

**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 4**

**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 CLASS CO-COUNSEL C. BRYANT ROGERS  
IN SUPPORT OF PSA III AND MOTION FOR ATTORNEYS FEES**

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

<b>RAMAH NAVAJO CHAPTER,</b>	)	
and <b>OGLELA SIOUX TRIBE,</b>	)	
and <b>PUEBLO OF ZUNI,</b>	)	
for themselves and on behalf of a	)	
class of persons similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
<b>vs.</b>	)	No. CIV 90-0957 LH/WWD
	)	
<b>DIRK A. KEMPTHORNE,</b> Secretary	)	
of the United States Department of	)	
Interior, et. al.,	)	
	)	
Defendants.	)	

**AFFIDAVIT OF C. BRYANT ROGERS IN SUPPORT OF  
THIRD PARTIAL SETTLEMENT AGREEMENT AND  
APPLICATION FOR ATTORNEYS FEES AND COSTS**

STATE OF NEW MEXICO	)	
	): ss.	
COUNTY OF SANTA FE	)	

I, CARL BRYANT ROGERS, being first duly sworn, depose and state:

1. I am co-counsel for plaintiffs and the plaintiff class in the above styled matter. I am submitting this affidavit in support of the proposed Third Partial Settlement Agreement Settling All Claims for Equitable Relief (“PSA-III”); and, in support of Class Counsels’ application for fees and costs to be paid from the common funds previously created pursuant to the parties’ first and second partial settlement agreements, the balance of which funds is now held in the reserve accounts presently maintained in the CRIS System from PSA-I as sub-account 1:90-CV-0957-02 (\$606,213.19) as of May 28, 2008,

and from PSA-II in sub-account 1:90-CV-0957-09 (\$294,329.96) as of May 28, 2008 and Wells Fargo Account No. 135-2220320 from PSA-II as of May 31, 2008.

2. This Affidavit supplements and incorporates by reference my Affidavit of October 10, 1998 (Docket No. 205) filed as an attachment to class counsels' Motion for Fees and Costs in connection with the first Partial Settlement Agreement in September 1998, approved by this Court in 1999 (Docket No. 284), reported at 50 F.Supp.2d 1092, and my Affidavit of September 26, 2002 (Docket No. 694) filed as an attachment to class counsels' Motion for Fees and Costs in connection with the second Partial Settlement Agreement in September 30, 2002, approved by this Court in December 6, 2002 (Docket No. 731), reported at 250 F.Supp.2d 1303 (D. N.M. 2003), hence does not repeat most of the background information set out there on me and my practice, except as subsequent events warrant revision of that information:

A. I am a graduate of the Harvard Law School where I received my J.D., cum laude, in 1977.

B. I am a member in good standing of the state bars of New Mexico and Mississippi and am admitted to practice before the United States Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth Circuits, and the District of Columbia and Federal Circuits and the U.S. Supreme Court. I am president of the Mississippi Choctaw Bar Association.

C. I have an AV rating from Martindale-Hubbell and our firm, VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP, is also listed in the Martindale-

Hubbell Bar Register of Preeminent Lawyers for our firm's expertise in the area of Civil Trial Practice.

D. I am a New Mexico Board of Legal Specialization Certified Specialist in Federal Indian Law. I received that certification in early 2005, shortly after this specialization was established by the State Bar in 2004. I was appointed to serve on the Federal Indian Law Specialty Committee for the State Bar of New Mexico on October 21, 2006 and was named Chairman of the Committee on October 24, 2007.

E. My present hourly rate for new tribal clients for said hourly work is \$225.00 per hour, but our firm does still represent some of our older tribal clients for lesser rates. I have deliberately kept my hourly rates at below market levels.

F. I am the principal author of "Tribal Law", Chap. 72, Vol. 8, Encyclopedia of Mississippi Law, pp. 371-416 (West Group 2001).

3. During the period in which this Third Partial Settlement Agreement was negotiated, I have also been serving as general or special counsel to various Indian tribes and tribal organizations and handling Indian law litigation in various federal, state and tribal forums. Since 1998 I have had primary responsibility for formulating the Class's various offers to the Defendants as regards equitable relief to address the "Calculation Claim," including drafting all prior equitable relief orders and the various methodologies approved in those orders; and, for analysis of the problems with Interior's carry forward methodology and the impact of that methodology and those problems on the various alternative approaches developed for addressing the "Calculation Claim" and those carry

forward problems, and the solutions negotiated for mitigating or eliminating those problems.

4. Prior to entry of PSA-I, Class Counsel Michael P. Gross and the undersigned as Co-Class Counsel agreed in a Stipulation of the Parties filed May 13, 1999 (Docket No. 283) that we were “obligated to continue representation of the Class on the following issues or matters to completion without additional fee: . . . 3. To seek prospective declaratory or injunctive relief to conform the Defendants’ indirect cost system to the law of this case.” (Emphasis added).

5. The “law of this case” referenced in that Stipulation referred to the law establishing that there was a defect in Defendants’ indirect cost rate system as found by the Tenth United States Circuit Court of Appeals in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997).

6. Kevin Gover, Assistant Secretary-Indian Affairs, acknowledged Interior’s duty to comply with the *Lujan* decision in a letter to all tribal leaders dated April 1, 1998. In that letter Assistant Secretary Gover informed the tribes that “As you know, under the Indian Self-Determination and Education Assistance Act (“ISDEA”), the BIA is required to pay contract support costs to tribes that contract under the Act. In *Ramah [Navajo Chapter v. Lujan]* the Court directed the BIA to change the methodology currently used to calculate contract support costs under the ISDEA for FY 99 and beyond.” (Insert added). For the reasons set out in this Affidavit, it has taken almost a decade to reach agreement with Defendants on what changes to that methodology should be made as are now proposed in PSA-III.

7. The Tenth Circuit's decision in *Lujan* addressed what is referred to in the proposed PSA-III as the "Calculation Claim." That claim was defined in PSA-I, Section 3.a.i. as follows:

"Plaintiff's Cause of Action" is the Plaintiffs' claim stated in the First Amended Complaint filed January 2, 1991. The claim sought monetary and equitable relief based on shortfalls in payment of indirect costs associated with contracts entered into under the [ISDA] arising from Defendants' use of a method based on OASC-10 and [Office of Management and Budget] Circular A-87 for determining indirect cost rates or their equivalent and payments thereon which: (a) include funding provided by Other Federal Agencies in the direct cost base (b) resulting in lower indirect cost rate which was then (c) applied only to the BIA's portion of the direct cost base resulting in (d) determination of BIA contract support (indirect cost) entitlements which were lower in amount than required by [ISDA] because (e) Other Federal Agencies did not fully pay, and were known not to fully pay, supplemental indirect costs (f) which caused lower contract support (indirect cost) recoveries to the Class. [Inserts added]

8. After this Court's approval of PSA-I on May 14, 1999 (Docket 284), as amended on May 25, 1999 (Docket 287), the parties commenced formal negotiations on various approaches for modifying Defendants' indirect cost rate system so it would conform to the law of this case as established in *Lujan*.

9. The parties' initial efforts to reach agreement on a way to modify Defendants' indirect cost rate system to bring it into conformity with *Lujan* were reflected in this Court's Order of September 21, 1999: Stipulated Order Regarding Equitable Relief (Docket 336). That Order authorized and required the calculation of what is referred to as a "demonstrative" rate which was intended to provide data on what impact there would be on indirect cost rates used for BIA ISDA programs if those rates were calculated by simply removing all non-paying federal funds from the base used in

the indirect cost rate calculation. Those rates were calculated and the data generated was used to further negotiations of the parties in their attempts to resolve this issue.

10. On November 29, 1999 (Pub. L. 106-113) the Congress enacted Section 114 of the Interior Appropriations Act for FY 2000. That provision was subsequently reenacted under various section numbers within later Interior Appropriations Acts and finally codified at 25 U.S.C. § 450j-3. From very early on and into the present Plaintiffs and Defendants have adopted fundamentally different interpretations as to the legal impact of that legislation on the continuing effect of the rulings in *Lujan* and whether that legislation eliminated or superseded any remaining “law of the case” effect from *Lujan*. See, the different views of the parties on this issue as set out in the “Parties Joint Submission on Remaining Issues” filed October 23, 2007 (Docket 1053). The parties’ different views on this issue significantly complicated the efforts to reach agreement on comprehensive equitable relief in this case.

11. Subsequently, after November 1999, the parties continued their efforts to reach agreement on modifying Defendants’ indirect rate cost system and to bridge their differences in regard to the impact of the above-referenced Appropriations Acts provisions later codified at 25 U.S.C. § 450j-3 and to fashion equitable relief respecting the Calculation Claim consistent with those provisions.

12. In formulating the Class position on this issue, Class Counsel relied in part on the National Congress of American Indians—National Policy Work Group on Contract Support Costs—Final Report (July 1999). That report concluded that the referenced statutory language did not eliminate Interior’s duty to modify their indirect

cost system to conform to the *Lujan* decision. *See*, excerpts from that Report addressing that issue attached hereto as Exhibit A.

13. The parties reported to the Court on their progress in seeking to bridge their differences on that issue and the difficulties they were addressing in the equitable relief negotiations at a hearing of August 1, 2000. An excerpt from the transcript of that hearing (pages 17-24) is attached to this Affidavit as Exhibit B. That excerpt sets out the undersigned's explanation to the Court of the Class position as to the effect of that legislation on the equitable relief negotiations and the Government's continuing duty to modify the system to conform to the *Lujan* decision. However, on reviewing that transcript it is clear that the undersigned counsel mistakenly referred to § 314 (instead of § 114) in referencing that provision.

14. During Calendar Year 2000 the Office of Inspector General, DOI ("OIG"), then the rate setting office for Interior for all ISDA contractors for which Interior was the Cognizant Audit Agency, took action to respond to a report of the GAO of June 1999 which recommended that OIG adopt a single method for calculating carry forward adjustments in connection with fixed with carry forward cost indirect rates and apply it nationwide. "Fixed With Carry Forward Rates" are defined at PSA-III, page 6, as follows:

A "Fixed With Carryforward Rate" as used herein means an indirect cost rate that is based on an estimate of costs for a future period and is not subject to revision during the period of time covered by the rate. The Fixed With Carryforward Rate embodies a "carryforward" in that the contractor is required to report the amount needed to reconcile the difference between the costs estimated for the time covered by the rate for a previous period (usually two years prior) and the actual costs that were

incurred for that period. The carryforward computation increases or decreases the new period's indirect cost pool and, thus, the rate for that new period to reflect the contractor's under-recovery or over-recovery of indirect costs for the previous period. The carryforward template for this kind of rate for ISDA contractors, as presently used by Defendants, uses actual expenditures, estimated (recoverable) and actual recoveries of indirect costs in the computation of a carryforward amount.

15. Prior to that 1999 GAO report, OIG had evolved two different ways of handling carry forward adjustments for such rates referred to as the Eastern method and the Western method. In general terms, the Western method (applicable to all ISDA contractors west of the Mississippi) was more beneficial to ISDA contractors than the Eastern method. This is because under the Western method under-recovery and over-recovery carry forwards could be netted out to reduce or eliminate any net over-recovery carry forward adjustment (which would give rise to a smaller future year's indirect cost rate reduction) or to produce a net under-recovery (which would give rise to a larger future year's indirect cost rate) than would otherwise be produced by the Eastern method. The Eastern method did not allow such offsetting.

16. Following the GAO report, OIG ceased negotiating indirect cost rates for ISDA contractors until it could resolve how to handle the conversion from the Western to the Eastern method, and while it explored how to proceed on making changes in OIG's indirect cost calculation methodology could be modified as required by the *Lujan* decision. This also prevented completion of "fixed with carry forward rate adjustments" for existing fixed with carry forward rates previously negotiated. Because Interior was in litigation in this Class action as regards the defect in the way Interior was calculating indirect cost rates as addressed in *Lujan*, and Class Counsel objected to Interior making

unilateral changes in that system while this litigation was ongoing, Interior sought leave of this Court to apply the Eastern method to all ISDA contractors. To help reduce the enormous difficulties caused by the inability of ISDA contractors to secure new rates during this period, the parties agreed upon (and this Court approved) a second stipulated order of October 5, 2000: Stipulated Order Regarding Equitable Relief (Docket 475). This Order did not approve any aspect of the Eastern method, but allowed OIG to proceed to use it in the interim until a final order on equitable relief could be entered in this action, while leaving unresolved how OIG was going to otherwise change its methodology to comply with *Lujan*.

17. During 1999 and 2000 the parties were also working diligently on a “benchmarking” approach to modifying the Defendants’ method for calculating indirect cost intended to address the defects in that system identified in the *Lujan* decision. The parties’ reported on their progress in this regard at a hearing of January 16, 2001. An excerpt from that transcript (pages 11-18) is appended hereto as Exhibit C. The proposed benchmarking solution only addressed the “Calculation Claim” and did not in any way address or alter any of Interior’s carry forward calculation practices, which had not theretofore been addressed in this action. Under the benchmarking approach each BIA ISDA contractor was to receive two indirect cost rates. One for BIA ISDA programs and one for all other programs under the benchmarking approach. BIA ISDA contractors which did not receive full funding from other federal agencies to pay their fair share of indirect cost expenditures would receive an increase in their BIA only rate sufficient to ensure that the rate would generate sufficient indirect cost funds which (if paid) would

cover the true cost to operate those BIA ISDA programs. The calculation of that adjustment was to be handled via an Excel program approved by the Court.

18. Based on the parties' presentations at that hearing, the Court approved entry of an Order Approving the Joint Motion for Preliminary Approval of Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology and Order that Notice be Sent to the Class (Filed January 16, 2001) (Docket 502) and an Amended Order Approving the Joint Motion for Preliminary Approval of Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology and Order that Notice be Sent to the Class (Filed January 16, 2001) (Docket 507). Those Orders approved use of the proposed benchmarking approach—set out in detail in Appendices to those Orders—for a trial period of two years following notice to the Class and an opportunity for objections. No objections were filed.

19. After implementation of the January 16, 2001 Amended Order, a number of complications arose as regards (a) OIG's rate calculations, (b) the impact of the conversion of all ISDA contractors to the Eastern method of calculating indirect costs and (c) lingering ambiguities as regards for which fiscal years the benchmarking approach would be implemented. The Court addressed those issues and clarified the dates for implementation of the January 16, 2001 Orders as set forth in an order of June 1, 2001: Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology (Docket 557). Among other things, this Order required Class Counsel to secure an independent accounting analysis of the effect of the benchmarking approach and report to the Court on whether the rates generated by that approach would accurately identify the

indirect cost requirements for operation of BIA's ISDA contracts. That study was supposed to be completed after the benchmarking rates had been in effect for two years. However, in practice, this really required that a four (4) year period elapse for those contractors using "fixed with carry forward rates" because the carry forward adjustments for such rates are not calculated until two years after the initial rate period based on audits of the contractor's operations for those periods.

20. Many of the problems which the parties had attempted to solve through the June 1, 2001 Order continued to manifest themselves in different ways which gave rise to this Court's Order of August 5, 2002: Second Stipulated Order to Implement Benchmarking Methodology (Docket 666).

21. At a hearing of September 9, 2002, the parties subsequently reported to the Court on the status of the benchmarking approach and the various difficulties encountered in carrying out the prior orders of the Court. The adverse impact that various aspects of Interior's carry forward adjustment process were having on the parties' efforts to secure equitable relief to address the Calculation Claim were first called to the Court's attention at this hearing. An excerpt from the transcript of that hearing (pages 34-38) is attached hereto as Exhibit D. At that hearing Plaintiffs apprised the Court of these difficulties and pointed out (at pages 36-38) *inter alia*:

MR. ROGERS: As we've moved forward [in implementing the benchmarking approach] . . .we found . . . And there are templates and formulas in this website that govern how OIG implements the carry forward calculation process. We reached agreement with the government on changes to a number of those steps. They have not completed their work to implement those yet, but we do expect them, that they will do so. And then we're going to be scheduling another session to try to address a

number of other parts of the process that we didn't reach agreement on but that we discussed and we made some progress on.

We can't initiate the study that's required by the benchmarking order until we do more on the carry forwards because what happens in the carry forward process more or less swamps or dwarfs what happens in the benchmarking calculation. And that's all I want to say about it. We have to figure out a way to tease out of the process what it is we're trying to measure on the Court's Order.

\* \* \* \*

MS. RICHARDSON: Well, just a few words. We are – we have the benchmarking order in place. And plaintiffs have raised new issues that we don't know are part of this lawsuit. But in the air of working together, we're willing to hear them out.

So we have differences of opinion about what is part of this case and what isn't, but we're certainly willing to work with them to try to get the benchmarking order in place and effective for the next two years as it was originally intended to be. We're still working on it, in other words. (Insert Added) (Emphasis added).

22. Following the hearing of September 8, 2002, the undersigned counsel undertook to summarize what Class Counsel and the Class experts had learned about the various carry forward defects identified in the course of the parties' efforts to reach agreement on an equitable relief order addressing the methodological defects which underlie the Calculation Claim ruled upon in *Lujan*. Interior's current template for calculating carry forward adjustments for future years' indirect cost rates is the same as the version we analyzed in 2002. A copy of that template is attached as Exhibit E. That is the same template as is attached as Exhibit 1 to Appendix B to PSA-III and is (substantively) the same as the Exhibit 1 template (type-marked Exhibit 3 on the original) attached to and referenced in the Exhibit F analysis referenced *infra*.

23. An overview of the undersigned's November 2002 analysis of those problems as they were then understood is attached hereto as Exhibit F. Among other things, that analysis traced the origin of the current carry forward problems to various Interior actions taken in 1990 (and reflected in various Interior memoranda) in an effort to modify OIG's carry forward templates to bring them into conformity with new requirements imposed on Interior by the 1988 Amendment to the ISDA, codified at 25 U.S.C. § 450j-1(d). The key problem as regards carry forwards identified in the November 2002 analysis is the problem caused by addition of a "shortfall" column to Interior's carry forward template and the formula instructions which relegate to that column large portions of unfunded indirect cost expenditures which are then not used to generate under-recovery carry forward adjustments. This prevents ISDA contractors from receiving a future year's rate increase by which they can partially recoup those under-recoveries. The Interior rationale often given for this instruction was that the "shortfall" column was necessary to prevent under-recovery carry forwards from ballooning the rates because of chronic insufficiencies in CSC appropriations (which some in the government thought would present a political problem). However, as shown in the Exhibit F analysis, there is no logical relationship or correlation between the extent of annual shortfalls in CSC appropriations and the dollar amount entered in the shortfall column based on Interior's Excel template instructions. The practical financial problem this column has caused for the tribes is that they are routinely suffering rate reductions from over-recovery carry forwards but are benefiting from rate increases from under-recovery carry forwards to a much smaller extent than warranted by any objective

comparison of their actual allowable indirect cost expenditures *versus* the actual indirect cost funding they have received from Interior.

24. Under the present system, the only under-recovery carry forwards BIA ISDA contractors are able to benefit from to secure an increased rate occur in circumstances where the IDC incurred amount shown on the template for BIA ISDA programs (e.g. \$200,000) exceeds both the rate times base amount (e.g. \$150,000) and the recovered collected amount (e.g. \$120,000). In that circumstance, the difference between the incurred amount (\$200,000) and the lower rate times base amount (\$150,000) is carried forward to generate a \$50,000 under-recovery, but the often much larger difference between the incurred amount and the recovered amount (here \$80,000 or a net additional \$30,000 over and above the \$50,000) is shunted into the shortfall column from which it never emerges to cause a positive rate adjustment.

25. The November 2002 analysis (Exhibit F) showed that there was no logical relationship between the dollar amount entered in the shortfall column and the size of the shortfall in Congressional Appropriations for indirect costs in a given year. The present carry forward template simply pretends (in calculating carry forward adjustments) that ISDA contractors actually received from Interior their “rate X base amount” any time that amount is lower than the “indirect cost incurred” amount, but higher than the “indirect cost recovered/collected” amount entered on the template. Yet, it is plain in those circumstances that the contractor did not in fact receive sufficient CSC funds from Interior to cover the actual allowable indirect cost needed (as evidenced by their audits) to operate their BIA ISDA programs for that year. At the same time, the computer

instructions for Interior's existing carry forward template make sure that all actual (but not theoretical) over-recoveries are carried forward to reduce ISDA contractor's future indirect cost rates, even when the amounts entered in the recovered/collected column do not evidence true Interior over-payments of indirect cost to the contractor.

26. The balance of the November 2002 analysis focused on problems encountered in implementing the benchmarking methodology for addressing the Calculation claim defect and integrating that methodology with Interior's carry forward methodology; and, identified a number of severe defects in OIG's October 2002 "benchmarked" carry forward template. (Exhibit 3 to the Exhibit F analysis).

27. Class Counsel concluded for the reasons shown in the undersigned's November 2002 analysis that the treatment of shortfalls and under-recovery calculations in Interior's carry forward template formula (the adverse impact of which was expanded to all ISDA contractors after the 1999 GAO report and the nationwide conversion to OIG's more restrictive Eastern method in 2000), is itself violative of the ISDA.

28. On January 1, 2003 the National Business Center, DOI, ("NBC") assumed Interior's rate making functions which had previously been handled by OIG. That transition and other difficulties associated with the benchmarking experiment and the impact of the carry forwards gave rise to this Court's Order of June 11, 2003: Third Stipulated Order to Implement Benchmarking Methodology (Docket 787). This Order more explicitly addressed the parties' difficulties in completing the benchmarking experiment in light of Interior's carry forward process. That Order *inter alia* and barred Interior from using OIG's flawed October 2002 benchmarked carry forward template.

29. In the course of the parties' efforts to reach agreement on an equitable relief solution for addressing the "calculation claim" from 1999 through 2003, during which period PSA-II was also negotiated and approved by the Court, it ultimately became clear to Class Counsel that no meaningful equitable relief addressing the methodological defects giving rise to the Calculation Claim as ruled by the Tenth Circuit in *Lujan* could be achieved without also securing major changes to the carry forward calculation methodology used by Interior; and, that the ultimate impact of the equitable relief obtained and how that equitable relief should be approached would also impact (and be impacted by) the final resolution of the CAPs issues respecting the remaining money damage claims in the case. Subsequently, the effort to reach agreement on equitable relief was put on hold pending the outcome of the Cherokee Nation's indirect cost claims as to which the U.S. Supreme Court had granted *certiorari* on March 22, 2004. The Cherokee Nation case involved indirect cost claims for non-CAP years based on ISDA contracts regarding Indian Health Service functions. The U.S. Supreme Court's ruling for the Tribe in that case is reported at *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Co-Class Counsel Lloyd Miller handled that case. An *amicus* brief setting out the views of the *Ramah* Class was also filed with the U.S. Supreme Court by Class Counsel Michael P. Gross and the undersigned.

30. The parties then refocused on obtaining a ruling from this Court on the parties' pending motions for summary judgment on the CAPs defense after *Cherokee Nation*. This Court's ruling for Defendants and against the Class on those motions was entered August 31, 2006 (Docket 1042). The Court also directed (in that ruling) that "the

parties are hereby instructed to inform the Court, in writing, within fifteen (15) days, whether or not any issues remain in this matter that require the further attention of the Court, prior to entry of final judgment.”

31. That order gave rise to the negotiation and submission of the parties’ statements of their respective views on those remaining issues as set out in the “Parties Joint Submissions on Remaining Issues” (Docket 1053) filed October 23, 2006. That submission summarized the parties’ positions on equitable relief as follows:

I. There remain issues of equitable relief to be resolved:

A. The Plaintiffs contend that Defendants remain obliged to change their indirect cost rate methodology (including such changes in Defendants’ carry forward rate adjustment procedure) as may be required to bring that methodology into compliance with the mandate of *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997) and the law of this case.

B. Defendants contend that several issues must be resolved to determine if plaintiffs are entitled to the relief they seek including, but not limited to:

1. Whether 25 U.S.C. §450j-3 (originally enacted in 1998) would, as a matter of law, preclude the Court from granting Plaintiffs the equitable relief they seek (modifications to the indirect cost rate methodology, including carry forward adjustments); and

2. Whether, given the Court’s recent decision relating to the appropriations caps (Order dated August 31, 2006), a conflict exists between class members rendering inappropriate any class treatment of the plaintiffs’ claim challenging NBC’s indirect cost rate methodology; and

3. Whether an Order requiring changes to the current indirect cost rate methodology is inappropriate and unwarranted given defendants’ contention that

contracting tribes are already authorized under the Indian Self-Determination Act, 25 U.S.C. §450 *et seq.* (“ISDA”) to elect an alternative multiple rate system that would allow Plaintiffs to isolate and fully capture the costs incurred in running only BIA programs.

II. The Plaintiffs contend that the Court should enter a declaratory judgment that the ISDA requires the defendants to pay direct contract support costs to ISDA contractors, subject to the availability of appropriations. Defendants contend that because the Bureau of Indian Affairs has adopted a policy requiring the payment of direct contract support costs, there no longer exists a live controversy for the Court to resolve.

32. Based on the above, the parties then intensified their efforts to seek an agreed resolution of the remaining equitable relief issues. Ultimately, in part because of the severe difficulties encountered in attempting to integrate the benchmarking methodology with the carry forward process and the inability to secure the study called for in the June 1, 2001 Order (Docket 557), the Government refused to continue with benchmarking and a different approach for addressing/correcting the “Calculation Claim” defect per *Lujan* had to be developed. That new approach (developed in 2006-2007) is the “Special Rates” option addressed in Appendix A to PSA-III. That option also includes a number of changes to Interior’s carry forward methodology which will also be extended to benefit those tribes which opt to continue use of a single rate template. Indeed, those carried forward changes have now been engrafted into a broader definition of the Calculation Claim for purposes of this settlement. That definition appears at PSA-III, p. 5, as follows:

1. Calculation Claim

The “Calculation Claim, refers to any asserted or unasserted claim for relief in connection with an ISDA contract awarded by the Secretary of the Interior, as defined in Section 3.a.i. of PSA I, but for purposes of this PSA III, also includes any asserted or unasserted claims challenging NBC’s or DOI Office of Inspector General’s carryforward templates, policies, and practices previously in effect or in effect as of the date of this PSA III. PSA-I Section 3.a.i. provides as follows: [*See*, quote at ¶ 7 of this Affidavit]. (Emphasis added).

33. One of the anomalies encountered by the parties in negotiating equitable relief as reflected in PSA-III—and which significantly complicated that effort—was the fact that while during the past two decades there has been a chronic shortage in appropriations to cover the true indirect cost needs of ISDA contractors, many contractors continued to incur over-recoveries and over-recovery carry forward adjustments, reducing their future years’ indirect rates based on the government’s carry forward templates. This is an anomaly because the Class as a whole is under-funded for indirect costs , yet large numbers of individual Class members continued to suffer over-recovery carry forward adjustments (reducing their future rates) in circumstances where the amount recorded as “recovered” or “collected” for indirect cost exceeded the amount recorded as “incurred” for allowable indirect cost expenditures during a given year. After detailed analysis, a number of factors were identified which contribute to this problem.

34. One of those factors is that even though the government’s carry forward template (Exhibit E) has a column which purports to show the amount of allowable indirect cost “incurred” based on the ISDA contractor’s audit for a given period, in reality that number does not reflect an actual audited accounting of actual indirect cost expenditures incurred to support a contractor’s BIA ISDA programs. The indirect cost

incurred amount referenced above is identified on the Exhibit E template under column D as “Indirect Cost Pool” amount. That number, however, is the result of a percentage allocation of total allowable indirect cost pool expenditures allocated among the different programs in the indirect cost base (the denominator of the fraction used to calculate an indirect cost rate) in accordance with the percentage that each contract or grant program constitutes of that base (based on audited expenditures) , using an allocation methodology authorized by OMB Circular A-87, 2 C.F.R. Part 225.

35. The percentage composition of the base made up of the various programs (including BIA ISDA contracts) estimated at the time the rate proposal is submitted will typically vary from the total of direct costs actually incurred for the various programs in the base during the year in which the rate is applied. That direct cost mix will typically vary from the estimated expenditures for those programs used to calculate the rate in advance both in amount spent per program and as to what programs are actually operated. This changes the actual percentage each program later turns out to constitute of that base as measured using the actual audited expenditures for those various programs during the year in question; and, therefore changes the number imputed for the BIA ISDA contracts’ share of those pool expenditures (the estimated pool expenditures constitute the numerator of the fraction used to calculate an indirect cost rate). Changes in these variables can cause that imputed number to vary dramatically based on factors that have nothing to do with the allowability or amount of the actual allowable administrative cost expenditures made to support those BIA ISDA contracts.

36. For example, in a year when a tribe actually incurred audited allowable indirect costs of \$200,000 to operate its BIA ISDA programs, the percentage reallocation of the total pool expenditures (total indirect cost incurred) could result in e.g. only \$180,000 being entered as indirect cost incurred to operate those programs on the carry forward template.

37. Also, as Class Counsel later learned (*see*, ¶ 44 *infra*), the total indirect cost pool expenditures entered on the carry forward template before that allocation is calculated is itself altered on the carry forward template before the allocation percentage adjustment is applied by deducting the prior period over-recoveries (or adding under-recoveries) to that total. This will reduce (or increase) the amounts allocated to each program as reflected on the template. Thus, in a year in which an ISDA contractor actually incurred \$200,000 in audited allowable indirect costs to operate BIA ISDA programs, this adjustment may further reduce the amount entered in the indirect cost incurred column. For instance, if only \$180,000 of the \$200,000 in actual indirect cost incurred would otherwise have been allocated to the incurred column on the carry forward template based on the percentage allocation procedure addressed in the preceding paragraph, that \$180,000 may be further reduced e.g. by another \$50,000 based on an over-recovery carry forward from two years prior. If that over-recovery carry forward was \$100,000, spread over all the programs in the base in accordance with the same percentage allocations and if the BIA programs constituted 50% of the base, one-half of that \$100,000 carry forward adjustment would be allocated to the BIA ISDA programs. So, even though the tribe actually incurred \$200,000 in allowable (audited)

indirect costs to support its BIA ISDA contracts, the number that is entered in the indirect cost incurred column for purposes of calculating the future years' carry forward adjustment will (in this example) actually be \$130,000. ( $\$200,000 - \$20,000 = \$180,000$ ;  $\$180,000 - \$50,000 = \$130,000$ ).

38. This problem is then often exacerbated by what numbers are recorded in the "indirect cost recovered" or "collected" ("collections") column on the carry forward template. Historically, most tribes have recorded in the indirect cost recovered column the total amount of BIA ISDA funds (and sometimes tribal funds) that they actually spent to pay their allowable indirect costs. This would include the amount awarded by BIA to cover indirect costs (indirect CSC), as well as BIA ISDA program money (which the tribes are allowed to use to cover shortfalls in CSC funding) used to cover those CSC shortfalls. Sometimes tribal money is used to cover those shortfalls. Typically, unless told otherwise, most auditors will identify all BIA ISDA contract funds actually expended to cover CSC expenditures as CSC funds received or collected and that amount is then entered in the indirect cost recovered/collected column on Interior's carry forward template.

39. (a) If the amount entered in the recovered/collected column matches the total actually expended to pay for allowable indirect costs per the audit, which in this example was \$200,000, but if \$35,000 of that was actually paid with ISDA program money or tribal money, nonetheless that \$200,000 recovered/collected amount is then compared to the dollar amount entered in the IDC incurred column (in this example \$130,000 instead of \$200,000) as required by the template. This makes it appear that the

tribe “collected” \$200,000 in indirect costs (of which only \$165,000 was actually a CSC award), and the template will then compare that \$200,000 “collected” amount to the reduced entry for the incurred amount (\$130,000). That comparison will then show an apparent overpayment difference of \$70,000 which under Interior’s existing template will then be carried forward as an over-recovery carry forward to reduce the tribe’s future year’s rate even though the tribe actually received \$35,000 less in CSC funds from Interior to pay for the \$200,000 in audited, allowable indirect costs which it actually incurred to operate its BIA ISDA programs.

(b) Moreover, many BIA ISDA contractors (at the beginning of their contract years) routinely charge their BIA ISDA contracts for the full amount of indirect cost expenditures they anticipate will be needed to operate their BIA ISDA programs that year, even though that amount is greater than their indirect CSC award. If it later turns out that they needed less indirect costs than originally held back for that purpose, they should (but often do not) rebook those unexpended funds to their programs. Those funds can then be carried over and spent during the next contract year. If, however, they neglect to rebook those funds. Their auditors will typically reflect those funds as showing that full amount as indirect cost fund recovered from BIA for that period. The ISDA contractor will thereafter enter the full amount originally recorded for indirect in the IDC recovered or collected column on the carry forward template (thinking this is required by NBC), even though a lesser amount was actually spent to pay for allowable indirect costs for that period. This will generate exactly the same kind of over-recovery carry forward adjustment as addressed above, even though the amount entered in that column was

neither recovered nor spent for indirect costs. This can also give rise to a bill of collection where the contractor neglects to document the carry over and expenditure of these funds in the next contract year. It is anticipated that the training session called for in PSA-III will facilitate a reduction in the occurrence of these kinds of self-induced over-recovery carry forward adjustments.

40. The adverse impact on ISDA contractors' indirect cost rates resulting from these features of the existing carry forward template is further exacerbated by the inability (under that template) of ISDA contractors to receive appropriate under-recovery carry forward adjustments (or to offset under-recoveries against over-recoveries) which, over time or for a given rate period, would otherwise tend to mitigate that adverse impact.

41. The several problems with Interior's carry forward process addressed above have caused (and continue to cause) the Class great difficulty. Proposed changes in PSA-III improve the situation in a number of ways. The first change which PSA-III would achieve is to make clear that ISDA contractors are not required to record in the indirect cost "recovered" or "collected" ("collections") column on the carry forward template anything except actual CSC awards; and, in a year in which they actually do recover more CSC funds than they need to cover the indirect cost reflected as incurred on the carry forward template, they may further reduce that number by not recording in the CSC recovered or collected column any CSC funds which were actually used (or which can be charged to cover) any unfunded Direct Contract Support Cost ("DCSC") expenditures incurred to operate BIA ISDA contracts where those DCSC costs were incurred and were (or would otherwise have been) charged against the ISDA program funds or paid with

tribal funds. Instead, these DCSC expenditures can be charged against the excess CSC award, thereby further reducing the amount the ISDA contractor is required to enter into the carry forward IDC recovered column. This factor will reduce or eliminate over-recoveries that might otherwise occur. This is one of the major benefits of the settlement. The ISDA contractors' right to make these adjustments is set out in footnote 4 on pages 4 and 6 of Exhibits 1 and 2 to Appendix A and on Exhibit 1 to Appendix B, as follows:

4/The amount of "Indirect Cost Collection" need not include direct funds (including direct program funds. Direct CSC, or indirect CSC funds lawfully redirected to pay for unfunded direct CSC) private funds, or tribal funds diverted to pay indirect costs in the pool, provided that the amount listed is consistent with the tribal contractors' audited financial statements or post-audit statements. Pursuant to Section III.B.1(a) and (b) of PSA III.

42. To take full advantage of this feature (and other features) of the settlement will require that ISDA contractors work closely with their auditors to ensure that their audit reports contain accurate financial information documenting the sources of funds used to pay for the allowable indirect costs (and DCSC) incurred and how the funds awarded for CSC per BIA ISDA contracts were expended. This will require some effort by the ISDA contractors to ensure that their auditors properly address this information in their audits. This factor is one of the reasons the settlement incorporates an extensive training component for ISDA contractors and their auditors. *See*, Article V of PSA-III..

43. The inequities caused by the addition of prior years' under-recovery carry forward adjustments to the indirect cost expenditures and totals used to generate the amount entered on the incurred column for BIA ISDA programs on NBC's carry forward template, and the deduction of prior years' over-recovery carry forward adjustments from

those expenditures to generate the incurred column entry for those programs (as referenced in ¶ 37 *supra*) were not fully understood until sometime in 2006. The problem was then referred to by Class Counsel as “double dipping.”

44. “Double dipping.” involves reducing (or increasing) the negotiated pool for a proposed “fixed with carry forward” indirect cost rate by a prior period’s over-recovery (or under-recovery) carry forward adjustment before the reduced (or increased) rate is approved for use in a subsequent period, but then making the same adjustment again two years later based on audited numbers during the carry forward process. If under-recovery and over-recovery carry forward adjustments were given equal treatment on the Government’s carry forward templates, this double adjustment would either benefit or harm the contractor in an even handed manner depending upon whether they had suffered an over-recovery carry forward adjustment or benefited from an under-recovery carry forward adjustment. But, given the way the existing carry forward template is structured, and the way the “shortfall” column unfairly skews the calculation (*see*, ¶ 37, *supra* and Exhibit F to this Affidavit) this double adjustment is extremely harmful to ISDA contractors. This is because the existing carry forward template intercepts and does not carry forward most under-recovery carry forwards and places them in a “shortfall” column, while carrying forward all over-recovery carry forward adjustments, except for theoretical over-recovery carry forwards barred by the 1988 amendments to ISDA. Theoretical over-recoveries are defined at ¶ 8 in Marcel Kerkmans’ declaration of May 31, 2008. The changes to Interior’s carry forward template reflected in PSA-III—both for the single rate template and the various special rate templates—will if adopted

significantly mitigate the harm presently caused to ISDA contractors by this double adjustment (“double dipping”) by providing more even handed treatment in calculating and carrying forward (or not .carrying forward) over-recovery or under-recovery rate adjustments used to finalize the contract price for indirect CSC for ISDA contracts.

45. The various carry forward changes proposed in PSA-III address and improve most of the major defects in the carry forward process identified especially in circumstances where the amount entered in the indirect costs incurred column (e.g. \$140,000) on Interior’s carry forward template is greater than the amount entered in the indirect cost recovered column (e.g. \$120,000) and where the rate-generated amount is greater than or equal to the recovered amount (e.g. \$130,000). Under Interior’s existing carry forward template only \$10,000 of the \$20,000 difference between the amount shown as incurred for indirect costs (\$140,000) and the amount actually paid by Interior to cover these costs (e.g. \$120,000) is carried forward. Instead, the other \$10,000 of that difference is trapped in the “shortfall” column. Hence, the contractor is not able to secure the benefit of a positive rate adjustment that would otherwise have resulted, while in the converse situation, under NBC’s existing carry forward templates over-recoveries based on actual over payments of CSC funds are always carried forward to reduce future year’s rates.

46. One of the major benefits of the settlement results from elimination of the “shortfall” column from Interior’s carry forward template and the substitution of two columns, the “under-funded” column and the “over-funded” column. The primary benefit of this change is to make the treatment of payment based under-recoveries and payment

based over-recoveries more even-handed while retaining compliance with the statutory prohibition against theoretical over-recoveries. *See*, ¶ 44, *supra*. This change also mitigates the harm caused by the “double dipping” process discussed above. The circumstances in which these particular changes produce difference outcomes for carry forwards are illustrated on Exhibit I. *See*, ¶ 56 *infra*.

47. There is a footnote on the proposed templates (footnote 5) which appears on pages 4 and 6 of the Excel spreadsheets marked as Exhibits 1 and 2 to Appendix A and Exhibit 1 to Appendix B. That footnote reads as follows:

5/ Underfunded indirect costs should be reported to the respective granting agencies. Underfunded amount may be, but are not necessarily, due to shortfalls in appropriations. The presence of an amount in either of these columns does not constitute a determination or admission that either the government or the contractor is liable to the other for any amount.

That footnote makes clear that the mere fact that dollar amounts appear in the under-funded column or the over-funded column does not mean that either the government or the contractor has an enforceable legal duty to pay that amount to the other.

48. There will be circumstances when the under-funded number could give rise to a Contract Disputes Act (“CDA”) claim by the contractor against the government where the under-funded amount for indirect cost expenditures is the result of a mistake by Interior. In those circumstances, even though the annual appropriations CAP on indirect CSC expenditures has been exceeded, a remedy will often be available under the CDA as evidenced by the decisions in *Appeals of Mississippi Band of Choctaw Indians*, IBCA 4711-4715 for FYs 2000-2002 and *Appeals of Mississippi Band of Choctaw Indians*, IBCA 4819 and 4820 for FYs 2003-2004. In those cases, Interior had erroneously failed

to include the Tribe in the calculations used to determine distribution of indirect support costs for FYs 2000 through 2004, all of which were years in which Congress had included “not to exceed” language regarding CSC appropriations and in which all of the funds appropriated for CSC to cover BIA ISDA contracts had been expended by Interior before these claims were filed. The Tribe had not received any under-recovery carry forward adjustments which might otherwise have allowed them to recoup some of these losses without invoking the Contract Disputes Act process. Based on the Interior Board of Contract Appeals ruling of April 14, 2006 in IBCA 4711-4715 and a subsequent stipulated order entered on December 14, 2006 in IBCA 4819 and 4820, the United States ultimately paid all past due CSC amounts to the Tribe with interest from the Judgment Fund established per 31 U.S.C. § 1304. Also, if the Class were to prevail on the CAP year claims on appeal, there would be a CDA remedy to recover those funds even in the absence of an Interior mistake of the sort involved in the Mississippi Choctaw decisions.

49. Likewise, in cases where an over-funding is due to some mistake from Interior in payment calculation or payment making or even a computer error on a check, there will be circumstances where the government could seek to recover that money from the contractor. Those circumstances and Interior’s right to seek recovery for such excess payments from a BIA ISDA contractor already exist and are not in any way created or enhanced by the proposed settlement. It is possible that in such circumstances the government could issue a bill of collection which the tribe would have an opportunity to challenge through a CDA appeal to the Civilian Board of Contract Appeals, to a U.S. District Court or to the U.S. Court of Federal Claims under 25 U.S.C. § 450m-1 and 41

U.S.C. § 601 *et seq.* In many circumstances the contractor will have a complete defense to such claims. Any ISDA contractor who receives a bill of collection should consult an attorney to analyze its defenses to such claims. *See*, 25 U.S.C. § 13a, 25 U.S.C. § 450j-1(a) (right to carry over unexpended ISDA contract funds without funding penalty); 25 U.S.C. § 450j-1(f) (one year deadline for initiating disallowed cost claims). Under current law, ISDA contractors also have the right to challenge errors in law or fact which underlie any such government claims and to plead other defenses and counterclaims or, to offset government claims, and to plead counterclaims in recoupment (pleading prior government failure to pay amounts due under the same contract as an offset to the government's claims even when the statute of limitations otherwise bars such claims against the government) so long as those claims and defenses are properly raised under the CDA. *See, Reiter v. Cooper*, 113 S.Ct. 1213 (1993); *Lockheed Martin Corp. v. U.S.*, 70 Fed. Cl. 745, 757 (Fed. Cl. 2006); *FDIC v. Hulsey*, 22 F.3d 1472 (10<sup>th</sup> Cir. 1994).

50. ISDA contractors can also greatly reduce the instances in which a bill of collection may be generated by reducing the number that might otherwise be entered in the "over-funded" column on the new template. They can do this by ensuring that the amounts entered in the indirect cost recovered (collected) column are strictly limited to actual CSC funds awarded; and, that if there are unfunded Direct Contract Support Costs incurred that would otherwise have been charge to or paid from BIA program or tribal funds, some of the CSC funds awarded can be rebooked to cover those DCSC costs, thereby reducing the number to be entered in the indirect cost recovered/collected column, thereby reducing any gap between the incurred amount and the recovered

amount in a way that may reduce or eliminate any basis for an entry in the over-funded column.

51. The interplay of (a) Contract Disputes Act proceedings and recoveries (41 U.S.C. § 601 *et seq.*, made applicable to ISDA contracts by 25 U.S.C. § 450m-1), involving claims for underpayments of indirect costs and (b) rate increases grounded in under-recovery carry forward adjustments also had to be addressed in negotiating the proposed equitable relief.

52. The questions of how the CDA claims and award process and the carry forward rate adjustment process affect (or should affect) each other arose in 2007 as the parties were seeking to finalize the special rates methodology and negotiate changes to the carry forward methodology.

53. The undersigned counsel prepared an analysis of the interplay of CDA recoveries and carry forward adjustments (copy attached as Exhibit G) based on the existing carry forward template which demonstrated that while there were some circumstances in which a CDA recovery would have to be reported as an indirect cost recovery on the carry forward template, there is not a one-to-one correspondence between the amount recovered in a CDA proceeding and the amount to be entered in the “IDC recovered” column of the carry forward template; and, there were some circumstances where proof that the contractor suffered a prior years’ under-recovery carry forward adjustment (and, hence, a reduced IDC rate) would provide (at least) a partial defense to a bill of collection claim for the same rate period. Finally, that analysis showed that proper accounting and careful carry forward template entries will eliminate any double

recoveries by the contractor or the government from these processes. This analysis allowed the parties to move forward to finalization of PSA-III. The new carry forward templates proposed in PSA-III will reduce the circumstances in which rate changes (and changes in indirect cost recoveries) based on carry forwards will be relevant to CDA claims and defenses.

54. Ultimately, through intensive and grueling negotiations in 2006-2007, the parties developed and explored various alternative methods for addressing the Calculation Claim defects and the carry forward problems. The parties ultimately settled upon the special rate solution set out in Appendix A to PSA-III to address the Calculation Claim and (as discussed above) a number of changes to the Defendants' carry forward methodology as set out in Appendix B to PSA-III to address those issues. The single example used to illustrate the special rates option (both the two rate option and the three rate option) in Appendix A to PSA-III actually produces a slightly reduced ISDA rate (or BIA ISDA only rate) in the first year of implementation. This is because the example assumes that the contractor has an over-recovery carry forward adjustment calculated for a prior year under the old methodology which is applied to the BIA-ISDA pool. A different example using all the same numbers but assuming the contractor's prior year's carry forward adjustment was an under-recovery (rather than an over-recovery) produces an increased ISDA only (or BIA ISDA only) rate for the first year. *See*, Exhibit H.

55. Some key points about the special rates option proposed in PSA-III are:

(a) No ISDA contractor will be required to use the special rates option under which two or more rates will be calculated and for which carry forward

adjustments will be calculated separately for each rate. All can opt to continue use of a single rate for which a unified carry forward adjustment will be calculated.

(b) ISDA contractors will have the option of calculating a single rate, two rates or three rates in the first year and in future years (after completion of carry forward adjustments) to determine which approach provides them with the best rate given their facts and circumstances and their carry forwards history.

(c) Over time as the improvements in carry forward treatments set out in PSA-III are implemented, the BIA ISDA only rate (or the ISDA only rate in which IHS and BIA funding are covered by a single separate rate and all other programs are covered by an all other programs rate) will cause those rates to diverge.

(d) The treatment of carry forwards for the non-ISDA programs covered by the non-ISDA special rate will be different than for the ISDA programs using special rates. As shown on note 1, page 3 of Appendix A to PSA-III, the treatment of non-ISDA programs carry forward adjustments will be comparable to the way such carry forwards are handled for such program funds for state and local governments. In addition to the differences in that treatment addressed at note 1, under-recoveries and over-recoveries for those programs will be offset against each other to produce a net over or under recovery similar to how these were handled in the old OIG Western method for calculating carry forward adjustments.

(e) The special rates option involves a variation on a multiple rate solution previously considered by the parties and rejected (on several occasions from 1999-2007), but resurrected and modified to make it more practically obtainable and

workable for ISDA contractors. Unlike the traditional multiple rate options (which still remains available) ISDA contractors will not be required to establish separate administrations or account for and allocate their indirect costs by any form of special cost categories in order to obtain and retain special rates.

(f) As explained in note 2, page 3 of PSA-III and in note 1 on page 3 of Exhibit 1 to Appendix A of PSA-III and on note 1 on page 3 of Exhibit 1 to Appendix A and additional “hybrid” kind of special rate option is also available under PSA-III. This option will be available “[i]f a tribal contractor can (1) identify a type of an otherwise allowable indirect cost that is chargeable to a particular special rate base. . . , but not to the other special rate basis and (2) that identified cost is not funded as Direct CSC.” In that circumstance “a tribal contractor may choose to add the identified indirect cost to the indirect cost pool for that particular special rate base only.” This will increase the rate applicable for that special rate base. The Excel program cell as shown on the electronic version of Exhibits 1 and 2 to Appendix A in which such special cost would be entered if this option is elected has not been activated on the Excel templates filed with PSA-III, but can be activated by NBC where the contractor properly invokes this option.

56. One of the great difficulties in securing the proposed PSA-III disposition of the equitable relief issues was the extremely complex and esoteric nature of the problem. Many variables and processes have to be considered and no one example can fairly illustrate the outcomes produced by Interior’s existing methodology or the impacts of the proposed changes to those methodologies. For example, we developed a chart to illustrate the different carry forward outcomes produced by Interior’s existing carry forward

template *vs.* under the modified (single rate) carry forward template which eliminates the “shortfall” column proposed as Exhibit 2 to Appendix B of PSA-III. This chart reflects different factual assumptions respecting the relative size of an ISDA contractor’s IDC incurred amount, rate times base amount and IDC recovered/collected amount for a given period. A copy of that chart is appended as Exhibit 3 to Appendix B of PSA-III. Another copy is attached hereto as Exhibit I. Even those illustrative examples are grossly oversimplified because they (of necessity) ignore the impact of the several problems which adversely impact how the numbers entered as IDC incurred and IDC recovered/collected are calculated. That Exhibit also assumes that the contractor is only operating BIA ISDA programs. Thus, that exhibit does not address (and therefore does not illustrate) how PSA-III improves the carry forward calculations in ways other than elimination of the “shortfall” column.

57. Very few attorneys and accountants actually understand the complexities underlying the government’s carry forward templates. Class Counsel (Michael P. Gross, the undersigned and Lloyd Miller are among those very few attorneys who have that expertise). That problem was compounded by the fact that the government personnel which Class Counsel had to negotiate changed many times over the last decade. The Justice Department attorneys Class Counsel dealt with in these negotiations changed three or four times. At various times both Interior and Offices of Inspector General had their own attorneys, and the personnel at OIG (and later NBC) assigned to these negotiations changed several times. At various times BIA accountants and auditors were also involved in the negotiations. On some occasions, the terminology was so obscure

that it would take a day to be able to define terms so we could have a discussion about the problems. So, this was a very difficult and grueling negotiation process. Without the stability finally obtained on the government side of the table once Karen Richardson, Esq., DOJ, became the lead attorney for the government in 2002 and NBC's Debra Moberly and Doris Jensen became the lead accountants for NBC in 2006, we would never have secured Government concurrence of the proposed equitable relief package as reflected in PSA-III.

58. When we began our work in 1999 to secure equitable relief to require modification of the Government's carry forward methodology to address the "Calculation Claim" defects (as Plaintiffs' contend is still required by the "law of this case" as established by *Lujan*), that work was undertaken without any expectation of an additional attorney's fee award per the 1999 Stipulation (Docket 283), and no additional fee award is here sought for that work. However, the carry forward problems discussed *supra* and in Exhibits F and G are different from the problem encompassed by the calculation claim as that claim was pled and defined in PSA-I, and many of the other (carry forward) problems didn't even exist when this action was filed in 1989.

59. However, since as shown above, in Class Counsel's opinion no meaningful equitable relief to address the "Calculation Claim" problem can be secured without also addressing the carry forward problems, we have sought to negotiate equitable relief to address them and the parties have redefined the "Calculation Claim" to accommodate that reality as set out at Section II.F.1. of PSA-III. *See*, ¶¶ 7 and 32, *supra*. However, in 1999 we never anticipated having to address (and were not even aware of) those carry forward

problems. They are different from the methodological defect encompassed by the Calculation Claim (though no relief on the calculation claim defects can be achieved unless we also to some extent address the carry forward problems), we have requested an additional fee award (to be paid from the balance of the common funds previously obtained) to compensate us for our additional legal work on these carry forward issues.

60. Because a great deal of my work on equitable relief re the calculation claim issues occurred in sessions in which we were simultaneously addressing the carry forward problems, it is not possible from my time sheets alone to segregate most of my hours for work on the calculation claim from my hours for working on the carry forward problems. However, on balance, I can (with a high degree of confidence) fairly attribute one -third of my time incurred for work on equitable relief from and after February 2001 to work on the Calculation Claim issues (for which I seek no additional fee) and two-thirds to work on the carry forward issues (for which I am requesting an additional fee award). My allocation of hours on this differs from Class Counsel Michael P. Gross because he spent a larger portion of his time working on the special rates issue and on other PSA-III settlement terms (equally applicable both to the Calculation Claim and to the carry forward problem) than I; and, because I have been far more focused on unraveling the carry forward complexities/difficulties and how they could be addressed to permit entry of a viable equitable relief order, and addressing those issues in work with the Class' experts and in negotiation sessions than on work to devise the special rates option as an alternative to the benchmarking approach.

61. All of the foregoing addresses problems relating to Interior's duty to calculate and pay indirect contract support costs (indirect costs). Parallel to the above, the parties were also working to secure Interior agreement to recognize Interior's duty to calculate and pay direct contract support costs. This issue was brought into the case by the Pueblo of Zuni (Docket 633).

62. The DCSC claim is defined in PSA-III as follows:

3. The Direct CSC Claim

The Direct CSC Claim" refers to any claim in connection with an ISDA contract awarded by the Secretary of the Interior alleging that Defendants failed to comply with 25 U.S.C. § 450j-1(a)(3)(A)(i) of the ISDA as regards Direct CSC.

63. As result of the efforts of Class Counsel (collectively, but primarily the efforts of Co-Class Counsel on the DCSC claim, Lloyd Miller), Interior was persuaded to adopt a comprehensive Contract Support Cost policy which included provisions acknowledging Interior's duty to calculate and pay DCSC to ISDA contractors. Class Counsel submitted a report to the Court on this issue June 29, 2006. (Docket 1028). The Interior CSC policy there referenced is appended as Appendix C to PSA-III.

64. Interior's adoption of a policy acknowledging its obligation to calculate and add to ISDA contracts DCSC is deemed sufficient for purposes of this settlement to satisfy Plaintiffs' equitable relief claims in this action as to DCSC. Interior has agreed in PSA-III to not make any changes in its CSC policy except per consultation with ISDA contractors. Moreover, PSA-III reserves the right of all Class members to challenge any

aspect of that policy and to challenge any changes to that policy Interior may make in the future.

65. The time and labor involved in my work on equitable relief in this action from and after December 18, 1998, has been broken out into five (5) categories, totaling 1,273.02 hours, through May 19, , 2008, as shown on Exhibit J, and sub-Exhibits 1-6 hereto. Of those hours, the undersigned is requesting that the Court consider 715.55 as hours for which an additional fee award should be granted. All of those hours are in addition to hours for work on money damage claims in this action and for negotiation and implementation of PSA-I and PSA-II. I have not been paid by any other client for the work reflected in those hours.

66. In regard to the merits of the Third Partial Settlement Agreement, it is my opinion that PSA-III constitutes a fair and reasonable resolution of the claims for equitable relief pled which will confer a substantial benefit upon the Class. It does not cure all of the problems associated with indirect cost rate calculations or the existing carry forwards methodology, but it significantly reduces or mitigates those problems. PSA-III represents a significant achievement given the serious and growing uncertainties of the applicable law and the vagaries of the litigation process and the complexity of the issues. The full benefits of the settlement in terms of its beneficial impacts on indirect cost rate calculations and carry forward adjustments will not be evidenced until two complete rate cycles have been carried out under the new system. This is because prior years' carry forward adjustments calculated under the old system will be carried forward into the first and second years of implementation of PSA-III. The right of individual

Class members to seek monetary or equitable relief outside of this Class action to redress any prior or future years' errors or illegalities which fall within § VI.B.2 of PSA-III or other provisions of § VI.B. (subject to Government defenses) are also reserved. Section VI.B.2. of PSA-III provides:

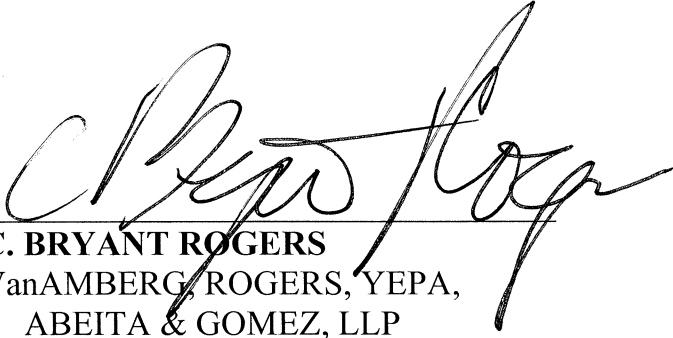
**2. Individual Claims Not Asserting the Settled Claims**

Any claims or challenge to any cost determinations made by Defendants relating to whether a cost is allowable or reasonable under applicable OMB Circulars, and any claim relating to mathematical or input errors in the calculation of indirect cost rates which have occurred or may occur are reserved.

67. Taking into account all of these factors, in my opinion the supplemental fee award requested in Class Counsel's fee application is warranted by the work required to secure PSA-III and the benefits that PSA-III will confer upon the Class.

68. All out-of-pocket costs which I have incurred through June 12, 2007 in pursuing equitable relief in this case have been reimbursed per prior orders of the Court authorizing such reimbursements (Dockets 284, 286, 453, 557, 734, 876, 1090). Additional (unreimbursed) out-of-pocket costs I have incurred in pursuing equitable relief from June 12, 2007 through May 5, 2008 total \$5,720.45, as shown by sub-Exhibit 7 to Exhibit J.

Further, Affiant sayeth naught.

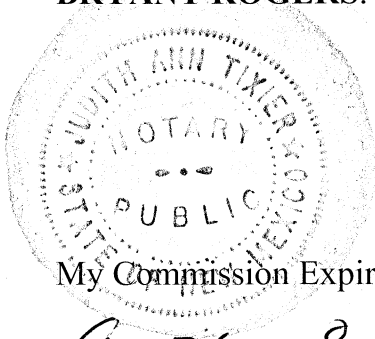
  
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STATE OF NEW MEXICO )  
: SS  
COUNTY OF SANTA FE )

Subscribed and sworn to before me this 24<sup>th</sup> day of June, 2008, by C.

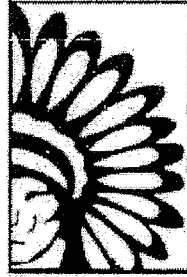
**BRYANT ROGERS.**



*Judith Ann Tixeront*  
NOTARY PUBLIC

My Commission Expires:

9-21-08



# **NATIONAL CONGRESS OF AMERICAN INDIANS**

**NATIONAL POLICY WORK GROUP ON**

**CONTRACT SUPPORT COSTS**

**FINAL REPORT**

**July 1999**

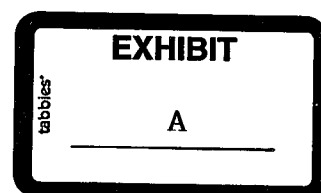
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### **EXECUTIVE SUMMARY**

#### **A. Purpose and Background of the NCAI National Policy Work Group on Contract Support Costs.**

In 1970 President Nixon formally launched the Nation into the Era of Tribal Self-Determination. Five years later that policy was embraced by Congress through enactment of the Indian Self-Determination and Education Assistance Act. Under that Act, federal agencies within the Department of the Interior and the Department of Health and Human Services were required and directed to turn over the complete administration of their federal Indian programs to the Indian tribes themselves, upon receipt of a formal tribal request.

The result of that enactment has been the transfer of hundreds of millions of dollars in federal Indian programs from the Bureau of Indian Affairs and the Indian Health Service to tribal operation, leading to enormous improvements both in the empowerment of tribal governments and in the delivery and quality of local health and social welfare programs serving Native American people. This massive transfer of federal authorities to local tribal governments has emerged as an outstanding example of the success that comes from the devolution of federal governmental prerogatives to local governmental institutions.

From the earliest implementation of the 1975 Act it was clear that the Bureau of Indian Affairs and the Indian Health Service were unable (and in some instances unprepared) to transfer to tribes the full resources of the federal government available to the agencies to carry out their federal Indian programs. In addition to the direct program funding, the Act authorized "contract support costs" (typically associated with personnel administration, financial management, procurement activities and the like) to be provided to tribes over and above the program resources. It was recognized that if these additional contract support cost funds were not provided, tribes would actually be *penalized* in exercising their self-determination rights, by being compelled to reduce program operations to cover these unavoidable costs.

**specific contract support costs.**

In 1999, 24 years after enactment of the ISDA, the Assistant Secretary for Indian Affairs for the first time stated in testimony to Congress that the BIA would very likely commence recognizing the tribal entitlement to receive contract support costs that are not a part of the indirect cost pool and are therefore "direct" in nature. For too many years, the BIA has acted contrary to the mandate of the ISDA in failing to recognize and pay direct contract support costs. The ISDA is clear in this respect, and the ISDA regulations direct tribes to identify those costs as a part of their proposals, the BIA has refused to comply with the law.

**6. The indirect cost methodologies applied by cognizant federal agencies such as the OIG, DCA or the Department of Labor, Office of Cost Determination should be modified, in close consultation with and active participation by tribes and tribal organizations, to comply with the requirements of the Tenth Circuit Decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997).**



The Tenth Circuit Court of Appeals has correctly determined that the common methodology employed by the Department of Interior Office of Inspector General, the Department of Health and Human Services Division of Cost Allocation, and the Department of Labor Office of Cost Determination unlawfully dilute the responsibility of the BIA and IHS to pay full indirect costs associated with ISDA contracts. The NCAI Work Group recommends that this illegal practice be corrected in the following manner.

First, the cognizant agency should remove from the direct cost base tribally administered funds received from other federal agencies. Next, the agencies should develop a set of guidelines, in close coordination with NCAI, the *Ramah* plaintiffs, and other tribal contractors, to determine which portions of the other federal agencies' programs that have been removed from the direct cost base (in Step One) should be added back into the base. If, as was the case for the *Ramah Navajo Chapter*, the burden associated with administering the programs of other federal agencies does not materially or significantly add to the administrative overhead required to carry out the BIA and IHS programs, no portion of the other federal agencies' programs should be added back to the direct cost base. If, on the other hand, the relative size of the other federal agencies' programs is such that the administrative burden upon a tribe will necessarily increase, to that extent the other federal agencies' programs should be added back to the direct cost base. Guidelines will avoid excess or complicated negotiations, and will produce reasonable approximations of need that are predictable.

Finally, the OIG (or other cognizant agency) should calculate an indirect rate to be paid by the BIA and IHS on the adjusted direct cost base, and then apply a credit for any indirect costs actually paid the tribe from the other federal agencies.

**7. Congress, OMB, and the Departments should reject any suggestions to move the negotiation of indirect cost rates out of the cognizant agencies' audit arms, either to outside negotiators or to local agency officials.**

have been rejected by OMB (as occurred for the IHS in FY 2000 budget request). In one or two years, significant Administration requests have been flatly rejected by Congress (such as the \$40 million contract support funding increase requested in FY 97 for IHS). And in some years, Congress has appropriated substantial increases in the face of no requested Administration increase *at all* (as occurred in FY 1999 for IHS).

Tribes continue to be caught in the middle, with the perennial Hobson's choice of either reducing program operations to sustain fixed administrative overhead costs, diverting scarce tribal resources to cover the shortfalls, or turning the operation of programs back to the BIA and IHS. With the latter choice unthinkable for most tribes, the ultimate victims of the contract support cost shortfall are the tribal members who depend so vitally upon these programs for their health, education and welfare.

#### **D. Recent Judicial and Administrative Decisions Concerning Contract Support Costs.**

Although it is a President who first announced the Indian Self-Determination Policy, and Congress which put it into law, it is the Judiciary that has ultimately been called upon to enforce it. This is particularly so in recent years, as the pressure on the contract support cost system has become palpable and tribes press forward their claims in all available legal forums. The result has been a stunning uniformity in cases upholding the right of tribes to receive full contract support costs associated with the operation of federal Indian programs transferred under the Act. These victories have reflected not only the judicial interpretation of the law, but also the judicial enforcement of the federal government's trust responsibility to Indian tribes.

***Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).** This court ruling on contract support costs struck down the BIA's assertion of unreviewable discretion to manage contract support cost funds in whatever way the BIA deemed best. At issue was a BIA policy that penalized tribes if they did not submit indirect cost information to the Bureau by a certain date. The court found that the Secretary had no authority to impose such penalties, and that Congress intended in the ISDA to require the Secretary to fully fund contract support costs from all available appropriations. The court indicated that, although a flat pro rata distribution among all tribes would meet the Secretary's obligations under the ISDA (in years when the Secretary's available appropriations are insufficient to pay the government's obligations to all tribes), other methodologies might also comply with the law. The court did not have occasion to consider IHS's variation on the pro rata policy, in which IHS generally commits not to reduce tribal contract support payments from one year to the next.



***Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997).** This case arose out of the persistent failure of most federal agencies other than the IHS and BIA to pay indirect costs at the full negotiated indirect rate determined by the OIG. The tribe argued that when the BIA and OIG assign a theoretical share of the indirect cost pool to some other federal agency which the BIA *knows* will not pay its share of the pool, the BIA in effect dilutes its own responsibility to pay the full contract support costs associated with carrying out its own

programs. This common occurrence is readily apparent and has substantial impact when the administrative burden on a tribe to operate its programs is not materially increased by the administration of a few non-BIA and non-IHS programs.

The Tenth Circuit Court of Appeals ruled that the BIA practice of including in the program base "other federal agencies" that do not contribute toward the indirect cost pool, diluted the BIA's own actual responsibility to fully fund contract support costs associated with the BIA's own contracts. The portion of the case relating to FYs 1989-1993 has since been settled with court approval for approximately \$80 million, including prejudgment interest.

Not yet resolved in the case is the equitable relief necessary to change the BIA and OIG's practice regarding the calculation and payment of indirect costs. This issue has received considerable discussion within the NCAI National Policy Work Group on Contract Support Costs, and a proposed recommended solution is contained in this report. Based upon those deliberations, however, it now appears that historically the BIA and OIG practice for negotiating indirect cost rates has reduced BIA and IHS calculated contract support entitlements by approximately 15% from the amounts to be paid under the ISDA. Regrettably, to date the DHHS, Division of Cost Allocation (which performs the same function as OIG for several tribal contractors) has consistently refused to participate in any of these NCAI-sponsored meetings and discussions.

***Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997) (*Shoshone-Bannock I*) and *Shoshone-Bannock Tribes v. Shalala*, 999 F. Supp. 1395 (D. Or. 1998) (on reconsideration) (*Shoshone-Bannock II*)**. In the course of two rulings, the Federal District Court for the District of Oregon concluded that since IHS's lump sum appropriation was legally available in 1996 to meet the Shoshone-Bannock Tribes' contract support costs requirements, IHS was legally required to pay those requirements. The court rejected the argument that IHS retained discretion over its lump sum appropriation sufficient to avoid the contract support cost funding mandate of the ISDA:

[P]ermitting IHS to first allocate a certain amount of funding from its lump sum appropriation for CSC and then deny CSC funding if the requests exceed the allocation would create an enormous loophole, granting the Secretary nearly unfettered discretion to determine when appropriated funds are available.

The decision effectively nullified IHS's practice of placing tribes on a priority list (or "A-queue") and requiring tribes to wait years and years before receiving any contract support costs at all associated with new programs. Although IHS paid the resulting judgment and reserved its right to appeal, during the pendency of the appeal Congress enacted section 314 as a rider to the FY 1999 Appropriations Act for IHS and BIA. In response, the parties in the case have agreed to a limited remand to the district court for a determination whether section 314 retroactively extinguishes the Shoshone-Bannock Tribes' claims. A decision on that issue is pending.

***Appeal of Alamo Navajo School Board, Inc. and Miccosukee Corp.*, IBCA 3463 (Dec.**

4, 1997); ***Babbitt v. Miccosukee Corp.*, Federal Circuit No. 98-1457 (appeal pending)**. In this case, the Interior Board of Contract Appeals ruled that the BIA could not reduce the amount of the administrative funding owed to a tribally operated BIA school below the amount required under the formula provided in the Tribally Controlled Schools Act of 1988 (TCSA), simply to keep the total amount paid to schools within the amount budgeted for that purpose by the Bureau. The IBCA concluded that:

[when] making allocations and disbursements for indirect costs under contracts and grants pursuant to the ISDA and the TCSA, and funded under unrestricted lump sum appropriations . . . the department remains bound by the statutory language of the authorizing legislation, despite shortfalls in the total amounts appropriated, because in providing indirect costs under these Acts the department is performing an essentially ministerial function. It has no authority to modify administratively the clear statutory mandates giving priority to indirect costs.

This aspect of the IBCA ruling is very similar to the ruling issued in the *Shoshone-Bannock* litigation (insofar as it concerns agency responsibilities in managing a lump sum appropriation), and has not been appealed.

The IBCA also ruled that the Miccosukee's FY 1994 indirect cost entitlement remained a legal obligation that must be paid by the government, notwithstanding an appropriations cap that year on contract support costs limiting the total amount available to the BIA for this purpose. The IBCA noted in a lengthy decision that the Miccosukee had negotiated both its indirect rate and its BIA contract, and had also commenced performing the contract, long before Congress imposed the appropriations cap. The BIA has appealed this aspect of the IBCA ruling to the Federal Circuit, and oral argument was held June 11, 1999.

***California Rural Indian Health Board v. Shalala*, No. C-96-3526 (N.D. Cal.)**. In this case, the Federal District Court followed the lead of the Oregon District Court in *Shoshone-Bannock* and ruled that IHS's "Priority list" (or "Aqueue") policy (under which Tribes receive no contract support costs at all for several years in connection with more recently transferred programs) was illegal. Like the *Shoshone-Bannock* litigation, the case involved years when contract support costs were paid out of the IHS lump sum appropriation, and not out of an appropriations earmark. In May 1999, the court also rejected IHS's argument that section 314 of the FY 1999 Appropriations Act (discussion below) is sufficiently clear to preclude the Tribe's right to continue its litigation against IHS through the discovery process.

***Appeal of Cherokee Nation of Oklahoma v. United States Department of Health and Human Services*, IBCA No. 3877-98. *Appeal of Seldovia Village Tribe*, IBCA Nos. 3782-97, 3862-97 and 3863-97**. These appeals involve claims against the IHS for unpaid contract support costs. In both cases, the tribes argue that the ISDA and their contracts entitle them to full contract support costs, and in both cases the government has raised as a defense the section 314 rider (among other defenses). The *Cherokee Nation* case was

argued April 15, 1999 and, along with the *Seldovia* case, is now awaiting decision.

***Cherokee Nation and Shoshone-Paiute Indian Tribes v. Shalala*, (E.D. Ok. CIV 99-092S).** In this recently filed case, the Cherokee Nation and Shoshone-Paiute Tribes seek damages for the government's failure to pay contract support costs. In the case of Shoshone-Paiute, for two years the Tribes received no contract support costs at all associated with its operation of a 15-bed hospital in remote Owyhee, Nevada, causing severe curtailments in all hospital and community health programs. The case has been filed as a class action, and on May 10, 1999 the Federal District Court issued a scheduling order to address Phase I liability issues.

### **E. Congressional Actions in 1998 (FY 1999) Relating to Contract Support Costs**

In 1998, the appropriations committees became increasingly concerned with the rising demands associated with contract support cost requirements due under the ISDA.

As this Report documents, over the years the agencies' available appropriations have failed to keep pace with the rising contract support cost requirements associated with the trend among tribes to take over the operation of increasing portions of the BIA and IHS. Although the committees recognized in 1998 that the widening gap between available agency appropriations and contract support cost requirements was not caused by any increase in indirect cost rates, pressure from the contract support system was nonetheless making it increasingly difficult for the appropriations committees (and subcommittees) to manage the IHS and BIA budget among competing demands. As a consequence, the appropriations committees took several actions either in the form of committee instructions or new statutory language.

**FY 1999 moratorium.** First, Congress imposed a one-year moratorium on any further transfers of IHS and BIA programs to tribal operations. The moratorium, promoted as a temporary measure to take stock of the situation, was nonetheless severely criticized by tribes and strongly opposed by the Administration. The moratorium was adopted without any involvement from the authorizing committees and without any hearings whatsoever.

Although all concerned parties recognize the severe problems caused by the lack of available appropriations to pay the federally negotiated contract support cost requirements, the moratorium is a dangerous interruption in the Nation's Self-Determination Policy. Moreover, the moratorium as finally enacted appears to have been unnecessary; had Congress continued its practice of appropriating \$5 million for the BIA for needs associated with new contracting initiatives, it does not appear the new initiatives would have exceeded these sums. (For IHS, it is less clear whether a \$7.5 million ISD Fund would have been sufficient to cover contract support costs associated with new interests signed in FY 1999.) By its own terms, the moratorium only has effect for one year.

**The 1999 GAO Study.** Second, the Senate Appropriations Committee directed the General Accounting Office to conduct a comprehensive examination of existing contracts and compacts for BIA and IHS programs, entered pursuant to the ISDEA, as they may be impacted by the available appropriations for associated contract support and other indirect costs." The primary focus of the GAO report is expected to be the impact of contract support cost shortfalls on the tribal operation of programs transferred under the ISDA. The report is expected to be issued in June 1999.

**FY 1999 CSC increase for IHS.** Third, in the face of an approximately \$90 million shortfall in available IHS appropriations to meet FY 1999 requirements, and also in the face of a failure on the part of the Administration to request any increase at all to meet this shortfall, Congress appropriated an additional \$35 million. As indicated elsewhere, the resulting \$204 million so earmarked is presently estimated by IHS to still fall approximately \$115 million short of the total need for contract support costs for FY 2000. (On a related note, in its FY 2000 budget request, the Administration has asked for an additional \$35 million increase.)

**FY 1999 CSC increase for the BIA.** Fourth, in the face of an understated BIA calculated contract support cost need of \$139 million, Congress appropriated \$115 million, an amount sufficient to only pay approximately 83% of all BIA-computed tribal requirements for contract support costs in FY 1999. (This amount represents a very modest \$4 million increase over the amount appropriated in the prior year.)



**FY 1999 response to the *ARamah Chapter*" litigation.** Fifth, and in apparent response to a possible misreading of a recent Tenth Circuit decision in *Ramah Navajo Chapter v. Lujan*, Congress included identical restrictions in the IHS and BIA portions of the Appropriations Act stating that contract support costs "may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act," and stating that such funds are not available "for any contract support costs or indirect costs associated with any [contract, compact or funding agreement] entered into between and Indian Tribe or tribal organization and any entity other than [the IHS or the BIA]." Although the BIA commonly refers to the *Ramah* case as having called upon the BIA to pay all indirect costs that are not paid by other federal agencies, the case required the BIA to stop the practice of diluting its *own* responsibility for the payment of indirect costs. Accordingly, this parallel provision, contained in both the IHS and BIA portions of 1999 Appropriations Act, should not have any impact on ongoing agency or tribal practices.

**The FY 1999 Asection 314" rider.** Sixth, Congress included a measure (section 314) stating that "amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service" by the Appropriations Act for FYs 1994-1998 for contract support costs "are the total amounts available" for those years for such purposes.