

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RAMAH NAVAJO CHAPTER, et al. v. DIRK KEMPTHORNE, et al.
No. CIV 90-0957 LH/KBM

Exhibit 2

**In Support of
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**

**DECLARATION OF MARCEL KERKMANS
IN SUPPORT OF PSA III**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RAMAH NAVAJO CHAPTER,)	
and OTLALA SIOUX TRIBE, and)	
PUEBLO OF ZUNI for)	
themselves and on behalf of a)	
Class of persons similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	No. CIV 90-0957 LH/KBM
)	
)	
DIRK KEMPTHORNE, Secretary of the)	
Interior, et. al.,)	
)	
Defendants.)	
)	

Declaration of Marcel Kerkmans
In Support of
PARTIAL SETTLEMENT III

I, Marcel Kerkmans, declare as follows:

1. I have previously submitted declarations or affidavits in this matter in support of Plaintiffs and the Class.
2. I reconfirm my previous declarations and affidavits.
3. I was retained as an expert for the Plaintiff and the Class both before and after the Class was certified.
4. For many years I was the chief financial officer and later executive director of an Indian Self-Determination contractor called the Alamo Navajo School Board, Inc., located near Magdalena, New Mexico.

5. During the course of my employment at Alamo I developed expertise in indirect cost rates as they pertain to contracting under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*

6. I have prepared, submitted, and negotiated numerous indirect cost rate proposals and agreements over the course of the past 28 years and am thoroughly familiar with OMB Circular A-87 and its related circulars as well as with the contract support cost policies and practices of the Bureau of Indian Affairs and Indian Health Service.

7. I was retained by Class Counsel Gross and Co-Class Counsel Rogers to advise them during the settlement negotiations for equitable relief. I participated in most of the face-to-face negotiation sessions between March 2005 and November 2007. I conferred and consulted with Class Counsel on numerous occasions about the wording of the settlement and the various carryforward problems which had been discovered including:

- A. The "shortfall" column into which most under-recoveries were directed, removing them from consideration in the carryforward calculations, thus leaving only over-recoveries to be carried forward. These unrecoverable "shortfalls" far exceeded the amounts which stemmed from insufficiencies of appropriations.

- B. Double-dipping in which a single year's over-recovery appears in two succeeding rate cycles, first to reduce the first succeeding year's indirect cost pool and then in the second succeeding year by deduction from the indirect costs "incurred" column. The effect of this practice is to pay back the Government twice for a single year's over-recovery, by reducing the contract price for indirect contract support costs in two succeeding years instead of just one.
- C. Counting diverted program or tribal funds as indirect costs "collected." This practice penalized Class members by showing more recovery of indirect costs than actually occurred, thus reducing under-recoveries or increasing over-recoveries, with rate-reducing consequences.

8. The settlement will significantly eliminate or alleviate these problems. By eliminating the "shortfall" column and substituting an "under-funded/over-funded" column or columns, the true extent of shortfalls of contract support costs will be visible to every contractor. Only variances between estimated indirect costs and actual indirect costs incurred will be carried forward, subject to the limitations on over-recovery carry forwards imposed by 25 U.S.C. § 450j-1(d) which bars theoretical over-recoveries. This limitation comes into play when the amount recorded as indirect cost incurred is less than the rate times base amount and where the amount

recovered in CSC funds is less than the rate times base amount, but greater than the indirect cost incurred amount. Payment-based shortfalls or over-funded amounts and under-funded amounts not otherwise carried forward to increase or decrease a future year's fixed with carry forward rate may be addressed by the contractor or the government through existing legal remedies and defenses.

9. I have also worked extensively with Class Counsel and the government's accountants at the National Business Center in developing the new special rates templates proposed in PSA-III. The Special Rates for ISDA and non-ISDA programs will meet the technical requirements in the Tenth Circuit's decision, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), which I have read, by creating stand-alone ISDA rates containing no other agencies in the base.

10. At Alamo, I was successful in securing hybrid rates for ISDA programs and non-ISDA programs which included in the ISDA rates certain pool expenses which benefited the ISDA programs disproportionately while still retaining their character as indirect costs. The effect was to boost the ISDA rates slightly and reduce the non-ISDA rate slightly, boosting recoveries for the Alamo corporation. The settlement (PSA III) allows for similar shifting of pool costs where justified.

11. I have read the declarations of Michael P. Gross and C. Bryant Rogers in support of PSA III. I am in agreement with their analyses and conclusions

that PSA III contains significant beneficial rate-making improvements for Indian tribal self-determination contractors.

12. These improvements will increase ISDA rates over time by diminishing the adverse effects of double dipping of over but not under-recoveries and removing diverted program or tribal funds from the carry forward "collected/recovered" column.

13. The Special Rates will also allow for off-setting the over and under-recoveries in the carry forward system for non-ISDA programs. This will help mitigate the effects of non-indirect cost paying programs in the base. Special rates will also permit those indirect costs which disproportionately benefit the ISDA programs to be reallocated from the non-ISDA rate pool to the special ISDA rate pool or pools. Such reallocations of indirect costs will increase the ISDA rates and decrease the non-ISDA rates.

14. Although the Class did not achieve all the improvements it sought, the ones included in PSA III will significantly benefit contracting tribes and remove significant adverse adjustments from the present system.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: 6/21/08


Marcel Kerkmans