

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

**RAMAH NAVAJO CHAPTER,
OGLALA SIOUX TRIBE, and PUEBLO
OF ZUNI**, for themselves, and on behalf of
a Class of others similarly situated,

Plaintiffs

v.

SALLY JEWELL, Secretary of the
Interior, *et al.*,

Defendants.

No. 90-cv-957-JAP/KBM

**JOINT MEMORANDUM IN RESPONSE TO
OBJECTION BY UNITED SOUTH AND EASTERN TRIBES, INC.**

I. INTRODUCTION

On September 30, 2015, this Court issued its Order Granting Preliminary Approval of the parties' Final Settlement Agreement ("FSA"); Directing Notice to be Sent to the Class; and Setting a Fairness Hearing. *See* Order, ECF No. 1314, Sept. 30, 2015; FSA, ECF No. 1306-1, Sept. 16, 2015. On November 19, 2015, United South and Eastern Tribes, Inc. ("USET"), timely filed an Objection. *See* Notice of Intention to Appear & Object to FSA ("Objection"), ECF. No. 1324, Nov. 19, 2015. Pursuant to § V.D.3 of the FSA, the parties jointly file this Memorandum in Response to the Objection. For the reasons set forth herein, this Court should sustain in part and overrule in part USET's Objection and should recognize that USET should be a part of the Class, along with 54 similarly-situated Tribes and tribal entities. As also explained herein, this Court should direct Class Counsel to send the attached proposed Notice to 26 of these newly-

identified Class Members that have not previously been informed of their right to request exclusion from the proposed settlement.

II. BACKGROUND

A. Relevant Provisions of the Final Settlement Agreement

1. The FSA resolves, on a class-wide basis, claims for unpaid Contract Support Costs (“CSC”) under the Indian Self Determination Act, 25 U.S.C. § 450 *et seq.*, for fiscal years 1994 through 2013.

2. Section II.A.1 of the FSA defines the Class and Class Members as “Indian Tribes and Tribal Members and tribal organizations that have contracted or entered into self-governance funding agreements with the Secretary of the Interior through the BIA or the Office of Self Governance (“OSG”) (collectively hereafter, “BIA”) under the ISDA during any year between fiscal years 1994 to the 2013.” This definition of the Class is consistent with this Court’s 1993 Order certifying a class of all Tribes and tribal contractors that have BIA ISDA contracts or compacts. *See* Order, Doc. No. 96, Oct. 1, 1993.

3. Section VIII.D.1 of the FSA provides that each Class Member shall receive a share of the Net Settlement Amount (the amount of the settlement available after deductions for attorneys’ fees and costs as well as costs to administer the FSA) according to the Distribution Percentage set forth in Appendix 2 to the FSA. The FSA further provides that Class Members’ Distribution Percentages may be subject to adjustment by agreement of the Parties, among other reasons, “if additional Class Members are later identified.” *Id.*

4. Appendix 2 to the FSA explains that the parties used two sources of data to identify Class Members and to develop and implement the Distribution Percentages: (i) the BIA payment database, which contained records of payments made to each Class Member from fiscal year 1994 through 2012; and (ii) for fiscal year 2013, BIA’s 2013 Shortfall Report. BIA records

showed that 645 separate tribal entities had ISDA contracts and received payments for Contract Support Cost (“CSC”) at some time during the period 1994 through 2013. *See id.*¹ According to the BIA payment database, however, there were many years when a Class Member had an ISDA contract for which it should have received CSC payments, but in fact received disproportionately small or even no CSC payments. *See id.* To address this phenomenon, the FSA established a minimum distribution amount of approximately \$8,000 for each year that a Class Member had an ISDA contract. *See id.*²

B. This Court’s Order Granting Preliminary Approval of the Final Settlement Agreement and Directing Notice to Be Sent to the Class

5. This Court’s September 30, 2015, Order Granting Preliminary Approval to the FSA directed the parties to publish a Summary Notice of Final Settlement in the manner provided for in the FSA. *See* Order ¶ 2. Class counsel thus published the Summary Notice on Class Counsel’s class website, www.rncsettlement.com, in *This Week from Indian Country Today* on October 7 and 14, 2015, and the online edition of *This Week from Indian County Today* from October 5–19, 2015. *See* Affidavit of Publication, ECF No. 1319, Oct. 23, 2015. Defendants also published the Summary Notice on the BIA’s and the Interior Business Center’s websites.

6. This Court’s September 30 Order also directed the parties to send a Notice of Final Settlement to Class Members that have previously been afforded the opportunity to request exclusion from the class. *See* Order ¶ 4. The parties mailed and emailed this Notice to the Class Members identified in Table 1 of Appendix 2 to the FSA by October 2, 2015; this Notice

¹ Cheesh-Na Tribe and Chistochina Village Council were previously listed as separate Class Members on Table 1 of Appendix 2 to the FSA. These are separate names for the same entity that have now been combined to reduce the number of Class Members the parties originally identified to 644.

² The \$8,000 amount is approximate for mathematical reasons.

informed them of their opportunity to file objections by November 19, 2015, but did not give these Class Members an additional opportunity to request exclusion from the Class.

Additionally, the Court's September 30 Order directed the parties to send a different Notice of Final Settlement to Class Members that have not previously been afforded an opportunity to request exclusion from the Class. *See* Order ¶ 3. The parties mailed and emailed this Notice to the Class Members identified in Table 2 of Appendix 2 to the FSA by October 2, 2015; it informed those Class Members of their opportunity to file objections and their right to request exclusion from the Class, by November 19, 2015.³ No Class Member has requested exclusion.

C. USET's Objection and the Parties' Response

7. On November 19, 2015, USET timely filed an Objection to the Proposed FSA based on its assertion that it was improperly excluded from the Class. *See* Objection at 1. USET did not object to any other aspect of the FSA. *See id.* USET asserts that its Distribution Percentage should be calculated based on 13 years of BIA ISDA contracts. *See, e.g., id.* at 2, 11. USET did not object to the proposed settlement on any other basis. *See id.* USET was the sole Tribe or tribal organization to file an Objection to the Proposed FSA.

8. The parties initially responded to USET arguing that USET was not a Class Member. *See* Ltr. fr. the parties to Geoffrey Strommer, Esq. (Nov. 12, 2015), attached as Ex. A to USET's Objection, ECF No. 1324-3, Nov. 19, 2015.

9. After USET filed its Objection, however, the parties re-examined the BIA data sources that they had used to identify Class Members. The parties realized that, in identifying

³ Additionally, Class Counsel and the Government issued press releases about the Proposed FSA and held a joint press conference on September 17, 2015. Defendants also held a press call that same day. Several news organizations, including the Associated Press, Reuters, NPR, as well as national and local newspapers and local television stations, ran stories on the proposed settlement.

Class Members, they had assumed that each Class Member had received a payment for CSC during at least one year of the time period covered by the settlement. The parties' original methodology thus unintentionally failed to identify Class Members that received payments for BIA ISDA contracts but never received a payment for CSC in *any* of the years covered by the FSA. USET was one such entity that never received a payment for CSC during the years covered by the FSA. The parties thus did not identify USET as a Class Member.

10. USET's Objection also prompted the parties to examine the BIA payment database to determine if there were other tribes or tribal organizations that, like USET, had received payments for BIA ISDA contracts but had never received any payment for CSC during the years covered by the FSA. Including USET, the parties identified a total of 55 Tribes and tribal organizations that received payments for BIA ISDA contracts but never received a payment for CSC during fiscal years 1994 through 2012.⁴ A list of these 55-newly-identified Tribes and tribal organizations is attached hereto as Exhibit A.

11. Based on this examination and the definition of the Class, the parties do not dispute that these 55 newly-identified Tribes and tribal organization are Class Members and should therefore receive a share of the Net Settlement Amount pursuant to the methodology set out in Appendix 2 to the FSA. *See* Appx. 2 at 5. Accordingly, the parties agree that each of the newly-identified Class Members should receive a minimum distribution amount of approximately \$8,000 for each year that such Class Member had a BIA ISDA contract.⁵

⁴ The parties determined that, for fiscal year 2013, they could continue to rely on the 2013 Shortfall Report. According to that report, no newly-identified class members received payments for BIA ISDA contracts for that year. .

⁵ The mean distribution to these 55 newly-identified Class Members would be approximately \$35,054.55.

12. Pursuant to the methodology set out in Appendix 2 to the FSA, these 55 newly-identified Class Members would, if approved by this Court, receive a combined total of \$1,928,000. Consistent with § VIII.D.1 of the FSA (providing that Class Members' Distribution Percentages may be subject to adjustment by agreement of the Parties, among other reasons, "if additional Class Members are later identified"), this would reduce the share of the Net Settlement Amount paid to previously-identified Class Members by an average of 0.2256 percent. The parties' recalculated Distribution Percentage for all 699 Class Members is attached hereto as Exhibit B.

13. Further examination of the 55 newly-identified Class Members revealed that 29 of the newly-identified Class Members had, as a result of the notices associated with the class certification, and amended complaints in this case, previously been given an opportunity to request exclusion from the class.⁶ This examination revealed, however, that 26 of the newly-identified Class Member have not previously been given an opportunity to request exclusion. The list of these 26 newly-identified Class Members is attached hereto as Exhibit C.

III. ARGUMENT

A. This Court Should Sustain in Part and Overrule in Part USET's Objection and Recognize the 55 Newly-Identified Entities as Class Members

In light of the parties' re-examination of the BIA payment database to determine if there were Tribes or tribal organizations that, during the years covered by the FSA, had received payments for BIA ISDA contracts but never received any payment for CSC, this Court should recognize that the 55 Tribes and tribal organizations newly-identified by the parties are properly part of the Class. This Court's 1993 Order certified a class of all Tribes and tribal contractors

⁶ See Notice of Class Action, Doc. No. 124, Mar. 21, 1994; Order, ECF No. 347, Dec. 17, 1999; Stip. Orders, ECF Nos. 633-34, Mar. 27, 2002.

that have BIA ISDA contracts or compacts, *see* Order, Doc. No. 96, Oct. 1, 1993, and Section II.A.1 of the FSA defines the Class and Class Members as “Indian Tribes and Tribal Members and tribal organizations that have contracted or entered into self-governance funding agreements with the Secretary of the Interior through the BIA or the Office of Self Governance (“OSG”) (collectively hereafter, “BIA”) under the ISDA during any year between fiscal years 1994 to the 2013.”

Additionally, this Court should recognize that these 55 newly-identified Tribes and tribal organizations should receive a share of the Net Settlement Amount pursuant to the methodology set out in Appendix 2 to the FSA. *See* Appx. 2, at 5. Accordingly, this Court should approve the parties’ re-calculation of the Distribution Percentage for each previously-identified Class Member and the calculation of the Distribution Percentage for each newly-identified Class Member attached as Exhibit A to this Response so that each of the newly-identified Class Members will receive a minimum distribution amount of approximately \$8,000 for each year that a Class Member had an ISDA contract.

Contrary to USET’s assertion, *see* USET Objection, at 2, 11, however, the BIA payment database only shows that USET received payments for BIA ISDA contracts in ten, rather than 13, years. Because this is a settlement to resolve a class action, the parties have relied, and must continue to rely, on uniform data in BIA’s possession to calculate each Class Member’s share, and cannot resolve the matter on a case-by-case basis. Thus, USET’s Distribution Percentage should result in a distribution amount of approximately \$80,000 for the ten years that the BIA payment database shows it was receiving payments for BIA ISDA contracts.

B. Notice to the Newly-Identified Class Members Should Be Limited to Those That Have Not Previously Been Afforded an Opportunity to Request Exclusion from the Class

The parties have provided the 55 newly-identified Class Members adequate notice of the proposed settlement for purposes of affording them an opportunity to object. Although Rule 23(e) requires that all class members be given notice of any proposed class action settlement in a manner directed by the Court (including individual notice to class members who can be identified with reasonable effort), *see* Fed. R. Civ. P. 23(e)(1)(B); Fed. R. Civ. P. 23 Cmte. Notes on Rules–2003 amend., neither Due Process nor Rule 23 “require actual notice” be provided to all class members. *See DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944, 946 (10th Cir. 2005) (actual notice provided to 70 percent of class deemed sufficient); *see also In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001).

In this case, Class Counsel published the Summary Notice of Final Settlement Agreement on Class Counsel’s website, in *This Week from Indian Country Today*, on October 7 and 14, 2015, and in the online edition of *This Week from Indian Country Today* from October 5–19, 2015. *See* Affidavit of Publication, ECF No. 1319, Oct. 23, 2015. Defendants also published the Summary Notice on the BIA’s and the Interior Business Center’s websites. The Summary Notice: (i) described the essential terms of the FSA; (ii) disclosed any special benefits provided to the class representatives; (iii) provided information regarding attorneys’ fees; (iv) indicated the time and place of the hearing to consider approval of the settlement, and the method for objecting to the settlement; and (v) prominently displayed contact information of class counsel and the procedure for making inquiries. *Accord* Manual for Complex Litigation (4th) § 21.633 at 321-22; *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336 (1st Cir. 1991) (discussing Rule 23(e)’s notice requirements). Also pursuant to Rule 23(e), the Summary Notice provided Class Members with instructions on how to access a complete copy of the FSA on Class

Counsel's website, and informed Class Members of their right to file and serve objections regarding the FSA or the attorneys' fees and costs requested by Class Counsel by November 19, 2015.

Additionally, Class Counsel and the Government issued press releases about the Proposed FSA and held a joint press conference on September 17, 2015. Defendants also held a press call that same day. Several news organizations, including the Associated Press, Reuters, NPR, as well as national and local newspapers and local television stations, ran stories on the proposed settlement. USET learned about the proposed settlement as a result of this press coverage and contacted class counsel shortly afterwards. Thus, publication of the Summary Notice and press coverage of the proposed settlement provided the 55 newly-identified class members with adequate notice of, and opportunity to object to, the proposed Settlement. *Accord DeJulius*, 429 F.3d at 944, 946.

The remaining issue concerns the ability of Class Members that have not previously been afforded an opportunity to request exclusion from the Class. Consistent with its September 30 Order, this Court should exercise its discretion and decline to grant the 29 newly-identified Class Members that have already had an opportunity to opt out an additional right to request exclusion at the settlement stage. *Accord* Order ¶ 4; Fed. R. Civ. P. 23(e)(4) (court "may refuse to approve the settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so").⁷

⁷ See also *In re HealthSouth Corp. Securities Litig.*, No. 07-11908, 2009 WL 1684422, 334 Fed. Appx. 248, 254 n. 12 (11th Cir 2009); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 354 (6th Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114-15 (2d Cir. 2005); *Class of Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992); *Lowery v. City of Albuquerque*, No. 09-457-JB, 2013 WL 1010384, *42 (D.N.M. Feb. 27, 2013); *In re Auto.*

(continued)

Also consistent with its September 30 Order, this Court should allow the 26 newly-identified Tribes and tribal organizations that have not previously been afforded an opportunity to request exclusion to have that opportunity. *See* Order ¶ 3; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (Due Process “requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing a ‘request for exclusion.’”); Fed. R. Civ. P. 23(c)(2)(v) (“For any class certified under Rule 23(b)(3), the court must direct notice that clearly and concisely states, in plain language: . . . that the court will exclude from the class any member who requests exclusion.”).

Consistent with one of the Notices previously approved by this Court, the parties have prepared a proposed Notice of Final Settlement Agreement to be provided to the 26 newly-identified Class Members that have not had a previous opportunity to request exclusion, attached hereto as Exhibit D. This proposed Notice gives these 26 newly-identified Class Members 30 days to request exclusion from the class.⁸ Apart from providing these 26 newly-identified Class Members sufficient information about the settlement and the opportunity to request exclusion, however, the proposed Notice does *not* provide these 26-newly identified Class Members an additional opportunity to object to the proposed settlement on any other grounds. The parties propose the Notice be so limited because, for the reasons set forth above, the parties have already

Refinishing Paint Antitrust Litig., MDL No. 1426, 2004 WL 1068807, *3 (E.D. Pa. May 11, 2004) (citing Manual for Complex Litigation (4th) § 21.611 (2004)).

⁸ The parties note that, while it is preferable, it is not necessary that the Court or the parties receive any requests for exclusion from these 26 newly-identified Class Members before the January 20, 2016, Fairness Hearing. The FSA provides that if a Class Member opts out of the Settlement, that Class Member’s share of the Settlement Amount, as reflected in the Distribution Percentages set out in Appendix 2 to the FSA, shall be retained by Defendants. *See* FSA § V.E.2. Thus, these class members could submit any request for exclusion before or after the Court’s January 20, 2016, Fairness Hearing.

provided all newly-identified Class Members adequate notice of, and opportunity to object to, the proposed settlement.

C. No Further Notice is Necessary to the 644 Previously-Identified Class Members

This Court should not direct additional notice be sent to the 644 previously-identified Class Members⁹ because the FSA informed them that Class Members' Distribution Percentages may be subject to adjustment by agreement of the parties, including, among other reasons "if additional Class Members are later identified." FSA § VIII.D.1. Additionally, the reduction of the previously-identified Class Member's share of an average of 0.2256 percent is a de minimis change.

IV. CONCLUSION

This Court should sustain in part and overrule in part USET's objection; recognize that USET, along with 54 similarly-situated Tribes and tribal entities, are Class Members; and direct Class Counsel to send in the manner provided by the FSA the Notice of the Proposed Settlement and Opportunity to Request Exclusion only to the 26 newly-identified Class Members that have not previously had an opportunity to request exclusion.

⁹ See *supra* n.1.

Dated: December 16, 2015

Respectfully Submitted,

s/ Michael P. Gross
MICHAEL P. GROSS
M.P.GROSS LAW FIRM, P.C.
460 St. Michaels Drive, Suite 401
Santa Fe, NM 87505
mike@mpgrosslaw.com
Counsel for Plaintiffs Ramah Navajo Chapter
and Oglala Sioux Tribe and Lead Class
Counsel

s/ C. Bryant Rogers
C. BRYANT ROGERS
VANAMBERG, ROGERS, YEPA, ABEITA,
GOMEZ & WORK, LLP
PO Box 1447
Santa Fe, NM 87504-1447
cbrogers@nmlawgroup.com
Counsel for Plaintiffs Ramah Navajo Chapter
and Oglala Sioux Tribe and Co-Class Counsel

s/ Lloyd B. Miller
LLOYD B. MILLER
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 West Fifth Ave, #700
Anchorage, AK 99501
lloyd@sonosky.net
Counsel for Pueblo of Zuni and Co-Class
Counsel

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

ERIC R. WOMACK
Assistant Director, Federal Programs Branch

s/ James D. Todd, Jr.
JAMES D. TODD, JR.
RYAN B. PARKER
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
james.todd@usdoj.gov
Counsel for Defendants