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**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re: Indian Tribes Contract
Support Cost Litigation

MDL Docket No. 1690

**RESPONSE TO MOTION TO TRANSFER AND CONSOLIDATE OR JOINTLY
MANAGE FOR PRETRIAL PROCEEDINGS BY UNITED STATES, HHS SECRETARY
LEAVITT, AND IHS DIRECTOR GRIM**

Pursuant to Rule 7.1(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, the United States, the Secretary of the U.S. Department of Health and Human Services ("HHS") Michael O. Leavitt, and the Director of the Indian Health Service ("IHS") Charles W. Grim (collectively "IHS Defendants"), by and through undersigned counsel, hereby respond to the Motion to Transfer and Consolidate or Jointly Manage for Pre-trial Proceedings filed by Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board (hereinafter "Movants"), as follows:

1. The first sentence is denied except to admit that a putative class action captioned Tunica-Biloxi Tribe of Louisiana & Ramah Navajo School Board v. United States, Secretary Leavitt, & Secretary Norton, No. 02-2413, has been filed and is pending in the United States

District Court for the District of Columbia (this case is hereinafter referred to as "Tunica") and to admit that a putative class action captioned Pueblo of Zuni v. United States, Secretary Leavitt, & Director Grim, No. 01-1046, has been filed and is pending in the United States District Court for the District of New Mexico (this case is hereinafter referred to as "Zuni"). The remaining allegations in the first sentence contain Movants' characterization of the claims raised in these two putative class action complaints. The complaints speak for themselves, and the Panel is respectfully referred to those complaints for a full and accurate statement of the claims contained therein. The second sentence is denied except to admit that a class action captioned Ramah Navajo Chapter et al. v. Secretary Norton, Earl Devaney, and the Assistant Secretary of the Department of the Interior, No. 90-957, brought by tribal contractors who contract with the Bureau of Indian Affairs ("BIA") is currently pending in the United States District Court for the District of New Mexico (this case is hereinafter referred to as "Ramah"). The remaining allegations in the second sentence contain Movants' characterization of the claims raised in the Ramah complaint. The complaint speaks for itself, and the Panel is respectfully referred to that complaint for a full and accurate statement of the claims contained therein. The third sentence is denied, except to admit that the Secretary of HHS and the Secretary of the U.S. Department of the Interior ("Interior") both administer the Indian Self-Determination and Education Assistance Act (hereinafter referred to as "ISDA"). The Panel is respectfully referred to the provisions of the ISDA, 25 U.S.C. §§ 450 et seq. for a full and accurate statement of their contents.

2. This paragraph is admitted.

3. The first sentence is denied, except to admit that Zuni and Tunica were brought on behalf of Indian Tribes and Tribal Organizations that contract with IHS and that Ramah was

brought on behalf of a class of Indian Tribes and Tribal Organizations that contract with the Secretary of the Interior. The remaining allegations in the first sentence contain Movants' characterization of the claims raised in Zuni, Tunica, and Ramah. The Complaints filed in those actions speak for themselves, and the Panel is respectfully referred to those complaints for a full and accurate statement of those three actions. The second sentence is admitted. The third sentence is denied, except to admit that a motion for class certification in Zuni was filed on March 9, 2005, and then withdrawn by notice on April 20, 2005. With regard to the fourth sentence of this paragraph, the IHS Defendants admit that a motion for class certification was denied without prejudice in Tunica, but are without knowledge or information with respect to the remaining allegation in this sentence. Footnote one is admitted, except to deny that the Tunica complaint filed in the District of New Mexico was unserved.

4. The first sentence is denied, except to admit that the complaints in Ramah, Zuni, and Tunica raise some common questions of law. The Panel is respectfully referred to the complaints of the three actions for a full and accurate statement of their contents. The second sentence is denied, except to admit that (1) the Ramah complaint involves the alleged underpayment of indirect CSC and the nonpayment of direct CSC by the Department of the Interior (BIA), (2) the Zuni complaint alleges that IHS breached Zuni's contracts by underpaying the amount of indirect CSC that IHS was required to pay under the ISDA and Zuni's individual contracts, and (3) the Tunica complaint alleges that IHS underpaid the amount of indirect CSC that IHS was required to pay under the ISDA and the plaintiffs' individual contracts. The Panel is respectfully referred to the three complaints for a full and accurate statement of their contents. The third sentence is denied, except to admit that all three of the cases appear to involve the legal

issue of whether an express limitation (a “cap”) in an appropriations statute that directs an agency not to expend funds beyond a certain amount for a particular purpose would be a legally sufficient basis for the federal agency to deny the liability of that agency or the United States to pay in excess of that amount.

5. This paragraph is denied on the basis that the cases do not raise common questions of fact.

6. The first clause of this paragraph is denied on the basis that transfer and consolidation or joint management of the three actions will not serve the interests of the parties and the witnesses. The second clause of this paragraph is denied on the basis that if the cases proceed in either district, the District of Columbia or the District of New Mexico, witnesses will still be required to give depositions in disparate forums. The third clause of this paragraph is denied on the basis that, even if transfer is denied, any discovery in Tunica and Zuni will not be duplicative of discovery already provided in Ramah.

7. The first sentence is admitted. The second sentence is denied, except to admit that some tribal contractors who have contracts with BIA and are class members in the Ramah case may also have contracts with the IHS and thus may be putative class members in the cases against IHS. The Panel is respectfully referred to the complaints filed in the three actions for a complete and accurate description of the proposed class definitions. The third sentence is denied on the basis that the class already certified in Ramah has a different class definition than that proposed in either Tunica and Zuni and thus a single class notice or supplementary notice could not be issued to the existing Ramah class in the event that a class was certified in either Tunica or Zuni. The fourth sentence is denied on the basis that the class in Ramah consists of Indian tribes

or tribal contractors that have contracts with the BIA, whereas the putative classes in the IHS cases consist of Indian tribes or tribal contractors that have contracts with the IHS, so that adjudication by a single court will neither promote judicial efficiency, promote “coordination or symmetry” with the class already certified nor is it needed to prevent competing or conflicting claims for class certification. The fifth sentence is denied, except to admit that the Secretaries of HHS and of Interior both administer the ISDA and that 25 C.F.R. Part 900 are regulations of the BIA and the IHS.

8. The first sentence is denied, except to admit that 25 C.F.R. Part 900 are regulations of BIA and IHS and to admit that 61 Fed. Reg. 32,482 (1996), states, inter alia, “The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) hereby issue a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103-413, the Indian Self-Determination Contract Reform Act of 1994. This joint rule, as required by section 107(a)(2)(A)(ii) of the Act, will permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation[,]” and to admit that the Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I of the Indian Self-Determination and Education Assistance Act quotes from 25 C.F.R., Part 900 by stating, inter alia, “It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act.” The Panel is respectfully referred to the regulations and the Internal Agency Procedures Handbook for a full and accurate statement of their contents.

9. This paragraph is denied on the basis that consolidation or joint management will

not conserve judicial resources in light of the differing procedural postures of the three cases and the individualized nature of the questions of fact presented by the merit claims made in each of the cases.

10. This paragraph is denied on the basis that the three cases do not satisfy the statutory requirements of 28 U.S.C. § 1407. Even if the statutory requirements were deemed to be satisfied, the most appropriate transferee forum would be the District of Columbia.

11. The first sentence is denied, except to admit that the United States Court of Appeals for the Tenth Circuit in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), considered, inter alia, a challenge to the methodology used by the National Business Center of the Department of the Interior (and its predecessor, the Office of the Inspector General) to calculate indirect cost rates for BIA contractors and held that although the ISDA was ambiguous with respect to whether this methodology was valid, the Court would apply a canon of construction to construe the ambiguity in the plaintiffs' favor and to admit that the claims in Tunica and Zuni have posed similar, although not identical, challenges. The Panel is respectfully referred to Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), and the three complaints for a full and accurate statement of their contents. The second sentence is admitted. The third sentence is denied, except to admit that some tribal contractors who have contracts with BIA and are class members in the Ramah case also have contracts with the IHS and thus may be putative class members in the cases against IHS and to admit that there may be some common questions of law, although no common questions of fact, between the BIA and IHS cases.

12. This paragraph is denied on the basis that the Honorable C. Leroy Hansen, unlike the Honorable Reggie B. Walton, has not adjudicated many of the legal defenses expected to be

raised in the Tunica and Zuni cases, except to admit that Judge Hansen is well acquainted with the Ramah case and the issues presented therein.

13. The IHS Defendants are without sufficient knowledge to assess the accuracy of the representation made in the first sentence. The second, third, and fourth sentences are admitted. The IHS Defendants are without sufficient knowledge to admit or deny the representation made in the fifth sentence.

14. This paragraph is admitted.

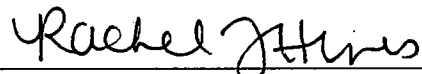
15. This paragraph contains Movants' intention to which the IHS Defendants are without sufficient knowledge or information to admit or deny.

The IHS Defendants deny every averment in the Motion not specifically addressed above.

WHEREFORE, having fully responded, the IHS defendants pray that the Motion be denied.

Respectfully submitted,

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