

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

PUEBLO OF ZUNI, on behalf of itself )  
and all others similarly situated, )  
 )  
Plaintiff, )  
 )  
v. ) Case No. CIV 01-1046 LH/LEG  
 )  
UNITED STATES OF AMERICA; )  
TOMMY THOMPSON, Secretary of the )  
United States Department of Health and )  
Human Services; and )  
MICHAEL H. TRUJILLO, Director of the )  
Indian Health Service, United States )  
Department of Health and Human Services,) )  
 )  
Defendants. )  
\_\_\_\_\_ )

**FIRST AMENDED COMPLAINT**

Plaintiff, for itself and all other members of the class described below,  
complains and alleges as follows:

**I.  
INTRODUCTION**

1. This class action for money damages is brought under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), as amended, 25 U.S.C. § 450 *et seq.* and the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (CDA). During the period covered by this First Amended Complaint the ISDA required the defendants

through the Indian Health Service, to enter into certain annual contracts with the plaintiff and other Indian Tribes represented by the class, and further required that the contract price include “contract support costs.” Despite the command of the ISDA, the defendants (1) failed to properly calculate the Tribes’ “contract support cost” requirements, (2) failed to pay the properly calculated amounts required to be paid, and (3) failed to fully pay even the Tribes’ undercalculated “contract support cost” requirements. This class action is brought to recover money damages for defendants’ failure to pay the plaintiff and the class the full contract support costs required to be paid: (1) under the ISDA and (2) under contracts between the Indian Health Service and the plaintiff entered into pursuant to the ISDA.

The damages claims asserted herein arise out of the defendants’ breach of the plaintiff’s and the class’s statutory rights under the ISDA, and the defendants breach of the plaintiff’s and the class’s contractual rights under their annual contracts. The period covered by the First Amended Complaint is federal fiscal years 1993 to the present.

## **II. JURISDICTION AND VENUE**

2. This Court has jurisdiction pursuant to 25 U.S.C. § 450m-1 (actions or claims for money damages arising under contracts authorized by the ISDA), 28 U.S.C. § 1362 (actions brought by Indian Tribes) and 28 U.S.C. § 1331 (actions arising under

federal law).

3. Venue in this civil action against officers and employees of the United States acting in their official capacity is proper in this District under 28 U.S.C. § 1391(e) because the plaintiff resides in this District.

### **III. PARTIES**

4. Plaintiff Pueblo of Zuni is a federally recognized Indian Tribe with tribal headquarters situated in Zuni, New Mexico. Pursuant to the terms of the ISDA, the Pueblo of Zuni has at all times relevant to this First Amended Complaint operated tribal health programs under various self-determination contracts and annual funding agreements entered into with the Indian Health Service.

5. Defendant United States is sued because the claims asserted herein involve statutory and contractual obligations of the United States and seek damages against the United States for breach of those obligations. Defendant Tommy Thompson is the Secretary of the United States Department of Health and Human Services (DHHS). Under the Indian Self-Determination Act, Congress has imposed upon the Secretary various statutory and contractual obligations that are the subject of this action. Defendant Michael H. Trujillo is the Director of the Indian Health Service, the Department's agency that exercises primary responsibility for administering the United States' trust programs serving Indian Tribes. The Secretary has delegated most of his responsibilities under the

Indian Self-Determination Act to the Director. Secretary Thompson and Director Trujillo are officers or employees of the United States, and they are sued here in their official capacities and collectively referred to herein interchangeably as “the Secretary” or “IHS.”

#### **IV. GENERAL ALLEGATIONS**

##### **The Indian Self-Determination Act**

6. Pursuant to the ISDA, IHS enters into “self-determination contracts,” “self-governance compacts,” and annual funding agreements (also referred to collectively herein as “ISDA contracts”) with tribes and tribal organizations. Self-determination contracts are entered into by the parties thereto under the authority of Title I of the ISDA, Pub. L. 93-638, as amended, 25 U.S.C. § 450 *et seq.* (hereinafter referred to as “Title I”). Self-governance compacts have been entered into by the parties thereto either under the authority of Title III of the ISDA, Pub. L. 101-472, as amended, reproduced at 25 U.S.C.A. § 450f note (2000 Supp.) (hereafter “Title III”), or since August 2000 under Title V of the ISDA, 25 U.S.C. § 458aaa *et seq.* A self-determination contract, a self-governance compact or an annual funding agreement is a binding contractual agreement between the Government and an Indian Tribe under which the Tribe undertakes the daily administration of one or more designated federal programs serving the Tribe, such as an IHS hospital, an IHS clinic or an IHS community health program. Each year IHS enters into hundreds of ISDA contracts. The same Act also applies to the Bureau of Indian

Affairs (BIA).

7. The ISDA requires that the contract price of any ISDA contract shall include an amount “not less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract. . . .” 25 U.S.C. § 450j-1(a)(1). *See also* 25 U.S.C. § 458aaa-7(c) (requiring Secretary to pay amounts specified in 25 U.S.C. § 450j-1(a)(1)-(5); Title III, § 303(a)(6). This amount is commonly referred to as the “Secretarial amount.”

8. This “Secretarial amount,” however, does not reflect the full cost of administering the contracted IHS programs. This is partly so because many of the administrative resources drawn upon by IHS in support of its operations are located in entirely different departments or agencies of the federal government. These include various functions carried out by the Office of Personnel Management, the Merit Systems Protection Board, the General Services Administration, the General Accounting Office, the various Inspectors General, the Treasury Department, and various other DHHS agencies. This is also partly so because applicable law or prudent management impose upon Tribes administering ISDA contracts certain requirements not borne by IHS in its administration of its own operations (such as the duty to complete annual audits under the Single Agency Audit Act, 31 U.S.C. § 7501, *et seq.*, and the need to carry certain forms of insurance).

9. Tribes with ISDA contracts also incur more costs than the Secretary

because the agencies historically imposed upon Tribes additional overhead burdens “more stringent than the requirements that are imposed on the Federal agencies themselves,” S. Rep. No. 100-274 at 9 (1987), such as requirements for program reporting.

10. Due to the facts noted in paragraphs 8-9 of this First Amended Complaint, without additional funding a Tribe administering an ISDA contract cannot deliver the same level of services to IHS beneficiaries that IHS could deliver when operating the same program that is the subject of the ISDA contract. Absent additional funding, such Tribes are compelled to divert federal program funds to pay for these administrative functions, effectively penalizing the beneficiaries of a Tribe that operates an IHS program under an ISDA contract. *See* United States General Accounting Office, REPORT TO CONGRESSIONAL COMMITTEES: INDIAN SELF-DETERMINATION ACT, SHORTFALLS IN INDIAN CONTRACT SUPPORT COST NEED TO BE ADDRESSED at 40 (June 1999).

11. Most of the additional costs incurred by Tribes under the ISDA are known as “indirect costs.” Historically, neither the Indian Health Service nor the Bureau of Indian Affairs has fully paid all tribal indirect cost requirements associated with ISDA contracts. Congress recognized the difficulties caused by the underfunding of contract support costs in 1988 and amended the ISDA that year to address these problems. In doing so the Senate Committee on Indian Affairs declared that:

Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

S. Rep. No. 100-274 (1987), at 13. It observed that:

[T]he single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.

*Id.* at 8. To address this problem, Congress added to the Act detailed provisions requiring that contracts include a carefully defined amount for “contract support costs” over and above the “Secretarial amount.”

**Contract Support Costs.**

12. In addition to the Secretarial amount, and to address the matters noted in paragraphs 8-11 of this First Amended Complaint, the ISDA requires that the contract price include “contract support costs.” The ISDA directs that:

There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for 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). The ISDA directs that contract support costs “shall be added” to the Secretarial amount as part of the contract price. *Id.* The ISDA further provides that:

The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of –

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under [25 U.S.C. § 450j-1(a)(1)].

25 U.S.C. § 450j-1(a)(3)(A). The ISDA further requires that:

During the initial year that a self-determination contract is in effect, the amount required to be paid under [25 U.S.C. § 450j-1(a)(2)] shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary –

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

25 U.S.C. § 450j-1(a)(5).

13. The ISDA provides that a contractor's right to full contract support costs as part of the contract price is a statutory right:

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)], subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

25 U.S.C. § 450j-1(g).

14. Contract support cost needs are specified in Section 106(a)(2) and are defined in Section 106(a)(3) of the ISDA. 25 U.S.C. § 450j-1(a)(2), (a)(3). They are also further defined in various IHS circulars describing how such costs are calculated, including ISDM 94-02, IHS Circular 96-04, IHS Circular 2000-01, and IHS Circular 2001-05.

15. The Indian Self-Determination Act Amendments of 1994, Pub. L. 103-413, amended the ISDA to require that “[e]ach self-determination contract entered into under [the ISDA] shall – (1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c). . . .” 25 U.S.C. § 450l(a). The terms of the model agreement, set forth in 25 U.S.C. § 450l(c), are commonly known as “the model contract.” These terms were incorporated into all of the Pueblo of Zuni's self-determination contracts that are the subject of this action.

16. Section 1(b)(4) of the model contract, set forth at 25 U.S.C. § 450l(c), restates in contractual terms the statutory right of all self-determination contractors to the full “contract support costs” specified in 25 U.S.C. § 450j-1(a):

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

#### **IHS Calculation of Contract Support Cost Requirements**

17. From fiscal years 1993 to the present, IHS has calculated the contract support cost requirements of tribes and tribal organizations contracting under Title I or compacting under Titles III or V under several successive sets of agency guidelines known as Indian Self-Determination Memorandum (ISDM) 92-2, and IHS Circulars 96-04, 2001-01 and 2001-05. These guidelines provide agency personnel with “instructional guidance on determining amounts of required contract support costs,” and they “detail[ ] procedures for calculating CSC requirements.” *See* IHS Circular 2001-05 at 1.

#### **Indirect Contract Support Costs**

18. Contract support costs are comprised of “indirect costs” and “direct” contract support costs. *See, e.g.*, IHS Circular 96-04, at 2, 5-8. Indirect costs, on average comprise 80% of the total contract support cost requirements calculated by IHS. *See,*

*e.g.*, President's Budget Request Fiscal Year 1997, Indian Health Service Justification of Estimates for Appropriations Committees at IHS-80 (1996).

19. Most tribes and tribal organizations carrying out ISDA contracts negotiate an annual "indirect cost rate" with the Tribe's "cognizant agency," which is the Department of the Interior's Office of Inspector General for "virtually all" ISDA contracts. President's Budget Request Fiscal Year 1999, Indian Health Service Justification of Estimates for Appropriations Committees, at IHS-118). With rare exception these negotiations occur under OMB Circular A-87. IHS then calculates each Tribe or tribal organizations' annual indirect contract support cost requirement associated with an IHS ISDA contract by multiplying the contractor's indirect cost rate by the Secretarial amount included in the contract (subject to appropriate adjustments reflected in the indirect cost rate agreement).

20. IHS's reliance on the unadjusted indirect cost rate negotiated with the Department of the Interior's Office of Inspector General, or on any other unadjusted indirect cost rate issued by any other cognizant federal agency of a tribal contractor, understates the full indirect cost requirement Congress directed the Secretary to pay in the ISDA. In 1997 the Tenth Circuit held that reliance by the federal government on such rates to calculate indirect contract support cost requirements, without further adjustment to account for agencies that by law pay no indirect costs (or pay less than the full amount dictated by such unadjusted rate), is contrary to the ISDA's command that:

Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

*Id.* See *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997). The IHS has at all times relevant to this First Amended Complaint engaged in the same practice in calculating ISDA indirect contract support cost requirements as was struck down by the Tenth Circuit in *Ramah*.

### **Direct Contract Support Costs**

21. “Direct” contract support costs, unlike “indirect costs,” are contract support costs which are directly and readily attributable to a single IHS ISDA contracted program (or group of such programs). Direct contract support costs include the additional “direct program expenses for the operation of the Federal program that is the subject of the contract,” 25 U.S.C. § 450j-1(a)(3)(A)(i), and may include such costs as workers’ compensation payments, unemployment taxes, and insurance. IHS calculates direct contract support cost requirements under the IHS guidelines identified in paragraph 17 of this First Amended Complaint.

### **General Shortfalls in IHS Contract Support Cost Payments**

22. The defendants have during the 1990s and through fiscal year 2001:

- (a) undercalculated, and thus failed to fully pay, all tribal indirect contract support cost requirements associated with tribal ISDA contracts, by employing

an erroneous and illegal methodology for calculating such requirements (as described in Paragraph 20 of this First Amended Complaint);

(b) failed to fully pay most tribal contractors' undercalculated contract support cost requirements associated with both "ongoing" contracts and "new or expanded" contracts.

23. Throughout the 1990s IHS generally told Tribes that they had no right to additional contract support costs over and above those sums that IHS actually paid in a given year.

24. At no time during the period FY 1993 to the present has the President ever requested from Congress the full amount of the contract support cost requirements associated with all tribal contracts between Tribes and the Indian Health Service. At no time during the period FY 1993 to the present has the Secretary reported to Congress the full contract support cost requirement associated with all tribal contracts. The Secretary's failure was contrary to the directive set forth in 25 U.S.C. § 450j-1(c) of the ISDA.

**The Lump-Sum Years.**

25. During the period FY 1993 through FY 1997, Congress funded IHS through a lump-sum appropriation that was legally available to carry out the ISDA, including to pay contract support costs. In each such year, an expenditure out of the lump-sum appropriation to pay full contract support costs associated with ISDA contracts in effect that year was within the purpose of the appropriation, the amount of the

appropriation and the timing of the appropriation's availability. IHS, in fact, used a portion of each such year's appropriations to pay such costs. At no time covering the period FY 1993 through FY 1997 did any appropriations Act of Congress limit the amount IHS could spend for contract support cost purposes. *E.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996); Omnibus Consolidated Appropriations Act for FY 1997. Although throughout this period various Congressional appropriations committees recommended that IHS spend various amounts of its lump-sum appropriations for contract support cost purposes; *see, e.g.*, H.R. Rep. No. 104-173 at 97 (1995); at 3; *see also* S. Rep. No. 104-125, at 94 (1995), at 4; S. Rep. No. 104-319 at 90 (1996), at 3; *see also* H.R. Rep. No. 104-625 (1996); none of these recommendations was ever enacted into law. None of these recommendations constituted an earmark or cap on the amount of appropriations legally available in the covered year to pay contract support costs. Throughout this period, IHS lump-sum appropriations were legally available to pay in full all contract support cost requirements associated with tribal contracts.

26. "Availability," a term of art in appropriations law, refers to the legality of an agency's expenditure of its appropriated funds. *See* I U.S. General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law* 2-4 (1991), (explaining that the statement "whether appropriated funds are or are not 'legally

available' for a given obligation or expenditure . . . is simply another way of saying that a given item is or is not a legal expenditure”).

27. In fiscal years 1993 through 1997 the Secretary had ample lump-sum appropriations from which to pay the Tribes their contract support cost entitlements. And if appropriated funds were legally “available” to pay the Tribes their contract support cost requirements, the Secretary had no delegated authority or discretion under the ISDA to refuse payment on ISDA contracts.

28. The last, unnumbered sentence of 25 U.S.C. § 450j-1(b) (hereinafter the “§ 106(b) availability clause”) provides as follows:

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

The § 106(b) availability clause specifically limits the Secretary’s authority to disburse funds to those funds that are legally available to pay amounts specified in ISDA contracts and required to be paid under the ISDA.

29. At the close of each of fiscal years 1993 through 1997 IHS had multi-million dollar unobligated balances and multi-million dollar obligated but unliquidated balances. This was still the case during FY 1997 for each of these fiscal years. During FY 1997 IHS shared with the IHS Contract Support Cost Work Group a document

entitled “Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls.” In this document IHS outlined the procedures by which such balances could be applied to pay prior year contract support shortfalls. IHS subsequently declined to carry out these procedures.

30. In allocating contract support costs during the period FY1993 through FY1997, IHS considered two separate categories of tribal contracts: (a) “ongoing” (also called “existing”) contracts, and (b) “new or expanded” (also called “initial or expanded”) contracts.

(a) “Ongoing” (or “existing”) contracts were contracts that a tribe had been operating in a previous year. For example, if a tribe was operating an IHS clinic and had been receiving its IHS funding (including contract support costs) since 1990, IHS deemed that contract in 1996 an “ongoing” contract.

(b) “New or expanded” contracts addressed IHS programs that were never operated by a tribe in prior years. For instance, if a tribe previously had nothing to do with running an IHS clinic, but submitted a contract to run the clinic for the first time in 1996, IHS deemed that contract a “new” (or “initial”) contract in 1996. Likewise, if a tribe had run some IHS medical programs in the clinic since 1990, and submitted a contract modification for 1996 to also run, for the first time, an IHS dental program, IHS deemed the dental portion of the contract an “expanded” contract in 1996.

31. Despite the legal availability of its entire lump-sum appropriations in the period FY1993 through FY1997 to pay tribal contract support costs, during that period IHS each year limited contract support cost payments to “ongoing” contracts and to “new or expanded” contracts, though in different ways. IHS did so even though Congress did not earmark or cap the amounts IHS could pay for such costs.

(a) During the period FY1993 through FY1997, IHS annually limited its total contract support cost payments to “ongoing” contracts to the total amount recommended in appropriations committee reports for that purpose. In each of fiscal years 1993 through 1997, IHS failed to pay scores of tribal contractors tens of millions of dollars in their full contract support cost requirements (even as miscalculated by IHS, *see* paragraph 20 of this First Amended Complaint).

(b) Congress established the “Indian Self-Determination Fund” (hereafter “ISD Fund”) in each of fiscal years 1993 through 1997 to pay “the transitional costs of initial or expanded” tribal ISDA contracts. *E.g.*, Pub. L. 104-208, 110 Stat. 3009, 3009-213 (1996). The only effect of the designation of the ISD Fund was to authorize IHS to spend the Fund over the course of two or more fiscal years; it did not limit the total amount IHS could spend for contract support costs associated with new or expanded ISDA contracts. Nonetheless, during the period FY1993 through FY1997, IHS, in general, only used the ISD Fund to pay contract support costs associated with “new or expanded” contracts. IHS distributed the ISD Fund among “new or expanded” contracts

on a first come-first served basis. To do this IHS used its “ISD Queue” or “Priority List,” which collected and then ranked tribally-contracted IHS programs by the year in which a tribe first contracted to carry out the program. IHS distributed the ISD Fund to pay that year’s contract support costs associated with contracts at the top of the Queue, continuing down until IHS exhausted the ISD Fund. IHS then removed those contracts from the Queue and advanced the rest. In any given year a tribe operating a contracted IHS program listed on the Queue would be paid contract support costs associated with that contract only if the contract advanced high enough to be covered by that year’s ISD Fund. If not, that year the tribe got nothing in connection with such costs. IHS Circular 96-04, at 10-11; ISDM 92-2, at 5. In each of fiscal years 1993 through 1997, IHS failed to pay scores of tribal contractors tens of millions of dollars in their full contract support cost requirements (even as miscalculated by IHS, *see* paragraph 20 of this First Amended Complaint) associated with their contracts listed on the IHS “Queue.”

32. Up through FY1997, Congress never capped the amount of funds that were legally available to IHS to pay contract support costs for “ongoing” tribal contracts or for “new or expanded” tribal contracts. In other litigation the defendants in this Action have conceded the preceding sentence.

33. In 1998 the House Appropriations Committee criticized the “basic ‘fairness’” of IHS’s system for paying contract support costs to tribal contractors. *See*

H.R. Rep. 105-609, at 126 (1998). Beginning in FY1999, IHS abandoned the “Queue” Policy described in Paragraph 30(b) of this First Amended Complaint.

34. The defendants’ actions in funding less than the full contract support cost requirements of tribal contractors over a period of many years is documented in (1) the 1999 report of the General Accounting Office identified in paragraph 10 of this First Amended Complaint; (2) IHS annual contract support cost shortfall reports prepared pursuant to section 106(c) of the ISDA (25 U.S.C. 450j-1(c)) but never forwarded to Congress as required by the ISDA; (3) IHS’s budget justifications submitted to Congress as part of the President’s annual budget request; (4) various additional reports prepared by IHS including special reports requested by committees of Congress; and (5) individual documentation IHS annually provides to tribal contractors stating each tribal contractor’s calculated annual contract support cost requirements and each tribal contractor’s annual payment.

35. The IHS annual contract support cost shortfall report is an annual report prepared each spring. In this annual report, IHS summarizes how much IHS has calculated as each Tribe’s requirement to meet its full contract support cost requirements in the prior year, how much IHS paid against that requirement, and the resulting shortfall, if any. In this report IHS also summarizes the full contract support cost requirement IHS has calculated for each Tribe in the current year, the amounts it has paid or expects to pay in the current year against those needs, and the shortfall (if any) it expects in the current

year. Further, the annual contract support shortfall report projects any similar shortfall IHS anticipates in the next fiscal year.

36. The IHS shortfall reports compiled each year are prepared by each of the twelve IHS Area Offices individually for each Tribe situated within each Area Office. The IHS Area Offices then forward their determinations of final contract support cost requirements to the IHS Headquarters, where the information is reviewed and compiled by the Office of Tribal Self-Governance, the Office of Tribal Programs, the Office of Management Support and the Division of Financial Management. The purpose of these reports is to meet the Secretary's duty under Section 106(c) of the ISDA to furnish to Congress an annual accounting of the full contract support cost requirements of contracting Tribes, as determined by IHS, and to provide an accounting of the amount of contract support cost funds that were paid according to IHS in that year. 25 U.S.C. § 450j-1(a)(1). In preparing each report IHS (either centrally or through its various Area Offices) calculates on an individual contract basis the amount of contract support costs required to fully fund tribal contract support cost requirements in the covered year, according to the instructions set forth in IHS's circulars regarding contract support costs. Each IHS shortfall report is accompanied by detailed appendices which include tribal-specific information relevant to the determination of contract support cost requirements for every tribal contractor in the United States.

37. In each of fiscal years 1993 through 1997 IHS determined the total amount it would make available for contract support cost payments that year shortly after the enactment of each year's annual appropriation for IHS. At no time contemporaneous with these determinations did IHS ever undertake a detailed analysis of the balance of its appropriation for purposes of determining how much in additional contract support cost funding could be paid to tribes with ISDA contracts that year.

**The “Cap” or Earmark Years.**

38. In each of fiscal years 1998 to the present Congress has limited the availability of appropriations IHS may spend to pay contract support costs due on ISDA contracts, by limiting such payments in the relevant appropriations acts to “not to exceed” a certain sum. The sums so appropriated have been insufficient to meet the full contract support cost requirements of all tribal ISDA contractors even at the understated amounts IHS calculated as specified in paragraph 20 of this First Amended Complaint.

39. The insufficient appropriations made to IHS to pay contract support costs in fiscal years 1998 to the present do not limit or excuse the federal government's continuing liability for the full contract price specified in the ISDA and in the plaintiff's contracts and funding agreements. The ISDA's § 106(b) availability clause limits the Secretary's ability to liquidate and pay the government's contractual and statutory obligations under the ISDA, but it does not limit the United States's liability for the contract price specified in the ISDA and in the plaintiff's contracts.

40. Even in years when sufficient appropriations were not available to the Secretary to pay all contracted amounts for contract support costs, the United States remained liable for the full amount specified in the ISDA and the ISDA contracts. The ISDA requires the Secretary to enter into binding contracts in advance of appropriations acts for specified amounts, including amounts for contract support costs. The duty and authority of the Secretary to enter into ISDA contracts is not limited to available appropriations.

41. Under the ISDA, a tribal contractor has a contractual right to a specific amount of contract support costs as part of the contract price. Both the Secretary's authority, and his mandatory duty, to award a tribal contract at this price, including full contract support costs, is not conditional on the availability of appropriations. While an insufficiency of appropriations to IHS may excuse IHS from providing full contract support cost payments on tribal contracts, it does not eliminate the obligation of the United States for the full contract price.

42. The mandatory funding provisions of § 450j-1(a), by providing the Secretary with legislative authorization to create obligations in advance of an appropriation, create what is referred to in the jargon of federal appropriations law as "contract authority." Failure by Congress to appropriate sufficient funds to meet those obligations does not limit the United States's liability to pay the specified amount of the obligation. The ISDA unconditionally mandates that the full amount of funding for

contract support costs must be added to the contract as a part of the contract price and specifically requires the Secretary to bind the United States to that amount through contract.

43. This action seeks an award of money damages arising out of the defendants' failure to pay full contract support costs. This action does not seek specific performance, and it does not seek the payment of contract support costs not previously paid. The court's authority to award "money damages" under 25 U.S.C. § 450m-1 of the ISDA is independent of the continuing availability (or lack thereof) of older appropriations to pay additional contract support costs. Money damages will be awarded from the Permanent Judgment Fund created by 31 U.S.C. § 1304. The Fund is not controlled by IHS and it is not dependent on appropriations to IHS. Rather, the Fund establishes a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlement may order payments without being constrained by concerns of whether adequate funds exist at the agency level to satisfy any judgment.

44. IHS has no authority to pay a judgment entered in this case. Such damages may by law only be paid from the Judgment Fund.

**V.  
SPECIFIC FACTS CONCERNING THE PUEBLO OF ZUNI**

45. The Zuni Reservation encompasses about 450,000 acres, located in the

west-central part of New Mexico. The Pueblo of Zuni is one of the largest and most remote of the nineteen New Mexico Indian Pueblos. The Village of Zuni contains the Pueblo's population center and is the site of all governmental, educational, health and social service organizations. Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country* at 470 (1996) (*Tiller's Guide*).

46. The Pueblo of Zuni's principal town was founded in about 1350 and its Reservation was established by Executive Order in 1877. Additional lands were added to the Reservation in 1917, 1935, and 1949. The Pueblo adopted a Constitution under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The governing body of the Pueblo of Zuni is the Tribal Council, made-up of the Governor, the Lieutenant Governor, and Six Tribal Council members, all of whom are elected to four-year terms. *Tiller's Guide*.

47. The Pueblo of Zuni currently employs 504 people, including 54 individuals in positions serving the health program.

48. Since before 1993, the Pueblo of Zuni has operated various federal IHS programs benefitting the Zuni people, through self-determination contracts authorized under Title I of the ISDA. The contracted programs have been operated for the benefit of the approximately 10,000 members of the Pueblo, most of whom live on the Zuni Reservation. At all times relevant to this First Amended Complaint, these contracted programs included, among others: the Otitis Media (Audiology) program (Contract Nos.

242-87-0032 and 242-96-0022); the Community Health Representative program (Contract Nos. 242-88-0030 and 242-96-0021); the Emergency Medical Service (EMS) program (Contract Nos. 242-95-0019); the Model Diabetes Project (Wellness Program) (Contract Nos. 242-93-0003 and 242-96-0008); the Teen Health Program (Contract Nos. 242-93-0074 and 242-97-0050); and the Zuni Recovery Center (substance abuse services) program (Contract Nos. 242-88-0031, 242-93-0072 and 242-97-0054). Since at least FY 1995 to the present, each of these contracts has been in the form of a Model Contract and Annual Funding Agreement.

49. The Pueblo of Zuni's self-determination contracts and annual funding agreements with the United States, together with the ISDA, entitled the Pueblo to all contract support costs described in 25 U.S.C. § 450j-1(a) for the Pueblo's contracts from fiscal years 1993 through 1998.

50. Under the Pueblo of Zuni's self-determination contracts and annual funding agreements for the period fiscal years 1993 through 1998; 25 U.S.C. § 450j-1(a); and other applicable law, the Pueblo of Zuni had a contractual and legal right to be paid, collectively, on all its ISDA contracts indirect and direct contract support costs in an amount totaling at least \$1,256,968; plus the additional sum of \$339,934 (representing the difference between the amount due for indirect costs as calculated by IHS and the amount due for indirect contract support costs as properly calculated pursuant to the ISDA and the Tenth Circuit's holding in the *Ramah* litigation (as described in Paragraph 20 of this First

Amended Complaint)); for a total amount of no less than \$1,596,902. Of this amount, IHS paid no more than \$932,773, leaving a total amount of unpaid contract support costs of at least \$664,129.

51. By multiple letters dated April 16, 2001, as supplemented by multiple letters dated September 28, 2001 covering each annual funding agreement, the Pueblo of Zuni submitted timely claims with IHS for damages for the contract support costs not paid to the Pueblo under its various contracts and funding agreements. Each claim was filed pursuant to the Contract Disputes Act (“CDA”), 41 U.S.C. § 601 *et seq.* and 25 U.S.C. § 450m-1(c) of the ISDA. Each claim made by the Pueblo of Zuni was under \$100,000. As to each claim the agency contracting officer had sixty days from receipt to issue a decision. 41 U.S.C. § 605(c)(1). As of the date of the filing of this First Amended Complaint, more than the statutory 60 days had passed since the submission of the claims, as so supplemented. Since the IHS contracting officer has to date not issued a decision on any of the claims, the claims have now been denied by operation of law. 41 U.S.C. § 605(c)(5). This First Amended Complaint is therefore timely insofar as it arises under the CDA. 41 U.S.C. § 609(a)(3); 25 U.S.C. § 450m-1(a), (c).

## **VI. CLASS ACTION ALLEGATIONS**

52. This action is brought by plaintiff as a class action, on its own behalf and on behalf of all others similarly situated, under the provisions of Rules 23(a) and

23(b)(3) of the Federal Rules of Civil Procedure for money damages and other relief as the Court deems appropriate, including costs and attorneys' fees.

53. The class so represented by plaintiff in this action, and of which plaintiff is itself a member, consists of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." The class so represented, and of which plaintiff is itself a member, may, at the Court's direction, be subdivided into subclasses comprised of (1) tribal contractors whose indirect contract support cost requirements were undercalculated and thus not fully paid, as alleged in Paragraph 20 of this First Amended Complaint; (2) tribal contractors whose contract support costs associated with their "ongoing" contracts were not fully paid (even as undercalculated); and (3) tribal contractors whose contract support costs associated with their "new or expanded" contracts were not fully paid (again, even as undercalculated).

54. According to IHS's contract support cost shortfall report covering fiscal year 1999 ("IHS 1999 Report"), 329 Tribes situated in 35 states then operated ISDA contracts for the administration of various IHS hospitals, clinics and other federal health care programs.

55. Of these 329 tribal contractors, all 329 tribal contractors suffered shortfalls in the payment of their indirect contract support costs associated with their ISDA contracts, due to IHS's failure to properly calculate such indirect contract support cost requirements (as alleged in Paragraph 20 of this First Amended Complaint). Further,

of these 329 tribal contractors, at least 296 Tribes experienced shortfalls in the payment of their contract support cost requirements as undercalculated by IHS, including (1) at least 142 Tribes that according to the IHS 1999 Report experienced shortfalls in contract support costs associated with their “ongoing” contracts; (2) at least 131 Tribes that were at the time of the IHS 1999 Report listed on the IHS Queue and that were underpaid in FY 1999 in connection with their “new or expanded” contracts; and (3) at least 23 Tribes that did not experience shortfalls in FY 1999 but did experience shortfalls in one or more earlier years associated with their “new or expanded” contracts.

56. The class is so numerous that joinder of individual members in this action is impracticable.

57. There are common questions of law and fact involved in this action that affect the rights of each member of the class in the same way, and the relief sought is common to the entire class. Each ISDA contract has an identical clause regarding the availability of appropriations. Each class member suffered one or more contract support cost shortfalls in the same way, for the same reason, and under the same IHS policies. Further, each class member’s claim raises the same legal issue: whether the Indian Self-Determination Act, and the ISDA contracts that implement the Act, required the federal government to pay the Tribes at the time the full contract price, including the full amount of the “shortfalls” they experienced in the designated years (including, but not limited to,

the amounts acknowledged in IHS's own reports). The class satisfies Rule 23(a)'s commonality requirement.

58. The claims of the plaintiff Pueblo of Zuni, are typical of the claims of the class in that the claims of all members of the class, including plaintiff, are based on the same statutes, legal theories, basic contract terms, and course of conduct. Like all other class members, the Pueblo of Zuni's claim is that the ISDA requires the government to calculate and pay full contract support costs associated with ISDA contracts, once a contract is executed and performance has commenced. The Pueblo of Zuni's claimed injuries arise out of the same precise course of conduct and events that led to the underpayments experienced by all other class members over the full class period. Further, there is no antagonism among class members, for any judgment awarded for damages (if any) will be payable from the Permanent Judgment Fund established in 31 U.S.C. § 1304, just as was the case in *Ramah v. Babbitt*, 50 F. Supp.2d 1091 (D.N.M. 1999). The class satisfies Rule 23(a)'s typicality requirement.

59. The named plaintiff is the representative party for the class, and is able to, and will, fairly and adequately, protect the interests of the class. The named plaintiff Tribes have no antagonistic or conflicting interests with those of the class, and class counsel is qualified, experienced and able to conduct the proposed litigation. The attorneys for plaintiff are experienced and capable in litigation in the field of contract support costs under the ISDA, having *inter alia* represented, or continuing to represent,

the Tribes in *Ramah Navajo School Board & Puyallup Tribe v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), on reconsideration, 999 F. Supp. 1395 (D. Or. 1998), on remand, 58 F. Supp.2d 1191 (D. Or. 1999), reversed \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. Oct. 16, 2001) (pending on rehearing petition filed Nov. 30, 2001); and *Shalala v. Cherokee Nation of Oklahoma*, \_\_\_ F.3d \_\_\_ (Fed. Cir., Feb. 25, 2000) (unpublished order dismissing government's appeal from a determination of liability for unpaid contract support costs). In addition, plaintiff's counsel represents the Tribes in *Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of Nevada v. United States*, No. 01-7106 (10th Cir.) (appeal docketed June \_\_\_, 2001); certain DHHS Division of Cost Allocation class members in *Ramah Navajo Chapter v. Babbitt*, No. 90-0957 (D.N.M.); and a putative class of Tribes contracting with the BIA that were never paid "direct" contract support costs in *Pueblo of Zuni v. United States*, No. 00-365 LH/WWD (D.N.M.) All of these cases involved or currently involve similar legal issues pertaining to contract support costs. Neither the Pueblo of Zuni nor its counsel herein have any interests that might cause them not to vigorously pursue all the claims stated herein.

60. This action is properly maintained as a class action inasmuch as the questions of law and fact common to all members of the class predominate over any questions affecting individual members. Here, the claims stem from a common course of conduct. The basic claim for unpaid contract support cost is the same for all class

members: they all claim that the ISDA and their annual contracts entitled them to full contract support cost funding. So, too, is the government's central defense the same: that appropriations have allegedly not been available to fully pay all Tribes their contract support cost needs, and that any such unavailability relieves the government of liability. The common issues thus "dominate this litigation," and are both determinative and dispositive. The class satisfies rule 23(b)(3)'s "predominance" requirement.

61. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. This case involves a course of conduct that was identical with regard to all members of the class. In addition, (1) the members of the class do not have a strong interest in controlling the prosecution of their separate claims, (2) there is relatively little litigation concerning the controversy already commenced by members of the class, (3) it is desirable to concentrate this litigation in the interests of judicial economy, and (4) the class is manageable. If individual actions were commenced in this Court by members of the class, the Court would ultimately be called upon to address the precise same legal issues as are presented in this action. The same would be true of other individual actions commenced in other districts. Therefore, a class action is a superior means for the fair and efficient resolution of the controversy.

62. The class meets the requirements of Rule 23(b)(1). Separate actions by tribes and tribal organizations against the defendants asserting the claims set forth herein (1) would create a risk of establishing incompatible standards of conduct for the

defendants, and (2) would also create a risk of individual adjudications which would, as a practical matter, be dispositive of the interests of other tribes and tribal organizations, and would substantially impair or impede the ability of such other tribes and tribal organizations to protect their interests.

63. The class meets the requirements of Rule 23(b)(2). The defendants have both acted and refused to act on grounds generally applicable to the class, making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

64. Each class member's damages can accurately be calculated by reviewing an extensive array of government documents, including, *inter alia*, internal IHS shortfall reports; IHS's ISD Queue reports; IHS's comprehensive fiscal year 1999 final determination regarding the contract support costs needs of all Tribes then remaining on the Queue from prior years; IHS's similar comprehensive reports for fiscal years 2000 and 2001; IHS field data supporting said reports; and indirect cost data maintained, in part, by the Department of Interior Office of Inspector General, and, in part, by the DHHS Division of Cost Allocation. Quantifying damages can be accomplished efficiently and accurately in this class action, both globally for the class and individually for each class member, given extensive existing agency data and analyses concerning annual tribal contract support cost requirements.

65. The claims asserted by the class do not include claims for the failure of the defendants to pay contract support costs for reasons specific to an individual tribe, such as (but not limited to) disagreements concerning the proper method for determining a particular tribe's contract support cost entitlements due to a dispute over particular items of cost.

**FIRST CAUSE OF ACTION  
(VIOLATION OF THE ISDA FOR UNDERCALCULATING  
“INDIRECT” CONTRACT SUPPORT COSTS)**

66. Plaintiff realleges paragraphs 1 through 65 as if fully set forth herein.

67. As alleged in Paragraph 20 of this First Amended Complaint, IHS failed to adjust the indirect cost rate issued by the Department of the Interior Office of Inspector General to account for the dilution in IHS's responsibility for indirect costs under the ISDA caused by the OIG's erroneous assumption, reflected in its rate calculations, that all agencies funding the Pueblo of Zuni contribute to the Pueblo's indirect cost pool at the full OIG-determined rate. This failure resulted in an undercalculation of the “amount” the Pueblo of Zuni was entitled to under the ISDA for contract support costs. Specifically, in order to calculate the Pueblo of Zuni's “indirect” contract support costs, IHS used or incorporated a method, based upon OASC-10 and OMB Circular A-87, for determining indirect cost rates which in each year: (a) included funding provided by certain agencies other than IHS and the BIA in the direct cost base, resulting in (b) a lower indirect cost rate which was then (c) applied to the IHS's portion

of the direct cost base, resulting in (d) a determination of an IHS indirect contract support cost requirement which was lower in amount than required by the ISDA because (e) the agencies that were wrongfully included in the direct cost base did not fully pay, and were known not to fully pay, supplemental indirect costs.

68. By failing to adjust the OIG rate to properly calculate the full amount of indirect contract support costs associated with the IHS programs operated by the Pueblo of Zuni under the ISDA, and those programs operated by other members of the plaintiff class under the ISDA, the defendants violated their statutory obligations to the Pueblo of Zuni and to the plaintiff class under: 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), 450j-1(b), 450j-1(c)(2), 450j-1(d) and 450j-1(g), and other applicable federal law.

**SECOND CAUSE OF ACTION  
(BREACH OF CONTRACT FOR UNDERCALCULATING  
“INDIRECT” CONTRACT SUPPORT COSTS)**

69. Plaintiff realleges paragraphs 1 through 68 as if fully set forth herein.

70. The Pueblo of Zuni entered into multiple ISDA contracts with the United States covering FY1993 through 1998. These ISDA contracts required the IHS to pay the Pueblo of Zuni full indirect contract support costs associated with all IHS programs transferred to tribal operation under those contracts.

71. The defendants failed to meet their contractual obligations to pay all indirect contract support costs required to be paid under the Pueblo of Zuni’s ISDA contracts for fiscal years 1993 through 1998, by failing to adjust the OIG rate to properly

calculate the full amount of indirect contract support costs associated with the IHS programs operated by the Pueblo of Zuni under the ISDA, and those programs operated by other members of the plaintiff class under the ISDA.

72. The multiple failures of the defendants to pay to the Pueblo of Zuni its full indirect contract support costs by undercalculating those costs, as alleged in this First Amended Complaint, constitute multiple breaches of the Pueblo's ISDA contracts for fiscal years 1993 through 1998.

73. The plaintiff class provided the defendants with IHS-funded services under ISDA contracts. These agreements and the law under which they were executed required the defendants to pay the plaintiff class members their full statutory entitlements to indirect contract support costs associated with all health programs transferred to tribal operation under those contracts. The defendants have failed to meet their contractual obligations by failing to pay all indirect contract support costs required to be paid under the plaintiff class members' contracts with IHS. The failure of the defendants to pay the plaintiff class full contract support costs as alleged in this First Amended Complaint constitutes multiple breaches of those ISDA contracts.

**THIRD CAUSE OF ACTION  
(VIOLATION OF THE ISDA FOR FAILING TO PAY FULL CONTRACT  
SUPPORT COSTS ASSOCIATED WITH "ONGOING" CONTRACTS)**

74. Plaintiff realleges paragraphs 1 through 73 as if fully set forth herein.

75. The amount of contract support costs the ISDA required the defendants to pay included the full amount of contract support costs associated with the Pueblo of Zuni's "ongoing" contracts in FY1993 through FY1998, and the full amount of contract support costs associated with the "ongoing" contracts of all other members of the Plaintiff class. The defendants failed to fully pay these amounts. In failing to fully pay these amounts, the defendants violated their statutory obligations to the Pueblo of Zuni and to the plaintiff class under: 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), 450j-1(b), 450j-1(c)(2), 450j-1(d) and 450j-1(g), and other applicable federal law.

**FOURTH CAUSE OF ACTION  
(BREACH OF CONTRACT FOR FAILING TO PAY FULL CONTRACT  
SUPPORT COSTS ASSOCIATED WITH "ONGOING" CONTRACTS)**

76. Plaintiff realleges paragraphs 1 through 75 as if fully set forth herein.

77. The Pueblo of Zuni entered into multiple ISDA contracts with the United States covering FY1993 through 1998. These ISDA contracts required the IHS to pay the Pueblo of Zuni full contract support costs associated with all portions of the Pueblo's contracts, including all "ongoing" portions of those contracts.

78. The defendants failed to meet their contractual obligations to pay full contract support costs associated with the "ongoing" portions of the Pueblo of Zuni's ISDA contracts for fiscal years 1993 through 1998, and the "ongoing" portions of the contracts of other members of the class.

79. The multiple failures of the defendants to pay to the Pueblo of Zuni its full contract support costs associated with its ongoing contracts, as alleged in this First Amended Complaint, constitute multiple breaches of the Pueblo's ISDA contracts for fiscal years 1993 through 1998.

80. The plaintiff class provided the defendants with IHS-funded services under ISDA contracts. These agreements and the law under which they were executed required the defendants to pay the plaintiff class members their full statutory entitlements to contract support costs associated with all health programs transferred to tribal operation under those contracts, including the "ongoing" portions of those contracts. The defendants have failed to meet their contractual obligations by failing to pay all contract support costs associated with "ongoing" contracts required to be paid, under the plaintiff class members' contracts with IHS. The failure of the defendants to pay the plaintiff class full contract support costs as alleged in this First Amended Complaint constitutes multiple breaches of those ISDA contracts.

**FIFTH CAUSE OF ACTION  
(VIOLATION OF THE ISDA FOR FAILING TO PAY  
FULL CONTRACT SUPPORT COSTS ASSOCIATED WITH  
"NEW OR EXPANDED" CONTRACTS)**

81. Plaintiff realleges paragraphs 1 through 80 as if fully set forth herein.

82. The amount of contract support costs the ISDA required the defendants to pay included the full amount of contract support costs associated with the Pueblo of

Zuni’s “new or expanded” contracts in FY1993 through FY1998, and the full amount of contract support costs associated with the “new or expanded” contracts of all other members of the Plaintiff class. The defendants failed to fully pay these amounts. In failing to fully pay these amounts, the defendants violated their statutory obligations to the Pueblo of Zuni and to the plaintiff class under: 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), 450j-1(b), 450j-1(c)(2), 450j-1(d) and 450j-1(g), and other applicable federal law.

**SIXTH CAUSE OF ACTION  
(BREACH OF CONTRACT FOR FAILING TO PAY  
FULL CONTRACT SUPPORT COSTS ASSOCIATED WITH  
“NEW OR EXPANDED” CONTRACTS)**

83. Plaintiff realleges paragraphs 1 through 82 as if fully set forth herein.

84. The Pueblo of Zuni entered into multiple ISDA contracts with the United States covering FY1993 through 1998. These ISDA contracts required the IHS to pay the Pueblo of Zuni full contract support costs associated with all portions of the Pueblo’s contracts, including all “new or expanded” portions of those contracts.

85. The defendants failed to meet their contractual obligations to pay full contract support costs associated with the “new or expanded” portions of the Pueblo of Zuni’s ISDA contracts for fiscal years 1993 through 1998, and the “new or expanded” portions of the contracts of other members of the class.

86. The multiple failures of the defendants to pay to the Pueblo of Zuni its full contract support costs associated with its “new or expanded” contracts, as alleged in

this First Amended Complaint, constitute multiple breaches of the Pueblo's ISDA contracts for fiscal years 1993 through 1998.

87. The plaintiff class provided the defendants with IHS-funded services under ISDA contracts. These agreements and the law under which they were executed required the defendants to pay the plaintiff class members their full statutory entitlements to contract support costs associated with all health programs transferred to tribal operation under those contracts, including the "new or expanded" portions of those contracts. The defendants have failed to meet their contractual obligations by failing to pay all contract support costs associated with "new or expanded" contracts, required to be paid under the plaintiff class members' contracts with IHS. The failure of the defendants to pay the plaintiff class full contract support costs as alleged in this First Amended Complaint constitutes multiple breaches of those ISDA contracts.

**SEVENTH CAUSE OF ACTION  
(DECLARATORY JUDGMENT)**

88. Plaintiff realleges paragraphs 1 through 87 as if fully set forth herein.

89. Section 314 of the Omnibus Consolidated and Emergency

Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. 105-277 (§ 314), provides in full:

Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208, and 105-83

for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

90. Defendants assert that § 314 bars some or all of the claims alleged by the plaintiff in this First Amended Complaint, rendering the defendants' contractual and statutory obligations described in this First Amended Complaint void and unenforceable.

91. Plaintiff contends that § 314 is wholly inapplicable to its rights and the rights of the Class to money damages as alleged in this First Amended Complaint. Plaintiff further contends that to the extent these enactments are directed at rendering the defendants' contractual and statutory obligations to the plaintiff and the Class void and unenforceable, they are not sovereign acts but mere actionable repudiations of vested contracts and vested statutory rights by a contracting party – the United States – which is bound to honor its contracts and just debts the same as any other contracting party.

92. The claim of defendants that § 314 bars the plaintiff's claims and those of the Class, rendering the defendants' contractual and statutory obligations void and unenforceable, presents a matter of actual controversy between the parties.

## PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court grant the following relief for itself and all other members of the class:

1. Monetary damages under the ISDA, 25 U.S.C. §§ 450m-1(a) and 450m-1(d) and the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, in an amount to be proven at trial.

2. Interest under the Prompt Payment Act, 31 U.S.C. § 3901 *et seq.*, the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, and other applicable law;

3. Costs of suit under the Equal Access to Justice Act, 28 U.S.C. § 2412, and other applicable law, including full reasonable attorneys' fees and expert witness fees.

4. A declaratory judgment that § 314 does not impair the rights of the plaintiff and of the class to money damages as alleged in this First Amended Complaint.

5. Such other and further relief including declaratory, injunctive and equitable relief, as the Court deems just.

DATED this 12<sup>th</sup> day of December 2001.

Attorneys for Plaintiff

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE

By: \_\_\_\_\_

Lloyd Benton Miller  
David C. Mielke

I hereby certify that I mailed and faxed, or caused to be mailed and faxed, a true and correct copy of the foregoing document to the following attorney of record this 12th day of December 2001:

Rachel J. Hines, Trial Attorney  
Federal Programs Branch, Civil Division  
U.S. Department of Justice  
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\_\_\_\_\_  
David C. Mielke

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