IN THE UNITED STATES DISTRICT COURT
IN AND FOR
THE 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.

DIRK A. KEMPTHORNE, Secretary
of the United States Department of
Interior, et al.,

Defendants.

No. CIV 90-0957
LH/KBM ACE

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE PARTIES' THIRD PARTIAL SETTLEMENT
AND
COUNSEL'S MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Introduction and Background

Now before the Court is the Third Partial Settlement (PSA III) negotiated in this eighteen year old class action and a motion for fees and costs. This memorandum explains and supports the settlement and justifies the request for additional attorneys' fees in the amount of $725,000. The fees requested constitute an additional 00.64% (or sixty-four one hundredths of one percent) of the combined common fund of $113,000,000 thus far created, or a less precisely calculable but much smaller percentage of the larger common benefit conferred

upon the class by the settlement. This memorandum also supports Counsel's request for reimbursement of: (1) approximately $17,800 in costs; (2) additional supplemental costs which will be incurred prior to final approval; and (3) New Mexico gross receipts tax at the Santa Fe County rate of 7.9375% as applicable.

The application provides for payment of $700,000 of the requested fees to be paid within ten days after the final approval becomes unappealable, and for payment of the additional $25,000 (together with supplemental costs) at the conclusion of the training program, upon application showing that final balances in the Reserve Accounts are adequate.

Unlike PSA I and PSA II, PSA III does not settle any damage claims. Instead, if approved, it will in part result in substantial beneficial changes to the rate-making methodology used to determine contract entitlements to indirect contract support costs (CSC) under the Indian Self Determination Act (ISDA), 25 U.S.C. § 450 *et seq.,* in accordance with the law of this case established in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1995).

PSA III also acknowledges the substantial benefit that Class Counsel has already achieved for the Class by prevailing upon the BIA, as a direct result of this litigation, to recognize contract funding requirements for "direct contract support costs" (DCSC). DCSC costs are comprised of certain required administrative costs that are directly associated with the operation of contracted programs such as the cost of worker's compensation insurance). These DCSC costs are not paid either as part of the Secretarial program amount or as indirect costs. Although the

ISDA has since 1994 expressly recognized the Secretary's duty to pay DCSC costs (25 U.S.C. 450j-1(a)(3)(A)(i)), not until this law suit was amended to include a DCSC claim did the BIA finally agree to recognize these costs, through the adoption of a new 2006 National Policy. In doing so, Co-Class Counsel Miller led an effort by Tribal representatives to persuade the BIA to promulgate a comprehensive Contract Support Cost Policy. A copy of the new CSC policy is attached to PSA III as Exhibit C. The BIA's formal recognition in that Policy of all contract support cost funding categories, and its revision to its payment methodologies, has already proven to be of tremendous benefit to the Class.[1]

This case began as a single claim (the "calculation" claim) for Ramah Navajo Chapter. The calculation claim asserted that indirect cost rates used by the BIA to determine indirect CSC requirements, a required component of the ISDA contract price, were improperly diminished by incorporation of programs from non-indirect-cost paying agencies in the base of the rate fraction. By using the resulting lower rates than required by the ISDA, the BIA under-calculated the contract price for indirect CSCs. In 1997, the Tenth Circuit in *RNC v. Lujan* held the BIA's practice to be contrary to the Act, and remanded to this Court for further

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[1] Class Counsel were not alone in persuading the BIA to adopt this policy. A nationwide CSC Class Work Group was assembled to make proposals, review drafts, and assist Class Counsel, especially Mr. Miller, the Co-Class Counsel for DCSC, in these negotiations. Several intensive work group sessions were conducted in Albuquerque, Minneapolis, Anchorage, Portland and Bloomington. All three Class Counsel, as well as NCAI, variously participated in these sessions and in concluding negotiations with the BIA held in Washington, D.C.

proceedings in conformity with its ruling. PSA I settled money damages for the calculation claim for the years 1989-1993.

Thereafter, Ramah Navajo Chapter and the intervenor Oglala Sioux Tribe added a second claim called the "shortfall" claim. This claim asserted that the Defendants had not paid in full even the understated contract price produced by the erroneous indirect cost rates. In 2002, a third claim called the "direct contract support cost" (or "DCSC") claim was added, arising out of the Defendants' failure to recognize or pay direct CSCs. In 2002, PSA II was approved settling damages claims covering portions of these two claims for the years 1992 and 1993 for the Shortfall Claim, and 1993 and 1994 for the DCSC claim. Appx. D to PSA II, p. 3, ¶ 2.

The Court approved PSA I on May 25, 1999, producing a common class fund of $76,000,000, together with pre-payment interest of $3,000,000. Also settled at the time was a total of $4,000,000 for four opt-out tribes whose agreements were subject to the attorney fees and costs provisions of PSA I. Counsel's fee was set at 11% of the principal amounts.

The Court approved PSA II on December 6, 2002, producing additional common class fund of $29,000,000, with counsel's fee set at 20%. All claims for equitable relief, together with all claims for money damages for years not included in either of these two settlements, were expressly reserved.

Of the total sums recovered from PSA I and PSA II, $96,000,000 was distributed to Class members, $14,200,000 was paid to Class Counsel as fees and

reimbursed costs, $400,000 was contracted to NCAI, and $1,500,000 was placed in reserve accounts to enable the Class to pay the costs of distributing the settlements to Class members and costs associated with remaining claims including equitable relief.

As of May 30, 2008, the Reserve Accounts and Wells Fargo account ($14,600), excluding $18,000 reserved for NCAI's contract, totaled approximately $909,000. This is the amount reasonably considered available for the Class's costs of training; costs of publication of PSA III and mailing notice to the Class; remaining expert fees and costs; and attorneys' fees and costs as requested herein.

Discovery of Carryforward Problems

The Tenth Circuit's decision and mandate dealt only with the original calculation claim. Class Counsel Gross and Co-Class Counsel Rogers stipulated at the time PSA I was approved that they would work to achieve equitable relief without any additional fee to address the calculation claim. (Docket No. 283, May 13, 1999). At that time, the existence of the carryforwards problem was not known by either the Court or counsel.

Early negotiations to address the Tenth Circuit's mandate concerning the calculation claim produced a demonstration rate sampling process, followed by the "Benchmarking" approach. Implementation of benchmarking, however, exposed the "carryforwards" issue specific to tribal contractors that employ "fixed with carryforward rates" (FCF). (Most contractors use FCF rates.) FCF rates are based on a before-the-fact estimate of indirect cost needs for a given year divided by

estimated direct program expenditures. The estimates are reconciled in a future year's rate calculations when actual audited numbers become available. In theory, the carryforward calculation for the new year should increase the new year's rate if there was an "under-recovery," or decrease it if there was an "over-recovery." But in practice, as revealed by the benchmarking experience, over-recoveries and rate decreases were the rule, and underrecoveries the exception. Class Counsel came to realize that "carryforward" problems affecting the numerator were as damaging to the Class as the original calculation claim affecting the denominator, and unless both the calculation claim and the carryforward problems were addressed, the entitlement to full contract support costs set forth in the ISDA could not be achieved. Benchmarking was then abandoned in favor of a more comprehensive approach.

While counsel easily recognized the problem of a systemic tendency towards rate reduction, the systemic flaws were multiple, complex and often hidden. The indirect cost rate system employed by Defendants under OMB Circular A-87 is an accounting tool designed to allocate costs among agencies, not a tool designed to determine contract prices under a statute like the ISDA. Its fundamental assumption is that whatever sums the recipient (rate-holder) spends on indirect costs are all that it needs. But as held in *RNC v. Lujan*, Indian tribes need the entire, undifferentiated indirect cost pool, every dollar of which is required to operate every BIA program at its expected level. S. Rep. No. 100-274, at 37-38 (1987), 1988 U.S. Code Cong. & Admin. News 2619-2620.

Another problem that came to the fore concerned the source of funds to pay indirect cost requirements. When Tribes cannot pay the full need identified in the indirect cost pool—for instance, because the BIA paid an insufficient amount to the Tribe—some Tribes supplement these costs by dipping into their direct program funds (or even tribal funds). The ISDA does not require or anticipate that internal tribal funds or program funds will be used to supplement the indirect costs the Tribe collects, much less that program monies will be diverted to cover such costs, yet this phenomenon regularly occurs.[2] This, too, was a newer problem, not part of the original calculation claim, that Class Council had to address.

Beyond the complexities, it turns out the Secretary created new instructions (called a template) for ISDA contractors, justified as a means to comply with 25 U.S.C. § 450j-1(d)(1) (which prohibits theoretical overrecoveries of carryforwards or "other adverse adjustments to a future year's rate or amount [of indirect CSC].") These new instructions, however they may have been intended, created a new set of adverse adjustments prohibited by the 1988 amendments to the ISDA (Pub. L. No. 100-472). Under those instructions, the Office of Inspector General (later the National Business Center) began shunting most "under-recoveries" into a new slot called the "shortfall" column. Amounts placed in this column were never included in the carryforward calculations, and thus could not be recovered through

[2] Sen. Rept. No. 100-274, at 12: ". . . Furthermore, the Bureau of Indian Affairs and the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services. . ." *See also, id., at* 30, 33.

an upward rate adjustment in a future period. Interior claimed the "shortfall" column was required to shield insufficiencies of appropriations from being carried forward, but in practice virtually all under-recoveries were swept into the new slot where they disappeared. Hence although over-recoveries led to negative rate adjustments, most underrecoveries were captured in the shortfall column and never carried forward to produce a positive rate adjustment.

The problem was magnified by practices over successive rate cycles that doubled any adjustment for either over- or underrecoveries, again to the detriment of tribal contractors since most underrecoveries were ignored. This procedure, dubbed "double dipping," along with the others, is detailed in the affidavits of Kerkmans, Rogers, and Gross.

As noted earlier, adding to the problems affecting the numerator was NBC's treatment of a contractor's diverted program or tribal funds used to pay agency-unreimbursed indirect costs. The template simply asks how much indirect costs were collected. Most contractors and auditors interpret this entry to require inclusion of program or tribal funds diverted to pay indirect costs. Although NBC maintains that rate-holders do not have to report such diversions as "collected" indirect costs, neither BIA nor NBC has ever instructed contractors on their right not to report diversions in this manner (at least until recently, as a result of the Class negotiations.) Each of these factors reducing the numerator or magnifying reductions to the numerator reduced needed governmental services to Indian people, in direct contravention of ISDA's intent.

Expected Benefits

PSA III alleviates these practices.

A new Direct CSC policy has been implemented as a direct result of this suit with tangible benefits already noted by Congress. Exhibit 1.

The original calculation claim regarding the inclusion of other agencies in the base is addressed by offering Class members options for Special Rates for ISDA and non-ISDA programs, but without requiring separate administrative structures. The economies of scale achieved through consolidating program management in one administration will be retained, but different rates can, at a Tribe's option, be created for self-determination and non-self-determination programs based on proportions of ISDA and non-ISDA programs in the base. The special rates option is an entirely new approach, and is vastly superior to an earlier multiple rates option examined and rejected by the parties prior to benchmarking. Over time as different numbers show up in these ISDA and non-ISDA rates, carryforwards will self-adjust to better identify the true indirect costs needed to operate ISDA programs and non-ISDA programs.[3] The special ISDA rates will not include any other agencies in the base.

Carryforward problems are also addressed by eliminating the "shortfall" column and substituting an "under-funded" or "over-funded" column. Payment-

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[3] Class members will also be permitted to move certain indirect costs which disproportionately benefit an ISDA program (such as janitorial services for schools or insurance for law enforcement) to the Special ISDA rate(s). This will increase those rates and diminish the non-ISDA rate, thus further minimizing the negative effect of non-paying agencies in the base.

based over- or under-recoveries—comparing what was spent and what was collected—will be shown in these columns and each contracting party will be able to seek compensation, if warranted, through existing legal remedies. See Appendices A and B to PSA III. Variances between actual indirect expenditures and estimated expenditures will be the only variances that are carried forward. Legal remedies open to the government are sharply curtailed by provisions in ISDA allowing contractors to make use of overpayments, 25 U.S.C. §§ 13a, 450j-1(a)(4), while Class members will be able to use administrative or judicial remedies to recover underrecoveries.

"Double dipping" will be neutralized to the extent over- and under-recoveries are treated more evenhandedly.

Finally, program monies or tribal funds used to pay indirect costs will no longer be counted as recoveries of indirect CSC on the NBC carryforward template.[4]

The settlement does not require Class members to use any of the new rate options or procedures, but it enlarges rate options and makes existing rate options easier to use. It will enable Class members to minimize underrecoveries from the non-paying programs in the rate denominator, and will boost the numerator.

As to the direct DCSC claim, Defendants have adopted a new National Policy fully responsive to this lawsuit. While Defendants may change the new

[4] Class members will be permitted to show diverted program or tribal monies as "collected" indirect costs if they wish. PSA III, Appx. A, p.4, n.4.

policy in the future, they commit to a process of consultation with Class members and Tribes before any change is made. PSA III also reserves class member rights to challenge the new Policy and any changes hereafter made to that Policy.

For periods after the effective date of PSA III (and provided Defendants comply with PSA III's rate-making provisions), the Class and Class Members may not recover in damages amounts greater than would be produced by application of the new procedures. This commitment extends to ISDA contracts issued by the Secretary of HHS, provided that he accepts and applies the new procedures.

As a component of the settlement, Defendants will conduct training and produce training materials with participation by Class Counsel and Class experts. CDs will be produced and made available for entities not able to attend. The Class commits up to $100,000[5] from its reserve accounts to help ensure that at least three two-day training sessions will be conducted. Defendants agree to contribute $50,000 toward these costs.

PSA III reserves the Class's claims for damages arising during the so-called "cap years," and preserves the Class's right to appeal from this Court's Order of August 31, 2006, granting the Defendants' motion for summary judgment as to those claims. If the "cap years" appeal succeeds, the rate-making changes in PSA III and the direct CSC changes reflected in the BIA Policy will produce higher payments to class members and higher recoverable Class damages than would be

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[5] The Parties estimated total costs for training and materials development at $100,000, each side paying half that amount. The extra $50,000 budgeted by Plaintiffs is a contingency to help ensure that 3 training sessions can be conducted.

produced under current rate-making and related procedures. Even if the "cap years" appeal fails, there will be a tangible benefit to the Class from the increase in the nationwide "need" for contract support costs required to be reported to Congress under 25 U.S.C. § 450j-1(c) with likely higher appropriations for contract support as a result. As shown in Exhibit 7 to the Class' Supplemental Memorandum in Support of Partial Summary Judgment, July 20, 2005, there is a close correlation between these reports, the President's annual request for contract support costs, and the ultimate appropriations enacted thereafter.

Persuading the BIA to adopt a policy recognizing DCSC has already produced a tangible benefit to the Class. The President's Budget Request now includes a category for DCSC where none appeared before. It appears further that Congress appropriated $15,000,000 more in FY 2008 for CSC precisely because the BIA could now report that there existed an additional $45 million unfunded need in direct CSC requirements. PL 109-369 (2006); PL 105-383 (2006); PL 110-5, § 2 (Div. B, Title I, § 101(a)(5) and Title II, ch. 5, 20515) (2007). Additionally, the President's Budget Request for FY 2009 contains language stating that in FY 2007, for the first time, the appropriation was sufficient to pay 100% of indirect costs and the new request would allow partial payment of Direct CSC requirements. *See* Budget Justifications 2007 and 2009 attached as Exhibit 1. This lawsuit brought the DCSC issue to the BIA's attention, and the result has been substantially increased appropriations for the Class.

This agreement is the product of lengthy arms-length negotiations respecting an extremely esoteric subject. It does not achieve all the Class would have liked. Each side compromised. The compromise was negotiated over an extended period of time starting in 2000. After basic principles were agreed upon, the parties exchanged, analyzed, discussed and revised thirty-four drafts of PSA III. Experts (including two class representatives, Greg Anderson and William Parkhurst, designated by NCAI) participated in the negotiations and reviewed final drafts of the settlement. A class expert, Marcel Kerkmans, was retained who was familiar with all aspects of indirect cost rate making. His declaration accompanying this motion and memorandum provides details of the settlement outlined above. Exhibit 2.

The Risks of Not Settling

In 1999, Congress enacted 25 U.S.C. § 450j-3.[6] The Defendants maintain that this provision reverses *RNC v. Lujan*. Although Plaintiffs strongly disagree, there is always some risk that the foundations of the current settlement might not be achieved if the rate-making issues were ultimately adjudicated. Further,

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[6] "Notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended [25 U.S.C. 450f et seq.], on and after November 29, 1999, funds available to the Department of the Interior for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act of 1975 and on and after November 29, 1999, funds appropriated in this title [1] shall not be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact or funding agreement entered into between an Indian tribe or tribal organization and any entity other than an agency of the Department of the Interior."

proving the carryforwards defects would be extremely time consuming and expensive, would require proofs based on arcane accounting procedures, would raise complex procedural and pleading questions, and would possibly only result in a determination that the Defendants' current practices are illegal, leaving the parties years from now with the same task they face now, namely how to construct a system that complies with the ISDA.

If litigated and appealed, as the loser would likely do, equitable relief would be delayed even further, and there would trigger additional expense to the parties and additional judicial resources.

The Context and Posture

Neither the work on direct CSC as a necessary component of ISDA funding, nor the work in exposing, analyzing, and reforming carryforwards, has been compensated. In their application and attachments, Counsel exclude time spent on the caps issue and Gross and Rogers exclude time spent in achieving reform of the other-agencies-in-the-base problem (the calculation claim[7]), as they agreed to do prior to approval of PSA I. (This commitment did not extend to later-discovered numerator issues or to DCSC issues, and could not extend to rate-making problems that did not exist in 1999 when PSA I was concluded.) Only work directly charged to this case in connection with the carryforwards problems and direct CSC are the subject of requested additional compensation.

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[7] Co-Class Counsel for DCSC Miller was not party to this stipulation so has not been required to differentiate his time between the different types of equitable issues.

The balance of common funds created in PSA I and PSA II will serve as the source of funds to pay attorneys' fees and costs for this extra work. The fee requested here is correctly viewed as an adjustment of the fees previously awarded, an increment for unexpected work not previously considered to be part of the case (*i.e.*, carryforwards) or achievement of other reforms not contemplated when PSA I was approved (*i.e.*, DCSC). The award of fees and costs under this application, if made, would be payable from those balances remaining in the previous common funds.[8]

The subject of this settlement falls within a Rule 23(b)(2) equitable relief class, since "[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The subject of this settlement is equitable relief. No jury trial issues are therefore involved. Settlement of Rule 23(b)(2) class actions do not provide renewed opt-out rights, so there are no questions presented in that regard. The Court's Order of May 21, 2008, provides for reasonable notice to the class and reasonable opportunity to object and be heard.

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[8] It should be noted that Class Counsel intend to file an appeal of this Court's Order on caps dated August 31, 2006, as reserved in PSA III, section VI.B.1. The fees and costs in this application are not intended to cover Class Counsel's compensation or costs involved with such appeal , which if successful and if subsequent Class recoveries are achieved, will be compensated and reimbursed upon subsequent application. Nothing in the application is intended to waive Class Counsel rights to reasonable fees and costs for creating any additional common fund.

Attorneys' Fees

In PSA I this Court praised Counsel's achievement of a $76,200,000 Class recovery as "truly phenomenal". *RNC v. Babbitt,* 50 F. Supp. 2d 1091, at 1102 (D.N.M. 1999). It nevertheless reduced Counsel's 12.5% fee request from the PSA I common fund to 11%.[9] It would be reasonable to assume that had the equitable carryforwards and direct CSC reforms and relief settled in PSA III been before the Court as part of PSA I, Class counsel would have requested a higher percentage as their fee or the reduction of the 12.5% request for PSA I would not have occurred. The 1-1/2% deducted from the PSA I fee request would have entitled Class Counsel and Co-Class Counsel to an additional $1.2 million. The fee of $725,000 here requested restores substantially less than that 1.5% reduction removed and constitutes less than 00.64% of the common fund, without consideration of the common benefit conferred on the Class by PSA III. Similarly, had PSA II included rate reforms and direct CSC recognition, a higher fee differential would be reasonable to assume.

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[9] This fee award did not take into account additional amounts settled for the individual opt out tribes including the biggest putative Class member, the Navajo Nation. These additional awards were, by agreement and with the assistance of Class Counsel, negotiated after PSA I was approved and resulted in additional payments totaling some $4,000,000. Class Counsel received 11% of these payments, the same percentage applying to the Class, as additional fees. This analysis does not take into account the additional $1.2 million which might have been awarded had PSA III been included in PSA I, or the additional $870,000 which might have been added to the award if PSA II and PSA III had been combined. *See RNC v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) approving PSA I and *RNC v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) approving PSA II. This Court applied the legal principles of PSA I to the second monetary settlement covering certain years of the shortfall and DCSC claims and those principles ground this application.

The 10th Circuit benchmark fee for cases of this nature is 25%. The additional common fund fee sought here remains substantially below the 10th Circuit benchmark. Based on the reasoning and law applied by this Court in PSA I and PSA II, the fee requested is reasonable and modest.

The latest CRIS account statements show a balance as of May 30, 2008, of $918,484.12, less a registration fee of $2.84. (Of this amount, some $18,000 is earmarked for NCAI under contract to the Class.) In addition, the Class has an account with Wells Fargo Bank containing some $14,604.

By their declarations Class Counsel have applied for $17,873 in unreimbursed costs to secure this settlement. Estimated costs for mailing and publishing the Class notice and unreimbursed expert costs are $20,000. Counsel's requested fee and costs are within the amount available and not yet committed. A net surplus of approximately $15,500 will remain even if all the training contingency of $50,000 is fully expended for that purpose.[10]

Counsel's fee application is accompanied by declarations containing detailed time sheets and cost bills of counsel who worked on this case and explanations of the work performed in securing this settlement. PSA III is an extension of the first two settlements and the common funds secured through them are the proposed source of the funds to compensate the attorneys. After deducting the amount reserved for training and the expenses incurred to achieve PSA III, the

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[10] If the training contingency were fully expended, counsel would have to forego all or a portion of the second fee installment of $25,000 and recovery of at least some supplemental costs.

remaining funds in the reserve accounts are so small that allocating and paying them to class members would involve expensive distribution costs and provide only nominal benefit to Class members. The settlement achieves significant, concrete results in reforming the challenged rate-making system and in achieving adoption of a new BIA policy encompassing the third major component of ISDA contract funding, direct CSC. Additional fees are requested only for work not contemplated by or compensated through the earlier settlements. Such an award assures that the Class does not experience a windfall from counsel's uncompensated labor, and produces an equitable outcome commensurate with the benefits achieved and effort expended to achieve them.

The common fund principle and its common benefit sub-principle are recognized in this Circuit. *Rosenbaum v. MacAllister*, 64 F.3d 1439, at 1444 (10th Cir. 1995) (common benefit approach proper in determining attorney's fees in combined class action and stockholder derivative suit which produced therapeutic corporate governance measures with relatively small monetary recovery). The instant motion is based on the common fund principle because the source of payment will be the reserves still available from the first two settlements. Had PSA III occurred at the time of PSA I or PSA II the attorneys' fees awarded then would undoubtedly have been increased to account for the significant benefits of equitable relief. The motion also comes within the law of this case set forth in the Court's approvals of PSA I and PSA II, in terms of counsel's demonstrated skill in this action.

Although the exact value of the future benefits conferred upon the Class in the form appropriation increases is difficult to quantify, they are real and they are substantial. Recognition of direct CSC as a new budget category is of great value in the effort to achieve full funding of CSC, and (as noted earlier) has already produced tangible benefits for the Class in two years of appropriation increases. Increased calculations in indirect cost requirements will likely lead to additional increased appropriations in the years ahead. And, if the Class's appeal of the caps ruling succeeds, the rate reforms and DCSC policy initiated by Class Counsel will produce even higher recoveries for the Class.

In *Rosenbaum*, 64 F.3d at 1444, the court awarded attorneys' fees, even though the "quantification of benefit in this case is exceedingly difficult;" the court remanded because the benefit was difficult to value and required reevaluation based on the *Johnson* factors, *Johnson v. U.S. Dept. of HUD*, 939 F.2d 586 (8th Cir. 1991)). As said in *Farkas v. Soft Drink and Brewery Workers Local 812*, 1996 WL 578100, at 2 (S.D.N.Y. 1996), regarding inclusion in a collective bargaining agreement of a "plain, written explanation" to give members adequate information before voting to approve it: "A benefit may be 'intangible and indirect, even atmospheric' and still be substantial . . . as long as it affect[s] the enjoyment or protection of an essential right.'" Citing *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2d Cir. 1995). The benefit here is considerably more than "atmospheric".

Applying the relevant *Johnson* factors to the instant motion shows the fee application to be reasonable:

1. Time and Labor. The 2,300 hours of work performed in securing equitable relief for carryforwards and the direct CSC matters compares favorably to the 3,000+ hours required to achieve PSA I. $725,000 divided by 2,300 hours equals $315 per hour, a very reasonable sum for such a remarkable outcome achieved by the Class and Class Counsel.[11]

2. Novelty and Difficulty of the Questions Presented. The carryforwards problems were unique and unknown at the time that PSA I was negotiated and approved. They involve exceptionally esoteric accounting issues. One of them, double dipping, was not discovered until well into the negotiations which resumed after the stay was lifted in the spring of 2005. The original other-agencies-in-the-base issue decided by the Tenth Circuit was subject to a new defense based on an amendment to ISDA which the Defendants claim (and which the Class disputes) vitiates the Tenth Circuit's 1997 decision. Yet Class Counsel

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[11] These calculations do not include an additional 453 hours of Mr. Miller's time on the DCSC claim, because these additional hours were partly compensated by Mr. Miller's other clients. Likewise, Mr. Gross does not include significant uncompensated time in the *Tunica* case whose issues overlap the rate-making issues which are the subject of this settlement. If a portion of these attorneys' additional time were added the resulting hourly rate would be even lower.

were able to negotiate a settlement which systemically removes other agencies from the rate denominator and which addresses previously unrecognized carryforward practices reducing the rate numerator.

3. Preclusion of Other Employment. Once again, Class Counsel spent a significant amount of time to accomplish this settlement and were precluded to that extent in working on ordinary fee generating cases.

4. The Customary Fee and Awards in Similar Cases. In *Amalgamated Clothing v. Wal-Mart*, 54 F.3d 69, at 71 (2d Cir. 1995), a fee awarded by the district court was affirmed in a common benefits case where the only benefit was to force the employer to include a proposal in a proxy statement made by dissident shareholders, which was subsequently voted down by the stockholders, the court saying: "The percentage of shares voted against a proposal is insignificant because the right to cast an informed vote, in and of itself, is a substantial interest worthy of vindication [and] contributed to a fair process . . . Accordingly, we hold that the promotion of corporate suffrage regarding a significant policy issue confers a substantial benefit regardless of the percentage of votes cast for or against the proposal at issue." The identification of the correct amount of indirect and direct

CSC, which PSA III will facilitate and which Congress will become apprized of, is analogous to the enhancement of corporate suffrage at issue in *Wal-Mart* but significantly more beneficial since it may and likely will lead to enhanced appropriations. If the caps appeal succeeds, there will be an enhancement of damages calculable by arithmetic means. The tangible benefits of the DCSC policy have already manifested themselves.

5. Any Prearranged Fee. There was no prearranged fee with the Class. See discussion in *Ramah I*, 50 F. Supp. 2d at 1104.

6. The Experience, Reputation and Ability of the Attorneys. See discussion in *Ramah* I, at 1105. Mr. Miller joined the class counsel team after PSA I was approved. The team's qualifications are discussed *RNC v. Norton*, 250 F. Supp. 2d 1303, 1312-1313 (*Ramah II*). Mr. Miller has since won a unanimous Supreme Court decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), involving unpaid contract support costs, while Mr. Rogers and Mr. Gross have won additional cases involving indirect contract support costs as recounted in their declarations.

7. The Undesirability of the case. See *Ramah I*, at 1105.

8. Objections by the Class. (reserved)

9. Requested Reimbursement of Costs. (reserved)

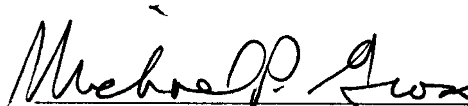
This memorandum is supported by the attached exhibits:

Exhibit 1	U.S. Department of the Interior, Bureau of Indian Affairs, Budget Justifications: Fiscal Years 2007 and 2009 (excerpts)
Exhibit 2	Declaration of Class Counsel Michael P. Gross
Exhibit 3	Declaration of Co-Class Counsel C. Bryant Rogers
Exhibit 4	Declaration of DCSC Co-Class Counsel Lloyd B. Miller
Exhibit 5	Declaration of Marcel Kerkmans
Exhibit 6	Declaration of Eric Treisman
Exhibit 7	Declaration of Dan MacMeekin

CONCLUSION

FOR THESE REASONS, Class Counsel respectfully request that the settlement be approved and that fees and costs be awarded as requested, with interest from date of award until the date of payment.

Respectfully submitted,



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June 24, 2008