

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

**RAMAH NAVAJO CHAPTER,
OGLALA SIOUX TRIBE, and PUEBLO
OF ZUNI**, for themselves and on behalf
of a class of persons similarly situated,

Plaintiffs,

vs.

No. CIV 90-0957 LH/KBM

DIRK KEMPTHORNE, Secretary of the
Interior, *et al.*,

Defendants.

ORDER APPROVING ATTORNEYS' FEES

THIS MATTER COMES before the Court upon an Application of Class Counsel and Co-Class Counsel for an Award of Attorneys' Fees and Costs (Docket No. 1144). On May 21, 2008, this Court entered an order granting preliminary approval of the Third Partial Settlement Agreement ("PSA III"), directed Class Counsel to send notice to the Class of this preliminary approval and the essential terms and conditions of the Third Partial Settlement Agreement, and set a Fairness Hearing to consider final approval of the Third Partial Settlement Agreement (Docket No. 1140). The Court has just entered an Order Approving the Third Partial Settlement Agreement. It is now incumbent upon the Court to consider the request of Class Counsel for fees.

Class Counsel request fees of \$725,000, which they represent is 00.64% of the combined common fund thus far created, which does not take into account the additional benefit conferred by the Third Partial Settlement Agreement ("PSA III"). Counsel propose that these fees be paid from

the Reserve Accounts belonging to the Class.¹ Specifically, Class Counsel ask that payment of \$700,000 of the requested fees be paid within ten (10) days of when the Court's Order Approving the Third Partial Settlement Agreement becomes unappealable², and that payment of \$25,000 in additional fees (plus supplemental costs) be made at the conclusion of the training program, upon a showing that final balances in the Reserve Accounts are adequate. Class Counsel seek payment of interest on the fee award from the date of the award until the date of payment. No opposition to this fee application has been filed by any Defendants or Class Members.

Having considered the relevant application and supporting memorandum and exhibits, the arguments of counsel, the absence of any objections to the fees sought, the applicable law, and after having conducted a fairness hearing upon notice to all Class Members on August 26, 2008, the Court finds that Application of Class Counsel and Co-Class Counsel for an Award of Attorneys' Fees and Costs (Docket No. 1144) will be **approved**.

Representations of Class Counsel and Co-Counsel

As noted above, Class Counsel and Co-Counsel (hereafter collectively referred to as "Class Counsel") propose that the fees and costs they seek for the work underlying PSA III be paid from the balance of common funds created in PSA I and PSA II.

Class Counsel argue that the fees requested here are correctly viewed as an adjustment of the fees previously awarded, an increment for unexpected work not previously considered to be part

¹As of August 8, 2008, according to Class Counsel, the Reserve Accounts and Wells Fargo account, excluding \$15,000 reserved for a contract with the National Congress of American Indians ("NCAI"), totaled approximately \$915,104. This is the amount reasonably considered available for the Class's costs of training; costs of publication of PSA III and mailing notice to the Class; remaining expert fees and costs; and attorneys' fees and costs. See 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 at 5 (Docket No. 1145)(hereafter "Pls.' Mem.").

²The Final Judgment in this matter will be filed contemporaneously with this Order. Pursuant to FED.R.APP.P. 4(a)(1)(B), the time for taking an appeal is 60 days, when the United States is a party.

of the case (*i.e.*, carryforwards), or achievement of other reforms not contemplated when PSA I was approved (*i.e.*, direct contract support costs, “DCSC”).³ *See* Pls.’ Mem. at 15. They represent that the compensation they now seek is only for work directly charged to this case in connection with the carryforwards problems and direct CSC issues, *see id.* at 14, and that these fees were not contemplated by, nor compensated through, earlier settlements. *Id.* at 18.

If approved, Class Counsel state that PSA III will in part result in substantial beneficial changes to the rate-making methodology used to determine contract entitlements to contract support costs (“CSC”) under the Indian Self-Determination Act (“ISDA”), in accordance with the law of this case established in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). They contend that PSA III achieves adoption of a new BIA policy that encompasses the third major component of ISDA contract funding, DCSC.

Class Counsel base their application on the common fund principle recognized by the Tenth Circuit in *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995), because the source of payment will be the reserves still available from the first two settlements. They contend that if PSA III had been accomplished at the time of PSA I or PSA II, the attorneys’ fees awarded then would have been increased to account for the significant benefits of equitable relief. Class Counsel justify their requested fee, stating that, if the amount they seek is awarded, the total amount of their fees for all three settlements will be less than the 25% benchmark fees generally awarded and approved by the Tenth Circuit in cases of this nature.

³ “DCSC costs are comprised of certain required administrative costs that are directly associated with the operation of contracted programs such as the cost of worker’s compensation insurance. These DCSC costs are not paid either as part of the Secretarial program amount or as indirect costs. Although the ISDA has since 1994 expressly recognized the Secretary’s duty to pay DCSC costs . . . not until this law suit was amended to include a DCSC claim did the BIA finally agree to recognize these costs, through the adoption of a new 2006 National Policy.” Pls.’ Mem. at 2-3.

Class Counsel acknowledge that the exact value of future benefits conferred upon the Class in the form of appropriation increases is difficult to quantify. Counsel state that recognition of DCSC as a new budget category is of great value in the effort to achieve full funding of CSC, and has produced tangible benefits for the Class in terms of increased appropriations. *See* Pls.' Mem. at 12. They argue that increased calculations in indirect cost requirements will likely lead to additional increased appropriations in the years ahead. *Id.* at 19.

Finally, Class Counsel argue the merit of their fee application under the *Johnson* factors, set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Counsel's fee application is accompanied by declarations containing detailed time sheets and cost bills of counsel who worked on the case, with explanations of the work performed in achieving the settlement.

Analysis

At the outset of its analysis, the Court states that it accepts all of the above-stated representations made by Class Counsel.

The Court approved PSA I on May 25, 1999, producing a common class fund of \$76,000,000, together with pre-payment interest of \$3,000,000. A total of \$4,000,000 was paid to four opt-out tribes whose agreements were subject to the attorneys' fees and costs provisions of PSA I, pursuant to a settlement at that time. Attorneys' fees were set at 11% of the principal amounts. The Court approved PSA II on December 6, 2002, producing an additional common class fund of \$29,000,000, with fees set at 20%. All claims for equitable relief, together with all claims for money damages for years not included in either of these two settlements, were expressly reserved. Of the total sums recovered under PSA I and PSA II, \$96,000,000 was distributed to Class

Members, \$14,200,000 was paid to Class Counsel as fees and reimbursed costs, \$400,000 was contracted to National Congress of American Indians, and \$1,500,000 was placed in Reserve Accounts to enable the Class to pay the costs of distributing the settlements to Class Members, as well as to pay costs associated with remaining claims, including equitable relief. *See* Pls.' Mem. at 4-5.

Class Counsel contend that the amount of fees they now seek is a less precisely calculable, but even smaller percentage, of the larger common benefit conferred upon the Class by PSA III. The Court notes that the two prior fee awards granted to Class Counsel were well within the range of the percentage method that has been approved by the Tenth Circuit for "common fund" types of cases, and granting this award will not cause this percentage to exceed this range.

In evaluating the fee application related to PSA I, the Court determined that in the Tenth Circuit, "the recent trend has been toward utilizing the percentage method in common fund cases," *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091, 1095-97 (D.N.M. 1999), (Docket No. 284 at 5), *citing* *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). It has been the judgment of the Court that the percentage-of-the-fund method was the appropriate means to determine reasonable fees for work involved in achieving PSA I and PSA II, and the Court shall continue to employ this approach.

In the PSA I opinion, the Court noted that "courts do not blithely grant the percentage requested by prevailing counsel," that "[m]ost courts select a percentage in the 20% to 30% range, and that the Ninth Circuit has indicated that 25% is the 'benchmark' award." *Id.* at 1096. The Court noted that the Tenth Circuit has directed that in determining what percentage would be reasonable, courts should review the twelve factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors are:

(1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee – this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Ramah I at 1096, (Docket No. 284), at 6-7.

An evaluation of the instant fee application in light of the relevant *Johnson* factors indicates that the fee application is reasonable. The Court notes that it has evaluated these factors in its prior decisions, approving PSA I⁴ (Docket No. 284) and PSA II (Docket No. 730). The Court adopts by reference its prior findings and conclusions as to the following factors, which are pertinent to the immediate fee evaluation as well: (1) Experience, Reputation and Ability of the Attorneys – Docket No. 284 at 25-26 and Docket No. 730 at 19; (2) The Skill Required to Perform the Legal Service Properly – Docket No. 730 at 16; (3) Prearranged Fee – Docket No. 284 at 24 and Docket No. 730 at 18; (4) Undesirability of the Case – Docket No. 730 at 19-20; (5) Preclusion of Other Employment – Docket No. 284 at 22 and Docket No. 730 at 16-17; (6) The Customary Fee and Awards in Similar Cases – Docket No. 284 at 23 and Docket No. 730 at 17-18; (7) Time Limitations Imposed by the Client or the Circumstances – Docket No. 284 at 24-25 and Docket No. 730 at 18-19; (8) The Nature and Length of the Professional Relationship with the Client – Docket No. 730 at 20; and (9) Awards in Similar Cases – Docket No. 730 at 21.

Factors that are specific to PSA III are the following:

⁴This opinion is reported at 50 F.Supp.2d 1091 (D.N.M. 1999).

Time and Labor

Class Counsel have submitted declarations that indicate 2,300 hours spent in securing equitable relief for carryforwards and direct CSC matters. This amount does not include an additional 453 hours of Mr. Miller's time on the DCSC claim, because he was partly compensated by other clients for this work. In addition, this figure does not include what Mr. Gross terms as "significant uncompensated time in the *Tunica* case", whose issues overlap the rate-making issues that are the subject of PSA III. *See* Pls.' Mem. at 20 n.11.

Negotiations of PSA III occurred over an extended period of time, starting in 2000. After basic principles were agreed upon, the parties exchanged, analyzed, discussed and revised 34 drafts of PSA III.

The Court concludes, taking into account its earlier findings of experience, ability and skill of Class Counsel, that the amount of time spent was reasonable and necessary in accomplishing PSA III. Furthermore, the sum of \$725,000 divided by 2,300 hours equals \$315 per hour, which is a reasonable hourly rate for the quality of representation afforded by Class Counsel, particularly in light of the benefits of this settlement.

Novelty and Difficulty of the Questions Presented

The Court accepts Class Counsel's explanation as to the "exceptionally esoteric accounting issues" involved in this case which include carryforwards problems, double dipping, and the issue of "other agencies-in-the-base." *See* Pls.' Mem. at 20-21. The difficulty of achieving PSA III is further indicated by the fact that negotiation of this agreement began in the year 2000, and involved 34 revisions before it was finalized.

Amount Involved and Results Obtained

The benefits of the Class are mentioned in the representations of Class Counsel, contained herein and accepted by the Court, and are also set out at length in this Court's Order Approving the Third Partial Settlement Agreement.

Conclusion

As noted above, the Court has carefully considered the arguments and representations advanced by Class Counsel in favor of their fee award as summarized herein, and accepts them as being valid. The Court has also taken into account the *Johnson* factors. Based on these considerations, the Court concludes that the fee application is reasonable and shall be approved.

The outstanding result contained in PSA III would not have been achieved without the commendable effort of Class Counsel, for which they should be paid the percentage amount of the Common Fund that they seek, *i.e.*, 00.64% of the combined common fund, plus post judgment interest, and an award of New Mexico gross receipts tax on those fees. The Court therefore awards \$725,000 plus post-judgment interest and gross receipts taxes, to be paid out of the Reserve Accounts.

WHEREFORE, the Court concludes that the application of Class Counsel for an award of attorneys' fees and costs in the amount of \$725,000 to be paid from the Reserve Accounts, is well taken, justified, and will be **granted**.

IT IS HEREBY ORDERED that the Clerk shall pay \$700,000 in fees to Class Counsel from the Reserve Accounts. These fees shall be paid to Class Counsel within ten (10) days of when the Court's Order Approving the Third Partial Settlement Agreement becomes unappealable.


IT IS FURTHER ORDERED that the Clerk shall pay an additional \$25,000 in fees to Class Counsel from the Reserve Accounts, plus supplemental costs, to be determined by the Court, at the

conclusion of the training program, upon a showing that final balances in the Reserve Accounts are adequate.

IT IS FURTHER ORDERED Class Counsel shall receive post-judgment interest on the fee award of \$700,000 from the Reserve Accounts, from the date of the award until paid, at a rate allowed by law.

IT IS FURTHER ORDERED that Class Counsel shall be paid gross receipts tax, from the Reserve Accounts, in an amount not to exceed \$57,000, for all fees at the Santa Fe County rate for gross receipts of 7.9375%.

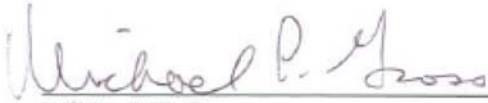
IT IS SO ORDERED.



SENIOR UNITED STATES DISTRICT JUDGE

Approved as to form

For Plaintiffs



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Lead Class Counsel



C. Bryant Rogers
Co-Class Counsel

Telephonically Approved 08/26/08

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