

**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

**UNOPPOSED MOTION FOR APPROVAL OF THE RESERVE ACCOUNT
AMOUNT, THE HOLDBACK AMOUNT, THE PAYMENT OF COSTS
AND FEES TO CLASS COUNSEL, AND THE FINAL CLAIM FORM AND
PAYMENT AMOUNTS FOR CLASS MEMBERS**

I. INTRODUCTION

Pursuant to this Court's Amended Findings of Fact and Conclusions of Law Approving the Final Settlement Agreement and Awarding Attorneys' Fees and Costs entered March 2, 2016 (EFC No. 1350) (hereinafter "Amended Order"), Class Counsel respectfully move for an Order approving (a) the amount to be deposited into the Reserve Account; (b) an amount of attorneys' fees to be withheld; (c) payment of costs and fees to Class Counsel, (d) commencement of the Claims Period, (e) the Claim Form amounts for each Class Member, (f) the final amounts to be paid to each Class Member, and (g) pre-approval for payments of those amounts once all preconditions for such payments required by the Final Settlement Agreement ("FSA") have been satisfied. In support of

this Motion, Class Counsel state as follows.

II. BACKGROUND

1. On February 23, 2016, this Court entered Findings of Fact and Conclusions of Law Approving the Final Settlement Agreement and Awarding Attorneys' Fees and Costs (EFC No. 1346). The Court's Findings and Conclusions approved the Final Settlement Agreement ("FSA"), as modified by Class Counsel's stipulation addressing reimbursement of the New Mexico gross receipts tax on the attorneys' fee award (EFC No. 1344). (The Court had previously approved the foregoing stipulation in its Order of February 19, 2016. (EFC No. 1345).) *See also* Revised Distribution Appendix dated December 16, 2015 (EFC No. 1328-1).

2. Also on February 23, 2016, the Court entered Final Judgment in this action. (EFC No. 1347).

3. On March 2, 2016, the Court entered the Amended Order (EFC No. 1350), making non-substantive changes to the February 23, 2016, Findings and Conclusions.

4. The gross "Settlement Amount" under Section II.M of the FSA is the sum of \$940,000,000, plus accrued interest from February 23, 2016 to the date of payment by the Department of Treasury ("Treasury"). That interest amount is \$7,965,659.39 as calculated and paid by the Treasury through July 11, 2016, when the last of multiple Treasury payments was made. Exhibit A is a Declaration from Co-Class Counsel C. Bryant Rogers which explains the payments Treasury made daily with interest separately calculated on the total amount paid on each payment date. The gross Settlement Amount Treasury paid is \$947,965,659.39. This is the total amount from which Class Members'

shares of the Reserve Account, attorneys' fees and litigation costs, and the Net Settlement Amount are calculated.

5. The FSA provides that, pursuant to the Treasury Debt Collection Authorities (31 U.S.C. § 3716 as part of the Debt Collection Improvement Act, and 26 U.S.C. § 6331(h) of the Internal Revenue Service Tax Code), "[t]he U.S. Treasury Department, Bureau of Fiscal Service will offset and/or levy any delinquent debt of a Tribal Contractor to the United States from that Tribal Contractor's share of the Settlement Amount and will notify that Tribal Contractor of that debt." FSA § VII.B.1; *see also* FSA § II.U. It further provides that the Treasury will deposit with the designated bank account only the settlement funds that are not subject to an offset and/or levy. FSA § VII.B.2. (The Treasury Debt Collection Authorities are also referred to as the Treasury Offset Program ("TOP").)

6. As addressed in the parties' Joint Motion to Modify Claim Form and Clarify Final Settlement Agreement (EFC No. 1360) ("Joint Motion"), Treasury has identified ten (10) Class Members subject to the TOP. For three (3) of these Class Members, application of the TOP will consume the Members' entire gross share amounts, and those Class Members will therefore not be receiving any payments from the Settlement Administrator. This is because Treasury's offsets exceed their shares of the gross Settlement Amount. For seven (7) Class Members, application of the TOP will not consume the Members' entire gross share amounts.

7. As noted above, the gross Settlement Amount that Treasury paid is \$947,965,659.39. Some of that principal and interest amount was offset by the

Government under the TOP. The total amount (principal and interest) received by the Designated Bank is \$947,446,885.53. This is also explained in Exhibit A.

8. As explained more fully below, the Class Administrator and Class Monitor have performed the calculations necessary to allocate the settlement funds to the Reserve Account, attorneys' fees and litigation costs, and payments to Class Members. Exhibit B shows the Claim Form amounts for each Class Member, *see infra* at ¶ 24, and Exhibit C shows the payment amounts for each Class Member, *see infra* at ¶ 24.¹ The parties' Exhibit D to the Joint Motion shows the total amounts the Reserve Account and attorneys' fees and litigation costs will be reduced pursuant to the TOP. ECF No. 1360-4.

III. RESERVE ACCOUNT FUNDING

9. The FSA provides in Section VIII.C for the establishment of a \$4,000,000 Reserve Account, but provides that this amount might be reduced as a result of the TOP. The three Class Members with full TOP offsets will necessarily not be contributing to the Reserve Account. The seven Class Members with only partial TOP offsets were able to contribute to the Reserve Account. After application of all TOP offsets, the total amount available for the Reserve Account is \$3,999,645.64, slightly less than the amount provided in the FSA. By this Motion, Class Counsel seek the Court's approval of this Reserve Account funding amount.

¹ The confidentiality requirements arising from the Debt Collection Authorities require that Exhibit C be filed under seal. It cannot simply be redacted because the names of the Class Members with offsets would be identifiable when compared to Exhibit B.

IV. ATTORNEYS' FEES

10. Pursuant to prior Orders of the Court, the attorneys' fee award amount is 8.5% of the total amount paid to the Class from the Judgment Fund as provided in the Final Settlement Agreement. EFC No. 1350, at 48. The FSA provides that, unless Treasury determines otherwise, "these attorneys' fees and costs may be subject to offset and/or levy pursuant to the requirements of Treasury Debt Collection" FSA § IX.A. This language makes clear that the attorneys' fees are to be calculated from the gross settlement amount. Application of 8.5% to the gross settlement amount (which, as noted in ¶ 4 is \$947,965,659.39) comes to \$80,577,081.05. Because Treasury did not determine otherwise, this amount is subject to being reduced pursuant to the TOP. After reductions for the three Class Members with full TOP offsets, the total attorneys' fee award amount is \$80,569,882.38.

11. Paragraph IX.D of the FSA directs the Court to reserve "no more than ten percent (10%)" of the total attorneys' fee award "to assure that Class Counsel shall responsibly oversee the administration of the Net Settlement Amount."² Class Counsel respectfully submit that the Court should reserve \$1,000,000 for this purpose, and that such amount be held by the Designated Bank in a separate attorneys' fee account as

² Section IX.D of the FSA provides in pertinent part as follows:

The Court shall reserve from the approved attorneys' fee award no more than ten percent (10%) of the total fee award to assure that Class Counsel shall responsibly oversee the administration of the Net Settlement Amount. Upon completion of their duties and application by Class Counsel, the Court shall by Order declare that Class Counsel's duties have ended and pay to Class Counsel any amount of the total attorneys' fee award which has been reserved.

provided in § IX.C of the FSA, to be released to Class Counsel on motion made at the final wind-up of the case.

12. Under the FSA, the Court has discretion to decide the amount of attorney fees to hold back, so long as the amount does not exceed 10 percent. FSA § IX.D. But the amount need not be 10 percent or even at the high end of the permissible range. As explained at the Fairness Hearing, the Court can “holdback 1, 2, 3, 5 or up to 10 percent.” Transcript of Fairness Hearing, ECF No. 1348, at 25 (Statement of Lloyd Miller).

13. The purpose of the holdback provision is to “assure that Class Counsel ... responsibly oversee the administration” of the distribution of the Net Settlement Amount. FSA § IX.D. Class Counsel respectfully submit that a holdback of \$1,000,000 is far more than sufficient to serve this purpose. This is because the proposed holdback is considerably in excess of the anticipated fees Class Counsel would incur to complete the remaining administrative work to finalize the settlement, if that work were to be done by Class Counsel on an hourly fee basis. Thus, the amount of the proposed reserve is more than adequate to fully motivate Class Counsel to spend the time necessary to diligently and responsibly complete all work on the settlement, thus fulfilling the purpose of the holdback provision.

14. No holdback of any amount was requested or imposed under PSA II. *See* PSA II § VIII.C. This Court did authorize holdbacks under PSA I and PSA III.

15. In PSA I, at the suggestion of the parties, the Court held back 50% of the fee award from the time the settlement agreement was approved until the Common Fund was distributed to the Class. *See Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091,

1109 (D.N.M 1999); PSA I, § 10.d. In that instance, however, unlike here, there was an enormous amount of work left to be done by Class Counsel after approval of the settlement and the award of attorney fees. Under that settlement, unlike here, there still remained the significant task of determining how to allocate the settlement amount among the Class Members, and to collect and process the required accounting data. Indeed, completing the PSA I distribution process took *several years*. See ECF No. 540 (Mar. 9, 2001) Order Approving Release of Balance of PSA-1 Fee Award. Moreover, at that time, Class Counsel had not yet established a track record with the Court. By contrast, under the FSA the parties have already done the comparable work and determined with precision the exact allocation of the settlement amount across the entire Class. Consequently, relatively little work remains to be undertaken by Class Counsel in administering the settlement and distributing the settlement funds during the proposed holdback period. Accordingly, a far lower holdback amount is appropriate in the unique context of this settlement.

16. In PSA III, the Court held back \$25,000 of a \$725,000 total award until Class Counsel provided extensive trainings specified in the settlement agreement. Order Approving Attorneys' Fees, EFC No. 1160, at 8. This small holdback was deemed adequate to ensure Class Counsel continued to perform their duties under the settlement.

17. Since the date of final approval of the FSA, Class Counsel have been working diligently to ensure that the distribution of the Net Settlement Amount occurs seamlessly and expeditiously. These efforts include working with the Settlement Administrator and Class Monitor regarding the claims process, verifying the accuracy of

Treasury payments and calculated share amounts, engaging on an ongoing basis with the Government to coordinate all settlement activities, and keeping the Court updated on all pertinent developments.

18. In view of Class Counsel's diligent service to the Class over the more than twenty-six years since this case was initiated, Class Counsel submit that the proposed holdback amount of \$1,000,000 is fully adequate "to assure that Class Counsel shall responsibly oversee the administration of the Net Settlement Amount." FSA § IX.D. Given this stated purpose of the holdback provision, Class Counsel respectfully submit that a \$1,000,000 holdback is reasonable and request the Court's approval.

19. As provided in Section IX.C of the FSA, "the amount of fees and costs approved by the Court and not in dispute shall be distributed to Class Counsel within ten (10) working days after the date on which Defendants make the first payment of the Settlement Amount to the Designated Account." By this Motion, Class Counsel request that the Court approve payment of \$79,569,882.38 to Class Counsel as fees, with \$1,000,000 held in reserve.

V. LITIGATION COSTS

20. The Amended Order provides that "Class Counsel will be reimbursed costs in the amount of \$1,205,989.92 as provided in the Final Settlement Agreement," EFC No. 1350 at 48, a sum later corrected to \$1,126,583.72, *see* Notice of Error Correction in Cost Submission of Co-Class Counsel C. Bryant Rogers (EFC No. 1354). These costs will be deducted from the gross Settlement Amount, pursuant to Sections VIII.A.1, II.N, and VII.B.2 of the FSA. The amount available for these costs after reduction pursuant to the

TOP is \$1,126,483.07. By this Motion, Class Counsel request the Court approve payment of this sum to Class Counsel.

VI. CLAIM FORM AND PAYMENT AMOUNTS FOR INDIVIDUAL CLASS MEMBERS

21. The FSA requires each Class Member to submit a Claim Form in order to receive payment of its share of the Net Settlement Funds. FSA § VIII.D.3. The claim forms will be provided to each Class Member by the Settlement Administrator, FSA § VIII.D.3, and will include an individual claim amount for each Class Member, FSA § VIII.D.4.

22. The FSA provides that Class Members' shares of the Net Settlement Amount will be determined by the Settlement Administrator pursuant to the Class Members' Distribution Percentages. FSA § VIII.D.1; *see also* Appendix 2, Doc. No. 1306-3.³

23. Attached as Exhibit B is a chart listing the final amounts to be inserted in the Claim Forms for the 699 Class Members, taking into account the addition of post-judgment interest and deductions for the final Reserve Account amount and attorneys' fees and litigation cost amounts.⁴ Attached as Exhibit C is a chart listing the final

³ While those shares were calculated originally at the same time the FSA was submitted, the FSA provides that the share amounts are subject to change for a number of reasons, one of which was if new class members were later identified. FSA § VIII.D.1. During the course of the comment period, the parties became aware of a number of additional Class Members. On December 17, 2015, the Court approved the inclusion of these newly-identified Class Members to the Class, and each Class Member's Distribution Percentage was adjusted accordingly. *See* Order Sustaining In Part and Overruling In Part the Objection by United South and Eastern Tribes, Inc. and Directing Notice to Be Sent to 26 Newly-Identified Class Members, EFC No. 1329. All share amounts were then recalculated as provided in the FSA. *See* List of Class Members and Their Share of the Net Settlement Amount, EFC No. 1328-2.

⁴ In previous Court submissions, these percentages were rounded to six decimal places for

amounts the Settlement Administrator will pay each Class Member, calculated as provided in Section VII.B of the FSA for each Class Member.⁵

24. For those Class Members who are not subject to the TOP, the Claim Form amount will be the same amount they will receive (subject to any distribution of additional funds from the Reserve Account, *see* FSA § VIII.C.5 or because of unclaimed funds, *see* FSA § VIII.D.3). *See* FSA § VIII.D.4 (Claim Form will be for “the amount of money each Class Member is entitled to receive from the Net Settlement Amount pursuant to Section VIII.D.1, *prior to* offsets and/or levies, if any, pursuant to Treasury Debt Collection Authorities.” (emphasis added)). But for Class Members who are subject to the TOP, such Members will not receive the amounts stated on the Claim Form, and the amounts they receive will be adjusted to reflect their TOP offset or levy. *See* FSA § VII.B.1; *see also* FSA § II.U.

25. For the Class Members subject to the TOP, Treasury did not pay the full shares to the Class. However, the Class still has an obligation under the FSA to issue Claim Forms to these Class Members reflecting their full shares of the Net Settlement Amount as shown on Exhibit B. *See supra* ¶ 24.

26. Sections VIII.D.4 and VIII.F of the FSA call for KCC/Gilardi & Co., LLC (the Settlement Administrator approved by the Court (EFC No. 1331)), and Moss Adams, LLP (the Class Monitor approved by the Court (EFC No. 1358)), to perform certain tasks

simplicity. Exhibits to this Motion show the full seventeen decimal points used to calculate share amounts.

⁵ The payments for the three Class Members with full TOP offsets will be \$0.00, despite the small negative amounts shown on Exhibit C. Application of the TOP offsets caused de minimis discrepancies in the payment amounts for these three Class Members. Ignoring these discrepancies is not inconsistent with the requirements of the FSA. *See* Exhibits E and F.

in the distribution process that include, respectively, calculating and confirming that the methodologies used to generate the Claim Form amounts and the payment amounts to Class Members are in conformity with the requirements of the FSA, and that those methodologies have been properly applied to accurately generate those Claim Form amounts and payment amounts.⁶ The Settlement Administrator and the Class Monitor have reviewed the Claim Form amounts and the payment amounts as set forth in Exhibits B and C and have approved those amounts as being in conformity with the requirements of the FSA, subject to approval of this Court, and those firms have confirmed their conclusions in declarations. *See* Exhibits E and F.

27. By this Motion, Class Counsel seek the Court's approval for the Settlement Administrator to send 699 individualized Claim Forms to the Class Members in the amounts shown in Exhibit B, subject to the provisions of Sections II.A.1 and VIII.E of the FSA for any Class Member that is no longer in existence or that has a leadership dispute.⁷ Once the Court enters an Order on this Motion, Class Counsel will be filing a

⁶ As noted above, *supra* note 5, application of the TOP offsets caused de minimis discrepancies in the payment amounts for the three Class Members with full offsets. Further, because payments class-wide must be rounded to two decimal places, the total paid out will be infinitesimally smaller than that received. Consistent with the requirements of the FSA, those issues have been ignored. *See* Exhibits E and F.

⁷ With respect to non-existent Class Members, Section II.A.1 provides, in pertinent part:

In the event a Class Member no longer exists, such Class Member's rights under this FSA shall belong to such Class Member's successor entity or, in the event no such entity exists, then the Tribe or Tribes by whose authority such nonexistent Class Member contracted or entered into a self-governance funding agreement as defined above.

With respect to Class Member leadership disputes, Section VIII.E provides, in pertinent part:

Motion asking the Court to authorize the methodology for making payments to Class Members that no longer exist, and payments to Class Members with a leadership dispute will be handled as indicated in Section VIII.E of the FSA.

VII. COMMENCEMENT OF CLAIMS PERIOD

28. Section II.R of the FSA defines the “Claims Period” as “the time set by the Court, including any extension of time, for the submission of Claim Forms attached hereto as Appendix 3.” Section VIII.D.3.a of the FSA provides that “if by the end of the Claim Period, any Class Member has not timely submitted a Claim Form through the Settlement Administrator ... that Class Member’s share of the Net Settlement Amount shall be reallocated to all other Class Members that have timely submitted claims,” and provides that “[t]he Court will set the deadline for submission of Claim Forms.” Section VIII.D.4 of the FSA also refers to the Court setting a “deadline” for submission of Claim Forms.

29. Section VIII.D.3.b of the FSA provides that “any unclaimed amounts exceeding in the aggregate \$10,000,000 shall be paid to the Treasury within 60 days of the end of the Claims Period.” If no Claim Form is ultimately submitted respecting a

In the event Class Counsel or the Settlement Administrator becomes aware that more than one individual or entity claims the right to act on behalf of a Class Member or to receive funds on behalf of that Class Member, then Class Counsel shall file an appropriate action in the nature of an interpleader in the Court to resolve such conflict. The Settlement Administrator shall deposit such Class Member’s share of the Net Settlement Amount into the registry of the Court pursuant to Rule 22, Federal Rules of Civil Procedure, provided that in filing any such action Class Counsel shall serve all persons and entities whom Class Counsel or the Settlement Administrator are aware claim an interest in such Class Member’s share.

Class Member's share, the disposition of the payment amount regarding those funds shall be governed by Section VIII.D.3.b of the FSA. The parties will later seek a further Order of the Court to address those funds if and as needed.

30. By this Motion, Class Counsel request that the Court not set a Claim Form return deadline at this time, but instead order Class Counsel to report to the Court seventy (70) days after the Claim Forms have been issued on: (a) the Claim Form return rate, and (b) Class Counsel's recommended deadline for returning Claim Forms (subject to any later extensions thereof that may be approved by the Court as provided in Section II.R of the FSA). This request is consistent with the discussion of this issue held at the September 23, 2015, hearing (transcript excerpt attached as Exhibit D). Once the Court sets a deadline, Class Counsel will propose sending a separate notice, approved by the Court, informing those Class Members that have not yet submitted a Claim Form of that submission deadline.

VIII. PAYMENT OF EACH CLASS MEMBER'S SHARE

31. By this Motion, Class Counsel also seek the Court's approval for Class Counsel to direct payment to each Class Member of the sum, except for the small negative amounts for three Class Members as discussed above, shown on Exhibit C, upon that Class Member's return of a properly-executed Claim Form as verified by declarations of the Settlement Administrator and the Class Monitor (to be filed of record), without requiring any further Order of this Court.

32. Defendants have been consulted and take no position on this Motion. Defendants note that the majority of the relief requested herein has already been

approved by this Court in its order granting final approval of the final settlement agreement.

WHEREFORE, for the foregoing reasons, Class Counsel respectfully move for an Order:

1. approving establishment of the Reserve Account in the amount of \$3,999,645.64, the reduced Reserve Account amount after the TOP offsets;
2. approving immediate payment to Class Counsel of litigation costs in the amount of \$1,126,483.07, the reduced cost award amount based on the TOP offsets;
3. approving a holdback of \$1,000,000.00 of the attorneys' fees to be paid to Class Counsel upon the completion of their duties under the FSA and application to the Court;
4. approving immediate payment to Class Counsel of \$79,569,882.38 for attorneys' fees, an amount which has been reduced by the TOP offsets and the proposed \$1,000,000.00 holdback provision;
5. approving the Claim Form amounts and final payment amounts for each Class Member set forth in Exhibits B and C, respectively, subject to the qualification regarding zero payment amounts for the three Class Members with full TOP offsets;
6. authorizing the mailing of the Claim Forms to each Class Member;
7. providing that no deadline for the return of Claim Forms be set at this time, but directing Class Counsel to report to the Court, seventy days after the Claim Forms have been issued, on the Claim Form return rate and on Class Counsel's recommendation as to the deadline the Court should set for return of Claim Forms;

8. authorizing payment to Class Members of the payment amounts set out in Exhibit C, subject to the qualification regarding zero payment amounts for the three Class Members with full TOP offsets, without further Order of the Court, once all preconditions for payment as set out at ¶ 38 of this Motion have been satisfied; and

9. for such other and further relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Plaintiffs' "Unopposed Motion for Approval of the Reserve Account Amount, the Holdback Amount, the Payment of Costs and Fees to Class Counsel, and the Final Claim Form and Payment Amounts for Class Members" was filed electronically pursuant to CM/ECF procedures for the District of New Mexico, which caused the parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Michael P. Gross