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, v. **SALLY JEWELL**, Secretary of the Interior, *et al*., Defendants.	No. 1:90-CV-00957-JAP/KBM

CLASS COUNSEL APPLICATION
FOR AWARD OF ATTORNEY FEES AND COSTS

In the settlement now before the Court—a settlement for damages of $940,000,000 that culminates a litigation saga spanning a quarter of a century—Class Counsel have achieved an extraordinary and historic result for the Class: a payment of nearly one billion dollars to be shared by virtually every Indian Tribe in the United States.

Class Counsel took a claim that was widely viewed as extremely unlikely to succeed, and that had been rejected by this Court and by every other court to consider it, and secured a favorable split decision in the Tenth Circuit, followed by the narrowest of wins in the Supreme Court. This narrow but decisive victory completely vindicated the Class's position that the Government was liable for breach of contract in failing to pay full contract support costs to Indian Tribes over a twenty year period, even though Congress had "capped" the annual agency appropriations made available for those payments, even though those caps admittedly left the agency with insufficient funds to pay all of the Tribes in full, and even though the agency's

obligation to pay the Tribes was subject by contract to the "availability of appropriations." *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012).

But that remarkable victory against long odds is not all that Class Counsel have achieved. After their stunning upset victory in the Supreme Court, Class Counsel's diligence and skill converted a claim that the Government had long valued at zero into a negotiated settlement of nearly one billion dollars, overcoming enormous hurdles erected by the Government, not the least of which was the Government's contention that the Class itself was subject to decertification—a position which, if sustained, would have led to no Class recovery at all.[1] The $940 million settlement will provide Indian Tribes across the United States with substantial compensation for suffering twenty years of contract support cost underpayments, eliminating all risk of decertification as well as the substantial additional risks associated with years of further litigation and appeals over complex legal and factual damage quantification issues. And the courtroom victory achieved by Class Counsel has already directly led Congress, for the past three years, to fully fund contract support cost requirements on a going-forward basis, providing hundreds of millions of dollars of additional financial benefits to all Class members.

In joining with the Class Representatives to announce this settlement, Kevin Washburn, the Assistant Secretary of Indian Affairs for the Department of Interior, said of this case, "The tribal leaders, and their smart and very persistent lawyers deserve credit for turning the United States around on this principle [of tribal self determination] by winning a major case in the

[1] Brief for the Petitioners at 12 n.6, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (No. 11-551), 2012 WL 596117, at *12 n.6 (questioning "the propriety of the class certification" in this case). And this Court had previously acknowledged that decertification was a real threat: "Decertification of the Shortfall claim is a possibility. . . ." *Ramah Navajo Chapter v. Norton* (*Ramah II*), 250 F.Supp. 2d 1303, 1308 (D.N.M. 2002).

United States Supreme Court in 2012."[2] He added, "When plaintiffs in this case forced the Administration to confront an issue that had festered for decades, the Administration embraced the principle that the plaintiffs won in court. We have fully funded these costs ever since."[3]

In light of these extraordinary achievements, and pursuant to Fed. R. Civ. P. 23(h),[4] Class Counsel now apply for an award of attorneys fees in the amount of 8.5% of the final sum to be paid from the Judgment Fund in settlement of this fourth phase of this case, and a further award to reimburse counsel for the necessary costs that have been incurred, including state gross receipts tax as applicable. The proposed fee award will cover both the extraordinary services that Class Counsel have already rendered in litigating and settling this case, and all future services Class Counsel will continue to provide in the distribution of the Net Settlement Amount and for all other actions necessary to bring this litigation to a final conclusion.

As a result of extensive negotiations over this issue, it is particularly significant that the Government "support[s]" the requested fee and agrees that an award of 8.5% of the settlement amount is "fair and reasonable" under the totality of the circumstances. *See* Final Settlement Agreement (FSA) § IX.A, ECF No. 1306-1 (Ex. A). The Government has an independent trust responsibility to protect the interests of its Indian tribal beneficiaries, and in exercising that sacred trust it has reached an independent judgment that the requested fee is reasonable. The

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[2] Liz Ruskin, *Of $1B Settlement, $125M Earmarked for Alaska Tribes*, Alaska Pub. Media (Sept. 17, 2015), http://www.alaskapublic.org/2015/09/17/of-1b-settlement-125m-earmarked-for-alaska-tribes/.

[3] Mary Hudezt, *Feds to Pay $940M to Settle Claims Over Tribal Contracts*, Assocd. Press (Sept. 17, 2015, 9:35 PM), http://bigstory.ap.org/article/1c2cc0286f6f41d89d82613ee363ec2a/feds-pay-940m-settle-claims-over-tribal-contracts.

[4] Rule 23(h) provides: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

Government's concurrence is a highly significant additional factor weighing in favor of this Application.

Finally, the requested fee also has the support of each of the named Class Representatives. Perhaps better than anyone else, the Class Representatives know firsthand the extraordinary labor, skill, and tenacity over the course of over two decades that was required to convert a claim deemed worthless by many lawyers and judges alike into a nearly one billion dollar settlement. Their unanimous agreement that an 8.5% fee is fair and reasonable is also entitled to significant weight.

I. INTRODUCTION

In 1970, President Nixon delivered to Congress a Special Message on Indian Affairs.[5] He was concerned that the Termination Policy respecting Indian Tribes then in effect was having devastating effects on Tribes, often turning relatively prosperous Tribes into paupers overnight. He considered the policy a violation of the "special relationship between Indian tribes and the Federal government [and] no more appropriate than to terminate the citizenship rights of any other Americans." *Id.* at 566. President Nixon told Congress that the fear of Termination "has often worked to produce . . . excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving." *Id.* The result, he said, was "a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale." *Id.* In place of the Termination Policy, he called for a bold new

[5] Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), in *Public Papers of the Presidents, Richard Nixon 1970*, at 564 (1971).

policy that "would strengthen the Indian's sense of autonomy without threatening his sense of community." *Id.*

To carry out this vision, the President proposed legislation that would "empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare, whenever the tribal council or comparable community governing group voted to do so." *Id*. at 567-68. He cited efforts toward local control already underway in the Ramah Navajo community and the Pueblo of Zuni (two of the Class Representatives here). *Id*. at 569, 570. Above all, President Nixon sought to ensure that "[n]o tribe would risk economic disadvantage from managing its own programs; under the proposed legislation, locally-administered programs would be funded on equal terms with similar services still administered by Federal authorities." *Id*. at 568.

Nixon's proposed legislation became Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450-458ddd-2 (as amended) As amended, the ISDA authorizes Indian Tribes to contract with the Secretaries of Interior and of Health and Human Services to operate all of the federal programs and services which each Secretary, in the absence of such a contract, would otherwise directly operate for the benefit of the local Indian community. *Id.* § 450f(a). Critical to the statutory scheme is the chosen vehicle for transferring funds: a binding contract between the Government and the Indian Tribe or its authorized tribal organization.

Unfortunately, the original enactment did not authorize sufficient funding for the Tribes to maintain parity between tribally-contracted programs and federally-operated programs. This was so because the law failed to require the Government to pay Tribes their necessary contract

support costs (CSC)—the funding that Tribes require to actually administer the contracted programs, covering costs ranging from keeping financial books and records and performing audits to carrying insurance and supervising the delivery of services. Without adequate funding for these overhead costs, a contracting Tribe was severely challenged in providing the same quantity and quality of services that had been provided by the federal agencies. Because the agencies did not provide enough resources for contracting Tribes to maintain program parity, many Tribes avoided self-determination contracting. Others protested, demanding changes in the law to allow them to provide services under contract equal to those provided by the agencies.[6] In 1988—after years of field investigations, hearings, and studies—Congress amended the ISDA to require the agencies to pay contracting Tribes not only the amount the Secretary would have otherwise provided to operate the contracted program, 25 U.S.C. § 450j-1(a)(1), but also to pay contract support costs, *id.* § 450j-1(a)(2).[7]

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[6] *See generally* S. Rep. No. 100-274 (1987); *Hearing on S.1703 to Amend the Indian Self-Determination & Education Assistance Act, before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987).

[7] There are two different types of CSC: "Indirect" contract support costs (ICSC) are administrative costs, such as legal, personnel, accounting, procurement, and financial support cost that are shared between contracted tribal programs and non-contracted tribal programs. *See* Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. pt. 200, app. VII §§ A.1, B.6 (2014). "Direct" contract support costs (DCSC) are administrative costs that are associated with a particular BIA program under contract, such as insurance costs for that particular program, and (unlike ICSC) they are not a part of the undifferentiated indirect cost pool supporting all tribal activities. DCSC includes direct costs such as workers' compensation, insurance, and facilities support costs which are not included (or fully included) in the Secretarial amount. Bureau of Indian Affairs, *National Policy Memorandum, No. NPM-SELFD-1, Contract Support Cost* §§ 6(J), 7(B)(2) (May 8, 2006) ("BIA NPM"); *id.* app. A at 14-24. The Department issued that policy memorandum as part of the equitable relief Class Counsel obtained for the Class under the third Partial Settlement Agreement. ECF Nos. 1138, 1145, 1159.

The 1988 amendments also gave tribal contractors a legal remedy to force the award of ISDA contracts in conformity with the statute, and provided a right to seek money damages for violations of the statute or for breach of contracts awarded under it. *Id.* § 450m-1. (Later amendments enhanced those remedies, and also required the agencies to use a model contract when contracting programs with Tribes under the Act. *Id.* § 450*l*.)

Following the 1988 amendments, the agencies delayed issuing any implementing regulations for six years, then in early 1994 proposed a set of regulations that threatened to severely undermine the Tribes' new ISDA rights. Congress swiftly responded that same year by cutting back on the agencies' regulatory authority and, in response to the agencies' continuing effort to undermine the tribal right to receive CSC, actually barred the agencies from writing any CSC regulations. *Id* § 450k(a); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1350 (D.C. Cir. 1996) (1994 amendments withheld from BIA any delegated authority to issue regulations on contract support costs). To ensure parity of services between contracting and non-contracting Tribes, Congress also enhanced the § 450j-1(a) mandate to add full contract support costs to all ISDA contracts. 25 U.S.C. § 450j-1(g).[8]

But the BIA still never provided full funding to tribal contractors for contract support costs and, beginning in fiscal year 1994, Congress started to "cap" the amount of appropriated funds the BIA could use to pay CSC. From fiscal year 1994 through fiscal year 2013 the capped appropriations were never sufficient to pay 100% of the Tribes' CSC requirements.

[8] In pertinent part, § 450j-1(g) requires the Secretary to "add to the contract the full amount of funds to which the contractor is entitled under subsection (a) . . . ." (emphasis added). These funds include CSC. The controversy over full funding of CSC leading to the 1988 and 1994 amendments is well documented in S. Rep. No. 100-274 and S. Rep. No. 103-374 (1994).

This class action challenged the BIA's failure to pay the Tribes their full contract support cost requirements. For more than two decades, the Government opposed the Class claim by invoking the "caps" language in the annual appropriations laws and valuing the Class's post-1994 underpayment claims at zero. Indeed, the Government repeatedly refused even to discuss settlement of these claims, both as part of PSA I and PSA II (when the cap claims were much smaller), and later when the litigation focused only on these claims. The government's no-settlement policy was perhaps understandable because the Class in particular, and tribal contractors generally, had suffered a series of setbacks on these claims in the courts.[9]

But Class Counsel persevered, and ultimately, by a five-to-four decision in the Supreme Court, the Class prevailed. As Class Counsel have argued since 1994, and as finally confirmed by the Supreme Court in 2012, the appropriation caps did not excuse the Government's failure to pay the full CSC required by the Tribes' ISDA contracts. The Government is therefore liable for money damages as a result of breaching tens of thousands of ISDA contracts over a twenty year period.

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[9] *See e.g.*, *Arctic Slope Native Ass'n v. Sebelius* (*Arctic Slope*), 629 F.3d 1296 (Fed. Cir. 2010) (appropriations cap shielded Government from liability for contract support cost underpayments); *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002) ("In sum, we agree with the District Court that funding for the Tribes' ongoing CSCs was subject to the availability of appropriations from Congress, and there were insufficient appropriations to fully pay those CSCs."); *Shoshone-Bannock Tribes of Fort Hall Reservation v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660, 664-65 (9th Cir. 2002) (Tribe had no entitlement to CSC funding independently of whether Congress appropriated money to cover such costs); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1379 (Fed. Cir. 1999) (BIA not liable for additional CSC where the ability of BIA "to bind the Government contractually was expressly conditioned on the availability of appropriations" and Congress capped the appropriations for CSC); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1103 (D.N.M. 2006) ("[I]t is doubtful that the [Supreme Court's] holding in *Cherokee Nation* would have an effect on ISDA contract disputes for contracts during statutory cap years . . . .").

As detailed further below, after decades of litigation and three years of intense, uncertain and contentious settlement negotiations, Class Counsel have secured a settlement of $940,000,000 for the Class. But the common benefit to the Class produced by Class Counsel's Supreme Court victory is even larger than this unprecedented settlement itself. Immediately following—and in direct response to—Class Counsel's Supreme Court victory, Congress eliminated the "caps" in annual appropriations legislation, and established a regime of fully paying all contract support cost requirements. Just in the years since fiscal year 2014, this has already resulted in hundreds of millions of dollars in increased CSC payments to tribal contractors. These major collateral benefits for the Class, which are in addition to the $940,000,000 settlement within the four corners of this case, underscore the magnitude of Class Counsel's litigation achievement.

It has taken decades of hard-fought litigation to overcome the capped CSC appropriations that first appeared in 1994. No longer will a Tribe suffer a decline in services because it chooses to control its own governmental programs and services. No longer will Tribes be discouraged from contracting because of concern that their necessary costs to operate the contracts will not be paid. Through the efforts of Class Counsel over the course of this quarter century of litigation, American Indians are now much closer to achieving the goal of self-determination articulated by President Nixon in 1970.

In summary, Class Counsel respectfully submit that an award of attorneys' fees of 8.5% of the settlement amount is fair and reasonable, well within the parameters set by this Court in prior settlements in this case, and fully justified by controlling Tenth Circuit law. In the remainder of this Memorandum we address the history of this litigation, the history of the settlement negotiations (with due regard for protecting aspects of such discussions consistent

with Fed. R. Evid. 408 and prior Orders of this Court), this Court's prior treatment of Class Counsel's fee requests in the three prior settlements in this case, and pertinent Tenth Circuit law on the award of attorneys fees.

II. HISTORY OF THE LITIGATION

A. The claims and earlier settlements.

In 1990, Class Counsel Michael P. Gross and Co-Class Counsel C. Bryant Rogers brought a putative class action on behalf of the Ramah Navajo Chapter,[10] claiming that the Department of the Interior (DOI) improperly calculated indirect cost rates for Tribes and tribal organizations. This first claim, the "ratemaking claim," asserted that the BIA's process for setting indirect cost rates to calculate contract support costs was skewed to prevent contractors from receiving their full entitlement to CSC. On October 1, 1993, this Court certified a class of all Tribes and tribal organizations that have BIA ISDA contracts or compacts, but then entered judgment for the Government on the Class's ratemaking claim. *See* Orders, ECF Nos. 96, 105. In 1997, the Tenth Circuit ruled in favor of the Class on this claim, reversing this Court's prior ruling for the Government. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). On May 14, 1999, this Court approved the First Partial Settlement Agreement (PSA I), ECF No. 285, settling the ratemaking claim for fiscal years 1989-1993 in exchange for a payment of $76,200,000 to the Class. *See Ramah Navajo Chapter v. Babbitt* (*Ramah I*), 50 F. Supp. 2d 1091 (D.N.M. 1999).[11] In accepting the settlement, this Court noted:

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[10] The Ramah Navajo Chapter has been Mr. Gross's client since his first day on the job as a lawyer in 1968.

[11] This Court allowed four previous opt-outs to re-enter the Class in order to negotiate separate settlements totaling approximately $6,000,000. *See* Stip. Orders, ECF Nos. 198, 247,

> The most striking aspect of the settlement is that the Partial Settlement Agreement releases only the single cause of action presented as defined in paragraph 3(a)(i) for the period FY 1989 through FY 1993. All other claims are reserved, not settled or released and will be pursued by the Class, presumably resulting in further awards. One would have thought that such a large settlement would have required complete resolution of all issues, however, Class Counsel have preserved many of the Class' claims for future resolution. Such a result is truly phenomenal.

Id. at 1103-04 (emphasis added).

In 1999, this Court permitted Ramah to amend its complaint to add a second claim alleging that the BIA had otherwise failed to pay tribal contractors their full amount of indirect contract support costs—the "shortfall claim." This claim asserted that the BIA had failed to pay even the amount produced by the incorrect rate method invalidated by the Tenth Circuit's decision in 1997. That same year, the Oglala Sioux Tribe, also represented by Mr. Gross, entered the case and also asserted the "shortfall" claim. *See* Order, ECF No. 347. In 2002, the Pueblo of Zuni through its counsel, Co-Class Counsel Lloyd B. Miller, intervened to assert a third claim alleging that the BIA failed to pay tribal contractors the full amount of their direct contract support costs—the "DCSC claim." *See* Stip. Orders, ECF Nos. 633, 634.

On December 6, 2002, this Court granted final approval to the parties' Second Partial Settlement Agreement (PSA II) to resolve plaintiffs' shortfall claims for fiscal years 1989-1993 and the DCSC claims for fiscal years 1989–1994, in exchange for which the Government agreed to pay $29,000,000 to the Class. *See Ramah II*. The Court deemed this settlement "an

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250, 462. These amounts were additional to the Class-wide settlement of $76,200,000. *Ramah I*, 50 F. Supp. 2d at 1101.

outstanding result given the nature of the claims and their inherent difficulties." *Id.* at 1312. Significantly, all other claims—including all cap year claims—were again reserved.[12]

On August 27, 2008, this Court granted final approval to the parties' Third Partial Settlement Agreement (PSA III), which significantly reformed the indirect cost rate system for tribal contractors operating ISDA programs. These changes included indirect cost rate reforms and a 2006 Bureau of Indian Affairs (BIA) CSC Policy that recognized the Bureau's legal obligation to calculate and pay direct contract support costs (DCSC) (among many other reforms). *See* Order, ECF No. 1138.

B. Litigation of the "cap" year claims.

Throughout the deliberations over PSA I and PSA II the Government refused even to discuss settlement of the Class rate-making and shortfall claims for any year after 1993, and any direct CSC claim for any year after 1994.[13] The Government took this position because for those later years, Congress, through statutory caps, limited the total amount of each annual BIA appropriation which the Secretary could spend on CSC. The Government asserted that these appropriation caps prohibited the payment of more contract support costs in aggregate to tribal contractors than the appropriation caps in a given year permitted. Based on its reading of these annual statutory caps, combined with the provision in the ISDA making the provision of funds

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[12] Again, the Court specifically noted the fact that this settlement reserved claims: "[T]he Second PSA releases only two of the three claims and those only for a two-year period; all three claims after the 'lump sum years' are reserved and not released." *Ramah II* at 1312.

[13] The oddity of two cutoff dates—the 1993 cut-off for indirect cost rate claims, and the 1994 cut-off for DCSC claims—came about because the congressional cap for fiscal year 1993 only capped the BIA's payment of "indirect costs," while the 1994 and future caps broadly extended to all "contract support costs." *Compare* Pub. L. No. 103-138, 107 Stat. 1379, 1390-91 (1993) ("not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs") *with* Pub. L. No. 103-332, 108 Stat. 2499, 2510-11 (1994) (substituting "contract support costs").

under the Act "subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), the Government refused even to discuss settlement of the Class claims for underpayments suffered in the "cap years."

But Class Counsel nonetheless tenaciously pursued these claims. In 2001, following the close of discovery, the parties filed cross motions for summary judgment on the cap-year claims. Class Counsel argued that the United States was liable under the Contract Disputes Act for CSC underpayments despite Congress's caps on the total appropriated funds that the BIA could spend on CSC. ECF No. 571. The Government responded by asserting that it had paid all of the CSC funds that Congress had appropriated for that purpose, and that the Act's "subject to the availability of appropriations" clause relieved the United States of any further liability beyond those appropriated sums. ECF No. 594.

Proceedings in this Court on these summary judgment motions were suspended while the parties negotiated the pre-1994 DCSC claims and while the Tenth Circuit, and then the Supreme Court, considered the *Cherokee* litigation. That litigation dealt with the related issue of contract support cost underpayments due from the BIA's sister agency, the Indian Health Service—but underpayments which Tribes had suffered in years prior to any appropriations caps. Since a tribal defeat over non-cap year claims would have necessarily spelled defeat for the cap year claims too, Judge Hansen's management of the issue made perfect sense.

Although proceedings here were suspended, Class Counsel remained extremely engaged in the cap-year issue and filed a comprehensive amicus brief on the Class's behalf in the Supreme Court phase of the *Cherokee* litigation. Class Counsel's brief focused on the 19th century government contract cases which ultimately proved to be the linchpin for the successful

outcome in the *Cherokee* litigation, an outcome that established a critical floor for later arguments to be made here over the Government's liability in cap years.

In April 2005, the Supreme Court ruled in favor of the tribal position in the *Cherokee* litigation, *see Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005). The Court's decision reversed Oklahoma district court and Tenth Circuit decisions which had favored the Government, while affirming a Federal Circuit decision which had favored the Tribes.[14] Thereafter this Court lifted its stay on the cap-year issue and the parties resumed litigating the matter.

Because *Cherokee* did not address cap years, the Government still refused to discuss settlement of the cap year claims even after the Government's defeat in that case. The Government continued to insist that the capped appropriations relieved—indeed prohibited—the BIA from paying any more CSCs to the Tribes. And this Court ultimately agreed. In August 2006, Judge Hansen issued summary judgment for the Government, finding that the appropriations caps were a valid defense to the Class's claim for breach of contract, and citing other cases which had reached similar conclusions, including *Babbitt v. Oglala Sioux Tribal Public Safety Department* 194 F.3d 1374 (in which Mr. Gross had represented the Tribe) and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F. 3d 1338 (in which Mr. Miller had represented the Tribe). ECF No. 1042. Once a final judgment was issued here, Class Counsel appealed to the Tenth Circuit. ECF No. 1176.

The stakes in the appeal were extraordinarily high. By 2006, eleven years of shortfalls had already accumulated a potential Government liability to the Class of hundreds of millions of

[14] Lloyd B. Miller, one of the Co-Class Counsel here, was lead attorney for the Cherokee Nation in that case. Affidavit of Lloyd B. Miller at ¶ 9.

dollars. Taking a page from the Supreme Court's *Cherokee* decision, Class Counsel now focused on crafting and refining an argument grounded on fundamental principles of government contract law as set forth in a Claims Court case more than 100 years old—*Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892). The Supreme Court had repeatedly cited *Ferris* in *Cherokee*, 543 U.S. at 637-38, 640, 641, 643, and it signaled a way forward that might defeat the Government's capped appropriations defense. The *Ferris* rule provides that so long as an agency receives sufficient appropriations to pay any single contractor the amount that is due under its contract, the fact that the agency has insufficient appropriations in the aggregate to fully pay all of its other contractors is immaterial; that fact does not relieve the Government of its liability to fully pay each individual contractor. The *Ferris* argument, augmented by arguments anchored in key provisions of the ISDA and in the core Indian law principle that ambiguities in statutes enacted for the benefit of Indians must be resolved in their favor, became the central focus of Class Counsel's position before the Tenth Circuit and later before the Supreme Court. But the argument was far from self-evident; after all, the Class was seeking a recovery for all tribal contractors. And while the agency had ample funds to pay one, it surely lacked the funds necessary each year to pay the whole Class. In a word, the argument was delicate.

After the parties filed their opening appellate briefs, the Tenth Circuit assigned a mediator to assist the parties in exploring the possibility of settlement. But despite the mediator's best efforts, the parties were unable to engage because the Government, as was the case when PSA I and PSA II were negotiated, remained steadfast in refusing to consider paying any amounts to settle the cap-year claims. For the Government, this was an easy case presenting no risk of loss.

And there was good reason for the Government's confidence. Not only did Circuit cases like *Oglala Sioux Tribal Public Safety Department* support the Government, but in the midst of these appellate proceedings the Class suffered a significant setback when the Federal Circuit relied on the *Oglala* case to reject materially identical tribal cap-year claims being asserted against the Indian Health Service. *Arctic Slope*, 629 F.3d 1296, *cert. granted & decision vacated & remanded*, 133 S. Ct. 22 (2012) (mem.). The very same Federal Circuit judge who had decided one of the *Cherokee* cases against the Government had now sided with the Government in *Arctic Slope*. The Tenth Circuit swiftly requested supplemental briefing and Class Counsel responded by urging that the Federal Circuit had misapplied the *Ferris* rule and misinterpreted several other key government contracting cases.

On May 9, 2011, this supplemental briefing proved to be critical in helping to produce a stunning victory on the cap-year claims. Against all odds and by a sharply divided opinion, the panel majority parted company with the Federal Circuit, reversed this Court's grant of summary judgment to the Government, and remanded the case to establish the amount of damages due the Class. *Salazar v. Ramah Navajo Chapter*, 644 F.3d 1054 (10th Cir. 2011). It was the first time that a Tribe had secured a federal court victory against the Government on a cap-year claim.

Given the amount of money at stake, the importance of this issue to the Government, and the Government's success in the Federal Circuit, it was no surprise that the Government promptly sought rehearing en banc and, when that proved unsuccessful, in October 2011 filed a certiorari petition with the Supreme Court. Despite vigorous opposition to the petition by Class Counsel, the inter-circuit conflict made the Supreme Court's January 2012 grant of the Government's petition almost a foregone conclusion.

In light of the enormous consequences for the Class, Class Counsel retained specialized Supreme Court counsel, Carter G. Phillips of the Sidley Austin firm, to assist in representing the Class before the Court. Mr. Phillips is one of the country's preeminent Supreme Court practitioners and has argued 80 cases before the Court. He had also served as co-counsel to Co-Class Counsel Lloyd Miller in successfully litigating the *Cherokee* case before the Court. His deep experience before the Supreme Court and his knowledge of the issues here were of invaluable assistance to the Class in crafting the most effective and credible arguments to make to the Supreme Court.[15]

Class Counsel worked intensely with Mr. Phillips and his team to develop the best possible arguments. Our expanded team resolved to continue relying on venerable principles of government contracting law grounded on the *Ferris* rule, as augmented by the ISDA and Indian canon arguments. As had been demonstrated in the *Cherokee* litigation, the best chance of victory depended upon Class Counsel's strategic decision to frame a legal theory based on *Ferris* that would have general applicability to government contractors, and not one that either depended solely on particular features of the ISDA or that sought a rule of special solicitude for Indian Tribes. By broadening the legal underpinnings of the case, Class Counsel raised the stakes for the Court's decision as one that would impact government contracting law generally, not just Indian law.

Finally, Class Counsel carefully devised and successfully implemented a highly effective amicus strategy. The key part of that strategy was obtaining support for the Class position from significant voices in the government contracting community—the U.S. Chamber of Commerce and the National Defense Industrial Association (NDIA). Securing this support would cement

[15] Sidley Austin's hours are included in Mr. Gross's Affidavit at ¶ 61 & Ex. G.

Class Counsel's framing of the issue as one going to the heart of government contract law and to the reliability of the government as a contracting partner. This highly effective strategy, which had also been used in support of the tribal position in the *Cherokee* case, resulted in a Chamber-NDIA amicus brief that powerfully reinforced the Class position that fundamental principles of government contract law meant that the tribal contractors here had to prevail, and that to deny them a recovery would cripple government contracting generally.

Another part of the winning strategy was to encourage Co-Class Counsel Lloyd Miller to file a separate amicus brief in his capacity as counsel in the then-unsuccessful Federal Circuit *Arctic Slope* litigation. This was important because the Government was advancing the superficially sympathetic argument that, in the face of each appropriations shortfall, the BIA had acted reasonably by prorating evenly the insufficient CSC payments across all tribal contractors, and by telling them in advance that it was going to proceed in this manner. The *Arctic Slope* brief disclosed to the Court that, while the BIA may have sought to prorate its payments evenly, the discretion to underpay Tribes that the Government was championing had been used by the Indian Health Service in a wildly irrational fashion that overpaid some contractors while paying other contractors nothing. The point was not lost on the Court, which raised the issue at oral argument, further vindicating Class Counsel's amicus strategy here.

Finally, Class Counsel worked with the National Congress of American Indians to secure a brief which detailed at length the long and sordid history of BIA misconduct in the years leading to the 1988 and 1994 ISDA Amendments. This, too, was important, because it helped to defuse the Government's portrayal of a well-intentioned agency doing its best to honor tribal contracting rights under difficult circumstances.

In June 2012, Class Counsel's carefully laid plans were vindicated with a narrow but decisive five to four victory. The Court held that the Government could not rely on the appropriations caps or any provision of the ISDA to excuse fully funding the CSCs due each tribal contractor. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. at 2186. This decision was a complete vindication of the legal strategy that Class Counsel had developed and executed. The Court's opinion squarely placed tribal contracting rights within the heart of government contract law, and even cited the Chamber-NDIA amicus brief in discussing the problems that would otherwise befall the government contracting arena were the Court to reject Class Counsel's position. Against all odds and the contrary to the expectations of virtually all observers—and the Justice Department—Class Counsel had prevailed.

C. The settlement negotiations.

Although the Supreme Court rejected the Government's caps defense and established that the Government must pay damages to the Class for underpaying the contracts, it did not say how to measure the damages. In a very real sense, after decades of litigation, Class Counsel were therefore back at the beginning. Faced with the prospect of either litigating all damages questions for many more years, or seeking a path to settlement, Class Counsel and the Government jointly chose the settlement path. And after more than three years of arduous and difficult discussions, twenty face-to-face meetings, scores of telephone conferences, and thousands of e-mails, a settlement has finally been forged.

But the way forward was fraught with difficulty. The parties had fundamental procedural and substantive disagreements on the correct method to calculate damages on a class-wide basis. The procedural challenge focused on the sheer magnitude of the issue at hand. Class Counsel initially proposed that damages for the Class be determined by relying on periodic "shortfall" reports and other data submitted to Congress by the BIA detailing the agency's own

contemporaneous calculations of the underpayments Tribes suffered each year, augmented by additional calculations drawn from other tribal contracting data.

The Government responded that contract damages had to be assessed on a contract-by-contract basis. But Class members had claims for each year they operated a BIA contract between 1994 and 2013. Since there were twenty years of underpayments at issue, affecting over 600 Class members, a contract-by-contract approach would have required a particularized review of contracts and related contract documents covering approximately 12,000 separate "tribe-years" (i.e., a Class member's contracts for a specific year). Since many Class members have multiple contracts each year, the number of actual contracts to be analyzed was even higher. Under the Government's preferred approach, a separate damages determination would have to be made for each such contract. That process would have consumed years, if not decades, to complete, even with the commitment of millions of dollars to the effort. And even if attempted, the effort would almost certainly have been frustrated by the fact that many Class members and the Government, alike, would be unable to locate the necessary documentation for thousands of contracts, many of which by this point were almost two decades old.

The issue was not easy to resolve, and the parties therefore initially selected a number of pilot tribal contracts to get a sense of the magnitude of the undertaking, the complexity of the analysis required, and the data necessary to make damage assessments. This effort alone consumed months of arduous work, and while it certainly helped show the way forward, it also highlighted in microcosm the many future conflicts the parties would have over damages issues.

In due course the parties reached a procedural compromise under which the full universe of some 12,000 contract years would be randomly sampled, with the result to then be extrapolated to the full Class.

Next, the parties had to nail down the details over how the statistical sampling would actually be done, another highly complex and costly undertaking. The parties each hired experts in statistical sampling, who then spent months designing a valid sampling protocol. The experts, Class Counsel and Government counsel all had to agree on how to design the sample to best reflect the actual underpayments, how to "stratify" the sample selection process so that fewer tribe-years had to be analyzed, and how large a sample within each stratum would be necessary for the sampling process to attain the desired level of accuracy with the desired level of confidence. Working closely with these expert statisticians, the Class Counsel and the Government ultimately settled on selecting a random stratified sample of 108 different tribe-years.

The substantive aspects of the sampling exercise were even more complex and contentious. The parties had to agree on a methodology to compute damages for each selected sample, but their legal approaches to the matter at hand differed greatly. Thus, while Class Counsel and the Government initially sought to develop a single joint methodology to calculate the underpayments suffered by each sampled tribe-year, a comprehensive agreement on this issue ultimately proved elusive. This was so for many reasons, but one central reason was the parties' differing approaches to the law itself. Tribes generally maintain that ISDA contracts are fixed-price contracts, with the price for each contract—including the amount of CSC—established by a fixed formula (or an equivalent) that applies the contractor's indirect cost rate to the agency program dollars being paid under the contract. Under this approach, a contractor was underpaid to the extent the Government did not pay in full the fixed-price amount of CSC calculated for the contract (putting aside for the moment other damage claims). On the other hand, the Government generally argues that ISDA contracts are cost-reimbursable contracts.

Under this approach, one must assess how much a tribal contractor actually spent on CSC, rather than how much a contractor was supposedly due for CSC at the outset, in order to secure a measure of the damages now due. As the Government generally views the matter, tribal contractors are only harmed to the extent the BIA does not pay the CSCs that a tribal contractor actually "incurred" in a given year. This core disagreement was a recurring theme as the parties explored various aspects of the claims in the context of particular contract years.[16]

Even for just the 108 tribe-years, computing the unpaid CSC proved to be a laborious and highly contentious process. For each tribe-year selected, multiple documents relating to the

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[16] A Senate Committee Report had previously condemned the Government's use of a cost incurred methodology in circumstances where the tribal contractor had not spent money to pay for costs because it did not have funds available to pay for those costs:

> Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affairs has also taken to arguing that such contractors had no legal remedies at all by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms. Thus, in a pending Interior Board of Contract Appeals proceeding, the Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate as approved by the Department of the Interior Office of Inspector General (the cognizant Audit Agency for self-determination contracts with the BIA), that the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid. That is, the contractor could not recover ordinary contract damages for the Bureau's breach in failing to fully fund the contract. The type of funding violation involved in that instance was not the product of a Congressional appropriation shortfall, but of a unilateral decision by the BIA to fund indirect costs for the contractor pursuant to a method other than that provided for in the contract and the applicable law. The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument.

S. Rep. No. 100-274, at 37 (1987). However, applying that rule in particular cases proved to be extremely difficult during the negotiations.

specific contract (or contracts)—including the original contract, the associated annual funding agreement, and associated audits, indirect cost proposals and agreements, and contractor financial records— had to be obtained from either the Tribe or from Government archives. Each side hired an accounting firm to assist with the complicated, technical process of calculating the underpayment for each contractor in the sample, but the ultimate judgments concerning the assessment of damage amounts fell on Class Counsel and Government counsel alike.

As noted earlier, numerous substantive and technical issues concerning the quantification of damages divided the parties. Just by way of example, there were disputes about which contracts were eligible for contract support costs and therefore should be included in the analysis. There were disputes about whether ISDA contracts awarded by agencies other than the BIA (such as Bureau of Land Management contracts) should be included. There were disputes about how to calculate direct contract support cost requirements for a given tribe-year. There were disputes about whether the Government owed damages for indirect costs associated with unpaid direct contract support costs. There were disputes about whether and how to take account of the Class's "miscalculated rate" claim in calculating the rates to be used for contracts in the sample, given changes in the law since the Tenth Circuit's *Lujan* decision in 1997. *See* 25 U.S.C. § 450j-2; *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 417-19 (D.D.C. 2008).

Each of these issues required extensive research, expert accountant work, and intense negotiations between Class Counsel and the Government to try to narrow, if not resolve, the differences on a sample-by-sample basis. In addition, other more global issues also divided the parties, including such issues as consequential (or expectancy) damages and pre-judgment interest. On all of these issues, both large and small, the work by Class Counsel was intense.

Yet, despite the parties' best efforts, and despite the Court's active supervision of the process, by September 2014 the sampling process was still far from complete, and therefore actual settlement negotiations had not yet begun. In September 2014, Class Counsel, the Class representatives, and the Government met with Chief Magistrate Judge Molzen for an in-person status conference. In advance of that conference, the parties on September 12, 2014, filed a Joint Status Report with the Court (ECF No. 1279). The Report detailed the status of the parties' ongoing sampling effort, which, the parties reported, had by then covered only 38 out of the anticipated 108 tribe-years. Joint Status Report, ECF No. 1279. 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[d] 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*. 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.

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 that Class Counsel made regarding mediation led Chief Magistrate Judge Molzen to take an aggressive and active role in the settlement discussions and to force the parties into mediation. *See* Clerk's Mins., ECF No. 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 No. 1281) directing the parties to engage in 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.

On December 15 and 16, Chief Magistrate Judge Molzen convened a settlement conference in Albuquerque. In advance of that conference, Class Counsel prepared 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.

Ultimately these strategic moves by Class Counsel 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.

D. Post-settlement negotiations.

Even after agreement on the settlement amount was reached, the work for Class Counsel continued unabated. Among scores of other issues, an agreement on the aggregate settlement amount left open the significant question of how the settlement funds would be allocated to individual Class members.

This presented a new and particularly complicated problem: to design a distribution methodology that would be fair, swift, and administrable. Distribution of the two previous monetary settlements took years, required extensive data collection, and thus caused heavy accounting costs. Class Counsel wanted to substantially reduce the costs of this final settlement and devise a system which would permit speedy release of the funds to the Tribes. With considerable help from Class Counsel's expert statistician, Class Counsel considered various factors that could influence the relative size of a Class member's underpayment, such as the time periods that different tribal contractors were contracting, the size of the underlying programs, and the location of the tribal contractors. Various alternative methodologies were tested in order to evaluate the relative fairness of each approach on different types of Class members. Class Counsel resolved these distribution issues in cooperation with Government counsel, accountants and statisticians, and the parties eventually agreed on the distribution methodology set forth in Appendix 2 to the Final Settlement Agreement. The process, however, took months to accomplish.

Class Counsel and the Government also had to wrestle with of the issue of whether and how the U.S. Department of the Treasury's debt collection processes would apply to the

distribution of the settlement funds to Class members. By law, payments by Treasury to any person are subject to the deduction of any money that person or entity owes to the Government. 26 U.S.C § 6331(h); 31 U.S.C. § 3716. How to accommodate the Government's right of deduction in the unique context of settlement payments being made to Class members also consumed several months. *See* Final Settlement Agreement §§ II.U, VII.B.[17]

The parties also had to reach agreement on opt-out issues, how to handle unclaimed class member shares, definitions of reserved and released claims, and many other issues as reflected in the Final Settlement Agreement.

The last major task, of course, was drafting and negotiating the settlement documents that have now been presented to the Court for review and approval. Once all substantive issues between the parties had been resolved, Class Counsel spent hundreds of hours preparing drafts of the multiple documents required to settle the case, and ensuring that the procedures of Rule 23 are adhered to in all respects (including providing fair notice to the Class). Dozens of drafts of the various agreements and their appendices were prepared, exchanged with the Government, and reviewed and discussed by Class Counsel.

The result is the historic settlement before the Court of $940,000,000 on a claim that the Government had long valued at zero.

III. ARGUMENT.

A. The Outstanding Results Achieved for the Class Justify a Fee Award of 8.5% of the Settlement Amount.

[17] The Department of the Treasury has not yet determined whether the portion of costs and attorneys' fees allocable to a particular debtor Class member will also be deducted from the Settlement Amount. In the interests of expediting this settlement, Class Counsel decided to assume the risk that their attorneys' fees could be adversely affected depending upon how Treasury ultimately resolves this issue.

The law of the Tenth Circuit amply supports a fee award of 8.5% of the settlement amount. As this Court held in *Ramah I* and *Ramah II*, the difficulty of the case and the results obtained are the key factors in determining the proper fee to be awarded to Class Counsel in class action litigation. *Ramah I*, 50 F. Supp. 2d at 1097; *Ramah II*, 250 F. Supp. 2d at 1306-07. In this case, Class Counsel's efforts over more than two decades in successfully litigating an exceptionally difficult claim through a Supreme Court victory, followed by three years of arduous negotiations, have produced a settlement of $940,000,000, one of the largest, if not the largest, award ever achieved in a class action (or in any other kind of case) in the Tenth Circuit.[18]

Moreover, the efforts of Class Counsel in this case have also yielded significant collateral benefits to members of the Class, and will likely continue to do so in the future. This case has restored to Indian Self Determination the central concept of parity of services between contracting and non-contracting tribes. It has already changed Congress's practices on full funding of CSC. As a direct result of the 2012 Supreme Court decision in this case, the statutory caps on payment of CSC were eliminated in FY 2014 and FY 2015, resulting in full CSC payment in those fiscal years.[19] This elimination of the caps applies not just to payments made to Class members by the BIA, but also by the Indian Health Service, which separately contracts

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[18] In *Ramah I*, this Court noted in its fee opinion that the gross common fund of $75,800,000 in that case was "one of the largest class action common recoveries in this Circuit. . . ." *Ramah I*, 50 F. Supp. 2d at 1003. The settlement now before the Court for $940,000,000 dwarfs that settlement by a factor of more than 12.

[19] For instance, the IHS FY 2015 Budget Justification, in requesting an additional appropriations to fully fund CSC, noted that the "budget request responds to the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter*, No. 11-551 (June 18, 2012)." *See* Dep't of Health & Human Services, *Fiscal Year 2015 Indian Health Service Justification of Estimates for Appropriation Committees* 137 (2014).

with the vast majority of Class members under the ISDA and to which the Supreme Court's holding in this case applies full force.

Thus, as a direct result of this litigation and the consequent elimination of appropriation caps, the BIA and IHS will have paid a total of $786,831,000 more in CSC in FY 2014, 2015 and 2016 combined, than they paid in the baseline pre-*Ramah* budget year of FY 2013—$136,771,000 by the BIA and $650,060,000 by IHS.[20] These very significant financial benefits, which Class members have already received and will continue to receive so long as Congress continues to fully fund CSC,[21] will substantially advance the Class's interests and will materially

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[20] The FY 2013 CSC appropriation for the BIA was $207,743,000. In FY 2014, the BIA appropriation for CSC was $242,000,000, an increase of $34,257,000 over the FY 2013 baseline, and in FY 2015, the BIA appropriation for CSC was $246,000,000, for an aggregate increase in BIA CSC funding of $38,257,000 over the FY 2013 baseline. The Administration has requested $272,000,000 for FY 2016, a further increase of $64,257,000 over the FY 2013 baseline. (All figures are from U.S. Dep't of the Interior, *Budget Justifications and Performance Information for Fiscal Year 2015: Indian Affairs*, at IA-TG-1 (2014) and U.S. Dep't of the Interior, *Budget Justifications and Performance Information for Fiscal Year 2016: Indian Affairs*, at IA-TG-1 (2015).) The accumulated common benefit increases for the BIA achieved since FY 2013 as a direct result of the *Salazar v. Ramah* victory total $136,771,000.

The FY 2013 CSC appropriation for IHS was $447,788,000. In FY 2014, the IHS appropriation for CSC was $612,484,000, an increase of $164,696,000 over the FY 2013 baseline, and in FY 2015, the IHS appropriation for CSC was $662,970,000, an aggregate increase in IHS CSC funding of $215,182,000 over the FY 2013 baseline. The Administration has requested $717,970,000 for FY 2016, an aggregate increase of $270,182,000 over the FY 2013 baseline. (All figures are from U.S. Dep't of Health & Human Services, *Fiscal Year 2016 Indian Health Service Justification of Estimates for Appropriations Committees*, at CJ-147 (2015).) The accumulated common benefit increases for the IHS achieved since FY 2013 as a direct result of the *Salazar v. Ramah* victory total $650,060,000. The accumulated increases achieved for both agencies combined total $786,831,000. The victory in *Ramah* has also resulted in increased funding for administrative grant support costs for tribally controlled schools under the Tribally Controlled Schools Act in 1988, 25 U.S.C. §§ 2501-2511. *See* U.S. Dep't of the Interior, *Budget Justifications and Performance Information for Fiscal Year 2016: Indian Affairs*, at IA-BIE-2, IA-BIE-16 (2015).

[21] And it appears likely that Congress will continue to do so. For FY 2016, the appropriations bill now under consideration in the Senate appropriates "such sums as may be

further the realization of self-determination for America's indigenous peoples. These continuing Class-wide benefits that flow directly from the successful litigation efforts of Class Counsel here—totaling in the hundreds of millions of dollars in addition to the settlement amount here—provide considerable additional justification for what would, on its own, be an eminently reasonable fee award.[22]

B. The Law of the Case Established by This Court in the Prior Fee Decisions in This Case Dictates that the Court Use a Percentage-of-the-Fund Approach to Set the Fee and Not a Lodestar Methodology.

This Court has had two prior occasions in this case to consider, construe and apply the standards for awarding attorney fees in class actions.[23] These prior decisions canvassed the law of this Circuit and took account of the unique characteristics and challenges of this class action. Like precedent in a case always should, these prior decisions have informed the expectations of Class Counsel (and the Class) for how the decisions on subsequent fee awards in this case would

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necessary" to pay CSC, and there is no cap on "such sums." Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016, S.1645, 114th Cong., at 29 (BIA), 104 (IHS) (as reported June 23, 2015). The House bill appropriates sums certain for CSC but does not cap them (and these are the sums noted above in footnote 20). Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016, H.R. 2822, 114th Cong., at 28 (BIA), 92 (IHS) (as reported June 18, 2015). In the meantime, the Administration has requested that CSC be made a mandatory appropriation for FY 2017 through 2019. U.S. Dep't of the Interior, *Budget Justifications and Performance Information for Fiscal Year 2016: Indian Affairs*, at IA-ES-6, IA-TG-2 (2015); U.S. Dep't of Health & Human Services, Fiscal Year 2016 Indian Health Service Justification of Estimates for Appropriations Committees, at CJ-147 to CJ-148 (2015).

[22] That said, Class Counsel base their 8.5% fee request only on the settlement amount and not on these additional benefits to the Class. Were these additional benefits (of $786,831,000) considered, the requested fee here would amount to 4.63% of the total common benefits achieved for the Class.

[23] The Court also awarded fees to Class Counsel a third time in this case for work done in achieving equitable relief in PSA III. But because that was a settlement for equitable relief alone, and no new common fund was created, the Court was constrained to awarding those fees from the limited amount of reserves remaining on hand from prior settlements. *See* n. 25, *infra*.

be made. For all these reasons, this Court's directly pertinent prior precedents in this case on how to evaluate and award fees should be applied here as law of the case.

1. PSA I and the *Ramah I* fee decision

In PSA I, the Class in 1999 reached a settlement in the amount of $76,200,000 to resolve the ratemaking claim for fiscal years 1989 to 1993. Class Counsel applied for a fee award of 12.5%of the common fund for that work. This Court said Class Counsel approached the fee request "in a reasonable manner," *Ramah I*, 50 F. Supp. 2d at 1106, and that it "commends Counsel on their conservative approach in their fee application and their obvious concern for the fiscal constraints of the tribes they represent," *id.* at 1107.

In a careful and extensive opinion on the fee award in *Ramah I*, Judge Hansen preliminarily noted "that there are two generally accepted means for awarding attorneys' fees in class action suits, the so called lodestar method—determining fees based on the hours worked and a reasonable hourly fee—and the percentage-of-the-fund method—awarding fees based on a reasonable percentage of the overall award." *Id.* at 1095. He said that "[t]he Tenth Circuit has observed that although there are advantages and disadvantages to the lodestar and percentage-of-the-fund methodologies, the 'recent trend has been toward utilizing the percentage method in common fund cases,'" citing the Circuit opinion in *Gotlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). *Ramah I*, 50 F. Supp. 2d at 1095.

This Court further explained, relying on the D.C. Circuit's opinion in *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993), "that the percentage-of-the-fund method is preferred as it rewards prompt and efficient resolution of class action litigation, while the lodestar approach's reliance on attorney work hours conversely encourages inefficiency and resistance to prompt settlement." *Ramah I*, 50 F. Supp. 2d at 1096. The percentage-of-the-fund

method, this Court also said, "'more accurately reflects the economics of litigation practice,'" *id.* (quoting *Swedish Hosp. Corp.*, 1 F. 3d at 1269), "since most common fund cases are the kinds of cases normally taken on a contingency fee basis, with counsel promised a percentage of any recovery," *id.* (quoting Hirsch & Diane, *Awarding Attorneys' Fees and Managing Fee Litigation* at 65).

But this Court recognized that courts "do not blithely grant" the percentage requested. Instead, the Court said, "[m]ost district courts select a percentage in the 20% to 30% range," and noted that 25% is treated as a "benchmark award." *Ramah I*, 50 F. Supp. 2d at 1098 (internal quotation marks and citations omitted). The Court stated that, under Tenth Circuit law, "in determining what percentage would be reasonable, courts should review the twelve factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974)," *Ramah I*, 50 F. Supp. 2d at 1096, but also noted the limited relevance and role of these factors in common fund cases, such as this:

> The Tenth Circuit cautioned, however, that while the *Johnson* factors are relevant, they were developed in the statutory fee context and "the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases." The *Brown* court, in fact, specifically held "that in awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using a lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record."
>
> Such is the case here. . . . [I]t is the judgment of the Court that the percentage-of-the-fund method is the appropriate means to determine a reasonable fee in this instance. Moreover, the Court concludes that a lodestar analysis would not be helpful in setting or even evaluating a reasonable percentage of the Common Fund.

Id. at 1097 (quoting *Brown v. Phillips Petroleum Co.*, 838 F. 2d 451, 455 (10th Cir. 1988)) (first emphasis in original; second emphasis added). The Court said that other *Johnson* factors, such

as the novelty and difficulty of the questions, the skill required, and the custom of contingency fee arrangements in similar cases "would help the Court more accurately determine a reasonable percentage of the fund to award in attorneys' fees." *Id*.

With this legal framework established, this Court made Findings of Fact, many of which addressed the applicable legal standard and the *Johnson* factors. With regard to the *Johnson* factor assessing the "customary fee," this Court again noted this Circuit's preference for a percentage-of-the-fund award, not a lodestar award:

> In the Tenth Circuit, the percentage method is the preferred method for establishing the fee. For these reasons, the Court has adopted this method of determining a reasonable fee because it most closely approximates the manner in which the marketplace would value the services provided. In the contingency fee context, the marketplace would value the services by the results obtained, not by the hours required to achieve them."

Id. at 1104. And again, the Court explicitly rejected relying on the lodestar method, urged by some objectors, "either as the primary means of setting the award or as a check on the reasonableness of a proposed percentage" because it "would not provide an accurate gauge by which to judge the award." *Id*. (emphasis added).

As if to further emphasize the point, this Court addressed the same question later in the Findings of Fact fact portion of the opinion, stating with reference to the "reasonableness" of the fee award: "[T]he Court finds that a lodestar analysis would not assist it in determining the reasonableness of this award. The marketplace would not determine the value of these services by the number of hours worked, and neither will this Court." *Id.* at 1106 (emphasis added).

To be sure, one of the *Johnson* factors does consider the time and labor involved, and this Court in its Findings noted that Class Counsel expended 3,245 hours in the case which, the Court said, "reflects remarkable efficiency," given "the complexity of the issues, the difficulty of the negotiations, and the quality of opposing counsel." *Id.* at 1102.

In its Findings, this Court concluded that the requested fee of 12.5% should be reduced to 11% of the common fund, or a fee of $8,338,000. *Id*. at 1106. On a per hour basis, this would be an award of $2,569.49 per hour, but this Court did not make such a calculation or consider it as a factor at all. It instead emphasized again "that a lodestar analysis would not assist it in determining the reasonableness of this award." *Id*. This Court called an 11% fee "a relatively small percentage of the fund, compared to that awarded in similar cases in the Circuit." *Id*.

Finally, the Court also entered formal Conclusions of Law on the fee issue, establishing law of the case on these questions. In Conclusion No. 8, the Court again stated that "[i]n determining reasonable attorneys' fees in common fund cases, the Tenth Circuit has expressed a 'preference' for the 'percentage-of-the-fund' method over the 'lodestar' method." *Id*. at 1107. In Conclusion of Law No. 11, the Court criticized the utility of applying the lodestar method here:

> 11. The lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar. In recent years, the trend has been toward the percentage of the fund method.

Id. By contrast, this Court explained the utility of the percentage-of-the-fund method in Conclusion No. 12:

> 12. The percentage-of-the-fund method:
>
> A. Most closely approaches the methodology actually employed in the market place for services in a case of this nature;
> B. Because it matches the marketplace, it provides incentives for counsel to pursue actions of this nature on behalf of large groups;
> C. Is less subjective than the lodestar place multiplier approach;
> D. Properly gives primary consideration to the result acchieved, which was the goal of attorney and client, rather than to time-spent;
> E. Encourages and rewards efficiency on the part of counsel and does not reward counsel for spending more time than necessary, duplicating services, and delaying recovery for the Class;

F. Most closely approximates the agreement between Class Counsel and [the Ramah Navajo Chapter];
G. Was recommended by experts called on behalf of the application.

Id. at 1108.

Using the percentage-of-the-fund method, this Court in Conclusion of Law No. 14 then deemed a 25% benchmark to be "an appropriate starting point . . . with adjustments to be made up or down" based on the [*Johnson*] factors. *Id*. In this case, the Court said, "a reasonable fee is derived by giving greater weight to the results obtained, the novelty and difficulty of the issues and the skill of counsel than to time spent." *Id*. at 1108. Applying all of these factors in Conclusion of Law No. 16, the Court concluded the 11% fee met this reasonableness standard. *Id.* at 1109.

At no point did the Court calculate a lodestar amount for the services rendered by Class Counsel or evaluate the percentage fee by reference to a lodestar or a multiplier.

2. PSA II and the *Ramah II* fee decision.

In 2002, the Class entered into a second partial settlement of claims, for $29 million, to resolve pre-cap year shortfall and DCSC claims. For the work involving in litigating and settling that portion of the case, Class Counsel sought an award of 20% of the common fund, or $5,800,000, for attorneys fees. *Ramah II*, 250 F. Supp. 2d at 1310.

In this Court's *Ramah II* opinion, the Court approved the settlement and granted the fee award in full. In so doing, the Court summarized and relied on the law governing fee awards set forth in its opinion in *Ramah I*. *Id.* at 1306-07. Indeed, the Court expressly incorporated by reference all of the Findings of Fact and Conclusions of Law from its *Ramah I* opinion. *Id.* at 1307 (Finding of Fact No. 1).

In *Ramah II*, this Court proceeded to make Findings of Fact and Conclusions of Law in the same manner as it did in *Ramah I*. Importantly for present purposes, this Court treated the

7,514.57 hours devoted to the PSA II settlement as a distinct and separate legal matter from PSA I, *id*. at 1310, and in setting the *Ramah II* fees did not consider the fees awarded in *Ramah I*. The Court said that the PSA II claims

> are related to, but quite distinct from, the claims that formed the basis for the First PSA. The new claims had to stand or fall on their own merits. In that sense, the proceedings that began with adding the new claims to the instant case and carried them forward to this settlement constitute, in essence, a new case.

Id. at 1316-17. The Court found that the time spent on PSA II, which was twice the time spent on PSA I, "was both reasonable and necessary to achieve the Second PSA." *Id*. at 1311.

With regard to many of the *Johnson* factors, the Court re-stated and relied upon its findings of fact in *Ramah I*. For purposes of determining that the percentage-of-the-fund methodology is the preferred approach in this Circuit, the Court simply quoted in full its previous Finding of Fact No. 63 at page 1104 of *Ramah I*. *See Ramah II*, 250 F. Supp. 2d at 1313 (Finding of Fact No. 38). And the Court in *Ramah II*, as it had in *Ramah I*, noted again that "the starting point in class action litigation is the benchmark of 25%, with adjustments up or down depending on the circumstances." *Id*. at 1315. In *Ramah II*, this Court said, "[n]one of the *Johnson* factors would support a downward adjustment from the benchmark." *Id*.[24]

Similarly, the Conclusions of Law set forth by this Court in *Ramah II* mirror those in *Ramah I* with regard to the applicable law controlling the award of attorneys' fees. In Conclusion No. 9, the Court "concludes that fees should be calculated according to the percentage-of-the-fund method." *Id.* at 1316. In Conclusion No. 10, the Court again stated that "an appropriate starting point is the 25% benchmark established by the case law . . . ." *Id*.

[24] This Court did note that where a recovery is "unusually large, some courts will apply a downward adjustment to avoid a 'windfall' to class counsel." *Ramah II*, 250 F. Supp. 2d at 1215.

This court concluded that "[t]he outstanding result would not have been achieved without the commendable effort of Class Counsel, for which they should be paid a reasonable percentage of the Gross Common Fund." *Id.* at 1317 (Conclusion of Law No. 12). The Court said a fee of 20% is "reasonable" and awarded that amount. *Id.*

As in *Ramah I*, at no point in *Ramah II* did the Court calculate a lodestar amount for the services rendered by Class Counsel or evaluate the percentage fee by reference to a lodestar or a multiplier.[25]

3. The *Ramah I* and *Ramah II* fee decisions are law of the case for this Fee Application.

The *Ramah I* and *Ramah II* fee decisions of this Court are law of the case for determining an award of fees for the settlement before the Court.

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[25] In 2008, this Court approved PSA-III, which resulted in the entry of equitable relief to reform the ratemaking process, a highly technical and arcane matter. This phase of the litigation involved considerable additional effort by Class Counsel, totaling 2,300 hours, to achieve significant systemic changes to the contract support cost system. *See* Order of August 27, 2008, ECF No. 1160 at 7. But since this settlement involved only equitable relief for the Class, no new common fund was created. This Court did, however, award a total of $725,000 in fees to Class Counsel, to be paid from undistributed funds in a reserve account still on hand from the common fund created by the two prior settlements. *Id.* at 8. This award was only 00.64% of the combined prior common fund. *Id.* But these were the only funds available for the payment of any fees, a constraint that dictated this relatively paltry percentage amount.

Because there was no new common fund, the Court agreed with Counsel's statement that the fee request was "correctly viewed as an adjustment of the fees previously awarded." *Id.* at 2, 4. The Court reaffirmed its prior approach to fee awards, stating, "It has been the judgment of the Court that the percentage-of-the-fund method was the appropriate means to determine reasonable fees for work involved in achieving PSA I and PSA II, and the Court shall continue to employ this approach." *Id.* at 5. This Court again took note of the 25% benchmark standard, and reviewed the *Johnson* factors to determine what percentage fee would be "reasonable." *Id.* at 5-6. Once again, the Court did not calculate nor apply a lodestar method to determine the fee, though it did note that the fee award divided by the hours worked would yield "a reasonable hourly rate for the quality of representation afforded by Class Counsel, particularly in light of the benefits of this settlement." *Id.* at 7.

Under the law of the case doctrine, "when a court rules on an issue of law, the ruling 'should continue to govern the same issues in subsequent stages in the same case.'" *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271(2014) (quoting *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013)); *see also Zinna v. Congrove*, 755 F.3d 1177, 1182 (10th Cir. 2014); *Rimbert v. Eli Lilly and Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011); *United States v. LaHue*, 261 F.3d 993, 1010 (10th Cir. 2001); *McIlravy v. Kerr–McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir. 2000). The doctrine was designed to promote finality and prevent re-litigation of previously decided issues." *Wilson v. Meeks*, 98 F.3d 1247, 1250 (10th Cir. 1996).

The law of the case doctrine "pertains both to rulings by district courts . . . and . . . by previous panels in prior appeals in the same litigation." *Bishop*, 760 F. 3d at 1082. It "applies to issues previously decided either explicitly or by necessary implication." *Copart, Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 495 F.3d 1197, 1201 (10th Cir. 2007). Although "'the law of the case doctrine is not an inexorable command,'" it is an established "'rule of practice in the courts.'" *United States v. Parada*, 577 F.3d 1275, 1280 (10th Cir. 2009) (quoting *United States v. Alvarez*, 142 F. 3d 1243, 1247 (10th Cir. 1998)); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (While "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, . . . as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . . .").

The law of the case doctrine was developed "'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Kennedy v. Lubar*, 273 F.3d 1293, 1298-99 (10th Cir. 2001) (quoting 18 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4478, at 788 (1981) (hereinafter, Wright

& Miller). It is also intended to prevent "'continued re-argument of issues already decided' . . . and to preserve scarce court resources." *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (quoting *Gage v. Gen. Motors Corp.*, 796 F. 2d 345, 349 (10th Cir. 1986)); *see also In re Dep't of Energy Stripper Well Exemption Litig.*, 821 F.Supp. 1432, 1435 (D. Kan. 1993) ("[Law of the case doctrine] 'is a rule based on sound public policy that litigation should come to an end, and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.'" (quoting *Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989))). At the appellate level, it is not uncommon for a court "'[to] adhere[] to prior rulings as the law of the case, at times despite substantial reservations as to the correctness of the ruling.'" *Lubar*, 273 F.3d at 1299 (alterations in original) (quoting Wright & Miller at 788). In the Tenth Circuit, a court should depart from the law of the case doctrine only in "'exceptionally narrow circumstances,'" *Parada*, 577 F.3d at 1280 (quoting *Alvarez*, 142 F.3d at 1247), such as "(1) when new evidence emerges; (2) when intervening law undermines the original decision; and (3) when the prior ruling was clearly erroneous and would, if followed, create a manifest injustice," *Bishop*, 760 F.3d at 1086.

Here, this Court in this case has made explicit rulings—indeed, some formalized as "Conclusions of Law"—with regard to the applicable legal standard and proper analysis of a request for attorneys' fees.[26] Of principal importance, this Court has established that the percentage-of-the-fund methodology, not a lodestar analysis, is to be used for setting attorneys fees. *Ramah I*, 50 F. Supp. 2d at 1108 (Conclusion of Law No. 13); *Ramah II*, 250 F. Supp. 2d

[26] Although the law of the case doctrine does not apply to interlocutory rulings, *see Rimbert*, 647 F.3d at 1251, the prior fee awards in this case have all been final, appealable judgments. *See Ramah I*, 50 F. Supp. 2d at 1109 ("Partial Final Judgment Under Rule 54(b)"); *Ramah II*, 250 F. Supp. 2d at 1317 ("Rule 54(b) Judgment Approving Second Partial Settlement"); Final Judgement, ECF No. 1162 ("Final Judgment" approving PSA-III).

at 1316 (Conclusion of Law No. 9). So too, this Court has expressly ruled that a lodestar analysis should not be used, even as a cross-check, "in determining the reasonableness" of an award. *Ramah I*, 50 F. Supp. 2d at 1106; *see also id.* at 1104 (lodestar analysis "would not provide an accurate gauge by which to judge the award"). This Court has expressly and unequivocally rejected the lodestar method because it is "difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result." *Id*. at 1108.

These are express rulings on questions of law that should "'continue to govern the same issues in subsequent stages of the same case.'" *Bishop*, 760 F.3d at 1082 (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). None of the narrow exceptions to the law of the case doctrine applies here. Thus, in considering the pending Application for Fees, this Court should adhere to rulings it made in *Ramah I* and *Ramah II*, award a fee based on a percentage of the common fund, and eschew a lodestar analysis or cross-check. To decide otherwise would undermine the sound reasoning of the law of the case doctrine and create inconsistency in a single, continuing lawsuit.

C. The Law of the Tenth Circuit Amply Supports a Fee Award of 8.5% in this Case.

Rule 23(h) provides that, in a certified class action "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

1. The fee should be calculated using a percentage-of-fund methodology.

For the reasons set forth above, this Court should adhere to its prior precedent in this case in determining an award of fees for the work that Class Counsel has done in creating a common fund of almost one billion dollars for the Class. Principally this means that, as this Court has said before, "the percentage-of-the-fund method is the appropriate means to determine a

reasonable fee," subject to a review under the *Johnson* factors, *Ramah I*, 50 F. Supp. 2d at 1097, and that "a lodestar analysis would not be helpful in setting or even evaluating a reasonable percentage of the Common Fund," *id.*

This is consistent with, indeed, required by, Tenth Circuit precedent. In this Circuit, attorney fees in class action common fund cases are calculated using a percentage-of-fund methodology. *See Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994) (stating "implicit preference for the percentage of the fund" method); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993) (observing that the court in *Brown* "recognized the propriety of awarding attorneys' fees in [common fund cases] on a percentage of the fund, rather than a lodestar basis."); *Tennille v. W. Union Co.*, No. 09-cv-00938-MSK-KMT, 2013 WL 6920449 at *4 (D. Colo. Dec. 31, 2013) ("The Tenth Circuit favors the percentage of the fund approach because it 'is less subjective than the lodestar plus multiplier approach,' matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis, as in this case." (internal citations omitted), *report and recommendations adopted as modified* 2014 WL 5394624 (Oct. 15, 2014) (increasing Magistrate Judge's recommended attorneys' fee award)).

The Tenth Circuit uses the percentage-of-fund methodology in common fund cases, like this settlement, because the arrangement better reflects the purpose of "*sharing* of the fees among those benefited by the litigation." *Brown*, 838 F. 2d at 454. This approach is "substantially different" than a fee award made under a statutory fee-shifting statute, which often focuses on the hours worked by the attorney and therefore relies on a lodestar methodology. *Id.* This method also "[p]roperly gives primary consideration to the result achieved, which was the

goal of the attorney and client, rather than to time-spent," all of which promotes "prompt and efficient resolution of class action litigation" by better aligning the interests of the class counsel with those of the class itself. *Ramah I*, 50 F. Supp. 2d at 1108 (citing *Swedish Hosp. Corp.*, 1 F.3d at 1268).

Moreover, the percentage-of-the-fund approach has the benefit of better reflecting the market rate for representation. *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("A court's objective is to find the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate." (internal quotation marks and citation omitted)); *Kifafi v. Hilton Hotels Ret. Plan*, 999 F. Supp. 2d 88, 104 (D.D.C. 2013) ("'[T]he percentage of recovery method is meant to simulate awards that would otherwise prevail in the market . . . .'" (internal citations omitted)).

More recent cases in the District of New Mexico have similarly held that an appropriate percentage of the judgment can be awarded to class attorneys. *See, e.g.*, *Lowery v. City of Albuquerque*, No. 09-0457, 2013 WL 1010384, at *44 (D.N.M. Feb. 27, 2013); *Robles v. Brake Masters Sys., Inc.*, No. 10-0135, 2011 WL 9717448, at *19 (D.N.M. Jan. 31, 2011).

2. <u>The requested fee of 8.5% is reasonable</u>.

Generally, under Tenth Circuit law, a reasonable fee award will range from 20% to 30% of the common fund awarded to a plaintiff class. *See Gottlieb v. Barry*, 43 F.3d 474, 487-88 (10th Cir. 1994) (approving a fee of 22.5% as "well within the range of permissible reasonable fee awards" and citing with approval a treatise statement that the typical percentage fee awarded in complex litigation is between 20% and 30%). In *Gottlieb*, the Tenth Circuit also referred with approval to the Ninth Circuit's determination that a 25% fee was the "benchmark" for fee awards in common fund cases. *Id.* at 488 (*citing Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376

(9th Cir. 1993)); *see also Brown*, 838 F.2d at 455 n.2 (citing numerous representative cases in other circuits awarding fees between 22% and 37.3%).

As discussed above, this Court in *Ramah I* said that a 25% fee is "the benchmark established by case law" and "an appropriate starting point" under the percentage-of-the-fund method. *Ramah I*, 50 F. Supp. 2d at 1108. This Court restated the same point in *Ramah II*: "the starting point in class action litigation is the benchmark of 25%, with adjustments up or down depending on the circumstances." *Ramah II*, 250 F. Supp.2d at 1315, 1316.

This benchmark has also been recognized in other Tenth Circuit district court cases. *Great-W. Life & Annuity Ins. Co. v. Clingenpeel*, 996 F. Supp. 1348, 1350 (W.D. Okla. 1998); *In re Thornburg Mortg., Inc. Secs. Litig.*, 912 F. Supp. 2d 1178, 1208 (D.N.M. 2012) (citing benchmark of 25%); *but see Lane v. Page*, 862 F. Supp. 2d 1182, 1257 (D.N.M. 2012) ("The customary fee to class counsel in a common fund settlement is approximately one-third of economic benefit bestowed on the class." (quoting *Anderson v. Merit Energy Co.*, 2009 WL 3378526 at *3 (D. Colo. Oct. 20, 2009))) ; *In re Thornburg*, 912 F. Supp. at 1253 ("The Court has recognized in other cases that fees in the range of 30-40% of any amount recovered are common in complex and other cases taken on a contingent fee basis." (internal quotation marks omitted)).

Most courts do modify the analysis when the common fund at issue is, as here, a "megafund" recovery—that is, a recovery of $100 million or more. *See In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1413 (D. Wyo. 1998).[27] However, even in such megafund cases, fee

[27] But not all courts awarding fees in mega-fund class actions agree that the larger the settlement, the lower the percentage fee should be. *See, e.g., Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("While some reported cases have advocated decreasing the percentage awarded as the gross Class recovery increases, that approach is

awards of between 10% and 15% are common. *See Kifafi*, 999 F. Supp. 2d at 104 (awarding 15% of $140 million fund); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) (14% fee of Class award of $1.027 billion); *Copley Pharm.*, 1 F. Supp. 2d at 1415 (13% fee of a fund of $150 million); *In re Black Farmers Discrimination Litigation*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (determining that $500 million to $1 billion megafund awards typically result in fee awards of 12.9%) (quoting *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011))); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) (finding that "awards of . . . 15 percent of the recovery or more are frequently awarded in [megafund] cases"); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. 2001) ("In cases regarded as 'mega-fund' cases, i.e, recoveries of $100 million plus, fees of fifteen percent are common.") And some cases have awarded fees in megafund cases even higher than 15%. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329-334 (3d Cir. 2011) (sustaining 25% attorneys' fee award in $293 million settlement fund); *Allapattah*, 454 F. Supp. 2d at 1204 (awarding fee of over 30% on a $1 billion fund), *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding fee of 30% on $410 million settlement fund); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F. Supp. 3d

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antithetical to the percentage of the recovery method . . . the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839 at *12 (D.D.C. July 16, 2001) (justifying award of 1/3 of recovery in megafund case by saying "it is not fair to penalize counsel for obtaining fine results for their clients").

167, 173 (D. Mass. 2014) (awarding 28% of a $325 million); *id.* at 170-71 (7 of 9 megafund cases cited have awards over 15%).[28]

By any of these metrics, then, the 8.5% sought here—with the support of the Government defendants and our three Class Representatives—is comfortably within the range of reasonable awards for megafund cases, and indeed, is on the low side of the range. Just as this Court previously deemed Class Counsel's earlier request for a fee of 12.5% of a prior settlement to be "conservative" and "reasonable," *Ramah I*, 50 F. Supp. 2d at 1107, the 8.5% sought here is much more so. Indeed, if the Court considers the totality of the financial common benefits Class Counsel's efforts have achieved here for the Class, the common fund would grow from $940 million to $1.727 billion, *supra* at 29, n. 20, and the requested fee would be the equivalent of 4.63% of that full common benefit—a fee that would fall below even the low end of the range of fees in megafund cases, *supra* at 30, n. 22.

The percentage requested here is significantly lower than the fee percentages already awarded by this Court in the earlier phases of this case (11% in *Ramah I* and 20% in *Ramah II*), and is well below fees awarded in many other megafund cases. It is fully justified by the extraordinary results achieved here in overcoming the Government's caps defense—a uniquely difficult issue that required resolution by a closely divided Supreme Court, involving work over a 20-year span—and in parlaying that victory into an unprecedented contract damage recovery against the United States in the face of extremely daunting and complex obstacles and very serious government defenses.

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[28] To be sure, there is also authority for fee awards of between 5% and 10% in megafund cases, *see In re Black Farmers Discrimination Litigation*, 953 F. Supp. 2d at 98-99; *In re NASDAQ Market-Makers*, 187 F.R.D. at 486-87, but by this metric, too, the requested fee falls comfortably within the range.

Finally, we emphasize again that the Government supports the requested fee of 8.5% as "fair and reasonable." The Government owes its own trust and fiduciary obligations to the all members of the Class, and it has emphasized this duty in the negotiations over the fee request. Indeed, the Government's support for this fee request is written into the Final Settlement Agreement itself. FSA at ¶ IX(A). That the Government supports the current fee request is a strong indication of the reasonableness of the request. Significantly, the parties did not negotiate a fee in this case until all other aspects of the settlement had been finally concluded. Thus, nothing but its independent judgment in the matter influenced the Government's final assessment that, under all of the cimsumstances, a fee of 8.5% is "fair and reasonable" to the Class.[29]

3. The *Johnson* factors support the requested fee award.

As this Court has previously recognized, the "reasonableness" of a fee award in the Tenth Circuit is shown by reference to the 12 *Johnson* factors. *Brown*, 838 F.2d at 454. The *Johnson* factors are:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee-this is helpful but not determinative; (7) time limitations

[29] Each of the past fee awards for PSA I, PSA II, and PSA III were considered by the Court on their own terms and, but for the award in PSA-III (which necessarily was limited to the reserve funds on hand left over from the prior settlements), each was fully justified by the particular circumstances of each settlement. This fourth settlement is indisputably the equivalent of an entirely separate case, with a distinct legal issue at its core, and dozens of damages and legal issues never explored in the course of the earlier settlements. That said, even if one were to merge the three prior fee awards and the 8.5% fee requested here into one aggregate fee award (as if this were one large case, instead of essentially 4 different cases), and similarly merge the two prior settlement recoveries and the $940 million to be paid in settlement here into one aggregate Class recovery, the overall fee award would amount only to 9% of the aggregate recovery. As demonstrated in text, such an award would be at the low end of a reasonable award under controlling Tenth Circuit law, all the more so given the hundreds of millions of dollars in additional collateral benefits already received, and yet to be received, by Class Members as a direct result of the efforts of Class Counsel in the *Salazar v Ramah* victory, *supra* at 29, n. 20.

> imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 454-55 (citing *Johnson*, 488 F.2d at 717-19); *see Ramah I*, 50 F. Supp. 2d at 1108; *Ramah II*, 250 F. Supp. 2d at 1316.

The 12 *Johnson* factors measure the contributions the attorneys made to the case, and provide support for the reasonableness of a fee award to them as compensation for their work. *Id.* A court's consideration of the *Johnson* factors is used in megafund cases to support a higher than normal fee award when the facts show that the class counsel demonstrated exceptional skill and achieved remarkable results. *See, e.g.*, 1 Alba Conte, ATTORNEY FEE AWARDS § 2:9 (3d ed. 2004) ("No rigid . . . small-percentage norm can be established as a general guideline in fee determinations involving very large recoveries. When a large fund has been recovered, the individual circumstances involved are necessarily unique in each case.").

Thus, for instance, the court in *NASDAQ Market-Makers* awarded attorneys fees of 14% of the $1.027 billion recovery based on application of the *Johnson* factors. *NASDAQ Market-Makers*, 187 F.R.D. at 487-88; *see also Copley Pharm.*, 1 F. Supp. 2d at 1414 (awarding fee of 13% based on a finding that the weight of the *Johnson* factors militated in favor of an upward increase in the fee award).

But the Tenth Circuit has said that "rarely are all of the *Johnson* factor applicable; this is particularly so in a common fund situation." *Brown*, 838 F.2d at 456; *Uselton*, 9 F.3d at 854. Thus, not all of the *Johnson* factors are to be weighed equally in common fund cases, and some do not apply at all. *Uselton*, 9 F.3d at 854; *see also In re Thornburg Mortg., Inc. Securities*, 912 F. Supp. 2d 1178, 1229 (D.N.M. 2012); *Lane v. Page*, 862 F. Supp. 2d. 1182, 1236 (D.N.M. 2012). Specifically, as this Court found in *Ramah I*, the Tenth Circuit has said that the eighth

Johnson factor, regarding the amount involved and results obtained, should be given greater weight in common fund cases than the first factor, regarding time and labor. *See Ramah I*, 50 F. Supp. 2d at 1097 (citing *Brown*, 838 F.2d at 455); *see also Ramah II*, 250 F. Supp. 2d at 1306 (the *Johnson* factors "do not necessarily have equal weight and . . . in this case, the time and labor involved is to be given less weight."). Accordingly, in *Ramah I* this Court specifically gave "greater weight to the results obtained, the novelty and difficulty of the issues and the skill of counsel than to the time spent." 50 F. Supp. 2d at 1108. *See also Lowery v. City of Albuquerque*, 2013 WL 1010384 at *44 ("Courts have consistently held that the most important factor within this analysis [of the *Johnson* factors] is what results were obtained for the class." (internal quote omitted)); *In re Thornburg Mortg.*, 912 F.Supp.2d at 1250 (same).

In this case, and in line with the megafund precedents cited above, the *Johnson* factors support a fee percentage that is even higher than the 8.5% requested here, so those factors unquestionably support the reasonableness of the proposed 8.5% fee.

a. The extraordinary results achieved by Class Counsel warrant the requested fee award under the eighth *Johnson* factor.

As stated by this Court in *Ramah II*, 250 F. Supp. 2d at 1316, and by the Tenth Circuit in *Brown*, 838 F.2d at 456, the eighth factor—regarding the amount of the recovery involved and the results achieved—carries the greatest weight in common fund cases. Moreover, the Drafting Committee for Rule 23 noted that "[o]ne fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. . . . For a percentage approach to fee measurement, results achieved is the basic starting point." Notes to Fed. R. Civ. P. 23 (2015).

Here, the results achieved are exceptional. The Government insisted that it would pay zero on the Class cap-year claims, forcing Class Counsel to litigate the case to the Supreme

Court. Even there, Class Counsel won by a close 5–4 decision, affirming a split 2–1 victory in the Tenth Circuit, *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), and reversing a unanimous decision by the Federal Circuit in favor of the Government on the same issue in the related *Arctic Slope* case. *Arctic Slope Native Ass'n v. Sebelius*, 133 S. Ct. 22 (2012), *reversing* 629 F.3d 1296 (2010). The ultimate result in favor of the Class was never assured, and without the highly skilled work of Class Counsel it is virtually certain that the Class would have recovered nothing on these claims. Instead, the parties have agreed on a common fund of $940 million. As one court stated, before awarding a 30% fee on a $410 million recovery:

> Class Counsel were staring down the barrel of these issues without any assurances whatsoever as to how the Court would rule. Class Counsel accepted these cases nonetheless, and the truly noteworthy risks that went with them. As discussed above, given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized.

In re Checking Account Overdraft Litig., 830 F. Supp. 2d at 1364.

Even after the Supreme Court ruled on the cap-year issue, a settlement was not assured because the threat of class decertification remained significant. *See supra* at 2, n. 1; *Ramah II*, 250 F. Supp. 2d at 1308 ("Decertification of the Shortfall claims is a possibility. . . ."); *id.* at 1314 ("Denial of certification as to the two new claims was possible."); *see also Ramah I*, 50 F. Supp. 2d at 1105 (citing "risk of decertification"). Had the Government pursued decertification successfully, each of the 645 Class members would have had to file individual suits. A significant portion (likely a majority) would not have done so, and those who did would have faced the prospect of difficult, burdensome and expensive individual litigation against the United States. By reaching a Class-wide settlement of nearly $1 billion on a claim the Government had long valued at zero—and that was won by a single vote in the Supreme Court—Class Counsel

achieved a monumental and remarkable victory for the Class. What the District Court said in *Ramah II* applies with far greater force here: the settlement "is an outstanding result given the nature of the claims and their inherent difficulties." *Ramah II*, 250 F. Supp. 2d at 1312.

Moreover, the benefits to the Class here are not limited to the monetary recovery reflected in the Final Settlement Agreement. As the D.C. Circuit has recognized, counsel should recover attorneys' fees if a party's claims "are the catalyst for defendants' subsequent remedial actions." *Kifafi*, 999 F. Supp. 2d at 96 (internal citations omitted); *see also id.* (allowing recovery of a common fund fee so long as the claiming parties' litigation "'played a causal role in achieving the benefits for which they seek fee reimbursement.'" (quoting *Consol. Edison Co. of N. Y., Inc. v. Bodman*, 445 F.3d 438, 451, 457 (D.C. Cir. 2006))).[30]

Here, among the benefits of this case is the Supreme Court's confirmation that ISDA contracts are governed by generally applicable principles of contract law. That decision would not be surprising, but the Court of Claims had previously held in *Busby School of the Northern Cheyenne Tribe v. United States*¸ 8 Cl. Ct. 596, 600 (1985), that self-determination contracts were somehow unenforceable because they were "sociological type" agreements, not contracts. Now, thanks to this litigation and to congressional action spurred directly by Class Counsel's victory in this case, *Busby School* has been decisively repudiated. As part of their work in this case, Class Counsel all participated intensively in the legislative and administrative effort that resulted in this about-face.

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[30] While the courts do not use the catalyst theory for purposes of determining the prevailing party under a fee shifting statute, *see RHN Corp. v. Box Elder Cnty.*, 416 F. Supp. 2d 1254, 1259 (D. Utah 2006), this is a common fund case. More to the point, the Class is plainly a prevailing party here. Our point is simply that Class Counsel's achievements in prevailing here were also the catalyst for achieving enormous additional financial benefits for Class Members that go well beyond the settlement amount now before the Court.

The Supreme Court victory in this case was indisputably the "catalyst for defendants' subsequent remedial actions" in providing some $786.8 million in additional CSC in the years since the Supreme Court's decision. There can be no serious doubt that Class Counsel's efforts "played a causal role" in obtaining these benefits for the Class. These substantial collateral benefits also include the value to be realized by Class members of full CSC funding by both the Bureau of Indian Affairs and the Indian Health Service in future years, as contemplated by the the President's proposal now pending in Congress.[31] The extraordinary collateral benefits that have been, and will continue to be, provided to Class members directly as a result of Class Counsel's efforts should inform the Court's analysis.

In short, under the eighth *Johnson* factor, the remarkable results achieved here plainly warrant the fee award that is requested.

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[31] To be sure, initially there was serious Administration resistance to these future benefits. The agencies' budget justifications to Congress for fiscal year 2014 were the first prepared after the Supreme Court decision. The agencies responded to the decision by proposing that Congress include in the appropriations legislation "mini-caps"—that is, separate line-item CSC appropriations for each BIA and IHS contractor. U.S. Dep't of the Interior, *Budget Justifications and Performance Information for Fiscal Year 2014: Indian Affairs*, at IA-OVW-3, IA-CS-5 (2013); U.S. Dep't of Health & Human Services, Justification of Estimates for Appropriation Committees for FY 2014: Indian Health Servs., *Justification of Estimates for Appropriation Committees FY 2014: Indian Health Service*, "Contract Support Costs" (pages are unnumbered; cited language is at PDF pages 149-50) (2013), *available at* http://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2014BudgetJustification.pdf. Vigorous opposition by Class Counsel, Indian Country, and many others defeated the agency proposals. *See e.g.*, S. Approps. Comm., *Explanatory Statement for the Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2014*, at 47-48 (2013), *available at* www.appropriations.senate.gov/sites/default/files/Interior%20Explanatory%20Statement.pdf. Since then, the agencies have reversed course and worked with Congress to secure appropriations sufficient to fully fund CSC, and they have concluded that the only way to conform the appropriations structure with the *Salazar v. Ramah* decision is to make CSC funding a mandatory budget category starting in fiscal year 2017. *See supra* at 28-30, nn. 19-21. None of this would have occurred but for Counsel's unprecedented victory here.

b. Class Counsel faced numerous novel and difficult issues in achieving the settlement, which is to be considered under the second *Johnson* factor.

Similarly, the second *Johnson* factor—the novelty and difficulty of the questions—favors a significant award. Given that the hotly contested issue here could be resolved only by the Supreme Court—and even there, only by the slimmest of margins—this case is the quintessence of litigation presenting questions of "novelty and difficulty."

Here, the cap-year claims at issue are entirely distinct from the claims litigated and settled in the first two partial settlements; indeed, they were expressly "reserved" in those settlements. *Ramah II*, 250 F. Supp. 2d at 1312; *Ramah I*, 50 F. Supp. 2d at 1103. Just as was true in *Ramah II*, once again the "new claims had to stand or fall on their own merits." 250 F. Supp. 2d at 1317. The legal issue here involved a novel question of how to interpret amended provisions of ISDA and related issues of federal appropriations law and government contract law. Similar to the situation presented to this Court in approving the fees in *Ramah II*: "The issue[] of liability [was] of first impression and not clear-cut. The government's liability has grown even more problematic by a significant and growing body of case law against the theory of the Class. The issues of liability and damages were surrounded by a legal and factual thicket." *Id.* (citations omitted).

Even after the Supreme Court ruled in favor of the Class on the issue of liability, the parties still had to address the damages issue. Settlement negotiations over that issue were beset by considerable factual and legal disagreements[32]—including whether damages should be

[32] This Court has previously noted the importance in this case of "a thorough understanding of both legal and accounting issues involving hundreds of different tribal organizations and the arcane methodologies used by the BIA in analyzing indirect costs." *Ramah I*, 50 F. Supp. 2d at 1103.

measured by a fixed price or a cost-incurred methodology, which contracts were eligible for CSC, how to estimate direct contract support cost needs, whether ISDA contractors were entitled to indirect CSC on unpaid DCSC, whether the Class was entitled to consequential damages, whether interest could be awarded in the absence of individual claims, and many other issues. These disputes led to enormous disagreements over how to quantify damages. The results achieved, despite the novelty and complexity of these issues, and the deep disagreements dividing the parties, strongly support a significant award under the second *Johnson* factor.

As the Government's Supreme Court briefs made clear, the legal hurdles faced by Class Counsel included a raft of adverse cases from the Ninth Circuit, the Federal Circuit, and the D.C. Circuit on the "caps" issue. *See supra* at 8, n. 9. The "novelty and difficulty" of the Class's claim could not have been greater when every court and almost every judge that considered the "caps" issue rejected the Class position—until Class Counsel prevailed before the Tenth Circuit and then the Supreme Court, each time by just one vote.

c. Class Counsel demonstrated superior skills in pursuing these claims, consistent with their outstanding experience, reputation, and legal ability, which are to be considered under the third and ninth *Johnson* factors.

Previously, this Court addressed together the third *Johnson* factor—the skill requisite to perform the legal service properly—and the ninth *Johnson* factor—the experience, reputation, and ability of the attorneys. *Ramah II*, 250 F. Supp.2d at 1312, 1314; *see also In re Thornburg*, 912 F.Supp.2d at 1255 ("Because factors three and nine are closely related, the Court analyzes together the skill requisite to perform the legal services properly, and the experience and skill of class counsel."). Class Counsel are all seasoned attorneys, with significant other litigation experience, who have special expertise on the CSC issues at the heart of this case. Here, both factors again mitigate in favor of a significant and enhanced award.

As both of the two previous fee decisions in this case have noted, "'[a] limited number of attorneys in the United States share [Class Counsel's] level of expertise and accomplishment' in the area of Indian law generally and indirect cost issues." *Ramah II*, 250 F. Supp.2d at 1312 (quoting *Ramah I*, 50 F. Supp. 2d at 1105) (first alternation in original). What this Court said about Class Counsel in both *Ramah I* and *Ramah II* is still true: Class Counsel are "highly experienced" in Indian law, "have excellent reputations, and are very able as attorneys in Indian law generally and in the indirect cost issues which gave rise to this case in particular." *Ramah I*, 50 F. Supp.2d at 1105; *Ramah II*, 250 F. Supp.2d at 1312. Above all, Class Counsel exhibited knowledge and skill in understanding the arcane world of indirect cost rates in order to determine how much CSC are due each contractor.

Thus, Class Counsel exhibited unusual skill and tenacity in litigating the case through multiple appeals, and eventually to the Supreme Court. The Class prevailed by a single vote in the Tenth Circuit and again in the U. S. Supreme Court—further evidencing both the difficulties involved and the skill of Class Counsel in prevailing. And after winning on the question of liability at the Supreme Court, Class Counsel successfully managed arduous settlement negotiations, involving abstruse statistical and accounting analyses, and difficult questions of data collection and interpretation, all of which required multiple experts and extensive participation by Class Counsel. The skill required to achieve the result obtained cannot plausibly be subject to doubt.

What this Court said twice before with regard to the earlier and smaller settlements in this case continues to apply: "[w]ithout the dedication and skill Class Counsel has exhibited throughout this litigation, it is doubtful that this matter would have been litigated, let alone resolved in such an exceptional manner." *Ramah I*, 50 F. Supp. 2d at 1105; *see also Ramah II*,

250 F. Supp. 2d at 1314. This Court in *Ramah I* deemed this "a very significant factor in the Court's analysis," *Ramah I*, 50 F. Supp. 2d at 1105, and it should remain so today.[33]

d. Class Counsel were the *only* lawyers to pursue the claims because of their perceived undesirability, a consideration under the tenth *Johnson* factor.

Given the above facts, it should come as no surprise that the cap-year claims were considered quite undesirable (and unwinnable) by other experienced lawyers in the field—the tenth *Johnson* factor. In fact, in at least one case, similar cap-year claims against the Indian Health Service were surrendered for nothing. That is, identical claims against IHS were valued at zero. *See Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99, 110 (D.D.C. 2012) (noting that the plaintiff "could have continued to litigate its [cap-year] 1999-2004 claims" but "[i]nstead . . . agreed to voluntarily dismiss these claims").

As both previous *Ramah* fee decisions noted, this case was also undesirable both because "'of the risk of decertification and the complexity and obscurity of the issues presented,'" *Ramah II*, 250 F. Supp. 2d at 1314 (quoting *Ramah I*, 50 F. Supp. 2d at 1105), and "because of the difficulty of calculating damages in what was basically a contingent fee case," *Ramah II*, 250 F. Supp. 2d at 1314.

e. Members of the Class have consistently pressed Class Counsel for a timely resolution of the claims, the seventh *Johnson* factor.

[33] No tribal contractor has opted out of this Class. The four that initially opted out during PSA I requested and were allowed to reenter the Class. Thus, every single ISDA contractor with the BIA is a Class member. We have identified 645 Class members, ranging in size from the Navajo Nation with an enrollment of some 250,000 persons to numerous small Alaska villages of fewer than 200 persons. That none of them has opted out is a remarkable testament to the Class's faith in its attorneys. (There are 74 Class members who previously have not had an opportunity to opt out but are being provided with that opportunity as part of this settlement. FSA § V.E, ECF No. 1306-1 (Ex. A)).

Class Counsel have been working under intense pressure from Indian Country and the Class Representatives to conclude this negotiation as rapidly as possible—the seventh *Johnson* factor. Indian Country desperately needs these funds.[34] As both the *Ramah I* and *Ramah II* decisions noted, "[t]he members of the Class possessed few, and in some cases no, alternative sources to make up this underfunding. This circumstance created and still creates a need to have this matter quickly resolved and to have the funds distributed to the Class." *Ramah II*, 250 F. Supp. 2d at 1314 (quoting *Ramah I*, 50 F. Supp. 2d at 1105). In response to the Class's need for a swift settlement, Class Counsel researched, developed, and presented a damages matrix to the Government in July 2012—just weeks after the favorable Supreme Court decision in the case. There followed near-monthly negotiations over the following three years, interspersed with thousands of hours of arduous work. Had Class Counsel failed to achieve agreement on a final settlement, the factual and legal issues in dispute would have required many years more of litigation with no assurance of any ultimate recovery for the Class.

While Class Counsel argued that a lengthy process of statistical sampling was unnecessary, Class Counsel were compelled to acquiesce when the Government made clear it would not negotiate a settlement except on those terms. But after diligently and patiently participating in the sampling process, Class Counsel saw an opening in September 2014 and made two strategic decisions which combined to shortcut potentially years of additional negotiations over a final settlement amount into just three months. As noted *supra* at 24-26, Class Counsel's insistence on an in-person meeting with Chief Magistrate Judge Molzen; Class Counsel's aggressive move to open settlement negotiations before the sampling process had

[34] *See e.g.*, Alexandra Fuller, *In the Spirit of Crazy Horse*, Nat'l Geographic (Aug. 2012) (cover story). The story concerns the poignant efforts of the Oglala Sioux Tribe, one of the Class's three representatives, in facing acute social and economic challenges today.

concluded; Class Counsel's proposal, initially opposed by the Government, for judicial mediation; and Class Counsel's direct entreaties to the Assistant Secretary for Indian Affairs, all led to the rapid conclusion of a process which would otherwise likely have lingered for another year or more. At the same time, Class Counsel devoted enormous resources to the expeditious resolution of the remainder of the sampling process in order to complete the settlement negotiations as quickly as possible under the one non-negotiable condition that had been set by the Government. In short, Class Counsel have been highly sensitive to, and responsive to, the demands of the Class to achieve a responsible settlement as swiftly as possible, in order to expedite the payment of damages to ISDA contractors who so sorely need the funding.

f. Class Counsel have spent 17 years and thousands of hours pursuing the present settlement, the first *Johnson* factor.

Significant time and labor by Class Counsel—the first *Johnson* factor—have been required in the pursuit of these cap-year claims, both by the three principal Class Counsel and by other attorneys from or associated with their firms.

Attached to this Application are Affidavits from Class Counsel Michael P. Gross and from Co-Class Counsel C. Bryant Rogers and Lloyd B. Miller. The three Class Counsel worked jointly and collaboratively on all aspects of this case. These Affidavits include detailed time records showing the time invested in the litigation and settlement of this case by all Class lawyers who have contributed to the effort. All hours for work on the cap-year claims back to the year 2001are included.

The attached Affidavits show that Class Counsel (and their firms) have devoted over 19,200 hours of uncompensated time to the litigation and settlement of the cap-year claims in this case as follows:

Michael P. Gross	10,283.63 hours[35]
C. Bryant Rogers	3,725.8 hours
Lloyd B. Miller	5,204.04 hours[36]
Total	19,213.47 hours

Class Counsel have been pursuing these cap-year claims tenaciously for over 17 years, far beyond the lifespan of most class actions (and most litigation altogether). Yet, without Class Counsel's vigorous and dogged challenge to the Government's position on these claims, there would have been no recovery at all for the Class. That much is a certainty. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359-60 (finding this significant to the first factor).

However, as both *Ramah I* and *Ramah II* noted, the Court gives this time-and-labor factor less weight than it does to the factors that measure "the results obtained, the novelty and difficulty of the issues, and the skill of counsel . . . ." *Ramah II*, 250 F. Supp. 2d at 1316; *see also Ramah I*, 50 F. Supp. 2d at 1097. That is because, as explained earlier, the Court uses the percentage-of-fund methodology, not the lodestar method, to determine a reasonable fee. *See supra* at 40-42. While the significant time spent by Class Counsel in litigating this difficult

[35] As set forth in Mr. Gross' Declaration, this includes 6,131.82 hours billed by Mr. Gross, 3,364.21 hours billed by Attorney Dan MacMeekin, 122.60 hours billed by Attorney Paul Frye, and 665 hours billed by the law firm of Sidley, Austin, which served as counsel to the Class in the Supreme Court proceedings in this case.

[36] As set forth in Mr. Miller's Declaration, this includes time billed by several attorneys in Mr. Miller's law firm, Sonosky, Chambers, Sachse, Miller & Munson.

claim over a period of 17 years may be a relevant data point, at best it serves to supplement, not supplant, the percentage-of-fund methodology.[37]

g. Work on this case has precluded Class Counsel from engaging in other employment, the fourth *Johnson* factor.

The fourth *Johnson* factor considers whether Class Counsel's work on the case has precluded other employment. What this Court said in *Ramah II* continued to apply to this settlement, but with even more force: "this case required 'a significant commitment of time on the part of Class Counsel' due to the fact that it involved the representation of virtually every Indian tribe in the United States and Class Counsel was either in a small firm or a solo practitioner." *Ramah II*, 250 F. Supp. 2d at 1313 (quoting *Ramah I*, 50 F. Supp. 2d at 1104). It is self-evident that the many thousands of hours devoted to this case by Class Counsel have displaced work on other cases.[38] *See*, *e.g.*, Affidavits of Lead Class Counsel Gross, ¶ 61 (still a sole practitioner), and of Co-Counsel Rogers, ¶ 63 (Mr. Rogers is a partner in a six-member firm with no associates; Mr. Rogers has been the only member of his firm to work on this case since Mr. Gross left that firm in 1997).

h. A percentage-of-fund fee is customary in class action cases, the fifth *Johnson* factor.

The fifth *Johnson* factor considers the customary fee in evaluating the requested award. In *Ramah I*, this Court stated that:

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[37] *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362 ("The lodestar approach should not be imposed through the back door via a 'cross-check.'"); *Kifafi*, 999 F. Supp. 2d at 104 (declining to perform a lodestar cross-check).

[38] *See* Class Counsel's affidavits for details in support of this element, including major loans taken out by Lead Class Counsel Gross to support the negotiations. In Mr. Gross's case, he declined another potentially lucrative professional opportunity. Affidavit of Lead Class Counsel Gross, ¶ 64.

> The customary fee in a case such as this, outside the context of a class action, is the contingent fee arrangement where counsel receives a percentage, usually 33 1/3 percent of the recovery, if there is any, and no fee if there is no recovery. In the class action context, the customary fee is established by the common fund doctrine and as discussed above. In the Tenth Circuit, the percentage method is the preferred method for establishing the fee.

Ramah I, 50 F. Supp. 2d at 1104. Accordingly, the customary fee will be one that applies a percentage to the common fund.

i. The requested fee is not just reasonable, but conservative, given awards in similar cases, the twelfth *Johnson* factor.

The twelfth *Johnson* factor considers fee awards in similar cases. Here, an 8.5% award fits well within the range of fees awarded in comparable cases. As discussed above, this Court has twice before in this litigation recognized that the "starting point in class action litigation is the benchmark of 25%, with adjustments up or down depending on the circumstances." *Ramah II*, 250 F. Supp. 2d at 1315, 1316. *See also Ramah I*, 50 F. Supp. 2d at 1108. As noted above, most courts start with a lower benchmark in a megafund case such as this, often one of 10-15%, and then use the *Johnson* factors to make upward adjustments. But even in megafund cases, courts routinely award fees of up to 15% percent of the fund, with some going even higher. *See supra* at 43-45.

In *Ramah I*, this Court considered cases with similar damages in order to evaluate whether the award was consistent with awards in similar cases, without requiring "precisely analogous facts" or even similar time investments. *Ramah I*, 50 F. Supp. 2d at 1104-05; *see also Ramah II*, 250 F. Supp. 2d at 1315. Applying the same approach here, the Court might consider *NASDAQ Market-Makers*, 187 F.R.D. at 488which awarded a 14% fee out of a common fund of $1.027 billion; *In re Vitamins Antitrust Litig.*, Case No. 99-197, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001), which awarded 34% of a $359 million fund; *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359which awarded a fee of 30% on a $410 million

settlement fund;-and *In re Neurontin Mktg. and Sales Practices Litig.*, 58 F. Supp. 3d at 170-71, 173 (D. Mass. 2014), which not only awarded a fee of 28% on a common fund of $325 million, but also cited 7 other megafund cases which awarded over 12%.

This Court might also consider a study which found that $500 million to $1 billion megafund awards typically result in fee awards of 12.9%. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 839 (table 10) (2010), cited in *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d at 98-99 (quoting *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d at 40). This study indicates that an 8.5% fee award is not only consistent with other megafund awards, but indeed falls on the low end of the range.

The remaining *Johnson* factors are not applicable to the current situation. There was no prearranged fee—the sixth *Johnson* factor. This Court, in both of the previous fee decisions in this case, said that the eleventh factor, which emphasizes the nature and length of the professional relationship with the client, was also not significant to the fee award decision (although at this point Class Counsel Gross has been in a client relationship with lead Plaintiff Ramah Navajo Chapter most of the time since 1968 and for a quarter of a century in this case). *See Ramah I*, 50 F. Supp. 2d at 1106; *Ramah II*, 250 F. Supp. 2d at 1314-15. Co-Class Counsel Rogers has also had a relationship with all three class representatives since before commencement of this class action, and Co-Class Counsel Miller has also had a relationship with Zuni and Ramah predating his entry into this case in 2002.

V. THE REQUESTED REIMBURSEMENT OF COSTS IS REASONABLE.

The Final Settlement Agreement (Paragraph IX.A) provides that "[a]llowable costs shall include, but not be limited to: (1) those items identified in subsection 10.a of PSA I; in section

VII.A of PSA II; in Section VIII.A of PSA III; and in this Section; and (2) applicable New Mexico state gross receipts tax on attorneys' fees."

The First PSA provided as follows:

> Allowable expenses include, but are not necessarily limited to filing fees, deposition costs, reasonable travel costs at government rates and per diem at government rates, long distance telephone expenses, facsimile costs, computerized legal research, expert witness fees, consultant fees, mediation expenses, photocopying costs at ten cents per page, extraordinary clerical costs, paralegal expenses, and New Mexico gross receipts tax on fees, if applicable.

Partial Settlement Agreement ¶ 10.a. PSA II and III adopted this language. *See* PSA II, § VII.A; PSA III § VIII.A.[39] Additionally, the FSA provides that Class Counsel will be reimbursed for their costs of providing notice to the Class, as well as any costs associated with distributing the funds. These items are included in the costs customarily awarded. *See* Alba Conte, 1 ATTORNEY FEE AWARDS § 2:19 (3d ed. 2004).

These costs to date total $1,157,996.35 and have been borne exclusively by Class Counsel through August 31, 2015.[40] Lead Class Counsel Michael P. Gross is a solo practitioner and has exclusively carried his firm's share of the expenses. He took out a $350,000 loan against his residence and has still had to contribute over $50,000 more to date to cover those expenses. Co-Class Counsel C. Bryant Rogers has likewise borne his share of these costs on his own, sustaining significant personal financial burdens, which are detailed in his affidavit in support of this Application.

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[39] PSA III also included some costs that were specific to the equitable relief of that settlement, but those are not relevant here.

[40] Mr. Gross incurred $407,309.27 in costs. Mr. Rogers incurred $348,775.28 in costs. Mr. Miller's firm incurred $401,911.80 in costs. Each of these cost totals is supported by a bill of costs submitted along with the respective Declaration. Class Counsel will submit a supplemental bill of costs in advance of the hearing on final approval of the settlement for costs incurred afer August 31.

VI. CONCLUSION.

"[T]he starting point in class action litigation is the benchmark of 25%, with adjustments up or down depending on the circumstances." *Ramah II*, 250 F. Supp. 2d at 1315. In a megafund case such as this, the customary benchmark fee is lower, but typically still in the range of 10% to 15%, and still subject to adjustment by application of the *Johnson* factors. What this Court concluded in *Ramah II* is true here as well: "None of the *Johnson* factors would support a downward adjustment from the benchmark." *Id*.

For all of these reasons, Class Counsel could reasonably have approached this Court with a fee request starting in the benchmark range of 10 to 15%, and sought an upward adjustment from there under the *Johnson* factors, based on the extraordinary difficulty of this case, the extraordinary skill exhibited, and the extraordinary results achieved.

Instead, Class Counsel seek an award of fees that is well below the benchmark range for a megafund case—and ask for a fee award of 8.5% of the common fund. Such an award is amply justified by the facts of the case, by awards in similar cases, by the personal risks and sacrifices made by Class Counsel in pursuing this case for decades against overwhelming odds, and by the results achieved for the Class, both within this settlement and outside of it. This request is, like this Court's characterization of Class Counsel's previous fee requests, both "reasonable" and "conservative," and for this reason it enjoys the support of the Class Representatives and the independent support of the Government as "fair and reasonable."

Accordingly, Class Counsel respectfully request that this Court grant this Application for an Award of Attorney's Fees and Costs in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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