

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

PUEBLO OF ZUNI, on behalf of itself )  
and all others similarly situated, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA; *et al* )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CIV 01-1046 WJ/WPL  
Filed Electronically

**MOTION OF PLAINTIFF PUEBLO OF ZUNI’S COUNSEL  
LLOYD B. MILLER FOR APPOINTMENT AS INTERIM CLASS COUNSEL**

Pursuant to Fed. R. Civ. P. 23(g)(2)(A), undersigned Plaintiff’s counsel Lloyd B. Miller respectfully moves this Court for appointment as interim class counsel in this matter. In support of this Motion, undersigned counsel shows the following:

1. Rule 23(g)(2)(A) provides that –

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

Undersigned counsel respectfully submits that formal appointment of Mr. Miller as “interim counsel” authorized to act on behalf of the putative class is both appropriate under the Rule and particularly warranted at this time. First, the Tunica-Biloxi Tribe’s and the Ramah Navajo Chapter’s unsuccessful recent motion to intervene, together with their attorney Michael Gross’s related unsuccessful motion to be appointed interim counsel under the Rule, instruct that appointment of interim counsel will help to forestall conflicts over the issue in the future. Second, in their separate

litigation pending in the District of Columbia, Tunica and Ramah recently requested a “status conference” with Judge Walton to discuss (*inter alia*) “whether proceedings in this action should be transferred to the District of New Mexico or otherwise coordinated with proceedings in *Pueblo of Zuni*.” *Tunica-Biloxi v. United States*, No. 02-2413, Plaintiffs’ Unopposed Renewed Motion to Lift Stay (Dkt. No. 76) at 3 (D.D.C. Sept. 23, 2005); *see also* Judge Walton’s Minute Order of Nov. 11, 2005 (reopening case). An appointment of Mr. Miller as interim class counsel will provide much needed order and clarity in the event *Tunica* is indeed transferred to this District for coordination with this case. Third, an Order appointing undersigned counsel will confirm not only undersigned counsel’s authority to undertake the diverse class discovery and motion practice currently underway and yet to come, but more importantly will confirm counsel’s authority to engage Defendants over potential class settlement of at least portions of this case, all as discussed at the Court’s recent status conference. *See* Dkt. No. \_\_\_, Transcript of Oct. 3, 2005 Status Conference, at 5-9 (Plaintiff’s counsel discussing settlement initiatives), 17-19 (Defendants counsel reporting “we are talking internally about the possibilities of settlement” while adding “I think that settlement would have to wait at least until we were to finish getting discovery” [now scheduled to end Dec. 13, 2005]).

2. Appointment of interim counsel under Rule 23(g)(2)(A) is guided by the standard set forth in Rule 23(g)(1)(C):

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel’s knowledge of the applicable law, and

- the resources counsel will commit to representing the class;
- (ii) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class;
- (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
- (iv) may make further orders in connection with the appointment.

As demonstrated below, undersigned counsel Lloyd B. Miller possesses all the qualifications necessary for appointment as interim class counsel.

3. “The competence and experience of class counsel . . . will most often be presumed in the absence of proof to the contrary.” Conte and Newberg, *Newberg on Class Actions*, § 3.24 at 3-133-134 (4th ed. 2002). That general presumption is particularly apt here, where Mr. Miller’s 27-year record of achievements demonstrates his and his firm’s exceptional qualifications in the specific legal areas pertinent to this litigation, namely litigation against the U.S. Indian Health Service and the United States over contract support cost issues arising under the Indian Self-Determination Act, 25 U.S.C. §§ 450–458aaa-15, and in class action litigation against the United States and others. *See* Exh. 1 (Résumé and *Curriculum Vitae* of Lloyd Benton Miller).<sup>1</sup>

4. The most powerful evidence of undersigned counsel’s requisite skill in matters directly pertinent to the instant case is Mr. Miller’s and his firm’s service to tribal contractors in the 10-year battle with IHS spanning three major cases and multiple administrative board, district court, and

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<sup>1</sup> Mr. Miller has not worked alone in these matters, and credit for the achievements noted goes widely, including to several members of his firm’s CSC litigation team. Information regarding the Sonosky firm is available on the web at [www.sonosky.net](http://www.sonosky.net). In addition to these legal resources, and as reflected in the several contract support cost and class action cases described herein, the firm also possesses the necessary financial resources required to pursue this action to completion.

appellate court decisions, all culminating in a unanimous 2005 Supreme Court ruling against the Government in *Cherokee III* (which, *inter alia*, reversed a prior Tenth Circuit ruling and overruled a prior Ninth Circuit ruling each in the Government's favor).<sup>2</sup> The United States already has paid \$12.6 million in damages and interest to the Cherokee Nation in the Federal Circuit portion of that case, with additional damages under negotiation for the portion of the case returned to the Eastern District of Oklahoma. It would be difficult to conceive of a more important and stunning victory for tribal contractors than *Cherokee III*, a victory that speaks for itself in terms of Zuni counsel's adequacy to represent the class in an action that seeks in significant measure to spread the benefits of *Cherokee III* to all other similarly-situated tribal contractors. Indeed, without the Supreme Court victory which Mr. Miller and his firm secured, the current claims would not exist.

5. In addition to the *Cherokee* cases, Mr. Miller's work in this District is also known through his and his firm's services in the *Ramah* class action litigation still pending against the Bureau of Indian Affairs. In *Ramah Navajo Chapter, Oglala Sioux Tribe and Pueblo of Zuni v. Norton*, No. 90-0957 LH (D. NM), the Zuni Tribe in 2000 filed a separate class action to litigate contract support cost claims theretofore not filed in *Ramah*. See *Pueblo of Zuni v. United States*, No. 00-0365 LH (D. NM) (later consolidated into the *Ramah* action). Those claims challenged the BIA's failure to pay "direct contract support costs" back to fiscal year 1992, and led directly to a swift and partial

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<sup>2</sup> See *Cherokee Nation and Shoshone Paiute Tribes v. Leavitt*, 125 S.Ct. 1172 (2005) ("*Cherokee III*"), *rev'g Cherokee Nation and Shoshone Paiute Tribes v. Thompson*, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002) ("*Cherokee I*"), *aff'g Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) ("*Cherokee II*"). See also *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660 (9<sup>th</sup> Cir. 2002). Mr. Miller and his firm represented the Tribal contractors in all these actions.

settlement in 2002 of \$29 million. *Ramah Navajo Chapter, et al. v. Norton*, 250 F.Supp.2d 1303 (D.N.M. 2002) (approving settlement).<sup>3</sup> Zuni counsel also appeared in this District in an earlier phase of the *Ramah* litigation, where Mr. Miller successfully represented certain absent class members whom *Ramah* class counsel had initially excluded from an earlier 1999 class settlement. See *Ramah Navajo Chapter v. Lujan*, 50 F.Supp.2d 1091 (D.N.M. 1999); *Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Babbitt*, 65 Fed. Reg. 4989 (Feb. 2, 2000) (discussing, *inter alia*, the “DCA” class members’ claims that Mr. Miller represented). Mr. Miller’s successful prosecution of these various claims in the *Ramah* class action litigation is further evidence that he possesses the requisite competence necessary for his appointment here as interim counsel for the putative class.

6. In addition to litigating these and many other cases arising under the ISDA,<sup>4</sup> undersigned

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<sup>3</sup> Mr. Miller’s filings for the Pueblo of Zuni not only preserved the “direct CSC” claims, but also added an additional year that no other class representative could independently litigate, representing millions of dollars for the class. In recognition of his expertise on the direct CSC claim, Mr. Miller was appointed co-lead counsel for the direct contract support cost claim following consolidation of the *Ramah* and *Zuni* actions. In his leadership role on that claim Mr. Miller has just concluded two years of negotiations with the BIA leading to the issuance of the BIA’s first contract support cost policy (issued in draft form for comment) that, *inter alia*, will (if adopted) recognize for the first time ever the right of Tribal contractors to “direct contract support costs” under their ISDA contracts. See Exh. 2, Letter of Oct. 31, 2005, from Interior Department Associate Deputy Secretary James Cason to “Tribal Leader[s].”

<sup>4</sup> For instance, Mr. Miller and his firm successfully challenged an illegal BIA practice of penalizing certain tribal contractors by making excessive contract underpayments in *Ramah Navajo Sch. Bd., et al. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (the first ever appellate decision on CSCs); he successfully enforced ISDA tribal contractor rights against a health insurer in *Yukon-Kuskokwim Health Corp. v. Trust Ins. Plan for Southwest Alaska*, 884 F.Supp. 1360 (D. Alaska 1994); and after five years of litigation he and his firm successfully secured a tribal exemption for ISDA contractors from the National Labor Relations Act, *Yukon-Kuskokwim Health Corp. v. Int’l Brotherhood of*

counsel was also deeply involved in lobbying for enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1988 (Pub. L. 100-472, 102 Stat. 2285), and for the enactment of diverse Federal Tort Claims Act-related measures that were added to the ISDA before and after those Amendments (*e.g.*, Pub. L. 100-202, 101 Stat. 1329-246). He crafted the tribal proposal that became the Indian Self-Determination and Education Assistance Act Amendments of 1990 (Pub. L. 101-644, 104 Stat. 4665), and he served as the lead tribal drafter and lobbyist for the massive Indian Self-Determination Act Amendments of 1994 upon which much of the recent litigation has depended (Pub. L. 103-413, 108 Stat. 4250). More recently, Mr. Miller played a central role in securing the Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, 114 Stat. 711 (adding Title V to that Act) and, particularly pertinent to the instant action, in resisting amendments that would have weakened tribal contractor rights to CSCs, and he has frequently been invited to testify before Congress and even to provide congressional staff training on issues pertaining to contract support costs.

On the regulatory front, Mr. Miller served on the ISDA Title I Negotiated Rulemaking Committee formed after the 1994 Amendments and co-chaired its key drafting committee; he served as a legal advisor to the ISDA Title V Negotiated Rulemaking Committee; he has been an active member of the IHS Contract Support Cost Work Group since its inception in the mid-1990s; and (as discussed more fully *supra* at 4, n.3) he has served as the lead tribal attorney participating in the BIA

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*Teamsters, Local 959, AFL-CIO, CLC.*, 341 NLRB No. 139 (May 28, 2004), on remand from *Yukon-Kuskokwim Health Corp. v. Nat'l Labor Relations Bd.*, 234 F.3d 714 (D.C. Cir. 2000), reversing 328 NLRB 101 (1999) and 329 NLRB 86 (1999).

Contract Support Cost Work Group formed in 2003 to develop that agency's first contract support cost policy.

7. In addition to this large body of ISDA-related work, Mr. Miller is also highly experienced in class action matters going far beyond the *Ramah* litigation, having served by dual federal and state court appointment as Plaintiffs' Liaison Counsel since 1989 in the historic EXXON VALDEZ oil spill litigation, and having also served in that case as Lead Class Counsel for the Alaska Native Class. See e.g., *In re the EXXON VALDEZ*, 296 F. Supp.2d 1071 (D. Alaska 2004) (pending on appeal *sub nom Baker v. Exxon Corp.*, No. 04-35174 (9th Cir.)) (remitting 1994 punitive damage award to \$4.5 billion), on remand from 270 F.3d 1215 (9<sup>th</sup> Cir. 2001); *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9<sup>th</sup> Cir. 1997) (dismissing additional economic injury claims under maritime law over and above \$20 million compensatory damage award).

8. Undersigned counsel is authorized to state that the Defendants oppose this Motion. To the extent that their opposition is premised on the perception that granting this Motion will prejudice the underlying issues going to class certification, thereby prejudicing the Defendants, the Defendants are mistaken. Rule 23(g)(2)(A) expressly contemplates the appointment of "interim" counsel before class certification proceedings are concluded, precisely to confirm appointed counsel's authority to take action on behalf of the "putative" class, including settlement negotiations. To the extent the Defendants' opposition is premised on the perception that a Rule 23(g)(2)(A) Order is unnecessary, the Court's recent disposition of highly costly and distracting appointment and intervention motions, together with the threat of similar motion practice in the future (as noted *supra* at 1), demonstrates precisely the contrary: that efforts remain afoot by other counsel to enter into this case. An

appointment Order will serve the interests of justice by discouraging such efforts in the future.

9. For the foregoing reasons, Plaintiff's counsel Lloyd B. Miller respectfully moves this Court for an Order appointing Mr. Miller as "interim counsel" authorized to take action on behalf of the putative class of Tribal contractors asserted in this action. Mr. Miller and his firm have plainly done extensive and successful work over more than a decade identifying, investigating and litigating the claims at issue here; they have considerable experience handling complex litigation and class actions; they have unparalleled knowledge of the applicable law; and they have ample resources to protect the interests of the putative class during this pre-certification period. Appointment will not only confirm Mr. Miller's authority to undertake the diverse discovery and motion practice heretofore undertaken and yet to be initiated (including a motion to certify the class); it will confirm Mr. Miller's authority to engage the Defendants in settlement discussions in the weeks ahead.

Respectfully submitted this 16th day of November 2005.

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & MIELKE, LLP

*/s/ Lloyd B. Miller*

By: \_\_\_\_\_

Lloyd B. Miller  
David C. Mielke  
Gary F. Brownell  
Arthur Lazarus, Jr., PC  
Melanie Baca Osborne  
Richard D. Monkman  
Vanessa L. Ray-Hodge  
Jennifer J. Thomas  
Sonosky, Chambers, Sachse, Endreson & Mielke, LLP  
500 Marquette Avenue, N.W., Suite 1310  
Albuquerque, NM 87102  
Telephone: (505) 247-0147



**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November 2005, I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Motion of Plaintiff Pueblo of Zuni's Counsel Lloyd B. Miller for Appointment as Interim Class Counsel** to the following attorneys of record (or their co-counsel) for Defendants:

Rachel J. Hines, Trial Attorney  
[rachel.hines@usdoj.gov](mailto:rachel.hines@usdoj.gov)

Julia J. Yoo, Trial Attorney  
[julia.yoo@usdoj.gov](mailto:julia.yoo@usdoj.gov)

*/s/ Elizabeth Tempel*

By: \_\_\_\_\_  
Elizabeth Tempel