IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER, et al. v. SALLY JEWELL, et al.
No. CIV 90-0957 JAP/KBM

Exhibit 3

In Support of
CLASS COUNSEL APPLICATION
FOR AWARD OF ATTORNEYS FEES AND COSTS

AFFIDAVIT OF CO-CLASS COUNSEL LLOYD B. MILLER IN SUPPORT OF APPLICATION FOR ATTORNEY'S FEES AND COSTS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE, and PUEBLO OF ZUNI, for themselves, and on behalf of others similarly situated,	)	
Plaintiffs,	)	No. 1:90-CV-00957-LH/KBM
vs.	)	
SALLY JEWELL, Secretary of the Interior, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF LLOYD B. MILLER IN SUPPORT OF APPLICATION FOR ATTORNEY'S FEES AND COSTS

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Lloyd B. Miller, being first duly sworn upon his oath, deposes and says:

1. My name is Lloyd B. Miller. I am a partner in the law firm of Sonosky, Chambers, Sachse, Mielke & Brownell, LLP of Albuquerque, New Mexico. Our firm is also known in Alaska as Sonosky, Chambers, Sachse, Miller & Munson, LLP; and in Washington, D.C. (our principal office) as Sonosky, Chambers, Sachse, Endreson & Perry, LLP. I am the lead attorney in this law firm charged with responsibility for representing the Pueblo of Zuni in the above-captioned case.

2. Attached to this affidavit is a true and correct copy of my résumé. (Attachment 1.)

3. I have been practicing law with the Sonosky Chambers law firm since 1979, following the completion of a judicial clerkship with the Honorable James M. Fitzgerald of the United States District Court for the District of Alaska. Throughout this period my practice has been devoted exclusively to representing the interests of Native American Tribes and tribal organizations. I received my undergraduate degree from Yale University in 1975 where I received my B.A. in a combined Philosophy, Psychology and Religious Studies Major. I received my law degree with honors (Order of the Coif) from the University of Virginia School of Law.

4. I am a member in good standing of the District of Columbia Bar and the Alaska Bar Association. I am also the founding member of the Alaska Native Law Section of the Alaska Bar Association, and I served as the Chair of that section for ten years from 1984 through 1993. For ten years I also served as a member of the Board of the Alaska Legal Services Corporation, including one term as President and two terms as Vice-President. I am a past Vice-President and current board member of the Alaska Chapter of the Federal Bar Association, a past co-chair of the Alaska Bar Appellate Section, a past member of the Circuit Executive Committee of the United States Court of Appeals for the Ninth Circuit, and a past Lawyer Representative from the District of Alaska to the Ninth Circuit. I have also been a guest lecturer on selected issues in Native American law at the law schools of Yale University, Harvard University and Georgetown University, and I have also spoken at numerous national Indian law conferences and symposia.

5. I have an AV rating from Martindale-Hubbell.

6. Over the past 30 years I have received numerous awards and distinctions related to my professional work including: Best Lawyers in America (2010-2016); Best Lawyers' Anchorage Native American Lawyer of the Year (2011, 2016); Thomson Reuters' Super Lawyers (2007-2015);; Top Ten Super Lawyers in Alaska (2007, 2009 and 2015); ranked lawyer in Chambers USA (2015); Inclusion in Benchmark Plaintiff guide as a Local Litigation Star in Alaska (2014); Best Lawyers' Best Attorneys in Alaska (2013);State of Alaska Legislature, Legislative Citation (2012); Healthy Alaska Natives Foundation President's Award (2012); Federal Bar Association, Chapter Activity Presidential Citation Award (2007); National Indian Health Board Medallion Award (1987); National Indian Health Board Tribal National Impact Award (2000). My law firm has also received numerous distinctions, including U.S. News & World Report's Best Law Firms Report as a national first-tier firm in Native American law, as well as an Alaska first-tier firm in this category (2011-2012, 2016); inclusion in Best Attorneys' Best Law Firms in the national tier and in two metropolitan tiers (2015); Corporate International magazine's Commercial Arbitration Law Firm of the Year in Alaska (2013); and inclusion in American Health Lawyers Association's Honor Roll for Alaska and for the Northwest for firm's excellence and commitment in the practice of health care law (2012).

7. The single largest focus of my practice on behalf of Native American interests has been on matters relating to the Indian Self-Determination Act of 1975, 25 U.S.C. § 450 *et seq.* (ISDA). Although my work under this general topic has been wide-ranging, it has included extensive involvement in the legislative processes leading up to the 1988, 1990, 1994 and 2000 amendments to the ISDA. I was the principal drafter of the first tribal proposals which led to the 1990 and 1994 amendments to Title I of the ISDA, and have frequently testified in hearings

relating to the ISDA's implementation, including a number of oversight hearings involving the issue of contract support costs. See e.g., *The President's Fiscal Year 2014 Budget for Tribal Programs: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. 53-55 (2013) (statement of Lloyd B. Miller); Indian Self-Determination Contract Reform Act of 1994: Hearing on S. 2036 Before the S. Comm. On Indian Affairs, 103rd Cong. 39-41 (1994) (statement of Lloyd B. Miller).

8. My work on ISDA matters has also included substantial litigation arising under the ISDA, including litigation to compel the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS) to award contracts under the ISDA, litigation to recover statutory damages for violations of the ISDA, litigation to enforce compliance with the ISDA, and litigation to recover damages for breach of contracts entered into under the ISDA. My work in this area has included the annual negotiation and periodic enforcement of contracts, compacts and annual funding agreements with both agencies. It has included participation in all meetings of the BIA Contract Support Cost Work Group and the IHS Contract Support Cost Work Group (both of which occasionally include the attendance of representatives from the DOI Office of Inspector General and its successor entities (today, the Interior Business Center), the HHS Division of Cost Allocation, and the Office of Management and Budget). It has included membership on and extensive participation in the negotiated rulemaking committees formed to develop regulations to implement the 1988 and 1994 Amendments to Title I of the ISDA (including co-chairmanship of the final Drafting Committee); similar participation (with my partner Myra Munson) in the negotiated rulemaking committee formed to develop regulations to implement the 1994 Amendments' addition of a new Title IV to the ISDA; and similar participation (along with my

partners Myra Munson and Jim Glaze) in the negotiated rulemaking committee formed to develop the regulations to implement the 2000 Amendments to the Act (which added Title V to the ISDA). It has included legislative advocacy since the 1990s on behalf of the National Tribal Contract Support Cost Coalition to secure contract support costs-related amendments to the ISDA, to oppose hostile Administration-advanced legislative proposals concerning contract support cost issues, and to secure increased BIA and IHS appropriations for contract support costs. It has also included ongoing legislative advocacy to secure amendments to Title IV of the ISDA. I was also the primary writer of the National Indian Health Board's comprehensive report on implementation of the 1988 ISDA Amendments, and worked for the National Congress of American Indians to write NCAI's 1999 report on contract support cost shortfalls.

9. I have litigated the following significant ISDA cases in recent years: *Salazar v. Ramah Navajo Chapter*, 567 U.S. __, 132 S. Ct. 2181 (2012); *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 Fed. Appx. 957 (Fed. Cir. 2012) (on remand from 133 S. Ct. 22 (2012), *granting petition and reversing opinion at* 629 F.3d 1296 (Fed. Cir. 2010)); *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), *aff'g Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) and *rev'g Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Yukon-Kuskokwim Health Corporation v. Trust Insurance Plan for Southwest Alaska*, 884 F. Supp. 1560 (D. Alaska 1994) (also involving provisions of the Indian Health Care Improvement Act); *Ramah Navajo School Board and Puyallup Tribe of Indians v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996);[1] and *Shoshone-Bannock*

[1] For approximately 10 years I represented the Ramah Navajo School Board (an arm of the Ramah Navajo Chapter) on a variety of matters, including a number of matters involving contract support costs due from the Bureau of Indian Affairs and the Indian Health Service. In

Tribes v. Shalala, 988 F.Supp. 1306 (D. Or. 1997); *Shoshone-Bannock Tribes v. Shalala*, 999 F.Supp. 1395 (D. Or. 1998) (on reconsideration); *Shoshone-Bannock Tribes v. Shalala*, 58 F.Supp.2d 1911 (D. Or. 1999) (on remand), reversed on appeal 279 F.3d 660 (9th Cir. 2002); *Shoshone-Bannock Tribes v. Shalala*, 408 F. Supp.2d 1073 (D. Or. 2005) (vacating final judgment and awarding money damages based upon *Cherokee Nation*). Since the Supreme Court's decision in this case in 2012, I have settled over 454 contract support cost claims against the IHS for numerous Tribes and tribal organizations, resulting in damage awards (including interest) totaling in excess of $660,000,000.

10. The most significant and directly relevant litigation victory I have achieved outside of this litigation is the victory secured in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). This victory laid the foundation for the victory in the *Ramah* case, and I discuss this case later in this Affidavit in its proper chronological order.

11. My resume includes additional major litigation I have been involved in outside the ISDA arena. This non-ISDA litigation includes 26 years of service as court-appointed Plaintiffs' Liaison Counsel to the U.S. District Court for the District of Alaska and to the Alaska Superior Court in the ongoing class action litigation arising out of the 1989 Exxon Valdez oil spill disaster. In that litigation I also served as class counsel for the Alaska Native Class, comprised of 18 federally recognized tribes and over 4,000 Alaska Natives whose subsistence way of life was heavily damaged by the 1989 disaster.

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addition to litigation, these matters included work with both IHS and the BIA to secure shortfall amounts due from prior years by accessing unspent prior year general agency appropriations. Unfortunately, the imposition of the caps on contract support cost appropriations brought this remedial effort to a halt, leaving Tribes with no choice but to institute litigation to recover damages over contract support cost underpayments.

12. The case pending before this Court has been underway for twenty-five years and I have had the privilege of serving as Co-Class Counsel for the past fourteen years. As a result of my work and that of my fellow Class Counsel, the Class has emerged with a historic settlement of $940 million. This result was hardly assured. To the contrary, the path to settlement has been long and there were many moments where all indications were that the class would recover nothing. This affidavit is offered in support of the Final Settlement Agreement and the Application for Attorneys' Fees and Costs being filed in this case in connection with that Settlement Agreement. As such, it contains a description of the work necessary to achieve the settlement. As relevant here, it also addresses work performed in *Zuni v. United States*, Case No. CIV 00-0365 LH/WWD (D.N.M.) (hereinafter "*Pueblo of Zuni*") (dismissed without prejudice on April 22, 2002, on a stipulation to merge claims and to add the Pueblo of Zuni into the *Ramah* action as the lead class representative for "direct contract support cost" claims).

13. Attached to this affidavit is a complete record of my law firm's time entries incurred in connection with the claims associated with the capped appropriations, including shortfall claims, direct contract support cost claims, and miscalculated rate claims, for the period July 3, 2002 through June of this year. (Work prior to that time was addressed in the submissions made to this Court in connection with the Second Partial Settlement Agreement (PSA-2), is detailed in those submissions, and is therefore not included here. PSA III hours that were accounted for previously as part of the PSA III fee application and which were logged to this account have not been redacted, but these hours have not been included in current hours.) PSA II and PSA III hours for which we were not compensated because they were logged after we filed the respective fee applications (totaling 122.8) have been redacted. The detailed daily

diary entries have been redacted in part only to the extent necessary to protect attorney-client privileged communications or attorney work product. However, the redactions have been limited to permit the Court to retain a sense of the substance of the work that occurred over time. According to Attachment 2, my firm has devoted no less than 5204.04 hours to the prosecution of claims in this case through August 31, 2015.

14. The foregoing hours exclude substantial time I failed to record from time to time, including considerable work performed while traveling. Work on the Application for Attorneys' Fees has been included in Attachment 2 and in the foregoing total because of its dual purpose in also supporting final approval of the underlying settlement. The workload this case has imposed upon me has been crushing, and my annual billings for several years have been in the range of 2,200 to 2,400 hours per year.

15. The overwhelming majority of the work I and my firm have performed in this case has occurred outside the District of New Mexico (primarily in the Washington D.C. area or in Alaska, where my firm has permanent offices). For this reason, it is my belief that the overwhelming majority of any attorney fee award ultimately payable to my firm should not be subject to any New Mexico Gross Receipts Tax under applicable law. In order to preserve as much funding as possible for the Class, my firm is in the process of preparing a ruling request to the New Mexico Taxation and Revenue Department ("NMTRD") to confirm the amount of New Mexico's Gross Receipts Tax that will be due on any attorney fee award to my firm. In the event the Court awards plaintiffs' counsel the New Mexico Gross Receipts Tax calculated on the full award of fees to be made by this Court, my firm will deposit its share of such taxes in a segregated trust account pending a ruling from NMTRD regarding the amount of this tax that is

actually due to the State of New Mexico. Once the amount of the tax that is actually due is determined, my firm will remit to the Reserve Account described in § VIII.C.1 of the FSA any remaining portion of such segregated funds so that such funds can be distributed to the Class or paid as otherwise specified in the FSA.

16. Attached to this affidavit is also a complete record of all costs incurred and reimbursable expenses advanced in connection with these cases for the period June 14, 2011 to the present. *See* Attachment 3. As reflected in Attachment 3, our firm incurred reimbursable expenses in connection with the above captioned case and the related *Pueblo of Zuni* litigation of not less than $401,911.80 for the period June 14, 2011 through August 31, 2015.

A. My Firm Joins the Case.

17. In late 1998, a first partial settlement was achieved in this action, and a final approval hearing was held in mid-December 1998. Scrutiny of the settlement terms and historic contract support cost shortfalls led the Pueblo of Zuni to contact me in March 1999.[2] At that time the Pueblo requested a meeting to review all of the Pueblo's contract support cost payments from the BIA and from the IHS, and to explore the extent to which existing class action litigation sought sufficient damages to remedy the severe shortfalls experienced by the Pueblo of Zuni.

18. In April 1999, I met with the Pueblo of Zuni in Albuquerque, New Mexico. I listened to a detailed presentation from the Pueblo Governor, several Council members, the

[2] I was quite familiar with this litigation for two reasons. First, I had followed it closely on behalf of my tribal clients, and I collaborated with Mr. Gross to submit a supporting amicus brief on behalf of several tribal contractors (including Chugachmiut, Inc.) when the case was first pending before the U.S. Court of Appeals for the Tenth Circuit. Second, after PSA-1 was announced I represented several tribal organizations who were not originally slated to receive a share of the settlement funds (the so-called DCA Tribes), and worked with Mr. Gross to secure their participation in the PSA-1 settlement.

Pueblo's Finance Director, and the Pueblo's certified public accountant regarding the Pueblo's experiences concerning contract support cost underpayments from various federal agencies. Also during that meeting, I provided a detailed oral report on the nature of all extant litigation concerning contract support cost issues. This report included a discussion of the miscalculated rate claim that was, at that time, the sole focus of the *Ramah Navajo Chapter* litigation. This discussion also focused on the *Cherokee Nation* class action then pending in the Eastern District of Oklahoma to recover CSC damages arising out of IHS underpayments. (I was the attorney of record in that class action.) It also included a discussion of the key litigation successes I had achieved at the time in other litigation, including in the *Shoshone-Bannock* litigation then still pending in the Oregon district court, and against the BIA in the 1996 *Ramah Navajo School Board* litigation in the District of Columbia Court of Appeals. The *Shoshone-Bannock* litigation was the first litigation in the country ever to hold the government liable for contract support cost underpayments and to reject a defense that appropriations were legally insufficient to pay such amounts. (The District Court's decision in that case employed reasoning ultimately endorsed by the Supreme Court a decade later in the *Cherokee* case, and nearly two decades later in the *Ramah* case.)

19. At this meeting it was concluded that the Pueblo of Zuni had suffered substantial contract support cost underpayments over a period of several years from the BIA due to at least four causes: (1) the miscalculation of the BIA's indirect contract support cost rate under the Indian Self-Determination Act (as confirmed in this action by the Tenth Circuit), (2) the shortfalls in the BIA's payment of even the miscalculated rate, (3) the failure of the BIA to pay any direct contract support costs ("DCSC"), and (4) the practice of the Office of Inspector

General in failing to include indirect cost shortfalls when applying the fixed-with-carryforward method of determining future indirect contract support costs requirements. It was also concluded that of these four issues, only the first (the miscalculated rate claim) was then being addressed by the ongoing *Ramah Navajo Chapter* litigation. The Pueblo of Zuni tribal leadership was distressed by this state of affairs because it believed the Pueblo was in a financial "death spiral" where the government always penalized the Pueblo for spending more on overhead than it had been paid in a particular year, even if the government owed the Pueblo more contract support costs that year. The Pueblo felt the only way to remedy the underlying cause was to bring new litigation against the BIA over the core shortfall it was suffering in indirect cost and DCSC payments. The Pueblo was distressed that the *Ramah* litigation at that time did not include these claims.

20. In the months following the April 1999 meeting, I worked with the Pueblo of Zuni to undertake extensive financial research and analysis regarding its potential claims. The Pueblo also undertook a very major document production initiative to locate all contracting records and financial data going back to fiscal year 1993. During this same period I reported to the Pueblo on the victory I secured in June 1999 against the government before the Interior Board of Contract Appeals on a Cherokee Nation administrative claim (one of the two litigations the Supreme Court would eventually consolidate in its 2005 *Cherokee Nation* decision). Based upon the evolving legal climate and thanks to the enormous document research and financial analysis undertaken to that point, the Pueblo decided to move forward with the litigation process and by letter dated September 30, 1999 the Pueblo filed six formal Contract Disputes Act claims

against the BIA with the Pueblo's BIA Contracting Officer. The claim letters covered the "shortfall claim" and the "DCSC" claim back to FY 1993, one for each year through FY 1998.[3]

21. Also in 1999, I met with Class Counsel Mike Gross to discuss the various litigations we were each handling against the government over contract support cost underpayments. We discussed the fact that the Indian Health Service had a practice of paying "direct contract support costs" (DCSC) and reporting to Congress DCSC underpayments, while the Bureau of Indian Affairs in contrast had never identified DCSC as part of the contract support cost requirement owed to Tribes, and that this issue was not in the *Ramah* litigation. We also discussed the fact that most of my litigation at the time was focused on seeking damages over shortfalls in the payment of indirect and direct contract support costs (as in the *Shoshone-Bannock* and *Cherokee* litigations), another issue which at that time was not in the *Ramah* litigation. This meeting laid the seeds for our eventual collaboration in joining forces, expanding the claims, and mounting what over the course of 16 years became an extraordinarily successful campaign to comprehensively litigate contract support cost damage claims against the BIA.

22. In late February 2000, the BIA Contracting Officer denied the Pueblo of Zuni's Contract Disputes Act Claims. But shortly before the BIA Contracting Officer decision issued, the Pueblo of Zuni learned that the Oglala Sioux Tribe had intervened in the *Ramah Navajo Chapter* case as a co-plaintiff and was now asserting the "shortfall" claim back to fiscal year 1993 on a class-wide basis. Based upon this intervening development, the Pueblo of Zuni concluded that it was no longer necessary to duplicate the ongoing efforts in this action regarding

[3] Descriptions of the claims can be found in the Final Settlement Agreement.

the "shortfall" claim, and determined to narrow the focus of its own energies to the "direct contract support cost" (DCSC) claim. Shortly thereafter I was instructed to prepare and file a Complaint asserting the direct contract support cost claims described in the preceding paragraph on behalf of the Pueblo of Zuni and a class of similarly situated tribes.

23. In March 2000, the Pueblo of Zuni filed Case No. 00-0365. The Complaint detailed the long history of the BIA's acknowledgement of its unfulfilled duty to account for and to pay direct contract support costs, including a number of admissions the Assistant Secretary for Indian Affairs made to congressional committees in the course of responding to questions I had submitted for the committees' consideration. Thereafter, I worked with the attorneys in the *Ramah* case to develop a comprehensive Joint Prosecution Agreement to marshal all of our forces together in the coordinated prosecution of both actions against the United States.

24. In discussions with the attorneys for the *Ramah* class, I also learned that the Ramah Navajo Chapter had recently submitted a similar Contract Disputes Act claim regarding DCSC underpayments, but that the Chapter's claim (unlike the Pueblo of Zuni's claim) did not go back to FY 1993 (a critical lump-sum year). In the context of the Joint Prosecution Agreement, the *Ramah* attorneys were pleased to have Zuni add the DCSC claims back to FY 1993 as part of the joint effort against the Defendants, and I was pleased to join forces with *Ramah* counsel to present a more formidable joint case that would, hopefully, benefit all Tribes. To guard against any possible statute of limitations defense, once the Ramah Chapter received a denial of its administrative DCSC claim, Ramah in April 2001 filed a motion to amend its Complaint in this case to add the DCSC claim going back to FY 1994, followed by Zuni's joinder in the case adding these claims back to 1993.

B. Prior Settlements through 2007.

25. In 1999, this Court approved the First Partial Settlement Agreement (PSA-1). Under this agreement, the parties agreed to settle the miscalculated rate claim for FY 1989 through 1993 for a payment to the Class of $76.2 million. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) (*Ramah I*). Later, the court allowed four previous opt-outs to re-enter the Class in order to negotiate separate settlements which I am informed totaled approximately $6,000,000. ECF Nos. 198, 247, 250, 462. These amounts were additional to the Class-wide settlement. *Ramah I*, 50 F. Supp.2d at 1101 (¶ 42).

26. In 2002, this Court approved a Second Partial Settlement Agreement (PSA-2) that provided for an additional payment to the Class of $29 million in settlement of all DCSC claims arising in fiscal years 1993 and 1994 (together with additional relatively minor remaining shortfall claims arising in fiscal years 1992 and 1993). *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D. N.M. 2002). The settlement included 1994 DCSC claims despite the fact that 1994 was a "cap year" claim (and despite the government's position it would not settle any cap year claims at all), because the FY 1994 Appropriations Act language only capped "indirect" costs. (Beginning with FY 1995, the Appropriations Act caps addressed all contract support costs, encompassing both indirect and direct costs.)

27. PSA-2 was the first time the BIA recognized it had a duty to pay direct contract support costs. But the negotiations did not establish how the BIA should be paying these contract support costs going forward. In order to address future years, the interlineated *Ramah* complaint also sought an injunction to require the BIA to recognize and pay all direct contract support costs in future years. Recognizing that the BIA was unlikely to begin paying these costs

on its own volition, Class Counsel pushed for and were successful in convincing the government to explore the possibility of settling the Class's claims for declaratory and injunctive relief relating to future direct contract support costs.

28. Initially the government resisted, and between the years 2002 and 2005 little progress was made. But after the Supreme Court 2005 victory in the *Cherokee* case, progress picked up as tribal pressure mounted and as the Shoshone Paiute Tribes (another one of my clients and the co-plaintiff in the *Cherokee* litigation) took the lead in pressing the Secretary's office to engage in meaningful negotiations with Tribes. I knew that direct contract support costs are a significant portion of total contract support cost requirements because of my work with the IHS in developing its contract support cost policy. As part of that work, I explained to the BIA that when IHS first began to compute tribal DCSC requirements in approximately 1992, IHS used a shorthand formula of 15% of salaries, because most DCSC requirements are a function of personnel costs. We explained that over time some Tribes renegotiated these costs to be more precise, but that other Tribes did not renegotiate those amounts for many years. Based upon my direct experience with IHS DCSC issues, I devoted significant time and energy over the course of several meetings across the country to convince the BIA that it should use this shortcut methodology—15%of salaries—to begin paying all contractors direct contract support costs. Some tribal advocates opposed this approach and instead wanted to determine direct contract support cost requirements through individual negotiations. But we were concerned that the BIA simply did not have sufficient personnel to engage in such negotiations, and ultimately we were successful in convincing the BIA to adopt our proposed shortcut methodology. These negotiations spanned well more than a year and the final agreement was reflected in a 2006 letter

supplement to the BIA's 2006 National Policy Memorandum on contract support costs. (The Policy Memorandum itself was a document we as Class Counsel worked intensely with the BIA to develop during the period from 2002 to 2006 as part of the work which led to PSA-3.)

29. As a result of these efforts, the BIA began paying very small amounts of direct contract support costs in 2006, and over the ensuing years those payments increased until full DCSC payments occurred in FY 2014.

30. The 2002 through 2006 negotiations also addressed ongoing claims created by the rate-making errors. To gather information regarding indirect cost rates, the parties used statistical sampling to survey a section of the class. Using this information, the parties eventually created a new tool to adjust indirect cost rates to account for the rate-making errors.

31. Achieving this settlement took several years and it was not until 2008 that this Court approved a Third Partial Settlement Agreement (PSA-3) which provided equitable relief relating for both direct contract support costs claims and indirect contract support cost claims.

C. Pre-2002 Work on Cap Year Claims.

32. Work was ongoing on the cap year claims both before and during the period when the PSA-2 and PSA-3 settlements were being negotiated and finalized. First, prior to 2001 *Ramah* Class Counsel engaged in discovery regarding these cap year claims, and those efforts are detailed in the declarations being submitted by Class Counsel Mike Gross and C. Bryant Rogers.

33. Second, using the information gathered during this discovery period, in 2001 Class Counsel filed a motion for summary judgment asking this Court to rule that the government was liable for underpayments even when Congress in the annual Appropriations

Acts had capped the total amount of funding that could be spent on contract support costs. The government responded with a cross motion for summary judgment, asking this Court to rule that the government was prohibited from paying any additional costs beyond the capped amounts.

34. Prior to the time that I joined the case as Co-Class Counsel for the DCSC Claims, I submitted a brief on behalf of the Pueblo of Zuni, urging the Court to rule for the Tribes on the cap year issue. The arguments made in the brief included all of the key points on which I eventually prevailed in the *Cherokee* case, and on which we eventually prevailed in the Supreme Court over a decade later. (The time spent on that motion is not included in my hours here because the work was done prior to my joining this case (although this work was never compensated).) The development of the legal theories reflected in that brief substantially contributed to the ultimate success we achieved in this litigation.

D. From 2002 Through 2006: Litigating the Claims in This Court.

35. When I formally joined this litigation as Co-Class Counsel in 2002, the cross motions for summary judgment on the cap year claims were pending but had been stayed, pending the outcome of my *Cherokee Nation* litigation before the Tenth Circuit Court of Appeals.

36. That case involved claims for underpayments in years where Congress had not capped the total amount of appropriations that could be spent on contract support costs ("pre-cap" or "lump-sum appropriation" claims). In 2001, the district court had dismissed the pre-cap year *Cherokee* claims on their merits, leading to the Tenth Circuit appeal. The stay in the *Ramah* case continued as the Tenth Circuit took up and ultimately affirmed the district court decision in the *Cherokee* case, and it remained in place until the matter was resolved in the Supreme Court.

In 2004, I briefed and argued the *Cherokee* case before the Supreme Court, and in March 2005 the Court reversed the Tenth Circuit and held the government liable for contract support cost underpayments in pre-cap years. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

37. To achieve this victory, I adopted a strategy that would later guide the litigation in our *Ramah* case. First, I centered the legal argument on government contract law. Specifically, I relied on the *Ferris* rule to argue that as long as there were sufficient appropriations to pay each individual contractor, insufficient appropriations to pay all contractors did not relieve the government of the duty to fully fund a contract. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 641 (citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (Ct. Cl. 1892)).

38. Second, I made strategic choices about soliciting specific amicus support. Specifically, I convinced counsel for the U.S. Chamber of Commerce, the National Defense Industrial Association and the Aerospace Industries Association to write a joint amicus brief supporting the tribal position. By convincing the Chamber and these trade associations of the potential negative impacts an adverse decision could have on all government contractors, I was able to procure a formidable ally in my efforts to persuade the Supreme Court that the case was not just about ISDA or tribal contracts but instead was about all government contracts. Although I also successfully encouraged other amicus participation, including from the National Congress of American Indians, it was the Chamber brief which the Supreme Court cited in its *Cherokee* opinion.

39. Once the Supreme Court issued its 2005 ruling in *Cherokee*, this Court asked for supplemental briefing to explain the impact of the *Cherokee* decision on the pending cross motions for summary judgment concerning the cap year claims. Given the recent victory in

Cherokee, this provided an important opportunity to apply in this case the legal strategy that was successful in *Cherokee*, and we spent considerable time developing our brief. In part, we emphasized the Supreme Court's statement that an agency is liable when an appropriation is sufficient to pay a contract, even though the appropriation is insufficient to permit the agency to pay in full all of the contracts the agency has awarded (a proposition known as the *Ferris* Rule). At the same time, we had to acknowledge that, while the Court's reasoning in *Cherokee* supported a victory in a cap year situation too, the cap year situation was not actually presented to the Court in that case, and lower courts had rejected cap year claims.

40. Despite these efforts, in August 2006 the Court ruled in favor of the government on cross motions for partial summary judgment, finding that the appropriations caps were a valid defense to the Class claim for damages caused by contract support cost underpayments. The Court correctly pointed out that appropriations caps were not at issue in the *Cherokee* decision, and it found that difference to be decisive. This ruling was not a final decision, because the equitable relief claims were then still pending. In order to secure a final judgment disposing of all claims, Class Counsel had to pause work on the cap year claims to complete work on the equitable relief claims. This would at least ensure the BIA was pricing the contracts correctly going forward, and would ensure those reforms commenced as swiftly as possible without delays which would otherwise have been associated with an interlocutory appeal on the cap year claims. As noted above, a settlement of these equitable relief claims was finalized in 2008.

E. From 2008 through 2011: Litigating in the Tenth Circuit.

41. In August 2008, this Court issued a final judgment regarding all claims, and at that point its August 2006 decision regarding the cap year claims was now appealable. At this

key moment a decision had to be made whether to continue to pursue these claims. After all, these claims were universally considered extremely difficult to win. Both this Court and the Court of Federal Claims had dismissed these claims, and as a result some Tribes were negotiating settlements over contract support cost claims spanning several years where the settlements accorded little to no value for cap year claims. We were painfully cognizant of the fact that, as of 2008, *every* court to have considered cap year claims had ruled for the government, and that an appeal was therefore pressing the frontiers of the law. The perceived hopelessness of the claims was later demonstrated in one case where a Tribe voluntarily dismissed cap year claims in order to secure a final judgment and advance an appeal on other issues, *see Menominee Indian Tribe of Wisconsin v. United States*, 841 F.Supp.2d 99, 110 (D.D.C. 2012).

42. Despite the near universal view of the cap year claims and against all odds, we decided to press on. We believed the Supreme Court's *Cherokee* decision provided a solid basis for securing a reversal of this Court's decision, and we committed to seeing this case to the very end no matter the cost in time and money. In September 2008 Class Counsel filed a notice of appeal to the Tenth Circuit, and we then began work on our appellate brief, knowing that hundreds of millions of dollars in accumulated unpaid contract support costs were now on the line. After considerable and vigorous debate within our team, and as had been done in the *Cherokee* case, we decided to once again anchor our arguments on government contracting law and the *Ferris* Rule. If the Supreme Court meant what is said about *Ferris*, we should prevail even when overall CSC appropriations were capped.

43. After the parties filed their opening briefs, the Tenth Circuit assigned a mediator to assist the parties in exploring the possibility of settlement. The Class was willing to compromise significantly in order to achieve settlement and the parties held extensive settlement negotiations. But despite the mediator's best efforts, the parties were unable to reach settlement because the government was unwilling to pay *any* amount in settlement of the cap year claims. Indeed this had been true throughout the litigation over these claims: on numerous occasions the Class offered to settle the claims at significant, even overwhelming, discounts, but the government was never willing to pay even one penny. The mediation therefore failed.

44. In the midst of these efforts, and while the Tenth Circuit decision was pending, the Class suffered a setback when the Federal Circuit issued a decision in a case involving nearly *identical* cap year claims against the IHS and ruled *for the government*. *Arctic Slope Native Ass'n, v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *vacated and remanded Arctic Slope Native Ass'n v. Sebelius*, 133 S. Ct. 22 (2012). (I was counsel of record for the plaintiff in the Arctic Slope litigation.) The Tenth Circuit swiftly requested supplemental briefing in light of the *Arctic Slope* decision. An unfavorable decision in the Tenth Circuit would have struck the death knell for these claims, and so once again we put all our energies into writing a persuasive brief under extraordinary time constraints. What made the challenge that much harder was that the Federal Circuit was generally perceived as the expert court in government contract law, and had ruled for the Tribes in one of the consolidated *Cherokee* cases, yet was now ruling against them in the context of cap year appropriations. Indeed, the very same Federal Circuit judge (Judge Dyk) authored both Circuit opinions.

45. Our heroic efforts to beat back the Federal Circuit's precedent were ultimately vindicated: on May 9, 2011, Class Counsel achieved the first win in history on cap year claims when the Tenth Circuit, in a divided opinion, overruled this Court and held the government liable in damages. The Court carefully took on and addressed each aspect of the Federal Circuit's contrary ruling in *Arctic Slope*, no doubt in anticipation of a certiorari petition arising out of the new inter-circuit conflict. In due course the government filed a powerful petition for rehearing and for rehearing en banc, and when the Circuit called for a response we were once again called upon to martial together our best arguments to overcome the petition. In the end, our arguments were successful and not one Circuit judge dissented from the Order denying the government's rehearing petition.

F. From October 2011 through June 2012: Litigating in the Supreme Court.

46. The entire Supreme Court chapter of this litigation was an extraordinarily massive and complicated enterprise, as befits any effort with so much as stake. Not only would the Court be determining a tribal contractor's right to damages for underpayments under contracts with the BIA—damages estimated to be roughly one billion dollars; the Court would also be determining a tribal contractor's right to pursue damages for similar claims under contracts with the IHS where nearly as much in damages was at stake. There were two phases to this battle.

47. First, there was the fight to avoid Supreme Court review. The split between the Tenth Circuit and the Federal Circuit, combined with the size of the government's potential liability, gave the government significant reason to petition the Supreme Court to hear the case. Still, we met with the Solicitor General in an effort to convince the government not to seek a writ of certiorari, and to encourage the government instead to consider settlement. As we explained,

at the end of the day the case only involved money damages, and with one circuit court ruling going each way, each side ought to be willing to compromise to arrive at an acceptable settlement amount. But both formal and informal settlement efforts proved unsuccessful, and in October 2011 the government filed a certiorari petition. Once the petition was filed we engaged specialized Supreme Court counsel Carter Phillips, of the Sidley Austin firm, to look at the case afresh and we worked together to develop an opposition brief which urged the Court to leave the Tenth Circuit decision undisturbed and, if necessary, to review and reverse the Federal Circuit decision in the Arctic Slope case. But in the end, the obvious conflict between the two circuit courts in such high stakes litigation proved too much, and after the Solicitor General urged the Court to hear the *Ramah* case over the *Arctic Slope* case, the Supreme Court in January 2012 agreed and granted the government's certiorari petition. The Court's decision to hear the Tenth Circuit case suggested that at least four Members of the Court might be at ease with the Federal Circuit's negative decision in the *Arctic Slope* case and were contemplating reversing the Tenth Circuit decision. (In the end, that is exactly what happened, and four Justices voted to reverse our hard fought victory.)

48. Second there was the fight to hold our circuit court win in the Supreme Court. With cert having been granted we knew that to win this case in the Supreme Court would be particularly challenging, and that the case could well hinge on just one or two votes. To provide us the best chance of victory, we extended our working relationship with Carter Phillips, and together we labored for weeks to develop the best possible presentation, taking our cues about the government's upcoming opening brief from its filings at certiorari stages of the *Ramah* and *Arctic* cases. Given the magnitude of the sums at stake, Mr. Phillips' extraordinary skill and

familiarity with the Court, Mr. Phillips' knowledge from having worked with me in the *Cherokee* case, and his experience and credibility before the Court, we also assigned Mr. Phillips to argue the case and set up a series of moot court discussions. We then developed a master strategy for briefing the case and undertook hundreds of hours of supplemental research into every aspect of the case. Exhaustive new research was done in various aspects of government contract law, including archival research on key Supreme Court and Court of Claims decisions. Meticulous research was also undertaken to chronicle the submission of every budget and the passage of every BIA Appropriations Act for the preceding 20 years, along with similar research on other comparative appropriations acts and other relevant statutes.

49. We also spent considerable time and effort convincing certain key organizations to submit amicus briefs supporting the tribal position. First, we spent considerable time convincing the U.S. Chamber of Commerce and the National Defense Industrial Association to submit a brief in support of the Class. Both because many of the players had changed and because the case could be framed as uniquely ISDA-driven, the Chamber's support took some convincing. But our team succeeded, and once again the Court would hear about the importance to the federal military-industrial complex of the core government contracting rules at issue in our case. Just as importantly, the Chambers and NDIA's participation would help keep the case focused more on government contract law, and less on the ISDA (since the ISDA certainly contained fodder for a negative ruling—again, as the views of four dissenting Justices would later demonstrate). So far as I am aware, this case and the *Cherokee* case were the only times that Indian tribal litigants in the Supreme Court sought *amicus* support outside the traditional

tribal arena, and it was critical to our ultimate success. Indeed, in *Ramah*, as had occurred in *Cherokee*, the Court's favorable opinion made reference to the Chamber/NDIA brief.

50. We were also successful in convincing the National Congress of American Indians to write a supporting amicus brief. As a tribal government organization, NCAI's membership includes over 250 tribal governments with extensive experience in tribal contracting. NCAI's brief could detail much of the history behind the development of the Indian Self-Determination Act, a history which was far too complex to cover in our own merits brief. Finally, we encouraged the Arctic Slope Native Association (whom I also represented) to submit an amicus curiae brief in this case, because that entity could show from its experience with the Indian Health Service that taking the government's argument to its logical conclusion would result in unpredictable and irrational payment regimes no government contractor could possibly predict, much less rely upon. This proved pivotal too, and at oral argument Justice Kagan asked pointed questions of government counsel based upon facts laid out in my Arctic Slope amicus brief.

51. Dozens of drafts of our brief circulated back and forth across our team, and each of us undertook substantial additional detailed legal and archival research into a wide range of issues. Supreme Court litigation always entails a level of work unparalleled in lower court litigation, and this case was no different. We even located the record in the *Ferris* litigation and in other early cases to match the legal doctrines developed there to the actual on-the-ground facts developed in those cases. We also researched such obscure issues as the origins of the Anti-Deficiency Act, a statute which the government claimed was pivotal in the case. (As a result of our advocacy here, the Court eventually discarded the issue in a footnote as non-dispositive.)

52. In June 2012, all of our efforts paid off and by the narrowest of margins—a five-to-four vote—the Supreme Court affirmed the Tenth Circuit decision and ruled that the government could not rely on the cap contained in annual Appropriations Acts to excuse fully funding the contract support costs due to tribal contractors. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012). Against extraordinary odds and by just one vote, we had prevailed against the United States in a case worth hundreds of millions of dollars. The case then returned to this Court for a determination of damages.

G. From July 2012 through December 2014: Settlement Negotiations.

53. Shortly after the June 2012 victory the parties entered into settlement negotiations. I took primary responsibility for beginning a damages matrix which eventually calculated estimated underpayments and damage amounts based on the BIA's contemporaneous shortfall reports to Congress. Those reports had detailed the additional amounts owed to tribal contractors each year, and by using formulas from other sources (including underpayment data from the IHS, whose records were more detailed than the BIA's) we could approach an estimate of damages to open settlement discussions with the government. Class Counsel presented this matrix to government counsel in July 2012. But, the government in due course refused to negotiate a settlement based on the government's own shortfall reports.

54. Instead, the government proposed reviewing each class member's contract documents for each year it contracted to calculate underpayments. Since there were 20 years at issue and over 600 class members, this approach would have required reviewing at least 12,000 contracts (more to account for Tribes that had several contracts each year), 12,000 audits, thousands of indirect cost rate agreements, and thousands of other relevant contract documents.

We Counsel opposed this procedure because it would have consumed years, very possibly a decade, to complete and was very likely not even possible given that some of the claims stretched back 20 years and documentation might no longer be available. Over a series of meetings to break the logjam over this issue, the government eventually proposed analyzing the underpayments experienced by the Class by studying a random segment of the Class, to be selected through a statistical sampling process, and extrapolating those results to the full Class. We as Class Counsel vigorously opposed this procedure and took the position that such an approach was unnecessary, would entails millions of dollars in costs, and would delay resolution of the case for years (and we were right: the settlement was delayed three years over this issue). But the government made clear it would not discuss settlement without first undertaking a statistical sampling.

55. Recognizing this to be the only method available to continue settlement discussions, we reluctantly agreed to the sampling process. We then hired a statistician to assist in creating a sampling plan, and to work with a statistician hired by the government (actually the government eventually hired two statisticians to deal with this issue). We met with the government often over the next several months as we worked to develop a joint sampling plan, a task which proved to be much more challenging than expected.

56. Initially, the parties sought to develop a single compromise methodology to calculate the underpayments for the Tribes chosen through the sampling process. In order to develop this methodology, the parties did an initial analysis, which we referred to as the "drive by" analysis, to test three tribal contractors' underpayments for three different years. The point was for the parties to learn the issues that might arise in any sampling, so that the sampling could

be tailored to the parties' needs and so that future analytical work could be outlined based upon real-world experience. To assist in this endeavor, each side hired expert accounting firms (in addition to the expert statisticians).

57. The parties and their experts met numerous times over a period of months to discuss the three individual drive-by analyses, but the meetings eventually proved that the two parties could *not* agree on a single methodology for calculating an individual contractor's underpayment. There was just too much disagreement on how to calculate damages.

58. The most fundamental disagreement centered on whether these were "fixed price" contracts or cost-reimbursable contracts. We believe that the Indian Self-Determination Act dictates how to price these contracts and that the tribal contractors were due a fixed sum based on that formula. Damages, then, are the difference between the price of the contract and what the government paid. But the government, instead, argued that these contracts were cost-reimbursable contracts, such that the government only owed the difference between the costs a tribal contractor incurred and what the government had already paid under the contract. These competing positions have been publically shared in many fora.

59. The Class's initial damages matrix was based on a fixed price approach. But the government repeatedly rejected this methodology for calculating the damages owed to the sampled entities (as detailed in Status Reports filed with this Court). Eventually, the Class decided to also complete an "incurred cost" analysis of the sampled entities. This is not to say that the Class agreed that tribal contractors were only entitled to damages for costs they had "incurred" and for which they had not been reimbursed. Far from it. But the "drive by" analyses disclosed that the parties disagreed sharply on how to correctly calculate claims even under on an

"incurred cost" approach. Thus, we needed to know how the government calculated its liability, how we would calculate that liability using the government's theory, and (of course) how we would calculate damages using our own fixed price approach to damages. Thus, to protect the interests of the Class we decided it would be necessary for us to undertake our own "incurred cost" analysis for each sampled contractor, plus the fixed price analysis wherever the necessary data was available. In short, the parties would not be able to undertake a single joint standardized approach for calculating damages.

60. The parties did, however, agree to develop a plan for selecting the sample. That said, developing even this agreement proved to be extremely challenging. Co-Class Counsel C. Bryant Rogers will address these issues in his affidavit in more detail, so I will only cover them briefly here.

61. First, we had to decide how to identify the population at issue. One possibility was to draw a random sample from the population of all Tribes and tribal organizations which contracted with the BIA during the covered years. But, no such list existed. Therefore, the parties had to explore the data that was available in order to create a master list of all class members for each of the 20 years. The best source of data was the BIA's payment information, which included contract support cost payments made by the BIA to tribal organizations. But this data was imperfect because it was both under-inclusive and over-inclusive. First, this data excluded class members who should have received contract support cost payments but never did. Second, this data included payments on contracts that, while paid through the BIA, were not BIA contracts at all (and instead came from other agencies). Additionally, it took substantial work to "clean up" the data—that is, get rid of duplicated entries, uncover jumbled names, and correct or

delete mistaken entries. Despite these many problems, there was no better data source and we therefore undertook months of corrective work.

62. Second, we had to merge data from a number of different databases to compile this information. This is because the BIA had collected this data from a variety of methods and it was stored in a variety of operating systems over the years. Thus, we were required to essentially create a fresh master database using information from a number of different data sources covering hundreds of Tribes and twenty years. This involved significant work by the expert accountants and legal counsel to identify contract support cost payments and purge the database of duplicated or erroneous entries. Not the least of the problems, too, was the BIA's tendency to list the same Tribe under multiple names.

63. Once the database was created, the parties then had to agree on how to design the sample to best reflect the actual underpayments. Class Counsel worked closely with our expert statistician to understand different statistical modeling techniques and what effects each technique would have on the eventual sampling plan. For instance, because the varying size of the annual appropriations impacted the amount of the underpayments each year, it was suggested that the sample should stratify by year. Doing so created twenty separate sampling strata. While this added a layer of complexity, it would also permit fewer actual samples to be taken.

64. Other factors, however, were more controversial. The parties spent a significant amount of time working through how to account for contract size in the sampling plan. For a time we considered stratifying the sample based on the underlying contract dollars. But in due course the parties settled on a modeling technique known as "probability proportional to size" (PPS). The PPS method of sampling makes it more likely for an entity with a larger contract to

be selected over a smaller contractor and reflects the judgment that Tribes with larger contracts experienced larger underpayments, and that by sampling larger contracts there would be less error than would occur if one were sampling only small contractors. That is, if there are 100 contractors but 50 of them accounted for only 10% of the amounts at issue, less extrapolation is needed to assess the global shortfall for all 100 contractors if more of the large contractors are selected for the sample. Put differently, scaling up from a very small number would be less accurate than scaling up from a larger number. We also believed the underpayments to small Tribes varied more for reasons that likely were not typical to the entire population. For these reasons, the parties agreed to increase the probability that Tribes with larger contracts would be selected—the PPS methodology.

65. At various times, the parties also considered other sampling methodologies including, among others, stratifying based on geographic location (to account for the possibility that Tribes in certain locations were treated differently); on distance from urban areas (to account for the possibility that tribes located in remote areas were treated differently); on the type of rate the contractor used to determine its indirect contract support costs (to account for the possibility that tribes with different types of rates experienced different rates of underpayments); on whether the Tribe contracted under Title I or Title V (to account for the possibility that the rates of underpayment varied based on whether the Tribe was a self-governance Tribe); on which Area Office the Tribes were located in (to account for the possibility that certain Areas may have paid contract support costs differently); and on whether the tribal contractor operated a tribal school under P.L. 100-297 (because of the possibility that the presence of the schools affected the rates of contract support cost underpayments). In the end, however, and after exploring each of these

options thoroughly, the parties concluded that such additional stratification was not necessary to produce a sample of reasonable size and acceptable overall accuracy.

66. Significant time was also devoted to the degree of statistical confidence necessary to consider the sampling process a success. Here, we debated two related concepts: the confidence level (expressed as a percentage), and the associated margin of error. The answers to these questions drove the number of statistical samples that would be collected and analyzed. This topic was heavily discussed and in the end, the parties agreed to do an initial "pilot sample" of 38 Tribes. When that sample was completed, the parties would evaluate the results and consider whether additional sampling was necessary. If so, the sampling plan called for an additional 66 samples to be analyzed, for a total of 104 sample tribe-years.

67. The parties also spent considerable time discussing what to do in the event a chosen sampled entity did not have sufficient documentation for an analysis to be completed. A number of different approaches to this problem were explored, but eventually the parties agreed to a method to pull substitute entities if necessary documentation could not be secured for a chosen selected entity. As part of this discussion, the parties confronted and eventually resolved how to address sampled entities whose data was incomplete. (Over time the parties developed various proxies and rules-of-thumb to fill in some of this missing data, although no firm agreements were ever reached on all of these proxies.)

68. It is perhaps not surprising, then, that the parties did not reach agreement on a sampling plan until well into the winter of 2013-2014, and never reached agreement on a sampling outcome).

69. Once the parties had agreed on a sampling plan, the statisticians drew the sample. With the list of the sampled Tribes in hand, the parties next set about collecting the documentation needed for the analysis. Given the age of some of the documents involved, the process to collect the necessary documentation was difficult and time consuming. Class Counsel wrote to all sampled Tribes and worked with tribal contractors chosen for the sample to follow up on the available documentation and assist in assuring those documents made it to the accountants. For its part, the government made numerous trips to national storage facilities to locate documents.

70. Once sufficient documentation had been gathered for a particular sampled entity, our accounting experts analyzed the documents to determine the size of the underpayment for that Tribe or tribal organization. Class Counsel was very involved in the analysis process, including assisting in determining which contracts were eligible for contract support costs and reviewing the calculations to determine if the methodology was consistent with the statutory requirements.

71. After each side finalized its own analysis, the two parties would meet to compare and critique the other's analyses. While it became clear early on that the parties would not agree on one single analysis, it was also clear that the sampling results would influence the eventual settlement amount and thus it was important for both parties to review the other party's calculations, to seek common ground wherever possible, and to narrow the spread between their calculations.

72. Completing this process required months during which the parties met numerous times. The sampling process highlighted many issues on which the parties disagreed.

73. One issue that continued to divide the parties was which contracts were eligible for contract support costs and therefore which ones should be included in our analyses. Often, these disputes involved construction contracts. Construction contracts generally include an amount for indirect costs, but these sums were often not as much as a contract support cost calculation would indicate was required.

74. Other disputes arose over contracts with agencies other than the BIA where the contract purported to be awarded under the ISDA. Agencies outside the BIA, such as the Bureau of Land Management, often award Tribes contracts, such as dam construction contracts, which can also be awarded to non-tribal entities. When these types of contracts are awarded to tribal entities, they are sometimes awarded under an ISDA contract. The ISDA provides that contractible programs include programs carried out "for the benefit of Indians." 25 U.S.C. § 450f(a)(1). In a case such as a dam construction program, the question arose whether the program was for the benefit of Indians. The answer to that question might be influenced by the fact that the contract was awarded under an ISDA contract. In the case of "ISDA" construction contracts, we also had to address how to account for the fact that many such contracts already contained an award of indirect costs. The parties vigorously debated how to address these kinds of issues.

75. Another issue that presented difficulties was the calculation of the direct contract support cost requirement. As mentioned earlier, our work on equitable relief spurred the BIA in 2006 to begin calculating the direct contract support cost requirement for each tribal contractor at 15% of the contractor's salaries. This ultimately had a significant role to play in the current negotiations.

76. But even using this approach had its obstacles because it was not easy to determine the salaries amounts. The BIA is supposed to collect "pay cost" data, one possible source for computing DCSC requirements. But, Class representatives and our experience working with Tribes indicated that this did not always happen. Instead, sometimes pay cost data was just carried over year to year, and sometimes it simply was not recorded. Over time, the parties explored a series of compromise approaches to computing direct contract support cost requirements in particular circumstances, and these discussions informed the ultimate settlement negotiations. All these discussions and negotiations took considerable time, both for the experts and for counsel.

77. Another issue that required significant work concerned the treatment of so-called "Choctaw Decision Schools." These schools receive some indirect costs through an administrative cost grant provided under P.L. 100-297. However, these funds do not always equal the Tribe's contract support cost requirement and in 1992, the BIA issued a decision ruling that Tribes that operated these schools and other non-school BIA ISDA contracts were eligible for contract support costs to the extent that their contract support cost requirement exceeded the amount the Tribe received under the administrative cost grant. Thus, determining contract support costs for tribal contractors that operated such schools required an additional step to determine their contract support cost requirement. While agreeing that the methodology must change, the parties disputed how this calculation should be done and significant work and time during negotiations were devoted to understanding how many Tribes this affected, what exactly the BIA was doing when it awarded contract support costs to these entities, and how to correct the payment database to reflect the reality.

78. Additionally, the parties sharply disagreed on whether the government owed damages for indirect costs on unpaid direct contract support costs. The Class argued these damages were necessary to restore tribal contractors to where they would have been had the BIA not breached the contracts—the goal of contract damages. These damages would work to compensate Tribes for the damages suffered as a result of having fewer dollars to operate their programs. Although the parties never reached agreement on this issue, their discussions informed the ultimate settlement negotiations.

79. The miscalculated rate claim also posed challenges. This claim was the basis of the original lawsuit, but in the years since the suit was filed, the legal landscape had changed. In 2008, a district court ruled that the claim was not viable after 1999 because the ISDA had been amended in 1999 and the Court ruled this amendment eliminated the claim. *Tunica-Biloxi Tribe of La. v. United States*, 577 F.Supp.2d 382, 417-18 (D.D.C. 2008). Here, too, the parties never reached agreement on this issue, but their discussions informed the ultimate settlement negotiation.

80. The foregoing issues were not the only ones that required extensive research, expert accountant work, and negotiations. There were many others, some affecting a single sampled entity and others that applied more broadly. The foregoing limited example of the issues that divided the parties is intended to give the Court and Class Members, alike, a sense of the negotiation challenges which confronted the parties and the enormous time and expense that went into the settlement process.

81. Given the foregoing discussion, it is perhaps unsurprising that the sampling process took far longer than either side had anticipated. To complete the initial pilot sample of

38 contracts took until August 2014. After this pilot sample was completed, the government took the position, as reflected in court filings, that the remaining 66 analyses would have to be completed before settlement negotiations could commence. At this point, the parties had already committed millions of dollars to the sampling process and still were not close to being done. Class Counsel believed that settlement negotiations on a final settlement amount could begin based upon the results drawn from the pilot sample as well as other extant data. In order to jump start the settlement negotiations, Class Counsel made a written settlement offer to the government in September 2014. Simultaneously, Class Counsel suggested to the Court that it undertake mediation of the case.

82. On September 15, 2014, a few days after making the foregoing settlement offer, the parties met with Judge Molzen for their first in-person status conference. In advance of that conference, the parties on September 12, 2014, filed a Joint Status Report with the Court (ECF 1279). The Report detailed the status of the parties' ongoing sampling effort, which the parties reported had, by then, only covered 38 tribe-years. The parties explained that they "disagree on the need to continue to conduct statistical sampling" beyond this group of 38, *id*. at 2, but that the parties were continuing to work cooperatively on the effort because "[t]he defendants believe that additional statistical sampling is necessary" to achieve a smaller "margin of error from the extrapolated results." *Id.* The Report detailed Class Counsel's position that "contemporaneous government records and statistics documenting annual contract support cost shortfalls provide a sufficient and reliable basis for a negotiated settlement," but the Government responded "that the shortfall reports are merely a budgeting tool and do not represent an assessment of the amount due under any contract with any tribe or tribal organization, and note that they were not provided

to Congress for many of the years at issue in this case." *Id*. at 3. Class Counsel and the Government explained to the Court that they were committed to accelerating the sampling process, as requested by the Government, but at the same time the Report noted that on September 2, 2014, "the class transmitted a written settlement offer to the defendants to resolve the case." *Id*. at 3-4. Finally the Report noted that, while Class Counsel was open to "the possibility of mediation," the Government believed mediation was "premature and possibly even unnecessary." *Id*. at 4.

83. The filing of this Joint Status Report, Class Counsel's strategic decision to jumpstart substantive discussions by making their September 2, 2014, settlement offer, and Class Counsel's invitation to the Court (over the Government's opposition) to become involved as a mediator, proved to be critical turning points in the case. As Class Counsel had hoped, the pending offer and the representations Class Counsel made regarding mediation led Judge Molzen to take an aggressive and active role in the settlement discussions, and to force the parties into mediation. *See* Clerk's Minutes, filed September 15, 2014 (ECF 1280). The Court directed the parties to continue the statistical sampling process for just two more months; directed the parties to attend a settlement conference with Judge Molzen in December 2014; and directed the Government to bring to the settlement conference Assistant Secretary for Indian Affairs Kevin Washburn. Four days later the Court entered an Order (ECF 1281) directing the parties to engage in face-to-face negotiations *before* the settlement conference with the Court, and requiring the submission of settlement statements to the Court. Thanks to Class Counsel's initiative, the table was now suddenly set for a potential early conclusion of the settlement process following three years of grinding work.

84. Judge Molzen's directive necessitated that the parties and their experts devote an extraordinary amount of time in September, October and November to finalizing as much of the sampling process as could be finalized. This is because the government remained adamant that a complete sample was a prerequisite to settlement. To accomplish this task, Class Counsel redoubled our efforts at document collection and reviewing our own and the government's analyses, and the government did the same.

85. To prepare for the December 2014 settlement conference, Class Counsel developed a 35-page confidential mediation statement setting forth Class Counsel's position, accompanied by 10 supporting exhibits including expert submissions. Shortly thereafter, Class Counsel also sent an 18-page single-spaced letter directly to Assistant Secretary Washburn conveying Class Counsel's positions in the case and urging the Assistant Secretary to join the Class in now promptly settling this long-pending case. We knew that we were in sharp disagreement with the government over a number of issues. The most important of these was whether these contracts were fixed price or cost reimbursable contracts, but there were many others. We therefore devoted considerable time to explaining this issue, along with many other issues, in the Mediation Statement.

86. As instructed by Judge Molzen, we then met with the government in Washington, D.C. on December 10, 2014 to resume settlement discussions and to hear the government's response to our September settlement offer. But this meeting only established that the parties were still hundreds of millions of dollars apart, and little progress was made.

87. The reasons driving the differences in the individual analyses have been discussed above. But there was another, class-wide issue that contributed significantly to the divide

between the parties: how to address pre-judgment interest. The Class argued that interest began accruing from the date the named class representatives filed their claims. Just as the Class's claims for damages were dependent on the class representative's claims, so too (we argued) was the Class's right to prejudgment interest. This issue divided the parties throughout the settlement process.

On December 15, 2014, Judge Molzen convened a settlement conference in Albuquerque. Despite the enormous gap between the parties, Judge Molzen was optimistic and started pushing the parties early. Although progress was slow, with the help of Judge Molzen the parties made progress and they eventually reached agreement in the evening on the dollar amount of the settlement. Ultimately, the many strategic moves by Class Counsel made in September were vindicated when, at the conclusion of the December settlement conference, the parties emerged with an agreement in principle to settle the case with a one-time payment to the Class of $940,000,000.

H. From January 2015 to the Present: Finalizing the Settlement.

88. Once the parties reached agreement on the total amount of the settlement, the parties had to develop a method for distributing the funds to each class member. I and the other Class Counsel worked with the government and the parties' experts to develop a methodology that would fairly distribute the funds. With help from the statisticians, we considered factors which could influence the relative size of a class member's underpayment, such as the time periods that different Tribes were contracting, the size of the underlying programs, and the location of the tribal contractors. In order to be sure we were distributing funds equitably, we researched the effect of different methodologies on different types of contractors. Finally, we

reached agreement with the Government that based the distribution of the settlement amount on the size of the payment made each year to each contractor.

89. We have also spent considerable time drafting a Final Settlement Agreement. We had to negotiate the terms of settlement and the process for settlement. To date, the parties have exchanged 20 drafts of the Final Settlement Agreement, and, among Class Counsel, we have exchanged countless more. There were similarly many drafts exchanged of the Notice to Class Members, the Distribution Appendix, the Claim Form, and other necessary settlement documents.

I. Additional Work and Qualifications.

90. Beyond the work undertaken by my firm directly related to the settlement, I have done extensive work to ensure that contract support costs are fully funded going forward. This has involved participation in the contract support cost workgroup that advises the BIA on issues related to contract support costs; collaboration with other interest groups working toward the same ends; work with the White House to press the Administration to request full funding for contract support costs in its proposed budgets; and work with Members of Congress on the annual appropriations bills. Since the Supreme Court issued its ruling in 2012, these combined efforts have resulted in full funding of contract support costs in 2014 and 2015. For 2016 Congress will likely enact an indefinite appropriation that will ensure full funding while also protecting program funds from being diverted to cover contract support costs. (The Senate has advanced such a proposal, and it appears the House will agree to the Senate's approach.) Finally, the White House has proposed making contract support costs a mandatory and permanent appropriation, ensuring that contract support costs are <u>always</u> fully funded in years to

come. Below, I have included the additional amounts appropriated in FY 2014 and FY 2015, along with the proposed additional amounts in FY 2016, over base year FY 2013.

	Bureau of Indian Affairs	Indian Health Service	Total
FY 2014	$34,257,000[4]	$164,696,000[5]	$198,953,000
FY 2015	$38,257,000[6]	$215,182,000[7]	$253,439,000
FY 2016	$64,257,000[8]	$270,182,000[9]	$334,439,000
Grand Total	$136,771,000	$650,060,000	**$786,831,000**

91. None of these developments impacting FY 2014, FY 2015, FY 2016 and the future would be occurring but for the Supreme Court victory we achieved in the *Ramah* litigation. All Class members have benefited, and will continue to benefit, tremendously from the full funding that has resulted from the Supreme Court's decision in this case.

92. Class Counsel are among an extremely small number of attorneys in the United States who are highly experienced in ISDA contracting matters. Further, Class Counsel were the only attorneys to take these claims on a contingent basis and the only attorneys willing to litigate the cap year claims. Pursuing these claims involved significant risk to Class Counsel because of

[4] *See* UNITED STATES DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2015, page IA-ST-2.

[5] *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES, FISCAL YEAR 2015 INDIAN HEALTH SERVICE JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 9 (2014).

[6] *See* UNITED STATES DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2016, page IA-ST-1.

[7] *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES, FISCAL YEAR 2016 INDIAN HEALTH SERVICE JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES, page CJ-6 (2015).

[8] *See* S. REP. NO. 114-70, AT 39 (2015).

[9] *See id.* at 71.

the high probability that we would be unsuccessful and therefore that we would never be compensated. This risk is evidenced not only by the string of losses suffered on cap year claims in the lower courts, but also by rulings that threatened the certification of the Class, s*ee Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007). Despite being the only lawyers taking on the risk, the Supreme Court's decision benefitted many others who successfully pursued similar contract support cost claims against the IHS. The final settlement is notable for having achieved such a large settlement for the class, despite serious disputes over virtually every aspect of the damages and despite the risk posed by a potential government motion to decertify the class.

93. My firm's involvement in contract support litigation has been the overwhelmingly dominant part of my practice for twenty years (as well as a significant part of the practice of other partners and associates of my firm). It has caused a considerable economic burden on my firm, both by virtue of my inability to take on hourly work and by virtue of the need to incur substantial out-of-pocket expenses. And it has placed upon me an enormous personal burden, causing me to regularly log well in excess of 2,000 hours per year for the last several years

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 29th day of September 2015.

LLOYD B. MILLER
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501
(907) 258-6377

SUBSCRIBED AND SWORN TO before me this 29th day of September 2015.

CORY L. ICKES NOTARY PUBLIC STATE OF ALASKA My commission expires June 26, 2016

Notary Public in and for Anchorage, Alaska
My Commission Expires: 06.26.2016