



contract support costs. All three cases involve indirect cost rates set by the same agency of the Interior Department.

The two first filed cases are pending in the district of New Mexico and one case is pending in the district of the District of Columbia.<sup>1</sup> The plaintiffs in the District of Columbia case have moved the Panel to transfer the District of Columbia case to the District of New Mexico and to consolidate the three cases for pretrial proceedings. The plaintiffs in the New Mexico cases concur in this motion.

All three of the cases were stayed for a year or longer awaiting a decision of the Supreme Court in related litigation. Only the stay in the Zuni case in New Mexico has been lifted as of this filing. On March 1, 2005, the Supreme Court validated the Plaintiffs' reading in all three cases by reversing the Tenth Circuit's decision 8-0 in *Cherokee Nation of Oklahoma, et al., v. Leavitt*, 543 U.S. \_\_\_\_, 125 S. Ct. 1172, 2005 WL 464860. The Supreme Court held that the United States is contractually bound to fulfill its obligations under ISDA contracts in the same manner and according to the same rules as all other contracts of the United States. The Supreme Court resolved a conflict in the Circuit Courts, affirming a judgment for Cherokee by the Federal Circuit and reversing the judgment against Cherokee by the Tenth Circuit. With this resolution of Circuit conflicts and a ruling favorable to the plaintiff Indian tribes and tribal organizations the two remaining cases in which stays remain in effect are ripe to be relieved of the stays and move forward to resolution.

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<sup>1</sup> This is the Tunica case. The Tunica plaintiffs originally filed their complaint in the U.S. District Court for the District of New Mexico on November 21, 2002. *Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc.*, No. CIV-02-1465 JP/LCS. Plaintiffs dismissed under Rule 41(a) following the decision of the Tenth Circuit Court of Appeals decided November 26, 2002, in *Cherokee Nation v. Thompson*, 311 F.3d 1054 reversed and remanded, *sub. nom. Cherokee Nation v. Leavitt*, 125 S. Ct. 1172 (March 1, 2005).

## II. PENDING LITIGATION

Three class actions are pending against the United States on behalf of Indian tribes and tribal organizations who operate programs and provide services as contractors with the Government pursuant to the ISDA. One of three is already certified, *Ramah Navajo Chapter c. Norton*, D.N.M. CIV 90-0957 LH/WWD. The Act provides that the Government is to provide "contract support costs" to the tribal contractors. 25 U.S.C. § 450j-1(a)(2). Most contract support costs are for "indirect costs" and a common gravamen of the claims in the three cases is that the Government has failed to calculate and pay contract support costs in the manner prescribed by contract and statute. Because of this miscalculation less than full indirect costs have been added to ISDA contracts or paid by the Government to contractors for several fiscal years.

The District of New Mexico case that involves BIA contracts has been significantly litigated. The case was filed in October 1990. The court certified the case as a class action in 1993, but ruled against the plaintiffs on summary judgment. The Tenth Circuit reversed that judgment, holding that the indirect cost rate method used by the BIA was illegal. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997). Upon remand to Honorable C. LeRoy Hansen the case was partially settled as to claims for certain years.<sup>2</sup> The remaining claims involve the same questions of fact and law as the two cases involving IHS contracts.

The District of Columbia case was filed on December 9, 2002. Certain defense motions to dismiss were ruled on by the district court with other grounds for dismissal

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<sup>2</sup> *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp.2d 1091 (D.N.M. 1999), and *Ramah Navajo Chapter v. Norton*, 250 F. Supp.2d 1303 (D.N.M. 2002).

reserved for later decision. The court denied class certification without prejudice with the plaintiffs having the right to renew the motion. On June 7, 2004, the Court in that case entered an order staying the proceeding because of the pendency of *Cherokee* on writ of certiorari to the Supreme Court.

The third case and second filed in the District of New Mexico, brought by the Pueblo of Zuni, was initiated in September 2001, assigned to Honorable C. LeRoy Hansen but promptly stayed by agreement of the parties on December 28, 2001 to await outcome of Cherokee's appeal, eventually decided by United States Supreme Court.

Michael P. Gross is and has been lead plaintiffs' counsel throughout the lengthy proceedings, including the Tenth Circuit appeal, in the *Ramah v. Norton* case in the District of New Mexico. Mr. Gross is lead plaintiffs' counsel in the *Tunica-Biloxi v. United States* case in the District of the District of Columbia. Lloyd B. Miller is lead plaintiffs' counsel in the *Zuni v. United States* case in the District of New Mexico and co-class counsel for the Direct Contract Support Cost claim in the Ramah case.

### III. ARGUMENT

#### A. The Actions Should Be Transferred and Consolidated In A Single Court Pursuant To 28 U.S.C. § 1407.

Transfer and consolidation or joint management will serve "the convenience of parties and witnesses and will promote the just and efficient conduct" of the litigation in each of the cases proposed for transfer. See 28 U.S.C. § 1407(a). The purpose of Section 1407 is to avoid "the possibility for conflict and duplication in discovery and other pretrial procedures in related cases . . ." Senate Committee Note to S. 159, reprinted in *17 Moore's Federal Practice 3d* § 112App.02, at 112App.4 (3d Ed. 2001).

The availability of transfer and consolidation or joint management for related cases was designed to “assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation.” Moore’s at Op. Cit. 112App.6.

In this instance a particular district court is uniquely appropriate for transfer and consolidation of the three pending cases. By transfer and consolidation or joint management by a single judge experienced with the facts and law uniformity of interpretation of ISDA can now easily be achieved, a chief congressional goal, as reflected by the fact, the two Secretaries have a single set of regulations for ISDA to ensure “a uniform and consistent set of regulations for all Indian self-determination contracts.” S. Rep. 100-274, at 38 (1987). See, 61 Fed. Reg. 32481, 32482 (1996). See *also*, the internal procedures jointly promulgated by the Secretary of Health and Human Services and the Secretary of the Interior: “It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act.” U.S. Dept of Interior and U.S. Dept of Health and Human Services, Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination Act, Declaration of Policy – Secretarial Policy (b)(3) (1999).

Since the inception of contracting with tribes under the ISDA, the Secretaries who administer such contracts (Interior and Health and Human Services) have except for a limited number of ISDA contractors relied on the Office of Inspector General of the Interior Department (or its successor for indirect cost rates, the National Business Center) to calculate the rates on which consolidated overhead and administrative costs – so-called “indirect contract support costs” – would be paid. The Government agencies relied on a manual known as OMB Circular A-87 that requires under the single rate

option used by most self-determination contractors that all programs operated by a contractor be included in the formula. The system assumes incorrectly that all programs funded by other federal and state agencies pay their prorata share of indirect costs, even though in fact IHS and BIA knew that not to be true. The use of this method systematically undercalculated and continues to undercalculate the indirect costs needed to operate the BIA and IHS contracts.

Counsel herein, Mr. Gross, on appeal to the Tenth Circuit obtained the ruling in *Ramah v. Lujan, supra*, that the Government's method of calculating indirect costs violates the ISDA and breaches the ISDA contracts. That ruling did not, however, end the litigation concerning the BIA contracts nor the IHS contracts.<sup>3</sup> In all cases, except for the settled years in the BIA case, the Government has refused to pay the full amounts notwithstanding the ruling in *Ramah v. Lujan* because it argued that Congress did not appropriate sufficient funds and because the ISDA contracts should not be treated as standard government procurement contracts among other defenses. As those same Government arguments were to be addressed by the Supreme Court in *Cherokee*, the three cases have been at a standstill for an extended period.

The claims in the cases have a temporal differentiation. For years 1994 and after in the case of BIA contracts and 1998 and after for IHS contracts the Congressional appropriations acts contained words of limitation or so-called "caps" on funds for indirect contract support costs. Before that the appropriations were in "lump sum" form. The

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<sup>3</sup> The United States did not seek further review of *Ramah v. Lujan* and final judgments were rendered for the lump sum years applicable to the BIA based on agreed partial settlements, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp.2d 1091 (D.N.M. 1991) and *Ramah Navajo Chapter v. Norton*, 250 F. Supp.2d 1303 (D.N.M. 2002). The Supreme Court's decision in *Cherokee* now vindicates the BIA for its willingness to settle the BIA lump sum years claims. Settlement negotiations on equitable claims are in progress and nothing in this Motion is intended to derail or delay amicable resolution of those issues. Mr. Miller, counsel in the Zuni case, is co-class counsel for the class in *Ramah* for intervenor Zuni Pueblo.

lump sum years for BIA contracts were resolved by agreed settlement in the District of New Mexico case as noted *supra* Note 3. The cap years and equitable relief remain an issue in all three cases as do the lump sum years in the *Tunica-Biloxi* case in the District of Columbia and the *Zuni* case in the District of New Mexico.

The three cases share common issues of fact related to the indirect cost system employed by both the Department of Health and Human Services and Interior and common issues of law which include liability for damages for the cap years (1994 and beyond for the BIA and 1998 and beyond for the IHS).

**B. The Appropriate Transferee Court Is The District of New Mexico.**

The convenient, logical and appropriate transferee district is the District of New Mexico.

Once the stay is lifted in the *Ramah* case Judge C. LeRoy Hansen will be addressing the miscalculation claim and other claims on the BIA contracts for the so-called cap years, 1994 and beyond for the BIA and 1998 and beyond for the IHS, by virtue of the parallel claim in *Zuni*. Plaintiffs previously moved for summary judgment in the BIA case on the issue but the stay was interposed due to the previously described Cherokee appeal. Motions for summary judgment raising the same miscalculation issue to be governed by the same authorities will be filed in the other cases. Transfer and consolidation or joint management will allow a single court with substantial background in the facts and the law to consider and decide the plaintiffs' indirect cost miscalculation claims on a global and consistent basis. Transfer to the proposed court means only one judge will be required to rule on the crucial issues. The District Court for the District of Columbia will be relieved of the burden of the *Tunica-Biloxi* action and the possibility of

inconsistent rulings will be avoided. *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326, 1327 (JPML 1969); *Schneider v. Sears*, 265 F. Supp. 257, 267 (S.D.N.Y. 1967).

Other factors generally recognized by the Panel all support the transfer and consolidation requested:

Judge C. LeRoy Hansen is already familiar with the parties, the underlying facts and the applicable cases construing the ISDA. *In re Evergreen Valley Project Litigation*, 366 F. Supp. 510, 511 (JPML 1973); *In re Private Civil Treble Damage Antitrust Litigation Involving IBM*, 302 F. Supp. 796, 800 (JPML 1969) (“We think that the just and efficient conduct of these actions will be best furthered by their transfer to a district wherein the assigned judge is already familiar with the proceedings. . .”); *In re L.E. Lay & Co. Antitrust Litigation*, 391 F. Supp. 1054, 1056 (JPML 1975).<sup>4</sup>

The proceedings concerning the Government’s ISDA contract support costs in the *Ramah v. Norton* case are further advanced than the other cases. *In re L. E. Lay & Co., supra*; *In re IBM Antitrust Litigation, supra*.

Of the five tribes or tribal organizations that are plaintiffs in the cases three of them, *Ramah Navajo Chapter*, *Ramah Navajo School Board* and *Zuni Pueblos*, are present in New Mexico contributing to the convenience of witnesses.<sup>5</sup> Plaintiffs’ experts in the *Tunica* and *Ramah* cases also reside in New Mexico. The agency responsible for setting rates is located in Sacramento, California. Thus that factor is of no consequence

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<sup>4</sup> Judge Walton in *Tunica* has decided some issues presented by defendants’ motion to dismiss in that case. Those adverse to the plaintiff’s are now largely mooted or overridden by the Supreme Court’s decision in *Cherokee*, or were left for later resolution and thus can be decided by Judge Hansen.

<sup>5</sup> The fourth, the *Tunica-Biloxi Tribe* of Louisiana resides in Louisiana, and the fifth, the *Oglala Sioux Tribe* of South Dakota, is a named Plaintiff in the *Ramah* Class Action and is also represented by Mr. Gross. *Oglala Sioux Tribe* has no objection to transfer as requested, nor does the *Pueblo of Zuni* represented by Mr. Miller.

except that Sacramento is closer to New Mexico than the East Coast. *In re Evergreen Valley, supra*; *In re Air Crash Disaster Near Silver Plume Colorado*, 352 F. Supp. 968, 969 (JPML 1972); *In re Tenneco Inc. Securities Litigation*, 426 F. Supp. 1187, 1189 (JPML 1977).

#### IV. CONCLUSION

For all of the reasons and on the facts provided, the plaintiffs request that the Panel transfer the action in the District of Columbia to the District of New Mexico and consolidate all cases in the court of Honorable C. LeRoy Hansen.

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### CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Brief in Support of Plaintiffs' Motion to Transfer and Consolidate or Jointly Manage for Pretrial Proceedings was served by Federal Express Overnight Delivery Service on this 30<sup>th</sup> day of March, 2005, to the following counsel of record:

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