

EXHIBIT D TO JOINT MEMORANDUM

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 a class of persons
similarly situated,

Plaintiffs,

No. 1:90-CV-00957-JAP/KBM

vs.

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

Defendants.

NOTICE OF FINAL SETTLEMENT

**TO NEWLY-IDENTIFIED MEMBERS OF THE RAMAH CLASS
THAT HAVE NOT PREVIOUSLY BEEN GIVEN AN
OPPORTUNITY TO REQUEST EXCLUSION FROM THE CLASS:**

PLEASE READ THIS NOTICE CAREFULLY.

**IT CONTAINS IMPORTANT INFORMATION ABOUT A
PROPOSED FINAL SETTLEMENT AGREEMENT IN THE ABOVE-
REFERENCED CASE.**

**THIS NOTICE DOES NOT CONTAIN
ALL TERMS AND CONDITIONS OF THE PROPOSED
FINAL SETTLEMENT AGREEMENT.**

**THE COMPLETE AGREEMENT, INCLUDING ITS APPENDICES,
THE JOINT MOTION FOR PRELIMINARY APPROVAL OF THAT
AGREEMENT, AND THE APPLICATION FOR ATTORNEYS' FEES**

**AND COSTS MAY BE FOUND AT:
<WWW.RNCSETTLEMENT.COM>.**

QUESTIONS MAY BE ADDRESSED TO CLASS COUNSEL.

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The parties have agreed to a proposed Final Settlement Agreement (FSA), which requires Defendants to pay Nine Hundred Forty Million Dollars (\$940,000,000) to settle the remaining claims in this lawsuit. This payment will come from the Judgment Fund established by 31 U.S.C. § 1304, as occurred in the prior partial settlements in this case. The settled claims are for alleged under-payments of contract support costs by the Bureau of Indian Affairs (BIA) and/or the Office of Self Governance (OSG) under the Indian Self-Determination and Education Assistance Act (ISDA) during fiscal years 1994 through 2013. During these years, Congress “capped” how much of the BIA’s appropriations could be used to pay contract support costs. Your Tribe or tribal organization may be a Class Member eligible to share in this settlement. The settlement is not final until approved by the Court.

BACKGROUND

In 1990, the Ramah Navajo Chapter brought suit against the Government in the United States District Court of the District of New Mexico claiming that the Department of the Interior (DOI) improperly calculated indirect cost rates for ISDA contractors. In 1993, the District Court certified a class of all Tribes and tribal organizations that have BIA

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ISDA contracts or compacts. In 1999 the parties entered into the First Partial Settlement Agreement to resolve plaintiffs' "rate claim" for fiscal years 1989-1993, and the government agreed to pay \$76,200,000 to approximately 320 Tribes and Tribal Organizations. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999).

In 1999, the Oglala Sioux Tribe intervened to assert a "shortfall claim," alleging that the BIA had failed to pay tribal contractors their full amount of indirect contract support costs. The Pueblo of Zuni also intervened to assert a shortfall claim and a "direct contract support cost claim," alleging that the BIA failed to pay tribal contractors their direct contract support costs. After notice to the Class, the two additional claims were incorporated into the class action.

In 2002, the parties entered into the Second Partial Settlement Agreement to resolve plaintiffs' shortfall claims for fiscal years 1989–1993 and direct contract support cost claims for fiscal years 1989–1994, and the government agreed to pay \$29,000,000 to approximately 224 Class Members. *See Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002).

In 2008, the parties entered into the Third Partial Settlement Agreement to reform the indirect cost rate system for tribal contractors

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operating ISDA programs. *See* Third Partial Settlement Agreement, ECF No. 1138 (Aug. 27, 2008).

In 2012, the Supreme Court ruled that the plaintiffs' claims were not barred by the government's appropriations law defense. *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

Although the Supreme Court upheld the plaintiffs' right to full payment of contract support costs, the amount of those unpaid costs was contested for those years that had not yet been settled. The parties engaged in settlement negotiations and retained auditing and statistical experts to assist them with valuing plaintiffs' claims in the course of these negotiations. Class counsel retained REDW, LLC, of Albuquerque, New Mexico. REDW is a certified public accountant and consulting firm that performs and has performed accounting work for tribes and tribal contractors. These include audit and attest services as defined by the American Institute of Certified Public Accountants. REDW assisted Class Counsel with the administration of the First and Second Partial Settlement Agreements. More information about REDW's clients can be found on its website: www.redw.com/home. Class counsel also retained Michael Larsen, Ph.D., a professor of statistics at George Washington University. The government retained Cotton & Company of Alexandria, Virginia, an audit

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and accounting firm, and Eugene Ericksen, an emeritus professor at Temple University. The named Class representatives also participated in the settlement negotiations. Final negotiations were assisted by the active participation of Chief U.S. Magistrate Judge Karen B. Molzen. The parties have agreed upon the proposed Final Settlement Agreement now pending before the Court.

The protracted and intensive settlement negotiations showed that the parties are far apart on many factual, legal and accounting issues materially affecting the calculation of the total amount of unpaid contract support costs from FY 1994 through FY 2013, and the resulting damages. If the case were not settled, the resolution of these issues would likely require litigation lasting many more years.

SUMMARY OF SETTLEMENT TERMS

Under Rule 23 of the Federal Rules of Civil Procedure, the Court advises you as follows:

1. The above-captioned Class Action is pending in this Court. For purposes of this final settlement, the Class consists of those Indian tribes and organizations that have entered into contracts with BIA or self-governance funding agreements with OSG under the Indian Self-Determination Act, Pub. L. 93-638, as amended, at any time between FY 1994 and FY 2013.

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2. Upon payment by the Defendants of the settlement amount of NINE HUNDRED FORTY MILLION DOLLARS (\$940,000,000), the Plaintiffs through their legal counsel will fully release the Defendants from all claims as to under-payment of contract support costs, both indirect and direct, for FY 1994 through FY 2013, except for certain individual Class Member claims preserved in the agreement.

3. Each eligible Class Member will be entitled to share in the net settlement amount—the amount remaining after the deduction of (1) attorneys' fees and costs; and (2) funds for a reserve account to cover (a) the costs of distributing the settlement, (b) the costs of reimbursing certain costs incurred by the named Class Representatives, and (c) the costs of reimbursing certain Class Members that contributed documents for the sampling that was done as part of the statistical and accounting analyses that led to the settlement.

4. The parties have agreed that the speediest, least expensive, fairest, and most accurate method for distributing the net settlement amount to each eligible Class Member is to use the statistical and accounting analyses which helped the parties negotiate the settlement amount. Those analyses disclosed that the amount of contract support costs paid to each Class Member closely correlates with its unpaid contract support costs.

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Using that correlation, each eligible Class Member's share will be determined by a ratio between (a) the amount of contract support costs that allegedly should have been paid as determined by the parties' negotiations based on the data collected from the sample, and (b) the contract support costs paid to each Class Member during the settlement years. Each Class Member with a BIA ISDA contract or OSG self-governance funding agreement in a given year will receive a minimum of approximately \$8,000 for that year. The shares of the named Class Representatives will be enhanced by twenty percent (20%) in recognition of their contributions in achieving this settlement. Additional information about the methodology used for distributing the net settlement amount to each eligible Class Member is more fully explained in the Final Settlement Agreement and its accompanying appendices, which can be found at: www.rncsettlement.com.

5. To be eligible for a share in this settlement, a Class Member must have entered into a contract with the BIA or self-governance funding agreement with OSG under the ISDA during any of the years FY 1994 through FY 2013 and must file a claim on a form to be provided by the Settlement Administrator. Each form sent to a Class Member will set forth the amount of money that the Class Member is entitled to receive from the net settlement amount. Each Class Member's share of the net settlement

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amount will be determined according to the methodology and distribution percentages as defined in the Final Settlement Agreement and set out in the Distribution Appendix that is attached to the Final Settlement Agreement. If by the end of the Claims Period, any Class Member has not timely submitted a claim form through the Settlement Administrator, or has disclaimed in writing its share of the Net Settlement Amount pursuant to the distribution percentages set forth in the Distribution Appendix, that Class Member's share of the Net Settlement Amount shall be reallocated to all other Class Members that have timely submitted claims in proportion to each such Class Member's share of the total net settlement amount; provided, however, that unclaimed (but not disclaimed) amounts exceeding in the aggregate ten million dollars (\$10,000,000) will be repaid to the United States Treasury.

6. Amounts remaining in the reserve account after the costs of the initial distribution have been paid will be distributed to the Class Members according to the same percentages used in the initial distribution, unless the amounts remaining are insufficient to justify the costs of a second distribution. In that case, the Court will determine the disposition of the remaining funds.

7. A Settlement Administrator will be approved by the Court upon motion by Class Counsel.

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8. As part of the settlement negotiations in this case, certain Class Members participated in a sampling exercise. Class Members that participated in this exercise are eligible to be reimbursed their reasonable out-of-pocket costs incurred in producing documents required for the sampling exercise. Class Members seeking reimbursement of such costs should submit invoices detailing such costs to Class Counsel within 60 days after final approval of this settlement. The Settlement Administrator will make the final determination on the eligibility and reasonableness of such costs. Such costs will be paid from the reserve account.

9. A Class Monitor will be approved by the Court upon motion by Class Counsel. Class Counsel is proposing to appoint Moss Adams, LLP as the Class Monitor. Moss Adams is a certified public accountant and consulting firm that performs and has performed accounting work for approximately 224 of the Class Members. This includes audit, attest and assurance services as defined by the American Institute of Certified Public Accountants. More information about Moss Adams and the safeguards it will put in place to address the appearance of any potential conflicts arising from its audit, attest and assurance service performed for certain Class Members can be found at:

<http://www.mossadams.com/mossadams/media/documents/other/ramah.pdf>.

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The Class Monitor will assist Class Counsel in overseeing the distribution of the Settlement Amount by reviewing the work performed by the Settlement Administrator.

10. Class Counsel have applied to the Court for an award of attorneys' fees of eight and one-half percent (8.5%) of the Settlement Amount for achieving this final settlement. The Government agrees that an eight and one-half percent (8.5%) fee for achieving this settlement is fair and reasonable and supports the application for attorneys' fees. Class Counsel have also applied for reimbursement of estimated costs to date of \$1,158,222.01 to be paid out of the Settlement Amount. The estimated costs include applicable New Mexico gross receipts tax on the attorneys' fees.

11. Notice of this Final Settlement was provided to Class Members on October 2, 2015, in several forms. Class Counsel published a Notice of Final Settlement on its website, www.rncsettlement.com, 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. The Government also published the Notice on the BIA's and the Interior Business Center's websites. Notice was also mailed and emailed to previously-identified Class Members. The Notices provided Class Members with the opportunity to file an Objection by November 19, 2015. Only one

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tribal organization filed an Objection, and objected solely on the basis of its exclusion from the Class. That Objection was the basis for the parties' agreement to search for and identify other Class Members. Your Tribe or tribal organization was newly-identified as a Class Member as a result of this process.

12. This Class consists of all Indian Tribes and tribal organizations that have entered into BIA ISDA contracts, including those Tribes which at one time requested exclusion from the Class but were thereafter permitted to re-enter the Class by Court Orders dated September 22, 1998, December 3, 1998, December 8, 1998, and August 1, 2000. Additional opportunities to request exclusion were afforded to all Class Members by Court Orders dated September 30, 1999, and March 27, 2002. No Member of the Class requested exclusion. However, some Members have entered the Class since March 27, 2002. Those Class Members that did not have ISDA contracts with BIA or self-governance funding agreements prior to March 27, 2002, were not Class Members when the earlier Notices issued. Those newly-identified Class Members listed on Exhibit 1 hereto may request exclusion from the Class by notifying the Court on or before January 19, 2016, and filing a Notice of Exclusion. If a Class Member is excluded, that Class Member's share of the Settlement Amount will be retained by the

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Government and the Settlement Amount will be reduced accordingly. In such event the Distribution Percentages for each remaining Class Member will be adjusted accordingly to remove the share previously allocated to the excluded Class Member.

Your tribal entity is a newly-identified Class Member that has not previously been given an opportunity to request exclusion. Therefore your tribal entity may submit a request to be excluded from the Class. If you remain in the Class, your Tribe or tribal organization will receive a claim form for a specified dollar amount. This amount will be generated by multiplying the estimated distribution percentage of your tribal organization shown on Exhibit A by the Net Settlement Amount. If you ask to be excluded from the Class you will receive nothing under the Final Settlement. The Court must receive any Request for Exclusion no later than January [19], 2016.

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OBJECTIONS

All Class Members (including the newly identified Class Members listed on Exhibit A) were given notice in writing or by publication of their right to object by November 19, 2015, to the terms of the Final Settlement Agreement or the attorneys' fee request.

HEARING

The Court will conduct a hearing at the Federal Building and United States Courthouse, 421 Gold SW, Sixth Floor, Albuquerque, New Mexico at 9 o'clock a.m. on January 20, 2016, at which time the Court will hear Objections, if any, to the settlement and fee application and thereafter render a ruling approving or declining to approve the settlement, and acting upon the fee application. Persons intending to appear at or attend the hearing are advised to so inform the Court and to reconfirm the date, time and place of the hearing by contacting the Clerk of Court before traveling to Albuquerque.

DEADLINE

The Court must receive any Request for Exclusion no later than January [19], 2016.

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**APART FROM REQUESTING EXCLUSION, PLEASE DO NOT
CONTACT THE COURT OR THE CLERK'S OFFICE ON ANY
SUBSTANTIVE MATTER DEALING WITH THIS NOTICE EXCEPT
TO CONFIRM THE DATE OF THE FAIRNESS HEARING.**