# CLASS COUNSEL'S PRESS RELEASE

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FOR IMMEDIATE RELEASE

## TRIBES AND UNITED STATES SETTLE CLASS ACTION SUIT FOR $940 MILLION

A class of over 640 Indian Tribes and tribal organizations together with the United States today filed a joint motion in Federal District Court in Albuquerque, New Mexico for preliminary approval of a $940 million settlement of a class action suit against the Government. The class action lawsuit, *Ramah Navajo Chapter v. Jewell*, No. 90-CV-0957 JAP/KBM, seeks damages for underpayments of contract support costs made by the Bureau of Indian Affairs ("BIA") under the Indian Self-Determination and Education Assistance Act of 1975 ("ISDA"). The Ramah Navajo Chapter brought the suit in 1990, and was later joined by the Oglala Sioux Tribe and the Pueblo of Zuni as Class Representatives. The Class is represented by Class Counsel Michael P. Gross and Co-Class Counsel C. Bryant Rogers and Lloyd Miller.

Under the ISDA, Indian Tribes can choose to take over federal programs such as law enforcement, courts, land management, and job training that the BIA would otherwise provide itself for a tribal community. Doing so allows Tribes to provide services that are more responsive to tribal needs, policies and objectives. About one-half of the BIA's programs are now administered by Tribes and tribal organizations under the ISDA.

To ensure that Tribes have the necessary resources to operate these federal programs, the ISDA requires that the BIA pay the Tribes' contract support costs ("CSC"), which are essentially administrative overhead costs. However, the BIA has historically underpaid CSC requirements. This has typically forced Tribes to divert program money to cover the overhead and thereby reduced program funding to the disadvantage of tribal members.

In 1994, Congress began capping total annual appropriations for CSC payments at levels that did not provide enough funding for the BIA to pay all tribal contractors' CSC needs. The government argued that these appropriation caps limited the Tribes' rights to pursue damages for the underpayments. In 2012, the Supreme Court rejected this argument, and held the government liable for the underpayments. The current settlement was negotiated in the wake of that decision, and covers the 20 years when the caps were in effect, 1994 through 2013.

The proposed settlement, if approved, will be the fourth and final settlement in the lawsuit. The first and second settlements were monetary settlements that covered years prior to 1994 and totaled $113 million. The third settlement in 2008 reformed the system for computing CSC requirements. The current settlement for an additional $940 million will immediately provide much needed funding to Indian nations. In addition, the Supreme Court victory in this case has already resulted in Congress removing all caps on CSC appropriations starting last year.

As a result, since 2014 annual CSC payments to Tribes and tribal organizations have been boosted by over $200 million dollars. In addition, the Supreme Court victory has led to hundreds of individual settlements of CSC claims against the U.S. Indian Health Service totaling several hundred million dollars. The hearing on the Joint Motion for Preliminary Approval is expected to be held at the United States Courthouse, 421 Gold Avenue, SW, Albuquerque, New Mexico 87103, on September 23, 2015, at 11:00 a.m., Honorable James A. Parker presiding.

The Indian Self-Determination policy was first proposed by President Richard M. Nixon in a Message to Congress on Indian Affairs in July 1970. He was concerned that the then existing policy of forced termination of Federal recognition of tribes deemed "ready to become full Americans" had caused tremendous hardship, violated Indian treaties, and breached moral obligations of long standing to America's first inhabitants. A bipartisan group of Senators spear-headed by Senator Henry "Scoop" Jackson of Washington accepted the President's call, introducing the legislation that was eventually enacted as Public Law 93-638.

Self-determination has generally been regarded as the most successful Indian policy in United States history. It reversed the disastrous policy of forced termination and recognized that Tribes were much more qualified to design and operate programs for the benefit of their members than a federal bureaucracy. But before today, the Act had not reached its full potential because, without full funding of contract support costs, contracted programs could not be operated at the same level as those run by the agencies. The Class's Supreme Court victory paved the way for full CSC funding for the future and this settlement ensures that past damages for the underfunding are compensated. Together, they represent important landmarks leading the way to fulfillment of the full promise of the ISDA.

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# Ramah Navajo Chapter, Oglala Sioux Tribe & Pueblo of Zuni v. Jewell

## Class Counsel Question and Answer Fact Sheet
**(Sept. 17, 2015)**

**What is the background to the new settlement?**

The *Ramah* litigation is a class action lawsuit against the BIA over unpaid contract support costs. Two earlier settlements in the case generally dealt with unpaid contract support costs between the years 1989 and 1993. A third settlement in 2008 made adjustments to the system for negotiating indirect cost rates. Earlier settlements left unresolved claims over unpaid contract support costs suffered during the period 1994 to the present.

**Why was 1994 a significant year?**

Since 1994, Congress has capped the maximum appropriation the BIA could spend on contract support cost payments. As a result, the BIA has long asserted that it could not be held liable for any resulting underpayments.

**What happened in the 2012 United States Supreme Court decision?**

In 2012, the United States Supreme Court held the government liable for underpayments that occurred in and after 1994. The Court explained that limited agency appropriations did not excuse the BIA's duty to pay each tribal contractor in full.

**What does the new settlement do?**

The new settlement filed on September 17, 2015 resolves all claims over unpaid contract support costs suffered during the years 1994 through 2013.

**Does the new settlement cover 2014 and 2015?**

No, the new settlement does not cover 2014 and 2015 because in those years Congress has appropriated sufficient funds for the BIA to fully pay tribal contract support cost requirements.

**How much is the settlement amount?**

The settlement is $940,000,000. Future interest on this amount will begin accruing once the federal court enters a final judgment approving the settlement.

**What is included and what is excluded from the settlement?**

The settlement generally resolves all past claims involving contract support cost underpayments where the underpayment was caused by an agency-wide regulation, policy or practice. But, it does <u>not</u> settle certain claims that are unique to a particular tribal contractor.

The settlement also specifically excludes one category of contract support cost claims: claims for unpaid startup costs or preaward costs.

**How will the settlement amount be distributed?**

The settlement agreement includes a detailed table showing the share of the settlement to be paid to each Tribe or tribal organization that contracted for some or all of the 20 years covered by the settlement. These pre-assigned shares were calculated by examining the government's records of contract support cost payments, combined with the information the government and the tribal plaintiffs secured in the course of doing a major statistical sampling project. A special Distribution Appendix that is part of the Final Settlement Agreement describes in detail how the percentage shares were computed. Without repeating that discussion here, it would generally be fair to say that the larger the CSC payments that were made to tribal contractors over the years, the larger the share of the settlement that is allocated to those contractors. In addition, the Distribution Appendix provides a minimum payment of $8,000 for each year that a tribal contractor had a contract with the BIA.

**What is the process for securing a share of the settlement?**

Each tribal contractor covered by the settlement will receive a Claim Form. The Claim Form will show the Tribe's percentage share of the settlement and the resulting amount computed for that Tribe from the funds on hand. The Form will be prepared to comply with the Contract Disputes Act, and it will have to be executed by tribal leadership and returned to the Settlement Administrator.

**What deductions will be made from the settlement before the settlement amount is distributed?**

Deductions will include funds for a "Reserve Account" to deal with unexpected contingencies, the costs of implementing the settlement,, and funds covering the attorneys' fees and reimbursable legal expenses to be awarded by the court.

**How are attorneys' fees being handled?**

As is typical in class action settlements, the case was handled without the payment of any attorneys' fees—that is, it was handled on a "contingent fee" basis. As is also typical in such cases, the attorneys' fees that will now be awarded will be paid out of the overall settlement amount, together with litigation costs. All such amounts are subject to court approval. The settlement agreement states that the tribal attorneys will seek a fee of 8.5% of the settlement amount, and it also states that the government "agree[s] that an 8.5 percent fee is fair and reasonable and support[s]" this fee award. The federal court will need to review and approve the award of fees and the reimbursement of costs. The attorneys in the case are filing a separate application for an award of fees and costs which will be posted on the class website along with all other settlement papers.

**Is there any provision for additional compensation to be paid certain Tribes?**

Yes, the settlement agreement provides for reimbursing costs incurred by those Tribes that were selected and participated in the sampling process for the time they spent participating in that process. The agreement also provides for enhancing by 20% the shares that would otherwise be computed for the Ramah, Oglala and Zuni Tribes, in recognition of the considerable work these three Tribes did over the years as the representatives of the Class.

**Who will supervise the settlement?**

The actual distribution of funds will be handled by a company to be selected as the "Settlement Administrator." This company has not yet been selected. The Settlement Administrator's work will be supervised by a Class Monitor. Both the Settlement Administrator and the Class Monitor will be required to report all of their work to the Court.

**How does the Treasury Offset Program (TOP) figure into the settlement?**

The settlement agreement notes that if a tribal claimant owes money to the United States, the Treasury will apply that debt to reduce that contractor's settlement amount. Any amount left after the offset of the debt will then be released by Treasury for payment to the tribal contractor.

**Is there any circumstance under which the settlement could be terminated?**

Yes, the settlement could be terminated in one unusual circumstance: if the Court permits at least 15 tribal contractors to opt out of the settlement, and if those 15 tribal contractors' collective share of the settlement exceeds 15% of the total settlement amount. Even if this threshold is not reached, the government will retain any funds that would have been paid to a Tribe that is allowed to opt out of the settlement.

**Who can opt out of the settlement?**

Most members of the Class previously had two opportunities to opt out of the *Ramah* class action lawsuit. For this reason, the proposed settlement only confers a right to opt-out of this last settlement on newly-contracting Tribes—that is, tribal contractors that first started contracting with the BIA after March 27, 2002. (Those contractors never before had a chance to consider whether to stay in or opt out of the case.)

**What happens now that the settlement agreement has been filed in court?**

The federal court will first consider whether to preliminarily approve the proposed settlement. This could take a few days or a few weeks, and is entirely in the hands of New Mexico Federal Judge Parker. Judge Parker has scheduled a September 23 hearing on the preliminary approval issue. The hearing is open to the public.

Next, if the settlement is preliminarily approved, a class notice will be sent to all known class members. The notice will also be published in at least one national newspaper focused on

providing news to Indian country, on the Class website at <rncsettlement.com>, and on the BIA's website. The notice will give class members 45 days to review the settlement (as well as the request for attorney fees) and to offer objections or comments.

Once the notice period expires, Judge Parker will hold a hearing to consider whether to give final approval to the settlement and to consider the fee application. Then, Judge Parker will write an opinion and order explaining his decision on both issues and addressing any objections which may have been filed during the class notice period.

If Judge Parker gives final approval to the settlement, the process for transferring the settlement funds from the Treasury to the Class bank account will begin sixty days after the order giving final approval. At that point, the actual distribution process will begin, as one of the first steps, the Settlement Administrator to send claim forms to all class members.

If any class member who objects to the settlement chooses to appeal Judge Parker's approval of the settlement, the whole process could be delayed until resolution of the appeal. Any such appeal could take a year or more.

**When is it projected that actual payments will begin?**

Even under the most favorable scenario, the process of sending out claims forms and the ensuing distribution of funds will not occur until well into 2016. Once that process is underway, it will likely consume all of 2016 until the very last sums are paid out.

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**MICHAEL P. GROSS**

Michael P. Gross is still working for his first client. Graduating in 1968 from Yale Law School he took a job as a Poverty War lawyer on the Navajo Reservation. His first assignment was to work on a lawsuit to reopen a public high school which had been serving a remote Navajo community called the Ramah Navajo Chapter. When the suit failed, he was instrumental in helping the community create the first Indian controlled school started from scratch by an American Indian community since the 19th Century. In 1982 he took his client to the Supreme Court winning the first case considered by that court involving the Indian Self-Determination Act, *Ramah Navajo School Board v. Bureau fo Revenue of NM,* 458 U.S. 832 (1982), a 6-3 decision holding that the State of New Mexico had no legal right to apply a sales tax on the non-Indian building contractor because it impeded Congress's goal to enable Ramah to build its own school.

He continues as the community's lawyer still working to secure the community's survival.

In the early 1970s he was instrumental in founding a grassroots Indian coalition to improve Indian education through self-determination contracting, following the pattern that the Ramah Navajo Chapter had followed. With particular help from his other individual client in this case, the Oglala Sioux Tribe, the Coalition of Indian Controlled School Boards played a key role in shaping the Indian Self-Determination Act. As counsel to the Coalition, Mr. Gross suggested that the word "authorized" in the draft Indian self-determination bill be changed to "directed". That suggestion was accepted. That one word made the current class action lawsuit possible.

Mr. Gross's career has centered on helping many Indian communities get their own schools and achieve control of other vital governmental functions.

He is an emeritus member of the governing "Corporation" of Brown University where he was a member of the class of 1964. He still serves on a committee overseeing the 50+-year long partnership between Brown University and predominantly Black Mississippi college called Tougaloo.

From 1985 to 1991 he served as a Board member of the Santa Fe, NM, public school district. And from 1985 to 2009 as pro bono counsel to the Navajo Code Talkers Association.

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Mr. Rogers is a NM Board of Legal Specialization certified Specialist in Federal Indian Law. He is AV-rated by Martindale-Hubbell and received his JD *cum laude* from the Harvard Law School in 1977. His practice focuses on tribal representation and litigation regarding state, tribal and federal jurisdiction, taxation, sovereign immunity, exhaustion of tribal remedies, reservation economic development, P.L. 93-638 contracts/compacts, P.L. 100-297 school grants, federal audit and contract disputes, bills of collection and contract support cost ("CSC") claims. He is a member of the Bars of New Mexico and of Mississippi and is counsel of record for the Tribe in *Dollar General Corp. v. The Mississippi Band of Choctaw Indians,* No. 13-1496, now pending in the U.S. Supreme Court. Mr. Rogers was counsel for the Tribe in litigation affirming the Tribe's assertion of civil jurisdiction over Dollar General in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014).

Before entering private practice in 1981, Mr. Rogers served as the public defender for the Oglala Sioux Tribal Court, worked for Indian Pueblo Legal Services at the Zuni and Laguna Pueblos in New Mexico, and established and administered a legal services program on the Mississippi Choctaw Reservation in 1979 to 1981. Prior to law school he served as chief planner, Choctaw Self-Determination Project, for the Mississippi Choctaws from 1971 to 1974.

Lloyd B. Miller is a partner with Sonosky, Chambers, Sachse, Miller & Munson, LLP, a national Indian rights law firm with offices in Washington, D.C., New Mexico, California and Alaska. Mr. Miller's practice involves Indian Self-Determination Act health and social service matters, labor law issues, gaming issues, ICWA matters, environmental issues, trial and appellate litigation, and a wide range of other Indian and general law matters for Tribes and intertribal organizations. Mr Miller's litigation successes include the landmark 2005 Supreme Court victory in Cherokee Nation, the 2012 follow-on victories in Arctic Slope and as co-class counsel in Ramah Navajo Chapter, and his successful 25-year term as plaintiffs' liaison counsel and Alaska Native Class counsel in In re the Exxon Valdez Oil Spill. Over the years Mr. Miller has recovered $750 million in judgments against the Indian Health Service and the Bureau of Indian Affairs, and he has also been a major architect of key tribal self-determination and other Indian statutes and implementing regulations. Additional recent Supreme Court practice has included representation of the Cherokee Nation in Adoptive Couple v. Baby Girl and the FBA in Jicarilla Apache Nation, as well as assistance in many successful efforts to persuade the Supreme Court not to review tribal victories in the lower courts. Mr. Miller holds degrees from Yale University and the University of Virginia School of Law (with honors), and he has been honored by the National Indian Health Board, the Alaska Legislature and the Healthy Alaska Natives Foundation for his work to advance Native American health and tribal self-determination. Mr. Miller has served in leadership positions with the Alaska Legal Services Corporation, the Alaska Bar Association, and the Federal Bar Association Indian Law Section, and on the U.S. Court of Appeals for the Ninth Circuit's Conference Executive Committee. Mr. Miller is a member of the D.C. and Alaska Bars and is admitted to practice before the Supreme Court and the Sixth, Eighth, Ninth, Tenth, D.C. and Federal Circuit Courts of Appeals. Mr. Miller has regularly been included among Top Ten Super Lawyers and Best Lawyers in America, and he and his firm enjoy an AV rating from Martindale Hubbell. U.S. News and World Report rates the Sonosky firm as a national first tier firm. Mr. Miller can be reached at Lloyd@sonosky.net