

**In the United States Court of Appeals  
for the Tenth Circuit**

PUEBLO OF ZUNI, on behalf of itself  
and all others similarly situated,  
Petitioner,

v.

UNITED STATES OF AMERICA; MICHAEL O. LEAVITT,  
Secretary of the United States Department of Health and Human Services; and  
CHARLES GRIM, Director of the Indian Health Service,  
United States Department of Health and Human Services,  
Respondents.

---

On Appeal from the United States District Court  
for the District of New Mexico

The Honorable William Johnson, District Judge  
Civil No. 01-1046 WJ/WPL

---

---

**REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)**

---

---

Donald J. Simon  
Arthur Lazarus, Jr.  
Sonosky, Chambers, Sachse,  
Endreson & Perry, LLP  
1425 K Street, N.W., Ste. 600  
Washington, D.C. 20005  
Telephone: (202) 682-0240  
Facsimile: (202) 682-0249

Lloyd B. Miller\*  
Richard D. Monkman  
Melanie Baca Osborne  
Sonosky, Chambers, Sachse, Endreson  
& Mielke, LLP  
500 Marquette Avenue, N.W., Ste. 1310  
Albuquerque, NM 87102  
Telephone: (505) 247-0147  
Facsimile: (505) 843-6912

\**Counsel of Record*

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>American Pipe &amp; Construction Co. v. Utah</i> , 414 U.S. 538 (1974) .....	3
<i>Beta Systems, Inc. v. United States</i> , 838 F.2d 1179 (Fed. Cir. 1988) .....	5
<i>Brooklyn Sav. Bank v. O’Neil</i> , 324 U.S. 697 (1945) .....	5
<i>Chris Berg, Inc. v. United States</i> , 426 F.2d 314 (Ct. Cl. 1970) .....	5
<i>Cherokee Nation v. Thompson</i> , 311 F.3d 1054 (10th Cir. 2002) .....	2
<i>Crown, Cork &amp; Seal Co., Inc. v. Parker</i> , 462 U.S. 345 (1983) .....	3
<i>LaBarge Products, Inc. v. West</i> , 46 F.3d 1547 (Fed. Cir. 1995) .....	5
<i>Ramah Navajo Ch. v. Lujan</i> , 112 F.3d 1455 (10th Cir. 1997) .....	3
<i>Rough Diamond Co. v. United States</i> , 351 F.2d 636 (Ct. Cl. 1965) .....	5
<b>Statutes</b>	
25 U.S.C. §§ 450–458aaa-18 (Indian Self-Determination Act) .....	1, 4
25 U.S.C. § 450m-1(a) .....	4
25 U.S.C. § 450j-1(k)(7) .....	1
25 U.S.C. § 450l(c) .....	4
41 U.S.C. §§ 601–613 (Contract Disputes Act) .....	4
<b>Regulations</b>	
2 C.F.R. pt. 225, App. B, § 10.b (OMB Cir. A-87) .....	1

**Rules**

Fed. R. Civ. P. 23 ..... 1, 3

    Fed. R. Civ. P. 23(a)(2) ..... 3

    Fed. R. Civ. P. 23(b)(3) ..... 3

The Government focuses much of its Opposition on explaining why the decision below was correct, instead of why it believes immediate review of that decision allegedly is not warranted. But the Government is wrong on both counts.

The Government asserts, for example, that granting interlocutory review would not prevent putative class members from actually filing “‘protective’ suits [in the district courts] or appeals [in the Civilian Board of Contract Appeals].” Opp. at 14. That misses the point. The more quickly this appeal is heard and resolved, the fewer “suits or appeals” will need to be filed by putative class members, since the agency decisions that compel a Tribal contractor to institute further legal action (absent a class) continue to be issued on a rolling basis—with hundreds of claims yet to be decided. Further, if this Court grants the Petition, there is a greater likelihood other courts and the CBCA will stay their hand in these “protective” proceedings, in deference to the possibility this Court will ultimately reverse and a class will be certified. That only conserves the resources of all tribunals, precisely as Rule 23 intends.<sup>1</sup>

---

<sup>1</sup> While some Tribal contractors with very small claims have filed protective suits or appeals, some Tribal contractors with larger claims would still prefer to be in the class. Why? Because many Tribes lack the independent resources necessary to commit hundreds of thousands of dollars to litigating against the Government, and because the ISDA and the Government’s regulations prohibit them from using contract funding for this purpose—*see* 25 U.S.C. § 450j-1(k)(7); 2 C.F.R. pt. 225, App. B, § 10.b (OMB Cir. A-87)—even assuming (as is unlikely) that a Tribal contractor would be prepared to reduce funding for health care and other critical government

The Government also denies in conclusory fashion that the underlying issues implicated here involve important questions of class action law, asserting they are merely ““routine.”” Opp. at 20. But saying so does not make it so, and this case is anything but ““routine.”” As the Petition reflects and the Government’s conduct in an earlier case here confirms, *see Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), the Government has played ‘fast and loose’ with the facts as the context changes. In *Cherokee*, the Government admitted that hundreds of Tribal contractors were underpaid tens of millions of dollars for one identical reason and one reason only: under IHS’s Circulars fewer funds were allocated to the contractors because the agency prioritized its spending on other matters. The Government even told this Court and the Supreme Court under oath the total amount of those underpayments in various years. Petition at 4-7. But here the Government asserts nothing of the kind ever happened; that the *Cherokee* situation was unique to those two Tribal contractors alone; that no other Tribal contractors were ever underpaid what they were due; and that a contrary assertion requires a contract-by-contract review to establish liability. *See e.g.* Opp. at 18.

Such a situation is hardly ““routine,”” and at a minimum review is warranted

---

services to finance such litigation. (The Government also errs in its assertion that the Zuni Pueblo claimed \$664,129, Opp. at 7. Actually (and as Defendants own district court pleadings agree), Zuni claimed about one-half that sum. *See* Defs’ Mem. in Supp. of Mot. to Dismiss at 9-10 (Dkt. No. 59).)

to explore the circumstances under which a district court may simply disregard and thus not even discuss, much less weigh, the impact on Rules 23(a)(2) and 23(b)(3) of having the core liability issue applicable to the entire class already established by a Supreme Court ruling. Petition at 15-16, 19. The Government's shifting representations to the courts only enhances the uniquely compelling case for immediate review, lest the opportunity for review be lost altogether.

Nor is the situation "routine" when, within the same Circuit, two diametrically opposing outcomes occur on a question of class certification under an identical statute involving identical claims by identical claimants and an identical defendant—here, the United States. Whether Judge Hansen was correct in *Ramah Navajo Ch. v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), where \$105 million was recovered for Tribal contractors through a class action (Petition at 20 n.15), or Judge Johnson was correct, where no class will be certified, it is important to the development of the law under Rule 23 that the question be answered. And again, absent granting this Petition, the opportunity to consider that critical question may be lost.

As for the district court's underlying decision, we add only these remarks. First, the Government is wrong that presentment is a "jurisdictional" requirement that trumps the ordinary class action litigation rules, including the mandatory *American Pipe-Crown Cork* Tolling Rule. Petition at 15 (discussing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v.*

*Parker*, 462 U.S. 345 (1983)). Confirmation that there is no jurisdictional prerequisite to filing suit in district court under the Indian Self-Determination Act is found in the Act’s jurisdictional provision, which expressly and independently grants “original jurisdiction” to the district courts to award “money damages” against the Government:

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a) (emphasis added).<sup>2</sup>

Second, the Government appears to concede that the contracts may be materially identical (Opp. at 19)—which they must be by law (25 U.S.C. § 450l(c)) and which defeats one key basis for the district court’s decision—but then switches to

---

<sup>2</sup> As pointed out in the Petition at 14 n.9, the only other courts to rule on the necessity for presentment under the Contract Disputes Act, 41 U.S.C. §§ 601–613, including one in this Circuit, have disagreed with the court below in this case, thus creating an intra-Circuit conflict.

arguing that the “annual funding agreements” that “accompanied” the contracts had “varied terms and conditions.” Opp. at 19. But the undisputed proof was otherwise,<sup>3</sup> and in any event the statutory contract and the statutory provisions incorporated by reference therein would vitiate any inconsistent term of an annual funding agreement.<sup>4</sup>

### CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition should be granted.

---

<sup>3</sup> Pl. Exh. 14, Depo. of Diego Lujan, IHS Abq. Area, Senior Contracting Officer, at 61:4-12, 68:2-21 (reviewing the funding provisions of the sampled Albuquerque Area 1997 and 2001 sample contracts, where there exist 31 Tribal contractors, and indicating that the operative provisions are not different in any material respect); *id.* at 61:19 - 62:24 (the Albuquerque Area has adopted “basic language” and “a format [for Annual Funding Agreements] that came along with the model agreement”); and *id.* at 156:12-157:22 (*e.g.*, “They [Albuquerque contractors] weren’t treated any differently” with regard to “implementing model contract terms,” “calculating [CSCs],” or “how [IHS would] pay or allocate [CSCs] to tribal contractors”).

<sup>4</sup> *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995); *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988)); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640 (Ct. Cl. 1965); *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317-318 (Ct. Cl. 1970). *See also Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (“a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy”).

Respectfully submitted this 20th day of June 2007.

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE, LLP

/s/ Lloyd B. Miller

By: Lloyd B. Miller  
Donald J. Simon  
Richard D. Monkman  
Arthur Lazarus, Jr.  
Melanie Baca Osborne  
500 Marquette Avenue, N.W., Ste. 1310  
Albuquerque, NM 87102  
Tel: (505) 247-0147  
Facsimile: (505) 843-6912  
E-mail address: [lloyd@sonosky.net](mailto:lloyd@sonosky.net)

**Certificate of Compliance With Fed. R. App. P. 5(c) and 10th Cir. Rule 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 5(c) and the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. Rule 32(a) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Office 12 in Times New Roman 14.

Dated this 20th day of June 2007.

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE, LLP

/s/ Lloyd B. Miller

---

Lloyd B. Miller  
500 Marquette Avenue, N.W., Ste. 1310  
Albuquerque, NM 87102  
Telephone: (505) 247-0147  
Facsimile: (505) 843-6912  
E-mail address: [lloyd@sonosky.net](mailto:lloyd@sonosky.net)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)** was served on the following attorneys or parties of record this 20th day of June 2007 via electronic mail, and via express delivery on June 21, 2007.

Jeffrica Jenkins Lee  
jeffrica.lee@usdoj.gov  
Barbara Biddle  
barbara.biddle@usdoj.gov  
U.S. Department of Justice  
950 Pennsylvania Avenue, Room 7537  
Washington, D.C. 20530-0001

Dated this 20th day of June 2007.

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE, LLP

/s/ Lloyd B. Miller

---

Lloyd B. Miller  
500 Marquette Avenue, N.W., Ste. 1310  
Albuquerque, NM 87102  
Telephone: (505) 247-0147  
Facsimile: (505) 843-6912  
E-mail address: lloyd@sonosky.net

## CERTIFICATION OF DIGITAL SUBMISSION

The undersigned hereby certifies as follows:

1. All required privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and
2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, E-trust Antivirus, version 7.1.192, a program which is automatically updated when new releases are made, and according to the program, the digital submissions are free from viruses.

Dated this 20th day of June 2007.

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE, LLP

/s/ Lloyd B. Miller

---

Lloyd B. Miller  
500 Marquette Avenue, N.W., Ste. 1310  
Albuquerque, NM 87102  
Telephone: (505) 247-0147  
Facsimile: (505) 843-6912  
E-mail address: lloyd@sonosky.net