 5; Deposition of Chris J. Krasowski, auditor, Office of the Inspector General, Department of the Interior, June 14, 1991, in *Ramah Navajo Chapter v. Lujan*, Attachment 7 to this Motion. An excerpt from IHS' FY2001 Report to Congress, Attachment 10 to this Motion, shows a need for individual contract support of nearly \$240,000,000 for approximately 194 contractors.<sup>10</sup> Almost all ISDA contractors receive funds from other federal agencies as Plaintiffs do and thus suffer from the same treatment in calculating indirect cost rates as Plaintiffs do. Kerkmans Affidavit (Att. 3).

## VI. THE CRITERIA FOR CERTIFICATION OF THE CLASS ARE MET

On these facts, the Plaintiffs are entitled to have their action certified as a class action.

### A. The GAO Report, Affidavits and Declarations, and Other Attached Documents

#### Establish Satisfaction of All the Criteria.

The GAO Report, the Affidavits and Declarations, and other documents attached to this motion establish the systemic use of indirect costs rates for all class members; the numerosity of the class; and the practical burdens that would be created if the claim in this case were not accorded class status.

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<sup>10</sup> Plaintiffs do not yet know why the IHS lists fewer contractors than are reported by GAO.

In addition, since the BIA and IHS use the identical methodology for determining indirect contract support costs, namely, the indirect cost rate system, the Ramah case (*Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10<sup>th</sup> Cir. 1997)) establishes the necessary class elements. In a July 23, 1991, deposition of Linda Richardson, Assistant Director of Administration for Financial Management in the Bureau of Indian Affairs, in the *Ramah* case (Attachment 9 to this Motion), Ms. Richardson testified:

Q. Do you have an opinion or do you have a view or can you state with any degree of certainty or knowledge that the lawsuit would or would not have an impact, whatever its outcome, on ‘638 contracting<sup>[1]</sup> beyond the one contractor that is the plaintiff?

A. I think it’s likely it would extend to other contractors.

Richardson deposition, at 51.

Ms. Richardson further stated that the BIA has applied the same policy at issue in Ramah’s case to all ISDA contractors, except as otherwise provided by law (as in the case of school grantees). *Id.*, at 52. She also conceded that one lawsuit would be more efficient than many lawsuits. *Id.*, at 53. She agreed that it would be relatively easy for the Court to communicate with members of the class, since their names and addresses are all on file. *Id.*, at 54.

Chris J. Krasowski was an auditor in the Office of Inspector General, Department of the Interior, the agency which negotiates most indirect cost rates for ISDA contractors. Mr. Krasowski has extensive experience negotiating indirect cost rates with tribes and tribal organizations under P.L. 93-638. Krasowski Deposition (Att. 7), at 5. He testified that he has been aware of problems with indirect cost rates. *Id.*, at 18-19. He spoke of “tribal contractors”

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<sup>11</sup> “‘638 contracting” is contracting under the ISDA, Public Law 93-638.

(plural) experiencing the same problem as the named plaintiff, Ramah Navajo Chapter in that case. *Id.*, at 43. That problem was the Department of the Interior’s refusal to increase the rate to cover the true cost of operating the contracted ISDA program. He, like Ms. Richardson, confirmed that the practice at issue here was imbedded in policy. *Id.*, at 58, 90. Mr. Krasowski was aware that this practice conflicts with Congress’ purpose in enacting ISDA— to provide the same amount of money to contracting Indian tribes and organizations that the Government itself would otherwise use to run these programs. *Id.*, at 83. Mr. Krasowski conceded that the net effect of the policy and practice at issue is to deprive ISDA contractors of contract support funding necessary to administer BIA contracted programs under P.L. 93-638. *Id.*, at 86-88.

Mr. Krasowski corroborated Ms. Richardson’s points as to the makeup of the class and the impact of the *Ramah* lawsuit on its members. For example, BIA’s (and IHS’) standard practice is to apply to all ISDA contractors the same methodology that produced Ramah’s shortfall. *Id.*, at 93-94 and 97. He estimated the number of these contractors to be in the hundreds. *Id.*, at 94.

Mr. Krasowski also confirmed that the class members—including the named Plaintiff—are not permitted to use federal funds to pay the costs and fees of litigating against the federal government. *Id.*, at 95. He opined that few of these organizations have the means to mount their own lawsuits challenging the Secretary’s contract support costs policy. *Id.*, at 96. He conceded that the problem with which this lawsuit is concerned affects a number of contracting tribes all around the country. *Id.*, at 96, 98. He agreed that the decision in *Ramah* would have a bearing on these other contractors’ indirect cost claims. *Id.*, at 96-97. And he concluded: “I’d say there’s other contractors that are in the same situation that Ramah is in.” *Id.*, at 100-101.

**B. These Factual Allegations Establish All the Elements Required by Rule 23.**

Rule 23 of the Federal Rules of Civil Procedure sets out several conditions to maintain a class action. These include Subpart (a) conditions and Subpart (b) conditions.

**Subpart (a):**

**1. The class must be so numerous that joinder of all members is impractical.**

IHS's own documents (Att. 10) show that IHS contractors are found throughout the nation in many different states. This geographic distribution of hundreds of class members favors certification. No specific number of members is required to comprise a class. With over 300 identifiable class members, the proposed class here falls well within the numerosity parameters of Rule 23, especially given its geographic diversity, the interests of judicial economy, and the inability of many class members to initiate individual lawsuits. Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d, §1762; *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251, 259 (D.D.C. 2002) (geographic dispersion an obstacle to joinder); *Lewis v National Football League*, 146 F.R.D. 5, 9 (D.D.C. 1992) (250 football players, geographically dispersed, satisfy numerosity requirement); *Vargas v. Meese*, 119 F.R.D. 291, 293 (D. D.C. 1987) (“Not only is size a factor in determining whether joinder is impracticable, but geographical dispersion of class members has also been found to be a factor presenting an obstacle to joinder”); *Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997)(class of 47 to 52 female police officers certified in sexual harassment case where members lived in at least 5 different states); *Gentry v. C&D Oil Co.*, 102 F.R.D. 490, 493 (W.D. Ark. 1984)(class of 81 service stations certified where joinder was impractical due to dispersed location of service stations in numerous counties of Arkansas and Missouri).

**2. There are questions of fact and law common to the class.**

The predominant fact central to this law suit is Defendants’ systematic use of a flawed methodology for determining the amount of indirect contract support costs that must be added to each Plaintiff’s and each class member’s contract—termed the Annual Funding Agreement—under 25 U.S.C. §450j-1(g). In the Indian Health Service’s “Justification of Estimates for Appropriations Committees” for FY 1998: Contract Support Costs (Attachment 8 to this Motion), Defendant IHS states:

The largest component of contract support costs is indirect contract support costs (approximately 80 percent) . . . .

Amounts needed for CSC are determined in independent negotiations with the cognizant Agency’s Inspector General (which is the Department of the Interior for virtually all contracts). The types of costs included in these indirect cost pools include the reasonable costs of tribal governing bodies, management and planning, financial management, property management, procurement management, data processing, office support, building rent, utilities, program specific insurance, legal services, and single-agency audits.

*Id.*, at IHS-115. The same paper requests \$172,720,000 for CSC for FY 1998. *Id.*

Other important common facts significant to this lawsuit are:

- Whether the Defendant Secretary had available appropriations sufficient to pay full indirect contract support costs prior to the introduction of appropriation “caps” in FY 1999.
- Whether Defendants requested sufficient appropriations from Congress to pay for indirect contract support costs during all material years.

Common legal questions central to this case are:

- Whether Defendants had a duty under the ISDA, as amended, to request sufficient funds from Congress to pay full indirect contract support costs during material years.

- Whether the Defendant Secretary has the power, in the absence of a “cap” in the appropriations act, to declare an insufficiency of appropriations based solely on his judgment of agency needs and the comments of Congressional committees not incorporated into the appropriation acts.
- Whether the indirect cost rate system employed by Defendants for IHS contracts meets the requirements for full funding of indirect contract support costs.

Although the amounts by which each class member have been hurt vary, this subordinate fact does not prevent certification. *In re Lorazepam & Clorzepate Antitrust Litigation*, 202 F.R.D. 12, 21, 28 (D.D.C. 2001), *review denied*, 351 U.S. App. D.C. 223, 289 F.3d 98 (2003)(“Although [the members of the class] may not have suffered identical damages, that is of little consequence to the typicality determination when the common issue of liability is shared”, *quoting Lewis v National Football League*, 146 F.R.D. 5, 9 (D.D.C. 1992)); *Kifafi v. Hilton Hotels Retirement Plan*, 189 F.R.D. 174, 177 (D.D.C. 1999)(to similar effect); *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 639-40 (D. Colo. 1986) (same); *Canadian St. Regis Band of Mohawk Indians v. New York*, 97 F.R.D. 453, 457 (N.D.N.Y. 1983) (same); *Leist v. Shawano County*, 91 F.R.D. 64, 67 (E.D. Wis. 1981)(same).

**3. The claims of the representative must be typical to those of the members.**

As shown above, Tunica’s and RNSB’s problem is identical to that of the members, all of whom suffer diminution in their funding of CSC under Defendants’ unlawful indirect cost rate system.

**4. The representative will fairly and adequately protect the interest of the class.**

Plaintiffs know of no conflicts with members of the class. There is no reason to believe that Plaintiffs will not fairly, vigorously, and conscientiously promote the interest of the class. Ramah Navajo School Board in particular has often litigated against the federal government in self-determination disputes. *See, e.g., Ramah Navajo School Board, Inc. v. New Mexico Bureau of Revenue*, 458 U.S. 832, 102 S.Ct. 3394 (1982) (ISDA preempts indirect state taxes, which impede fulfillment of ISDA's goals); *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (Secretary's discretion to allocate funding for CSC to ISDA contractors is limited by the goals of ISDA). "The law does not require that a named plaintiff be the perfect class member, or even the best available." *Helmley v. Ashland Oil Co.*, 1 Kan. App. 2d 532, 534, 571 P.2d 345, 349 (1977). *See also Georgia State Conference v. Georgia*, 99 F.R.D. 16, 28 (S.D. Ga. 1993)("Rule 23(a)(4) does not require that the class representative be the best of all representatives, but one who will pursue a resolution of the controversy in the interests of the class"). In this case, there is no reason whatsoever to doubt the named plaintiffs' intentions and ability to represent the class in excellent fashion.

**Subpart (b)(1):**

Class actions may be maintained if the prerequisites of Subpart (a) of Rule 23 are met and:

**(A) Separate lawsuits would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class.**

There are two elements to this condition in this case. First, the Indian Health Service and the Bureau of Indian Affairs are each subject to and charged with implementing the same

governing statute, the ISDA. The BIA is already subject to a class-wide decision with nationwide effect that holds the current system for determining indirect cost rates illegal. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997). It makes no sense, and would be directly contrary to the express command of Congress for uniformity in implementation of ISDA, for the IHS and the Secretary of Health and Human Services to be exempt from the rule now applicable to the BIA and the Secretary of the Interior.

Second, the traditional concept of inconsistent adjudications applies here. Already, with regard to other contract support issues, several class members have brought separate lawsuits against the United States and the Secretary of HHS over contract support issues. *See, e.g., Norton Sound Health Corp. v. Thompson*, 2003 WL 148220 (9<sup>th</sup> Cir. No. 01-35804, February 6, 2003) (unpublished) (Indian healthcare consortium raised triable issues on contract support costs claim); *Shoshone Bannock Tribes v. Shalala*, 269 F.3d 948 (9<sup>th</sup> Cir. 2001), *amended*, 279 F.3d 660 (9<sup>th</sup> Cir. 2002) (no US obligation to fund contract support costs beyond available appropriations); *Cherokee Nation v. United States*, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002), *reh. en banc denied*, No. 01-7106, Jan. 22, 2003 (US contract support costs obligation is subject to availability of appropriations). Although none of these cases presented the rate-calculation claim presented here and none was certified a class action, they illustrate both the nationwide character of the underlying controversy over contract support costs and the danger of individual adjudications that may result in conflicting standards and rules.

The satisfaction of Subpart (b)(1)(A) is fully supported by the attachments. In sum, they demonstrate that Defendants would suffer considerable disadvantage if separate adjudications resulted in conflicting rules for rate-making in the OIG/NBC indirect cost rate making process

under OMB Circulars A-87 and A-122 and the resulting duty of the Secretary to add the full amount needed to run the contracted program to each ISDA contractor. The *Ramah v. Lujan* case has now produced a required change in the methodology for the BIA class members. While Tunica-Biloxi and RNSB may succeed here in obtaining a similar ruling, if that ruling did not have class-wide impact, another court in another case could find that the current system meets legal requirements. Or another court might order reforms different from those this Court might order. Conflicting standards and rules would thereby be imposed on Defendants. Additionally, if the damage claim in this case were granted, many other tribes and organizations would no doubt sue to recover their own damages in potentially hundreds of cases.

**(B) Dispositions as to the class which as a practical matter dispose of their interest or would substantially impair or impede their ability to protect those interests.**

Again, the attachments fully establish the satisfaction of this condition.

**Subpart (b)(2):**

**The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.**

The actions complained of by the Plaintiffs are the product of an agency-wide policy, as discussed above.

**Subpart (b)(3):**

**The court finds that questions of law or fact common to the class predominate over any questions affecting only individual members and that a class action is superior to other methods for the fair and efficient adjudication of the controversy.**

Again, this finding is supported by the attached materials.

### **C. Competency of Class Counsel**

The Court should consider the quality and experience of the lawyers for the named representative plaintiffs who would undertake to represent the class, in addition to the express requirements of Rule 23 discussed above. Attachments 13, 14, and 15 are the curriculum vitae of proposed class counsel Michael P. Gross, J. Eugene Gallegos, and Daniel H. MacMeekin. Mr. Gross and Mr. Gallegos are both experienced and successful class action attorneys. Mr. MacMeekin has experience in Indian law and federal litigation. Mr. Gross is Class Counsel in the *Ramah v. Lujan* litigation and successfully recovered two class action settlements for the BIA class, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999); and *Ramah Navajo Chapter v. Norton*, \_\_\_ F. Supp. 2d \_\_\_ (D.N.M. No. CIV 90-0957 LH, Dec. 6, 2002). Proposed Class Counsel and Co-Class Counsel are reinforced by, in addition to Mr. MacMeekin, Donald Juneau of Hammond, Louisiana, local counsel for the Tunica-Biloxi Tribe, and Eric Treisman of Santa Fe, New Mexico, who has assisted Mr. Gross post-remand in the *Ramah* BIA class action. Each has extensive legal experience in Indian law as shown by their curricula vitae, Attachments 16 and 17. The team is especially experienced in the field of contract support costs under ISDA. They are among the few lawyers nationwide who have an understanding of this arcane field.

### **VI. NOTICE**

Pursuant to Local Civil Rule 23.1(c), Plaintiffs propose that the notice required by Rule 23(c)(2) of the Federal Rules of Civil Procedure be accomplished as follows:

- Upon certification, class counsel will draft an appropriate notice, present it to opposing counsel for concurrence, and then to the Court for approval.

- Class counsel will be responsible for arranging to send the notice by United States mail to the approximately 1,100 known potential class members. These potential class members include all federally-recognized tribes and approximately 600 tribally-sanctioned organizations.
- Class counsel will arrange for publication of the notice in a newspaper in general circulation among American Indian tribes and tribal organizations, either *Indian Country Today* or *News from Indian Country*.
- Class counsel will pay for the mailing and publication of the notice.
- Responses to the notice (opt outs) will be filed with the Clerk of the Court prior to the deadline stated in the notice, with copies mailed to Plaintiffs' counsel and Defendants' counsel.

The potential class members are the same as those identified as appropriate recipients of notice in *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10<sup>th</sup> Cir. 1997). The procedure here outlined is likewise the same as that used in *Ramah Navajo Chapter*. There have been no complaints of inadequate notice in that case.

## **VII. CONCLUSION**

FOR THESE REASONS, Plaintiffs Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc., pray that this action be certified as class action under Rule 23(b)(2) and (3), and for such additional relief as may be requisite.

Respectfully submitted

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Dated: April 8, 2003.

## ATTACHMENTS

1. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0657 – Certification Order
2. U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT – SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED
3. Affidavit of Marcel Kerkmans in Support of Plaintiffs’ Motion to Certify Class
4. President’s Council on Integrity and Efficiency, AUDIT OF METHODS OF REIMBURSING INDIAN ORGANIZATIONS FOR INDIRECT COSTS INCURRED (September 1987)
5. Declaration of Jim Hooper, Jr. in Support of Plaintiffs’ Motion to Certify Class
6. Declaration of Douglas Burke in Support of Plaintiffs’ Motion to Certify Class
7. Deposition of Chris J. Krasowski, auditor, Office of Inspector General, Department of the Interior, in *Ramah Navajo Chapter v. Lujan*, June 14, 1991
8. Department of Health and Human Services, Fiscal Year 1998, Indian Health Service – Justifications of Estimates for Appropriations Committees
9. Deposition of Linda Richardson, Assistant Director of Administration for Financial Management in the Bureau of Indian Affairs, Department of the Interior, in *Ramah Navajo Chapter v. Lujan*, July 23, 1991
10. Excerpt: Indian Health Service FY2001 Report to Congress
11. Richard M. Nixon, “MESSAGE TO CONGRESS ON INDIAN AFFAIRS”, [1970] Pub. Papers 564
12. Senate Report No. 100-274 (1987), accompanying Pub. L. 100-472
13. Curriculum vitae of Michael P. Gross
14. Curriculum vitae of J. E. Gallegos
15. Curriculum vitae of Daniel H. MacMeekin
16. Curriculum vitae of Donald Juneau
17. Curriculum vitae of Eric Treisman