

**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.

RYAN ZINKE, Secretary of the Interior, *et
al.*,

Defendants.

No. 90-cv-957-JAP/KBM

**UNOPPOSD MOTION TO AMEND ORDER OF AUGUST 17, 2016 (DOC. 1362)
AND CERTAIN RELATED ORDERS REGARDING DISTRIBUTION OF
SHARES OF NO-LONGER EXISTING CLASS MEMBERS**

COME NOW the Plaintiff Class by and through Class Counsel and hereby move the Court for an Order allowing any Class Member to receive additional payments from Class funds if that Class Member has already received a payment pursuant to an approved Claim Form. Those additional payments would be part of either (1) the allocation of the settlement share of a no-longer-existent Class Member to a Tribe that authorized that Class Member to contract with the Bureau of Indian Affairs (“BIA”) under the Indian Self-Determination Act (“ISDA”); or (2) the distribution of funds remaining in the Reserve Account to all Class Members under § VIII.C.5 of the Final Settlement Agreement (“FSA”). In support of said motion, the parties state as follows:

1. Section VIII.D.3.a of the FSA (Doc. 1306-1) provides that Class Member payments cannot be made without submission of a duly executed Claim Form approved by the Settlement Administrator and the Class Monitor:

In order for a Class Member to receive payment of its share of the Net Settlement Amount pursuant to the Distribution Percentage, the Class Member shall return a signed copy of the Claim Form provided by the Settlement Administrator.

2. This Court's Order of August 17, 2016 (Doc. 1362) approved the Class's plan for implementation of the FSA Claim Form requirement set out at ¶ 31 of the Class motion filed August 15, 2016 (Doc. 1361):

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.

That Order also authorized payment of the Exhibit C payment amounts:

The Court authorizes the payment of the payment amounts to the Class Members as set out in Exhibit C without further Order of the Court once all preconditions for payment have been satisfied.

Neither the Class Motion (Doc. 1361) nor the Court's Order specifically addressed the circumstances of how to make additional distributions to authorizing Tribes of no-longer-existing Class Members.

3. Out of an abundance of caution, the Class, the government, the Settlement Administrator, and the Class Monitor have interpreted the Court's Order of August 17, 2016 as requiring that Class Members file discrete claim forms each time they become

eligible for an additional share of the settlement. Thus, Class Members have been required to submit properly executed and supported Claim Forms both for their direct shares of the Ramah settlement, and later for their shares of defunct no-longer existing Class Members. This same requirement was reaffirmed in each separate Order listed on Exhibit 1 approving payments to authorizing Tribes of the no-longer existing Class Members.

4. Enforcing serial Claim Forms has slowed down the distribution process considerably and has and proven to be burdensome for the Settlement Administrator. As of August 30, 2017, the Class Members shown on Exhibit 1 who were asked to file additional Claim Forms for shares of defunct entities had still not submitted that additional form. Exhibit 1 to this Motion shows the Court's prior Orders approving distributions among the authorizing Tribes of defunct Class Members, the amounts to be distributed to each such Tribe, and a listing of those authorizing Tribes who have to date not submitted the requested second Claim Form. The submission of additional claims forms does not add to the integrity of the payment process, because each Class Member's previously-approved Claim Form has already been fully vetted by the Settlement Administrator and the Class Monitor, with respect to proper authorization and payment methodology.

5. If this Motion is granted, Class Counsel would instruct the Settlement Administrator (for checks) and Huntington National Bank (for wire transfers) that, in the case of all Class Members who have filed an initial Claim Form for their regular shares of the Ramah settlement, and who are now eligible to receive an allocated portion of the

shares of a defunct Class Member, all authorized payments should be wired or mailed to the same addresses as used for the Tribe's initial payment under the FSA, without requiring that a second Claim Form be executed and approved before payment. All that would be required for Class Counsel to authorize such supplemental payments is (a) entry of an Order of the Court approving how a particular no-longer-existing Class Member's share is to be divided among an identified group of authorizing Tribes when no "successor entity" exists under § II.A.1 of the FSA, including the orders for this purpose previously entered by the Court as shown on Exhibit 1; and (b) filed declarations of the Settlement Administrator and the Class Monitor that confirm that the amount proposed for payment to each authorizing Tribe that will receive a portion of a no-longer existing Class Member's share is the amount in the Court's Order approving how such shares shall be divided among those authorizing Tribes, and that the Class Member's address and method of payment to be used is the same as was used for that Class Member's initial payment.¹

6. The original Claim Form submission requirement was included in the FSA to satisfy perceived requirements of the Contracts Dispute Act, 41 U.S.C. §§ 7101 *et seq.* ("CDA") for the submission of a written claim. *Cf.* FSA § I (1st Whereas). The clarification (and revision to the Court's Order at Doc. 1362) requested in this Motion is consistent with the parties' original intent regarding the CDA claims process. The CDA

¹ If a Class Member has already submitted a Claim Form for additional funds but it has not yet been approved by the Settlement Administrator or Class Monitor, Class Counsel will direct payment to the previously-certified bank accounts or addresses from the original Claim Form, once the required declarations are filed, as proposed for all other Class Members receiving additional funds.

does not require the filing of an amended or second Claim Form in order to validate a CDA payment in excess of the amount originally claimed, when such larger payment is otherwise determined to be warranted pursuant to a negotiated settlement or order of a court or the Civilian Board of Contract Appeals. *See Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099, 1009–10 (D.N.M. 2006) (“The CDA does not bar a plaintiff from seeking an amount of damages that exceeds the quantum in the claim to the contracting officer.”); *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984) (affirming the “general principle that a monetary claim properly considered by the contracting officer ... need not be certified or recertified if that very same claim (but in an increased amount reasonably based on further information) comes before a board of contract appeals or a court” (emphasis omitted)). The FSA can reasonably be interpreted – and, we respectfully submit, should now be interpreted -- to also not require the filing of a second Claim Form in the circumstances here involved. Requiring the filing of a second Claim Form in these circumstances does not advance the interests of the Class, the government, or any Class Member.

7. The same rationale applies to the second distribution to the entire Class anticipated to be made later this year out of the Reserve Account. Thus, the parties agree and hereby request that the Court now confirm that the submission of an additional Claim Form is not a condition on the future payment of Class Member shares of the Reserve Account. (Distribution of amounts remaining in the Reserve Account is governed by FSA § VIII.C.5.). So long as a given Class Member has duly filed an approved Claim Form for its initial share under the FSA, no additional Claim Form will be required. Although the

parties are requesting that the Court so rule at this time, no distribution from the Reserve Account will occur unless and until the Court enters a further Order authorizing such distribution.

8. Class Counsel have conferred with Defendants' Counsel on this motion and have confirmed that it is not opposed.

WHEREFORE, the Plaintiff Class hereby prays that the Court grant this motion and the relief prayed for therein and for such other and further relief as the Court deems just.

Respectfully submitted,

s/ Michael P. Gross

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing 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/ C. Bryant Rogers
C. BRYANT ROGERS