

IN THE UNITED STATES DISTRICT COURT
FOR THE 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/KBM

DIRK KEMPTHORNE, Secretary of the
Interior, *et al.*,

Defendants.

ORDER APPROVING THE THIRD PARTIAL SETTLEMENT AGREEMENT

THIS MATTER COMES before the Court on the Joint Motion for Preliminary and Final Approval of Third Partial Settlement Agreement and For an Order That Notice Be Sent to the Class (Docket No. 1138). On May 21, 2008, this Court entered an order (Docket No. 1140), granting preliminary approval of the Third Partial Settlement Agreement, directing Class Counsel to send notice to the Class of this preliminary approval and the essential terms and conditions of the Third Partial Settlement Agreement. The May 21, 2008 order also set a Fairness Hearing to consider final approval of the Third Partial Settlement Agreement.

Having considered the relevant pleadings, including the text of the thirty-four page Third Partial Settlement Agreement Settling All Claims for Equitable Relief and its appendices, the arguments of counsel, the absence of any objections to the proposed Third Partial Settlement Agreement, and the applicable law, and after having conducted a Fairness Hearing on August 26,

2008 upon notice to all Class Members, the Court finds that the Third Partial Settlement Agreement is in the best interest of the Class and will be approved.

Details of the Third Partial Settlement Agreement (“PSA III”)

In August 2006, this Court ruled in favor of Defendants as to their liability for unpaid contract support costs during years in which Congress capped the appropriation for contract support costs. The PSA III indicates that this ruling will be appealed by the Class. Notwithstanding this ruling, the parties subsequently engaged in extensive settlement negotiations on the non-monetary claims still existing in this case, resulting in the PSA III.

Pursuant to the Third Partial Settlement Agreement, the United States and the other Defendants agree to change some of their indirect cost rate-making practices, and the Parties have agreed that claims for equitable (declaratory and injunctive) relief are to be dismissed with prejudice.

The PSA III does not contain a monetary settlement, but addresses the methodology currently employed by the National Business Center (“NBC”), and formerly by the Office of the Inspector General (“OIG”) of the United States Department of Interior (“DOI”), to establish indirect cost rates for tribal contractors operating Pub.L. 93-638 programs. The proposed PSA III also resolves all of Plaintiffs’ equitable relief claims regarding direct contract support costs. The parties agree that the proposed agreement is fair and falls within the ranges of settlements that are fair and reasonable, and that it has been achieved through extensive arms-length negotiations spanning a period of approximately nine years, with very intensive negotiations over the last two years.

The parties represent to the Court that they have completed sufficient discovery to reach an informed and intelligent decision with respect to these equitable claims. Class Counsel are

experienced in Indian claims and similar litigation and are able to adequately represent the Class's interests in settlement.

Under the PSA III, the Court would retain jurisdiction to enforce the judgment incorporating the settlement and to dispose of the Reserve Accounts.

The essential terms and conditions of the PSA III are spelled out in the Summary Notice of Third Settlement to All Members of the Ramah Class (Appendix F to Joint Motion for Preliminary and Final Approval of PSA III, Docket No. 1138), which was sent to the Class, following approval of its content by both parties, and as per direction of this Court on May 21, 2008:

I. Summary of Key Terms of the Proposed Settlement

The settlement achieves three broad Class goals:

1. It provides simplified options for removing non-paying [non-ISDA] agencies from the indirect cost rate base by allowing tribes to have a separate rate for any non-paying agencies, thus meeting the mandate of the Tenth Circuit on remand. These new options for tribal contractors to negotiate "special rates" do not require the creation of separate administrations for the programs included under each special rate;
2. It reforms carryforward procedures used in determining "fixed-with-carryforward" rates; and,
3. It recognizes the adoption of the Bureau of Indian Affairs (as a result of this Class action) of a new contract support cost policy that includes direct contract support costs, as an additional component of contract support costs, alongside indirect contract support costs.

Additionally, the settlement provides intensive training for tribal finance officers, accountants, and tribal officials in the use of the new procedures and their effects. (Insert added)

II. The Principal Benefits and Features of the Settlement

The settlement provides:

1. Simplified special rate options which will enable Class members to avoid the dilution of indirect cost rates applied to ISDA contracts allegedly caused by the requirement to include all programs of all agencies in the direct cost base, including those which do not pay all, or in some cases, any, indirect costs.

2. Preserves each Class Member's right to choose or not to choose special rate options created under the settlement or retain a single rate.
3. Reforms carryforward procedures in several ways by:
 - A. Allowing rate holders to report as "recovered" or "collected" only those ISDA funds actually paid by ISDA funding agencies for indirect costs, and not ISDA program or tribal monies diverted by tribal contractors to pay indirect costs because of shortages in appropriations.
 - B. Reducing the instances where only over-recoveries but not under-recoveries are carried forward by eliminating the carryforward of any over-payments of indirect contract support costs that are not due to over-estimates of indirect contract support cost need so that Class Member's rates will not be adjusted downward in those circumstances.
 - C. Preserving Class Members' rights to use remedies under the Contract Disputes Act, the ISDA, or other applicable law, for any individual claims not settled in this action (e.g., contract claims and claims based on under-payments of indirect costs due to agency error). The ISDA agencies will retain their corresponding right to issue bills of collection for erroneous over-payments and recoveries by those agencies because those over-payments will also not be included in carry forward calculations.
4. Provides a series of training sessions by the National Business Center and Class Counsel and Class Experts on the use of the new rate options and procedures and creates materials to explain the same through discs and CDs.
5. Reserves all Class and individual claims to money damages not settled in the First Partial Settlement (PSA I) and the Second Partial Settlement (PSA II) based on the government's past actions. These reserved claims relate to unsettled cap year claims.
6. Reserves all claims for monetary relief, money damages, and equitable relief against the Indian Health Service for under-payment of indirect contract support costs; except that, if the DHHS or IHS or any other agency accept and apply the new rates negotiated under this settlement by the Department of the Interior's National Business Center, no claim may be made for greater monetary relief or money damages than would, after the implementation of the new rate system, be produced under it. This same condition applies to the DOI and BIA.
7. The settlement recognizes the lawsuit's critical role in the adoption by the Bureau of Indian Affairs of a contract support cost policy acknowledging contractors' and compactors' right to Direct Contract Support Costs and requires extensive consultation with Class Members if the Department of the Interior or Bureau of Indian Affairs seeks to amend or rescind the policy.

The Court has carefully reviewed the joint motion that seeks final approval of PSA III, along with the attached settlement agreement and its appendices. The settlement encompasses all claims for equitable relief in the Amended Complaint. With the Court's approval of PSA III and the

Plaintiffs' execution of the Release of Claims, set forth in Appendix D, the parties agree that there will be no remaining claims in this case.¹

No one has objected to the approval of the PSA III. While the Court takes this fact into consideration in evaluating the fairness of the settlement agreement, it has no effect whatsoever on this Court's role as a fiduciary for the absent class members. The Court has undertaken its own independent evaluation and review of the proposed settlement agreement in fulfillment of that responsibility.

WHEREFORE, having considered the foregoing, the Court concludes that the PSA III, filed with this Court on May 19, 2008, is fair, reasonable, adequate and a beneficial outcome for the Class. The PSA III meets the criteria set forth in Federal Rule of Civil Procedure 23(e).

IT IS, THEREFORE, ORDERED that the Third Partial Settlement Agreement is approved.

IT IS FURTHER ORDERED that the Court by request of all parties hereby corrects a typographical error at page 26, Section X (D) of PSA III, which correction substitutes the word "or" for the word "for" in the following sentence: "Any Class Member who seeks monetary relief ~~for~~ or money damages on an ISDA contract claim based on breach of this PSA III must pursue such claim in accordance with the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, 25 U.S.C. § 450m-1 and other applicable law".

IT IS FURTHER ORDERED that judgment approving the Third Partial Settlement Agreement, under which the United States and the other Defendants agree to change some of their indirect cost rate-making practices, and pursuant to which the Parties have agreed that claims for

¹ Plaintiffs carefully note however that, once a Final Judgment is entered in this matter, they intend to appeal from this Court's August 31, 2006 decision (Docket No. 1042).

equitable (declaratory and injunctive) relief are to be dismissed with prejudice, subject to the Court's inherent jurisdiction to enforce this settlement, is hereby **ENTERED**.

IT IS FURTHER ORDERED that the Clerk shall retain control of the balance of the Reserve Account(s), subject to disposition by order of the Court, to carry out the remaining undertakings of the Parties regarding training.

IT IS FURTHER ORDERED that the Clerk of the Court is authorized to continue charging and deducting a Registry Fee, not to exceed two and one-half percent (2 ½%) of the total amount of all interest earned on the invested funds in the Reserve Account(s) contained in the Registry, pursuant to the policy of the Judicial Conference and the Administrative Office of the United States Courts. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE GUIDE TO JUDICIARY POLICY AND PROCEDURES, Vol. I, Chap. VII, pt. J(6)(AO at 430-434 (1997).


IT IS FURTHER ORDERED that the "Settled Claims," as defined in the Third Partial Settlement Agreement are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the Third Partial Settlement Agreement constitutes a contract of the Parties for the benefit of Class Members which shall survive this litigation and be enforceable as such.

IT IS FURTHER ORDERED that the Third Partial Settlement Agreement becomes effective when this Order Approving the Third Partial Settlement Agreement is no longer appealable.

IT IS FURTHER ORDERED that upon entry of this Order, the Court has adjudicated all rights and liabilities of the parties, and that it is therefore appropriate to contemporaneously enter a Final Judgment.

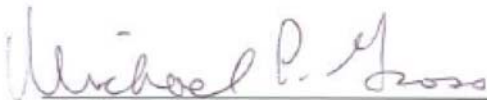
IT IS SO ORDERED.



SENIOR UNITED STATES DISTRICT JUDGE

Approved as to form

For Plaintiffs



Michael P. Gross
Lead Class Counsel



C. Bryant Rogers
Co-Class Counsel

Telephonically Approved 08/26/08

Lloyd B. Miller
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For Defendants

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James Todd
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