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JUDICIAL PANEL ON
MULTIDISTRICT
LITIGATION

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

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

**PUEBLO OF ZUNI RESPONSE TO MOTION TO TRANSFER AND
CONSOLIDATE OR JOINTLY MANAGE PRE-TRIAL 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), responds to the Motion to Transfer filed in this matter as follows:

1. The Pueblo of Zuni agrees with movants' paragraph 1, regarding the general nature of the various actions affected by the instant Motion, and adds the following additional details.

The pending transfer motion primarily involves two uncertified class action lawsuits against the United States and the Indian Health Service (IHS) of the U.S.

Department of Health and Human Services. (A third related class action (*Ramah*) is also described below.)

The first of the two actions most directly at issue was filed by the Pueblo of Zuni against IHS in September 2001. *Pueblo of Zuni v. Leavitt, et al.*, Civ. No. 01-1046 LH/LFG (D. NM) (*Zuni*). That action alleges that the United States is liable in damages for the failure of IHS, over the course of certain designated years, to pay some 330 tribal contractors the full “contract support costs” that the Indian Self-Determination Act required IHS to pay. 25 U.S.C. §§ 450, 450j-1(a)(2). The *Zuni* action is broad and alleges both that (1) IHS failed to pay the full amount IHS calculated as the amounts due the contractors, and that (2) IHS actually miscalculated (and thus understated) the amounts due the contractors. The former claim has come to be known as the “shortfall claim,” and the latter claim has come to be known as the “miscalculated rate claim.”

The latter claim – the “miscalculated rate claim” – further breaks down into two sub-components, for this claim challenges IHS’s decision to pay certain contract support costs (known as “indirect” contract support costs) according to an accounting formula developed for different purposes either by (a) the Office of Inspector General (OIG) of the Department of the Interior or (b) the Division of Cost Allocation (DCA) of the Department of Health and Human Services.

In sum, the *Zuni* action broadly covers what can be called the “shortfall claim,” the “OIG miscalculated rate claim,” and the “DCA miscalculated rate claim.” Further, all

three of these claims arise in two different settings: (1) the early years when Congress provided the agency with a lump sum appropriation from which IHS could pay the contracts (called the “lump-sum years”), and (2) the later years when Congress capped the total amount IHS could pay the contracts to an amount that was insufficient to pay all the ISDA contracts that IHS had awarded (called the “cap years”). The government’s liability for “shortfall claims” under the ISDA in lump-sum years has been expressly resolved against the government in *Cherokee Nation and Shoshone-Paiute Tribes v. Leavitt*, 125 S. Ct. 1172 (2005).

The second of the two pending putative class action lawsuits involving IHS contract underpayments is *Tunica-Biloxi Tribe of Louisiana et al v. Leavitt*, No. 02-2413 (D.D.C.) (*Tunica*), and was filed in late 2002. (The plaintiffs in *Tunica* are the movants in this MDL proceeding.) The *Tunica* case is narrowly limited to the “OIG miscalculated rate claim;” that is, it includes neither the “shortfall claim” nor the “DCA miscalculated rate claim.” *Tunica*’s “OIG miscalculated rate claim” is asserted both as to certain lump-sum years and certain cap years.

The instant transfer motion also implicates a third case, *Ramah Navajo Chapter, Oglala Sioux Tribe & Pueblo of Zuni v. Norton*, No. 90-0957 (D. N.M.) (*Ramah*), filed in 1990. The *Ramah* case involves contract underpayments under the ISDA made by IHS’s sister agency the Bureau of Indian Affairs (BIA) (situated within the Department of the Interior), but otherwise involves very similar, and in part identical, issues. Specifically,

the *Ramah* case involves the “shortfall claim,” the “OIG miscalculated rate claim” and a third claim known as the “direct contract support cost claim.” (This last claim asserts that the BIA unlawfully failed to pay Tribal contractors the “direct contract support costs” the contractors were entitled to be paid under § 450j-1(a)(3)(A)(i) of the ISDA.)

Portions of all three claims in *Ramah* have been settled. *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D. N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F.Supp.2d 1303 (D. N.M. 2002). The first of the two partial settlements followed a 1997 appellate court ruling finding the Government liable under the “OIG miscalculated rate claim,” and covered the government’s liability in lump sum years *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). The second partial settlement involved “shortfall claims” and “direct contract support cost claims” and similarly covered the government’s liability only in lump-sum years. In light of these two partial settlements, the only damages claims now remaining in *Ramah* are all three claims arising in cap years (*i.e.*, years when Congress capped the total amount the BIA could pay for contract support costs at an amount insufficient to pay all ISDA contracts awarded by the BIA).

2. The Pueblo of Zuni agrees with movants’ general description of the actions (par. 2), there being two actions pending in the District of New Mexico, and a third action (the most recently filed) pending in the District of Columbia.

With respect to the *Zuni* action, on March 17, 2005, the New Mexico District Court lifted the stay previously entered in that case. (Stays had been entered in all three

cases pending the outcome of Supreme Court proceedings in *Cherokee Nation and Shoshone-Paiute Tribes v. Leavitt*.) On April 19, 2005, following Rule 26 disclosures and associated proceedings under Rule 16, the Court met with the parties and, by Order entered April 21, 2005, directed that class discovery commence for a period of 90 days, to be followed by Rule 23 motion practice. The Court's April 21 Order also partially denied a motion by the Government to stay most proceedings in the case, including class certification proceedings.

3. The Pueblo of Zuni agrees with movants' general description of the cases (par. 3), except to note that while movants correctly state that all three cases involve the failure of IHS or the BIA to pay "indirect" contract support costs, (1) the *Zuni* case also involves the failure of IHS to pay full "direct contract support costs" (as part of the core "shortfall claim"), and (2) the *Ramah* case also involves the failure of the BIA to pay "direct contract support costs."

4. The Pueblo of Zuni agrees with movants (par. 4) that each of the complaints in the three cases raises common questions of law and fact regarding the Government's obligations to Tribal contractors under the ISDA. Those issues common to all three cases include the government's liability in "cap years" and the government's liability under the "OIG miscalculated rate claim." Further, each case involves the government's liability for failing to pay Tribal contractors their full "contract support costs" as mandated by the ISDA.

There are additional common issues of law and fact between the *Zuni* and *Tunica* cases. Both were filed as putative class actions on behalf of all tribal contractors alleging the “OIG miscalculated rate claim.” (*Zuni* covers additional claims as well.) They both involve the IHS’s failure to pay tribal contractors full contract support costs in fiscal years 1995 through 2001. (*Zuni* covers additional years.) Thus, both cases involve the same putative class members, the same defendants, the same claim, and the same years.

5. The Pueblo of Zuni agrees with paragraph 5 of the transfer motion, except that *Zuni* believes that coordination between the three cases is sufficient without technical “consolidation” of all three cases. For instance, the Pueblo of Zuni believes that substantial efficiencies can be achieved if, upon transfer, the district court establishes a briefing schedule in the *Zuni* and *Tunica* cases that would permit the district court to resolve in a coordinated manner the “cap years” issues presented in all three cases, and as to which supplemental briefing will shortly be underway in *Ramah*. (The Pueblo of Zuni has already informally discussed such coordination with the Court as between the *Zuni* action and the *Ramah* action.)

6. The Pueblo of Zuni agrees with movants’ observations in paragraph 6 regarding efficiencies in case management that would flow from transfer of the *Tunica* action to the situs of the remaining two actions.

7. The Pueblo of Zuni agrees with movants’ discussion of the class action certification status of all three cases (par. 7), and adds the following details.

In the event the transfer motion is granted and thereafter the *Zuni* and *Tunica* actions against IHS are consolidated, it is possible that a class in *Zuni* will have already been certified (since certification proceedings are already underway in *Zuni*). In that event, the district court may elect as part of the consolidation simply to add the *Tunica* plaintiffs as additional class representatives for the “OIG miscalculated rate claim.”

The Pueblo of Zuni agrees that the alternative of competing or overlapping class actions against IHS proceeding in two districts situated 2,000 miles apart should be disfavored.

The Pueblo of Zuni corrects one slight misstatement. The *Ramah* case does not overlap the putative *Zuni* or *Tunica* classes, although it is correct that a very large proportion of Tribal contractors would, upon certification, be members of both classes.

8. The Pueblo of Zuni agrees with movants’ statement in par. 8 that the statutory and regulatory requirements imposed upon the agencies under the ISDA are identical in all significant respects pertinent to these actions.

9. The Pueblo of Zuni agrees with movants’ statement (par. 9) that joint management will conserve judicial resources and avoid the possibility of inconsistent rulings.

10. The Pueblo of Zuni agrees with movants (par. 10) that the most appropriate transferree forum is the District of New Mexico, given that District’s 15-year experience with the *Ramah* case (including Judge Hansen’s and the Clerk of Court’s experience in

managing the complexities of two multi-million dollar partial settlements in *Ramah*), and given the 2001 assignment of the *Zuni* case to Judge Hansen (including pretrial proceedings now being actively managed by Chief Magistrate Judge Garcia).

11. The Pueblo of Zuni agrees with movants' observations (par. 11) regarding the progress of the *Ramah* case before Judge Hansen and regarding Judge Hansen's familiarity with all aspects of the classes implicated in all three cases.

12. The Pueblo of Zuni agrees with movants' observations (par. 12) regarding Judge Hansen's experience and expertise in the issues presented in all three cases.

13. The Pueblo of Zuni agrees with movants' observations (par. 13) regarding undersigned counsel Lloyd B. Miller's concurrence with the transfer motion, offered both on behalf of the Pueblo of Zuni as the sole plaintiff in the *Zuni* case, and on behalf of the Pueblo of Zuni as one of the three named class representatives in the *Ramah* case, in so far as the ultimate goal of the motion is coordinated management of all three cases.

In concurring with this transfer motion, undersigned counsel notes for the Multi-District Litigation Panel that (1) he is also counsel of record for the tribal contractors in the recently-concluded Supreme Court litigation *Cherokee Nation & Shoshone-Paiute Tribes v. Leavitt*, 125 S.Ct. 1172 (2005), reversing *Cherokee Nation & Shoshone Paiute Tribes v. Thompson*, 311 F.3d 1054 (10th Cir. 2003) (which, in turn, had affirmed a district court ruling reported at 190 F. Supp. 2d. 1248 (E.D. Okla. 2001)), and affirming *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) (which in turn had

affirmed Interior Board of Contract Appeals opinions reported at 01-1 B.C.A. (CCH) ¶31,349 and 99-2 B.C.A. (CCH) ¶30,462); (2) he has and continues to serve as counsel to those contractors at the district court and appellate levels; (3) he served as counsel to the tribal contractor in *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (D. Or. 1998), *on remand*, 58 F. Supp. 2d 1191 (D. Or. 1999), *rev'd sub nom.*, *Shoshone-Bannock Tribes v. Secretary, Dep't of Health and Human Services*, 279 F.3d 660 (9th Cir. 2002) (effectively overruled by *Leavitt*); and (4) he serves as counsel to the tribal contractor in *Confederated Tribes of the Grande Ronde Community of Oregon v. United States*, 03-2244C (Fed. Cl. filed Sept. 26, 2003) (Judge Williams). All these cases involved or continue to involve damage claims against the Government under the ISDA arising out of IHS contracts with tribal contractors.

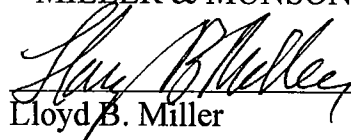
14 & 15. To the extent a response is warranted, the Pueblo of Zuni agrees with paragraphs 14 and 15 of the transfer motion.

For the foregoing reasons, the Pueblo of Zuni concurs in the movant's motion to transfer the *Tunica* action from the District of Columbia to the District of New Mexico

for coordinated management with the *Zuni* and *Ramah* cases.

Respectfully submitted this 27th day of April 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the:

**RESPONSE TO MOTION TO TRANSFER AND CONSOLIDATE OR
JOINTLY MANAGE PRE-TRIAL PROCEEDINGS; and**

**RESPONSE MEMORANDUM TO BRIEF IN SUPPORT OF MOTION TO
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were served on the following attorneys or parties of record this 27th day of April 2005 by U.S. mail:

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Docket: 1690 - In re Indian Tribes Contract Support Costs Litigation

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Judge:

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