

**BEFORE THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION**

**IN RE INDIRECT CONTRACT )  
SUPPORT COSTS )  
LITIGATION )  
\_\_\_\_\_ )**

**MDL Docket No.**

**PLAINTIFFS' MOTION TO TRANSFER  
AND CONSOLIDATE OR JOINTLY MANAGE FOR  
PRE-TRIAL PROCEEDINGS**

Pursuant to Rule 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation and 28 U.S.C. § 1407(c), plaintiffs Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc. in the District Court for the District of Columbia, Civil Action No. 02-2413 (RBW), by their counsel, move the Panel to transfer and consolidate or jointly manage pending actions for pretrial proceedings. The actions are identified on the accompanying Schedule and copies of the complaints in each action are provided in an Exhibit folder.

In support of their motion, plaintiffs state:

1. Two class action lawsuits have been filed and are pending against the United States of America and Tommy Thompson, Secretary of Health and Human Services, each alleging breach of contract and violation of the Indian Self-Determination

and Education Assistance Act, 25 U.S.C. § 450 et seq. ("ISDA") as a result of the method adopted by the defendants that miscalculates and so under-funds the payment to ISDA contractors with the Indian Health Services ("IHS") for indirect contract support costs. One class action lawsuit is filed and pending against the United States of America and Gale Norton, Secretary of the Interior, alleging the same miscalculation of rates for indirect contract support for ISDA contractors with the Bureau of Indian Affairs ("BIA"). Both agencies are co-equally responsible for carrying out and administering the self-determination Act.

2. The actions that are the subject of this motion are pending in two districts: one in the District of Columbia and two in the District of New Mexico. The last filed of these cases is the District of Columbia case and remains under stay with motion pending to lift the stay.

3. Each of the cases is brought on behalf of a class of Indian Tribes and Tribal organizations who are ISDA contractors with the defendants through the Indian Health Services ("IHS") and the Bureau of Indian Affairs ("BIA") claiming money damages and equitable relief because the tribes were not paid full indirect contract support costs by the IHS and BIA in violation of the defendants' statutory and contractual obligations to the class members. Only the BIA case (Ramah) has been certified as a class action to date. A motion for class certification has recently been filed in Zuni. A similar motion in Tunica was denied without prejudice and will be renewed.<sup>1</sup>

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<sup>1</sup> Tunica was originally filed in the District Court for the District of New Mexico on November 21, 2002, CIV 02-1465-JP/LCS. Approximately one week later, the Tenth Circuit confirmed summary judgment for the Government in the Cherokee case, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002). Tunica dismissed its unserved complaint under Rule 41(a) and refilled in the District Court for the District of Columbia. On March 1, 2005, the U.S.

4. Each of the complaints raises common questions of fact and of law. In each case plaintiffs allege that the United States has a contractual and statutory responsibility to pay plaintiffs full "indirect contract support costs" for operation of the plaintiffs' ISDA contracts; that the defendant Secretaries, through the Office of Inspector General of the Department of Interior as cognizant agency for most ISDA contractors, have adopted a method of determining indirect contract support cost rates that systematically causes underpayment of such indirect costs. Each of the cases also presents identical issues as to the "cap years" liability of the United States.

5. Because the pending cases raise common factual and legal questions transfer and consolidation before a single court is proper.

6. Transfer and consolidation or joint management of the three actions will serve the interests of the parties and witnesses; witnesses will not be required to give depositions in disparate forums and the plaintiffs and defendants will not be required to provide duplicative discovery.

7. In one of the District of New Mexico cases a class has been certified for the claims against the BIA. The putative class for the claims against the IHS overlaps the class previously certified for the claims against the BIA. Both cases against the IHS seek certification of a class, so if the actions are consolidated the transferee court can reach a single decision concerning Rule 23 certification and a single class notice or supplementary notice can be issued to the existing class of additional claims. Adjudication by a single court will promote coordination and symmetry with the class already certified and prevent competing or conflicting claims for class certification or

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Supreme Court reversed the Tenth Circuit's judgment in *Cherokee v. Leavitt*, 543 U.S. \_\_\_, 125 S. Ct. 1172, 2005 WL 464860.

inconsistent adjudication under a common statute and promote judicial efficiency. Uniformity of law is especially desirable here where a single statute is to be administered by two separate agencies under a single set of regulations. 25 C.F.R. Part 900.

8. The agencies have joint identical regulations as required by the Indian Self-Determination Act and in legislative history it was noted that the joint product would “permit the Departments to award contracts and grants to Indian tribes without the unnecessary burdens or confusion associated with having the separate sets of rules for single programs legislation.” 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).

9. Consolidation or joint management will conserve judicial resources and prevent the possibility of inconsistent rulings heightened because each of the cases seeks to determine the rights of the same putative class in *Zuni* and *Tunica* and a similar class in the case of *Ramah*.

#### **Proper Transferee Forum**

10. The most appropriate transferee forum for this litigation is the District of New Mexico and the court of Honorable C. LeRoy Hansen, the district judge assigned the two actions pending in that district.

11. In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997) it was held that the Department of Interior through the BIA had violated its ISDA contracts and the statute by using the same indirect cost rate methodology that is being challenged against the IHS in the Zuni and Tunica cases. The *Ramah v. Lujan* case involving BIA was filed October 4, 1990, and since 1992 presided over in the district court by Honorable C. LeRoy Hansen, including class certification, two settlement approvals and various other proceedings pursuant to Rule 23. See, on remand, *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). The issues and the composition of the class of Indian tribes and tribal organizations in the case before Judge Hansen necessarily overlap with the issues and class composition pending in the other two cases involving IHS contracts.

12. Judge C. LeRoy Hansen has approximately thirteen years experience (including the period during the appeal) litigating the issues that are common to the subject cases and is well acquainted with the background, the facts, the provisions of the ISDA and the issues in the cases and is uniquely suited to preside over the consolidated or jointly managed actions.

13. Counsel Lloyd B. Miller for plaintiff in the case of *Pueblo of Zuni v. United States of America, Tommy Thompson and Michael H. Trujillo*, District of New Mexico, CIV 01-1046 LH/LEG concurs in this motion. Counsel for defendants in Tunica and Ramah do not. Lead class counsel in the *Ramah* case is Mr. Michael P. Gross, who concurs in this motion on behalf of the class and named class representatives Ramah Navajo Chapter and Oglala Sioux Tribe. Mr. Lloyd B. Miller is co-class counsel for the

direct contract support costs claim in that case and represents the Pueblo of Zuni as named class representatives for that claim. The Pueblo of Zuni also concurs in this motion.

14. Plaintiffs submit a brief in support of this motion.

15. Nothing in this motion is intended to derail or delay resolution of equitable claims presently being negotiated in the Ramah BIA case.

WHEREFORE the designated plaintiffs request that the Panel transfer and consolidate the actions listed on the Schedule for consolidated pretrial proceedings in the District of New Mexico.

Dated March 30<sup>th</sup>, 2005.

Respectfully Submitted:

GALLEGOS LAW FIRM, P.C.

By Michael P. Gross for  
J.E. GALLEGOS

Lead Counsel for Service  
460 St. Michael's Drive, Bldg. 300  
Santa Fe, New Mexico 87505  
Telephone: (505) 983-6686  
Fax: (505) 986-1367  
New Mexico Bar No. 897

M.P. GROSS & ASSOCIATES, P.C.

By Michael P. Gross  
Michael P. Gross

Counsel for Plaintiffs  
460 St. Michael's Drive, #401  
Santa Fe, New Mexico 87505  
Telephone: (505) 995 8066  
Fax: (505) 989 1096  
New Mexico Bar No. 1027

ERIC TREISMAN  
Co-Counsel for Plaintiffs  
Post Office Box 2897  
Santa Fe, New Mexico 87505  
Telephone: (505) 988-9570  
Fax: (505) 986-8305  
New Mexico Bar No. 2744

DONALD JUNEAU  
Co-Counsel for Plaintiffs  
Post Office Box 1857  
Hammond, Louisiana 70404  
Telephone: (985) 429-0830  
Fax: (985) 542-0046  
Louisiana Bar No. 7593

DANIEL H. MACMEEKIN  
1776 Massachusetts Avenue, NW, Suite 801  
Washington, DC 20036  
Telephone: (202) 223-1717  
Fax: (202) 223-1459  
D.C. Bar No. 393035

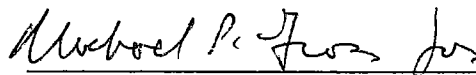
### CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing 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:

Sheila M. Lieber  
Rachel J. Hines  
U.S. Department of Justice  
Federal Programs Branch, Civil Division  
20 Massachusetts Avenue, N.W., Rm. 7314  
Washington, DC 20001

Lloyd Benton Miller  
Sonosky, Chambers, Sachse,  
Enderson & Mielke  
501 Tijeras Ave., N.W., Suite 200  
Albuquerque, NM 87102

Karen K. Richardson  
Senior Counsel, Civil Division  
U.S. Dept. of Justice  
Federal Programs Branch  
20 Massachusetts Avenue, N.W., Rm. 6126  
Washington, DC 20530



J.E. Gallegos

## SCHEDULE OF ACTIONS

*Ramah Navajo Chapter, Oglala Sioux Tribe and Pueblo of Zuni v. Gale Norton, Secretary of the Interior, Neil McCaleb, Assistant Secretary of Interior for Indian Affairs, Earl Devaney, Inspector General.*  
United States District Court, District of New Mexico, CIV 90-0957 LH/WWD  
Honorable C. LeRoy Hansen

*Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board Inc. v. United States of America, Tommy G. Thompson, Secretary of Health and Human Services, Gale A. Norton, Secretary of the Interior.*  
United States District Court, District of Columbia  
Civil No. 02-2413 RBW  
Honorable Reggie B. Walton

*Pueblo of Zuni v. United States of America, Tommy Thompson, Secretary of Health and Human Services, Michael H. Trujillo, Director of Indian Health Services.*  
United States District Court, District of New Mexico  
CIV 01-1046 LH/LEG  
Honorable C. LeRoy Hansen

**BEFORE THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION**

**IN RE INDIRECT CONTRACT  
SUPPORT COSTS  
LITIGATION** )  
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**MDL Docket No.**

**EXHIBITS TO PLAINTIFFS' MOTION TO TRANSFER  
AND CONSOLIDATE OR JOINTLY MANAGED  
FOR PRE-TRIAL PROCEEDINGS**

**COMPLAINTS IN SUBJECT CASES**

**GALLEGOS LAW FIRM, P.C.**

**J.E. GALLEGOS**  
Co-Counsel for Plaintiffs  
460 St. Michael's Drive, Bldg. 300  
Santa Fe, New Mexico 87505  
Telephone: (505) 983-6686  
Fax: (505) 986-1367  
New Mexico Bar No. 897

**ERIC TREISMAN**  
Co-Counsel for Plaintiffs  
Post Office Box 2897  
Santa Fe, New Mexico 87505  
Telephone: (505) 988-9750  
Fax: (505) 986-8305  
New Mexico Bar No. 2744

**M.P. GROSS & ASSOCIATES, P.C.**  
**MICHAEL P. GROSS**  
Counsel for Plaintiffs  
460 St. Michael's Drive, Bldg. 300  
Santa Fe, New Mexico 87505  
Telephone: (505) 983-6686  
Fax: (505) 989-1096  
New Mexico Bar No. 1027

DONALD JUNEAU  
Co-Counsel for Plaintiffs  
Post Office Box 1857  
Hammond, Louisiana 70404  
Telephone: (985) 429-0830  
Fax: (985) 542-0046  
Louisiana Bar No. 7593

DANIEL H. MACMEEKIN  
1776 Massachusetts Avenue, NW, Suite 801  
Washington, DC 20036  
Telephone: (202) 223-1717  
Fax: (202) 223-1459  
D.C. Bar No. 393035

DONALD JUNEAU  
Co-Counsel for Plaintiffs  
Post Office Box 1857  
Hammond, Louisiana 70404  
Telephone: (985) 429-0830  
Fax: (985) 542-0046  
Louisiana Bar No. 7593

DANIEL H. MACMEEKIN  
1776 Massachusetts Avenue, NW, Suite 801  
Washington, DC 20036  
Telephone: (202) 223-1717  
Fax: (202) 223-1459  
D.C. Bar No. 393035

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**FILED**

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

UNITED STATES DISTRICT COURT  
SANTA FE, NEW MEXICO

JAN 02 1991

RAMAH NAVAJO CHAPTER,

Plaintiff,

vs.

MANUEL LUJAN, Secretary of the  
Interior; EDDIE BROWN, Assistant  
Secretary of the Interior; MARVIN  
PIERCE, Chief of the Office of  
Inspector General, U.S. Department  
of the Interior; and THE UNITED  
STATES OF AMERICA,

Defendants.

*R. St. Amant*

CLERK

No. CIV 90-0957 SC

**FIRST AMENDED COMPLAINT**

1. The Ramah Navajo Chapter is a subdivision and tribal organization of the Navajo Nation, a recognized Indian tribe, authorized and sanctioned to contract with the United States Government under The Indian-Self Determination And Education Assistance Act, 25 U.S.C. §§450 et seq., as amended, P.L. 93-638.

2. Defendant Manuel Lujan is the Secretary of the Interior and is charged by law with the responsibility for implementing The Indian Self-Determination And Education Assistance Act, supra, and other laws intended to benefit Indians.

3. Defendant Eddie Brown is the Assistant Secretary of the Interior and is charged by law with the duty and responsibility of implementing The Indian Self-Determination And Education Assistance Act, supra, and other laws intended to benefit Indians and is the

person in charge of the Bureau of Indian Affairs, U.S. Department of the Interior.

4. Defendant Marvin Pierce is the Chief of the Office of the Inspector General, U.S. Department of the Interior and is charged by law with the duty and responsibility of negotiating indirect cost rates with P.L. 93-638 tribal contractors.

#### Jurisdiction

5. The matter in controversy exceeds \$10,000 exclusive of interest and costs. The controversy arises under one or more contracts by and between the United States Department of the Interior and the Ramah Navajo Chapter, each authorized by The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§450, et seq., as amended (Public Law 93-638). The Court has subject matter jurisdiction by reason of 25 U.S.C. §§450m-1; 28 U.S.C. §1346; 5 U.S.C. §§701, et seq.; 28 U.S.C. §1331; 28 U.S.C. §1361; 41 U.S.C. §609; 28 U.S.C. §1343; and 28 U.S.C. §§2201 and 2202.

#### Facts

6. For several years the Ramah Navajo Chapter with authority of the Navajo Nation has exercised its self-determination rights under 25 U.S.C. §§450 et seq. to contract for programs formerly operated by the Bureau of Indian Affairs of the Department of the Interior. These contracts have encompassed and presently do encompass real estate programs, natural resources, law enforcement, Aid to Tribal Government, water rights, juvenile services and crime prevention. In fiscal year 1989, the year in question, the direct

federal funding base of these programs totalled \$755,770. Total direct funding from all sources was \$845,000.

7. The Indian Self-Determination Act, supra, mandates that the Secretary of the Interior enter into contracts for programs of this type whenever a qualified tribe or tribal organization applies for them and that he provide funding in an amount no less than he would have provided himself under his direct control of the program.

8. Apart from direct program funds, however, tribal self-determination contractors such as Plaintiff are entitled to additional compensation for indirect costs, also referred to as "contract support." These extra funds are intended to compensate tribal contractors for expenses non-governmental entities typically incur when they assume the responsibility of performing services previously performed directly by the federal government. These indirect costs include such things as insurance, legal fees, audits, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. For many self-determination contractors these additional costs can be and are significant. At Ramah, these costs have traditionally been 50% or more of the direct program base.

9. Under the framework established by the Bureau of Indian Affairs indirect costs are generally computed for each self-determination contractor by a negotiation with the Interior Department's Inspector General (OIG). The negotiation produces a ratio of indirect cost pool costs to direct program revenues. In turn the ratio or percentage is then applied to the direct program

base to produce the actual dollar amount of that contractor's indirect cost reimbursement for a given fiscal year.

10. Before passage of P.L. 100-472 on September 15, 1988, OIG followed a procedure borrowed from other federal agencies encompassed in a document known as OMB Circular A-87. Under it, tribal self-determination contractors were penalized if other federal or state agencies did not pay their fair share of indirect costs. A spiraling series of deficits resulted for many of these tribal contractors sending them into enormous debt either to their governing tribes or to the federal government itself. Along with correcting other problems, P.L. 100-472 was designed to correct this problem by mandating that P.L. 93-638 contractors get 100% of their need for indirect costs regardless whether other federal agencies or states pay their fair share.

#### Claim

11. In the case of Plaintiff, the fiscal year 1989 negotiation with OIG resulted in agreement as to the size of the indirect cost pool but disagreement as to the size and makeup of the direct cost base. Under the Plaintiff's proposal, the indirect cost rate would have been 51.5% and would have resulted in an indirect cost reimbursement of some \$392,000.00. Under OIG's counter-proposal, the indirect cost rate would have been 40% and resulted in an indirect cost reimbursement of \$302,300.00. In point of fact, Ramah, Navajo Chapter received approximately \$324,000.00 in indirect cost reimbursements during fiscal year 1989 but is still owed approximately \$68,000.00 which has not been paid.

12. The parties have failed to achieve a meeting of the minds as to the indirect cost rate for fiscal year 1989 and Plaintiff has exhausted its administrative remedies by having filed a contract dispute, which was denied August 27, 1990. The disagreement threatens to disrupt each successive year's negotiation.

13. The impasse over the fiscal year 1989 rate results from Defendants' insistence that certain State and other grants to the Ramah Navajo Chapter, which represent flow-through monies from other federal agencies, be taken into account by including them in the direct cost base, the denominator in the ratio producing the percentage called the indirect cost rate.

14. The Defendants' insistence on this procedure directly violates the express provisions of 25 U.S.C. §§450j-1(d)(1) and (2) and has damaged Plaintiff by depriving it of at least \$50,000 badly needed for operation of its programs. This damage resulted from (a) decreasing the indirect cost percentage for fiscal year 1989 applied to the BIA program base, resulting in a smaller indirect cost recovery for BIA-contracted programs; and (b) failing to provide reimbursements mandated by Congress for indirect costs associated with other agencies' programs in the amount determined to be needed reflected in the indirect cost pool (the numerator), namely, the difference between what other agencies paid in indirect costs and the amount generated by the ratio of indirect cost pool divided by the direct program base.

15. Additionally, Ramah Navajo Chapter was not reimbursed its full entitlement to indirect costs in fiscal year 1987 and is due the balance of that year's funding entitlement, which under

