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JUDICIAL PANEL ON
MULTIDISTRICT
LITIGATION

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

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| In Re INDIAN TRIBES CONTRACT |) | |
| SUPPORT COST LITIGATION |) | MDL No. 1690 |
| |) | |
| |) | |
| |) | |

**PUEBLO OF ZUNI RESPONSE MEMORANDUM TO
BRIEF IN SUPPORT OF MOTION TO TRANSFER AND
CONSOLIDATE FOR PRETRIAL PROCEEDINGS**

The Pueblo of Zuni, plaintiff and representative of a putative class in *Pueblo of Zuni v. Leavitt, et al.*, Civ. No. 01-1046 LH/LFG (D. NM), hereby responds to the Brief filed in support of the Motion to Transfer *Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc. v. Leavitt*, No. 02-2413 (D.D.C.) (*Tunica*) to the District of New Mexico for consolidated or joint management with *Pueblo of Zuni v. Leavitt, et al.*, Civ. No. 01-1046 LH/LFG (D. N.M.) (*Zuni*) and *Ramah Navajo Chapter, Oglala Sioux Tribe & Pueblo of Zuni v. Norton*, No. 90-0957 (D. N.M.) (*Ramah*).

1. The Pueblo of Zuni respectfully incorporates its Response to the movant's Motion to Transfer (filed simultaneously herewith), and limits its response to additional matters covered in movant's Brief.

2. The Pueblo of Zuni agrees that the stays previously entered in two of the three cases ought now to be lifted. Previously stays were entered in all three cases pending the outcome of a seminal Supreme Court case between two tribal contractors and the Indian Health Service raising questions regarding the core enforceability of Indian Self-Determination Act contracts, questions as to which the Circuits had been in conflict. On March 1, 2005 the Supreme Court resolved the conflict in favor of Tribal contractors and against the Government, holding ISDA contracts to be as enforceable against the Government as ordinary procurement contracts. *Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Leavitt*, 543 U.S. ___, 125 S.Ct.1172 (Mar. 1, 2005), *aff'g Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) and *rev'g Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). The Supreme Court decision also effectively overruled a contrary Ninth Circuit decision issued in *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002). (Undersigned counsel for the Pueblo of Zuni also serves as counsel to the tribal contractors in all these cited cases.) As of this writing, the stay in *Zuni* has been lifted and the case is under active management by Chief

Magistrate Judge Garcia, while unopposed motions to lift the stays previously entered in *Tunica* and *Ramah* remain pending.

3. With respect to the identification of counsel, undersigned counsel Lloyd Miller is sole counsel in all the cases cited in paragraph 2, hereof, namely the two *Cherokee* cases that arose through the Tenth and Federal Circuits and that were resolved by the Supreme Court earlier this year; the *Shoshone-Bannock* litigation resolved by the Ninth Circuit in 2002; and the *Zuni* litigation. These constitute virtually all of the outstanding cases against the government arising under Indian Health Service contracts authorized by the ISDA other than the most recently filed *Tunica* case.¹

In addition to IHS litigation, Mr. Miller is co-class counsel in the *Ramah* BIA litigation, representing the Pueblo of Zuni and pressing class claims added to that action in 1999 and partially settled in 2002. *Ramah Navajo Chapter v. Norton*, 250 F.Supp.2d 1303 (D. N.M. 2002). Mr. Miller also represented a portion of the *Ramah* class (known as the DCA Tribal contractors) during the first partial settlement approval proceedings reported at *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D. N.M. 1999).

Mr. Gross is class counsel in the *Ramah* action (where an appellate ruling on the OIG miscalculated rate claim led to a first partial settlement in 1999, and where later claims asserted there and added to the case in 1999 by class representative Pueblo of Zuni

¹ Pursuant to Rule 7.2(i), counsel also alerts the Panel to *Confederated Tribes of the Grande Ronde Community of Oregon v. United States*, 03-2244C (Fed. Cl. filed Sept. 26, 2003) (Judge Williams), which asserts a contract support cost claim against the United States in the Court of Federal Claims. The Complaint is attached.

led to a second substantial partial settlement in 2002). Mr. Gross is also class counsel in the *Tunica* action. (In both actions Mr. Gross is joined by other co-class counsel.) Mr. Miller and Mr. Gross continue to work cooperatively in their respective cases arising under the ISDA.

4. The Pueblo of Zuni concurs in the *Tunica* argument that transfer of the *Tunica* action is appropriate under 28 U.S.C. 1407(a), and that such transfer will maximize the efficient and non-duplicative resolution of these closely-related cases within the Circuit and the District that have the most familiarity with contract enforcement actions arising under the Indian Self-Determination Act.

Both *Zuni* and *Tunica* were filed as putative class actions on behalf of all tribal contractors alleging the “OIG miscalculated rate claim.” (*Zuni* covers additional claims as well.) Both cases involve the IHS’s failure to pay tribal contractors full contract support costs in fiscal years 1995 through 2001. (*Zuni* covers additional years.) In sum, both cases involve the same putative class members, the same defendants, the same claim (among others), and the same years (again, among others).

Both *Tunica* and *Zuni* were stayed pending the outcome of the Supreme Court litigation. Since the *Cherokee v. Leavitt* decision, pre-trial proceedings have moved forward in *Zuni*, including Rule 16 proceedings, Rule 26 disclosures, a scheduling conference, an Order directed primarily at class discovery and briefing issues, and the commencement of class discovery. With class certification proceedings now underway

in *Zuni*, it is particularly important to avoid, if possible, inconsistent rulings with respect to overlapping class certification requests. *In re Natural Resources Fund, Inc.*, 372 F.Supp. 1403, 1404 (J.P.M.L. 1974). The fact that *Zuni* “encompasses the alleged class” in *Tunica*, “presents another compelling reason to bring these actions together for pretrial in a single jurisdiction.” *In re National Airlines Inc. Maternity Leave*, 399 F.Supp. 1405, 1407 (J.P.M.L. 1975).

Plaintiffs’ counsel and experts in all three cases are primarily located either in New Mexico or Alaska; the main class representatives *Zuni* and *Ramah* are situated in New Mexico; the approximately 330 members of the classes are situated in 35 states (the overwhelming majority of which are located in the Western United States); and most of the defendants’ key agency representatives are located in New Mexico, California and Maryland. New Mexico’s geographically more central location would be the more convenient forum for counsel, experts, witnesses, and class members.

For reasons stated herein and in the Pueblo of *Zuni*’s Response to the underlying Motion to Transfer, the Pueblo of *Zuni* concurs in the transfer motion so that the *Tunica* case may be efficiently managed in a coordinated fashion with the *Zuni* and *Ramah* actions. The Pueblo of *Zuni* also favors full consolidation of the *Tunica* and *Zuni* actions upon transfer, so that the claims presented in *Tunica* (which are duplicative of a subset of the larger number of claims presented in *Zuni*) may proceed in an efficient manner, both for the benefit of the class and for the benefit of the Government.

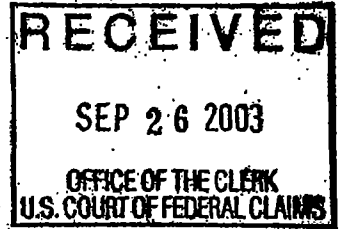
Respectfully submitted this 27th day of April 2005.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP



Lloyd B. Miller
Counsel for Pueblo of Zuni
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501
T: 907-258-6377
F: 907-272-8332
E: lloyd@sonosky.net

IN THE UNITED STATES COURT OF FEDERAL CLAIMS



CONFEDERATED TRIBES OF
THE GRAND RONDE
COMMUNITY OF OREGON, a federally
recognized Indian Tribe,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 03 - 2244C

COMPLAINT

Plaintiff Confederated Tribes of the Grand Ronde Community of Oregon
for its complaint here alleges as follows:

Nature of Action

1. This breach of contract action arises under the Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, 88 Stat. 2203 (1975), codified as amended at 25 U.S.C. §§ 450-450n (the "Indian Self-Determination Act") and the Contract Disputes Act, Pub.L. 95-563, 92 Stat. 2383 (1978), codified as amended at 41 U.S.C. §§ 601-613.

Parties

2. Plaintiff Confederated Tribes of the Grand Ronde Community of Oregon (hereinafter "the Tribe") is a federally recognized Indian tribe, recognized as such by the United States pursuant to the Grand Ronde Restoration Act, Pub.L. 98-165, 97 Stat. 1064 (1983), codified at 25 U.S.C. §§ 713-713g.

3. Defendant United States of America acting through the Indian Health

Service of the U.S. Department of Health and Human Services (hereinafter the "United States" or "IHS") has entered into various contracts with the Tribe under the Indian Self-Determination Act, as more fully set forth herein.

Jurisdiction

4. This Court has jurisdiction over the Tribe's claims pursuant to 25 U.S.C. §§ 450m-1(a) & (d) and 28 U.S.C. § 1491(a). This is an action for money damages arising under an express contract with the United States, entered into pursuant to the Indian Self-Determination Act.

FIRST CLAIM FOR RELIEF (Breach of Contract)

5. The Tribe realleges paragraphs 1 through 4 above.

6. Under the Indian Self-Determination Act the United States provides a means by which Indian tribes, including the Tribe, may assume the operation of various programs, including health care programs, the United States otherwise would administer for the benefit of Indian tribes.

7. Effective on or about October 1, 1988, the defendant, acting by and through the IHS, entered into two contracts with the Tribe numbered 248-89-0029 and 248-89-0038 (herein collectively referred to as "the Contracts"). Under the Contracts the Tribe agreed to operate certain federal health care programs for the United States. The Contracts were modified from time to time and no less than annually, in order to extend the period of contract performance. As used herein, the term Contracts includes all such modifications through fiscal year 1993 ("FY1993"), including all funds added to said Contracts through FY1993, whether or not by formal contract modifications.

8. Under the Indian Self-Determination Act and the Contracts, IHS was required to pay the Tribe (I) all costs of furnishing health care for certain purposes as specified in the Contracts, in amounts determined pursuant to 25 U.S.C. § 450j-1(a)(1) (referred to herein as "direct program costs") and (ii) all "contract support costs" required by the Tribe to manage the Contracts and ensure compliance with all contract requirements and applicable federal law, in amounts determined pursuant to 25 U.S.C. §§ 450j-1(a)(2), (3) and (5).

9. Most of the Tribe's contract support costs required to operate the Contracts are known as indirect costs, and are comprised of a pro rata share of the Tribe's total "indirect cost pool" supporting the administration of all the Tribe's activities. The pro rata share of the Tribe's indirect cost pool allocable to the Contracts is expressed as an "indirect cost rate." At all relevant times the Tribe's indirect cost rate was established by the Office of Inspector General of the U.S. Department of the Interior (hereinafter "OIG"), pursuant to applicable circulars issued by the Office of Management and Budget. The dollar amount of the Tribe's indirect cost pool to be allocated to the Tribe's Contracts with IHS in FY1993, and thus to be paid by IHS in FY1993, was determined by application of the Tribe's indirect cost rate for FY1993 to the direct program costs paid under the Contracts that year.

10. On or about December 18, 1992, the Tribe and the United States, acting through the OIG, entered into an Indirect Cost Negotiation Agreement which identified an indirect cost rate for FY1993 of 56.2%.

11. Under the Contracts, the Indirect Cost Negotiation Agreement, and the Indian Self-Determination Act, in FY1993 IHS was required to pay the Tribe, as

indirect contract support costs, the amount determined by multiplying the Tribe's direct program costs paid under the Contracts (less certain exclusions) by the Tribe's indirect cost rate of 56.2%.

12. In FY1993 IHS failed to pay in full the indirect costs the Tribe was entitled to receive under the Contracts and the Indian Self-Determination Act. On information and belief, part of the reason for this failure is that IHS added certain program funds to the Contracts in the course of FY1993, but failed to calculate and pay the appropriate indirect costs associated with those additional program funds.

13. IHS's failure to pay the Tribe's contract support cost requirements, including indirect costs, associated with activities performed by the Tribe under the Contracts in FY1993 resulted in a contract support cost underpayment that damaged the Tribe in an amount not less than \$85,751, plus interest.

14. On or about September 6, 2001, the Tribe submitted a timely and properly certified claim to recover damages of \$85,751 arising out of the events described in this Complaint.

15. On or about September 27, 2002, defendant's contracting officer denied the Tribe's damages claim. On information and belief, the Tribe received actual notice of the defendant's denial of the Tribe's claim on or about September 30, 2002.

PRAYER FOR RELIEF

WHEREFORE, The Tribe demands judgment against the United States, as follows:

1. On the Tribe's First Claim for Relief, the sum of eighty five thousand, seven hundred and fifty one dollars (\$85,751.00), such other damages as may be

proven in this action, interest under the Contract Disputes Act and plaintiff's fees, costs and disbursements; and

2. Such other relief as the Court deems just.

Respectfully submitted this 26th day of September 2003.

Lloyd B. Miller by William R. Perry
William R. Perry
Lloyd B. Miller, Esq.
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP
900 West 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332

Counsel of Record for Plaintiff
Confederated Tribes of the Grand Ronde
Community of Oregon

Of Counsel:

Rob Greene, Esq.
Stephen Kelly, Esq.
The Confederated Tribes of the Grand Ronde
Community of Oregon
615 Grand Ronde Road
Grand Ronde, Oregon 97347
Telephone: (503) 879-2339