No. 08-2262

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAMAH NAVAJO CHAPTER, *et al.*,
Plaintiffs-Appellants,
v.
KENNETH L. SALAZAR, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Senior Judge C. LeRoy Hansen

APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

MICHAEL P. GROSS
Counsel of Record and Class Counsel
M.P. Gross Law Firm, PC
460 St. Michael's Drive, No. 401
Santa Fe, New Mexico 87505
Telephone: (505) 995 8066
Facsimile: (505) 989 1096
mike@mpgrosslaw.com

LLOYD B. MILLER
Co-Class Counsel
Sonosky, Chambers, Sachse, Miller & Munson, LLP
900 West Fifth Ave., Ste. 700
Anchorage, Alaska 99501
Telephone: (907) 258 6377
Facsimile: (907) 272 8332
lloyd@sonosky.net

C. BRYANT ROGERS
Co-Class Counsel
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
P.O. Box 1447
Santa Fe, New Mexico 87504
Telephone: (505) 988 8979
Facsimile: (505) 983 7508
cbrogers@nmlawgroup.com

TABLE OF CONTENTS

	Page
Table of Authorities	iii
INTRODUCTION	1
I. THE GOVERNMENT HAS NOT JUSTIFIED ITS REQUEST FOR PANEL REHEARING OR REHEARING EN BANC.	1
A. The Request for Panel Rehearing Does Not Meet this Court's Requirements.	1
B. The Government's Request Does Not Satisfy the Rigid Standards for Rehearing En Banc.	2
II. THE GOVERNMENT'S SPECIFIC OBJECTIONS TO THE PANEL'S DECISION ARE WITHOUT MERIT.	7
CONCLUSION	15
Certificate of Compliance with Rule 32(a)	17
Certification of Digital Submission	17
Certificate of Service	17

TABLE OF AUTHORITIES

Page

Cases:

Air Line Pilots Association International v. Eastern Air Lines, Inc., 863 F.2d 891 (D.C. Cir. 1988) 6

Alamo Navajo School Board, Inc. and Miccosukee Corp., 1998-2 BCA ¶ 29,831, p. 147681 (1997) and ¶ 29,832, p. 147699 (1998), 1997 WL 759441 (1997), *reversed sub nom. Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999) 4-5

Arctic Slope Native Association v. Sebelius, 629 F.3d 1296 (Fed. Cir. 2010) 3-4

Babbitt v. Miccosukee, 217 F.3d 857 (table), 1999 WL 989060 (Fed. Cir. 1999) 4

Babbitt v. Oglala Sioux Tribal Public Safety Department, 194 F.3d 1374 (Fed. Cir. 1999) 4-5

Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) *passim*

Ferris v. United States, 27 Ct. Cl. 542 (1892) 9, 11-12, 13

Lincoln v. Vigil, 508 U.S. 182 (1993) 12

Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091 (D.N.M. 1999) 15

Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) 4, 5

Star-Glo Associates, LP v. United States, 414 F.3d 1349, 1355 (Fed. Cir. 2005) 10

TVA v. Hill, 437 U.S. 153 (1978) 10

Constitution:

United States Constitution, Appropriations Clause, art. I, § 9, cl. 7 13

Statutes:

Anti-Deficiency Act, 31 U.S.C. § 1341(a) 12-13

Contract Disputes Act, 41 U.S.C. §§ 601 et seq. 13

Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450-458bbb-2 *passim*

§ 450j(c)(1) 14

§ 450j-1(a)(2) 1, 10

§ 450j-1(b) 10, 14

§ 450j-1(g) 10, 11

Judgment Fund, 31 U.S.C. § 1304 13-15

Legislative History:

Senate Report 100-274 (1987) 15

Senate Report 103-374 (1994) 15

Rules:

Federal Rules of Appellate Procedure

Rule 35 6

Rule 35(b)(1)(A) 2

Rule 35(b)(1)(B) 3

Tenth Circuit Rules

Rule 35.1(A) 2, 6

Rule 40.1(A) 1-2

Other authorities:

Advisory Committee Note to 1998 amendments of Rule 35 of the Federal Rules of Appellate Procedure 3, 6

Comp. Gen. Op. B-217990.25-O.M. (Oct. 30, 1987) 15

Judgment Fund: Treasury's Estimates of Claim Payment Processing Costs under the No FEAR Act and Contract Disputes Act, GAO-04-481 (April 28, 2004) 14

INTRODUCTION

This case involves a claim by tribal contractors that the government owes damages for breach of contract. A divided panel of this Circuit reversed the entry of summary judgment for the government and remanded the case for further proceedings in the district court. Slip op. at 46. The government now twice says it will raise "additional defenses" in the district court. Pet. at 3, 15.

Consistent with the law of this Circuit, the Panel majority held that, contrary to the government's claim, certain appropriations Act language, coupled with certain language from the Indian Self-Determination Act, 25 U.S.C. §§ 450-458bbb-2, did not excuse the government's failure to pay the tribal contractors the "contract support costs" they were due by contract. § 450j-1(a)(2). Given the further proceedings on the merits to take place below, en banc review at this interlocutory stage is hardly a sound use of this Circuit's scarce resources. Moreover, the reasons advanced by the government in its Petition fail to meet the strict standards required for en banc review. The petition should therefore be denied.

I. THE GOVERNMENT HAS NOT JUSTIFIED ITS REQUEST FOR PANEL REHEARING OR REHEARING EN BANC.

A. The Request for Panel Rehearing Does Not Meet this Court's Requirements.

To justify rehearing by the Panel, the government must show that "a significant issue has been overlooked or misconstrued by the court." 10th Cir. R.

40.1(A). The government has made no such showing. Instead, it simply repeats the same arguments that it made in its briefs before the Panel and that were painstakingly addressed and rejected by the Panel majority in a careful decision issued after seventeen months of deliberation. As such, the government's petition amounts to little more than an attempt to re-litigate this appeal.

B. The Government's Request Does Not Satisfy the Rigid Standards for Rehearing En Banc.

> En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.

10th Cir. R. 35.1(A).

The Government does not assert that the Panel's decision conflicts with any decision of this Court or with any decision of the Supreme Court. Fed. R. App. P. 35(b)(1)(A). Thus, the sole issue is whether the question presented in the Petition raises an issue of "exceptional public importance." 10th Cir.R. 35.1(A).

In this regard, the government alleges that *if* it loses all of the "additional defenses" it plans to raise upon remand, Pet. at 3, 15, the decision *could* "subject[] the United States to substantial financial exposure from the multitude of individual claims for additional [contract support costs]." Pet. at 3. The government's hyperbole is unsupported and should be viewed skeptically. The government made similarly unsupported allegations in *Cherokee Nation v. Leavitt*, 543 U.S. 631

(2005).[1] But after the Supreme Court nonetheless found the government to be in breach of contract there, the government's earlier claim that such liability would impose extraordinary additional damages ended up being vastly overstated. Its repetition of that unsupported claim here is hardly a basis for burdening this Court's limited en banc docket.

Moreover, the Panel's decision is entirely interlocutory, since the Panel merely reversed the district court's grant of summary judgment in favor of the government, and then remanded for further proceedings. Slip op. at 46. Since the government tells the Court it will "undoubtedly … present additional defenses," Pet. at 3, 15, further review now is premature and therefore particularly unwarranted.

The only other ground offered by the government—that the Panel decision conflicts with a decision of a sister court of appeals—does not in itself establish that an issue is of exceptional importance warranting en banc review. *See* Fed. R. App. P. 35(b)(1)(B) & advisory comm. note to 1998 amendments. Thus, while it is accurate that the Panel decision conflicts with the December 15, 2010, decision of the Federal Circuit Court of Appeals in *Arctic Slope Native Association v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), the Panel requested the parties to submit

---

[1] *See* Petition for Certiorari (No. 03-853) at 27, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) ("the Indian Health Service could face liability of up to $100 million.")

supplemental briefs addressing that decision, then carefully considered *Arctic Slope* in its opinion and rejected its reasoning. Slip op. at 33-40. A certiorari petition in *Arctic Slope* was filed on July 18, 2011. To the extent the conflict between the two Circuits is serious, it can be resolved by the Supreme Court so there is no sound reason for this Circuit to devote its scarce en banc resources to reviewing the same conflict.

The government also argues that the Panel's decision conflicts with an earlier decision of the Federal Circuit in *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), and with the decision of the District of Columbia Circuit in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). But those decisions were rendered *before* the Supreme Court's unanimous decision in *Cherokee*, and continue to have force only if they are consistent with *Cherokee*—which formed the cornerstone of the Panel's opinion. Significantly, the Supreme Court did not cite the Federal Circuit's *Oglala* decision, but instead chose to cite only the two administrative decisions that *Oglala* had reversed. *Cherokee*, 543 U.S. at 645, *citing* "*Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, 1998-2 BCA ¶ 29,831, p. 147681 (1997) and ¶ 29,832, p. 147699 (1998), 1997 WL 759441 (1997)." *See also Babbitt v. Miccosukee*, 217 F.3d 857 (table), 1999 WL 989060 (Fed. Cir. 1999) (reversing *Miccosukee* based upon decision in *Oglala*). Consistent with the Supreme Court in

Cherokee (but contrary to the Federal Circuit in *Oglala*), the Interior Board of Contract Appeals in *Alamo* and *Miccosukee* had concluded "that Interior was legally bound by the ISDA contracts to provide full indirect cost funding, despite specific congressional limitations on appropriations for indirect costs." 194 F.3d at 1377.[2] Since *Cherokee* has overtaken *Oglala*, the alleged conflict with *Oglala* is no conflict at all.

As for the D.C. Circuit case, *Ramah Navajo School Board* was an abuse-of-discretion case under the Administrative Procedure Act, not a breach of contract case, and thus did not raise *any* of the contract law questions at issue here. Instead, it addressed the Secretary's lack of power to penalize a tribal contractor by reducing its contract payments when indirect cost rate proposals are late. 87 F.3d at 1342-1343 & n. 5. Nonetheless, the panel carefully analyzed this decision, too, and likewise rejected its reasoning. Slip op. at 19-21.

Given (1) the interlocutory nature of the Panel decision, (2) the speculative nature of the government's assertion about damages, (3) the fact that the Panel decision conflicts with the decision of only one other Circuit and there is a near-term possibility of Supreme Court review of that conflict, and (4) the panel's careful and extensive assessment of the other Circuit's decision after thorough

[2] Indirect costs are the principal component of contract support costs. *See* Slip Op. at 5-7.

supplemental briefing, en banc review is not warranted under the "exceptional public interest" prong of Fed. R. App. P. 35 and 10th Cir. R. 35.1(A).

On the other hand, had the Panel decided the case in favor of the government, it would have upset time-honored principles of federal contract and appropriations law and the long-standing expectations of federal contractors of all stripes nationwide that they will be paid in full upon performance of services. Tribes' Suppl. Brf. at 8 n.3. Such a decision would indeed have presented a question of exceptional public importance. Instead, the panel resolved this case consistent with over a century of government contract law and consistent with the Supreme Court's recent *Cherokee* decision reaffirming that law and its application to ISDA contracts. The panel decision properly applies those fundamental principles to the circumstances presented here.

In sum, the government has not satisfied the "rigid standards" for en banc review. Fed. R. App. P. 35(b) (advisory comm. note to 1998 amendments). *See Air Line Pilots Association International v. Eastern Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir.1988) (Ginsburg, J., concurring in denial of petition for rehearing en banc) ("Only in the rarest of circumstances . . . should we countenance the drain on judicial resources, the expense and delay for the litigants, and the high risk of a multiplicity of opinions offering no authoritative guidance, that full circuit rehearing of a freshly-decided case entails.") (internal quotation marks omitted).

II. THE GOVERNMENT'S SPECIFIC OBJECTIONS TO THE PANEL'S DECISION ARE WITHOUT MERIT.

Most of the government's petition is focused on whether the panel decision was correct, rather than on whether en banc review is warranted. Pet. at 6-14. In all but one of these respects, the Government repeats arguments advanced to, and considered by, the Panel. We briefly respond to these assertions.

A.

The government's principal contention on the merits is that the Panel's result fails to consider "the parties' expectations" at contract formation, Pet. at 6, based upon the text of the Indian Self-Determination Act and "the parties' course of dealing." *Id*. at 7. The government urges that, when the ISDA is correctly understood (*id*. at 7-8), it is the contractors that carried the risk of nonpayment. This is so, the government contends, because the statute placed upon the contractors, and not the government, the risk that the multi-million dollar lump sum appropriation for "contract support cost" (CSC) payments might prove insufficient to pay all of the contractors in full. But as the Panel correctly held, that argument is foreclosed by the Supreme Court's *Cherokee* decision on this *precise* point:

> [T]here is no merit to the "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay all contractors." Cherokee, 543 U.S. at 640 (citation omitted).

Slip op. at 17. The government's contrary construction of the ISDA was rejected in *Cherokee*, and it was properly rejected once again by the Panel.[3]

Here, the government mischaracterizes *Cherokee* by arguing that "[i]n *Cherokee*, the government conceded both that the contract assured the amount the plaintiff sought for CSC, and that the government had breached that promise. *Cherokee*, 543 U.S. at 635." Pet. at 8. But the cited page of the Court's opinion says nothing of the kind, and a passage on the next page shows that the core liability for breach of contract was, in fact, sharply contested by the government:

> [The Government's] sole defense consists of the argument that it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, *and that, in this instance, Congress failed to do so.*

543 U.S. at 636 (emphasis added). The italicized language describes *precisely* the same argument the government advances here—that it is relieved of its "promise" to pay a contractor if Congress has failed to appropriate sufficient funds. In this

---

[3] The Panel likewise properly rejected the government's argument that the Department's Federal Register notices somehow limited its contractual obligation. Pet. at 14. The Panel correctly noted that the notices were published well after the contract year was already underway and after contract performance had begun, and that final individual notices indicating how much contract support would actually be paid were never sent out until each year was nearly over—in other words, after contract services had been substantially performed. Slip op. at 9-10. These notices were not contract amendments. The vague warning of possible problems in the future could not convert a binding contract obligation into a discretionary grant (the thrust of the government's argument), particularly where the government got the full benefit of the bargain it contracted for. Even the dissent concedes that the notices could not alter the contract obligation. Dissent at 27.

respect, the two cases could not be more similar, as the Panel properly noted. Slip op. at 29-30.

Compounding its misreading of *Cherokee*, the government (Pet. at 8) then contests the Panel's understanding of the *Ferris* Rule, as discussed in *Cherokee* (also in the context of the ISDA). Slip op. at 22-24, 31-33, 35-36 (discussing *Ferris v. United States*, 27 Ct. Cl. 542 (1892)). The Panel's reading of the *Ferris* Rule is not only correct; it is compelled by the Supreme Court's statements in *Cherokee*.[4] In short, the Panel correctly reasoned that "the government cannot escape liability for one mandatory expenditure by appealing to its obligation to pay another without rendering the term 'mandatory' meaningless." Slip op. at 29 n.7.

B.

---

[4] *See Cherokee*, 543 U.S. at 637: citing *Ferris* and noting parties' position that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." (emphasis in original); *id.* at 640: rejecting "mutual self-awareness" argument and citing *Ferris*; *id.* at 641: citing *Ferris* after noting government's concession that "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds*.'" (emphasis in original). As the Panel held (and the government does not dispute), here, "as in Cherokee, there [wa]s no statutory restriction that would preclude the Secretary from using appropriated funds to pay full CSC need to the individual contractors bringing suit." Slip op. at 29-30.

The government next argues that the only possible construction of a statutory earmark in an appropriations act is as a congressional intent to cut off contract rights. Pet. at 9. But in *Cherokee* the Court noted that the purpose of such "*statutory* earmarks" is "to protect funds needed for more essential purposes," (543 U.S. at 642), since the effect of such a measure is to bar the agency from using its other funds for the earmarked purpose. This is consistent with the express aim of the § 450j-1(b) proviso—to protect the provision of federal government services to non-contracting tribes. To construe a "statutory earmark" in an appropriations law as both impairing a contract obligation and thereby implicitly amending the underlying statute under which the obligation arose runs contrary to well-established rules of statutory construction. *See TVA v. Hill*, 437 U.S. 153, 190 (1978) (disfavoring implied amendments by appropriations Act); *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (disfavoring implied breach of contract rights by appropriations act). *See also Cherokee*, 543 U.S. at 646 (disfavoring repeals of government contract obligations).

It is also contrary to the government's earlier concession that nothing in the appropriations Acts amends any provision of ISDA. Gov't Opp. Br. at 45. Those provisions include the 1994 mandate of § 450j-1(g) that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section…." and § 450j-1(a)(2), which establishes contract

support costs as a separate category of funding to which the § 450j-1(g) mandate applies. Slip op. at 2-3. The Panel followed this Circuit's rules for construction of ISDA and other statutes enacted for the benefit of Indians. Slip op. at 4, 15-16. Nowhere has the government even tried to explain why the same Congress would create the § 450j-1(g) full funding obligation and then take it away.

C.

Repeatedly, the government insists that the Panel's ruling will force the government to pay more on its contracts than Congress intended, arguing that the sum of its contractual obligations to all ISDA contractors will be more than the lump sum amount appropriated for contract support cost payments. But that position depends on the flawed contention that all ISDA contractors in aggregate should be considered a single contractor confronting a single insufficient appropriation, thereby relieving the government of its obligation to pay any of the contractors in full.

That is not how the *Ferris* Rule works, and the Panel correctly rejected that mischaracterization. Slip op. at 22-23 (discussing *Ferris*); *see also id*. at 30 ("the government's argument rests on an improper conflation of over 600 tribes and tribal contractors into one amalgamated contractor.") Instead, the Rule looks to the sufficiency of the appropriation at hand to pay an individual contractor. If the appropriation is sufficient to pay a particular contractor what it is due under its

contract, the government is obligated to pay that contractor in full, regardless of whether the appropriation is sufficient to pay all contractors in full. (And if it is not, the government will be in breach of any contracts it cannot pay in full).

The Panel well understood this basic principle, and it understood that a contrary rule would wreak havoc among government contractors, since they would never have *any* certainty of payment. A contractor would never know whether an appropriation that on its face was sufficient to pay its contract would instead be spent by the government in payments made to other contractors or for other purposes. As the Panel noted, under *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), a contractor would have no right to any particular share of an appropriation. Slip op. at 17, 19-21. And if, as here, the government's exhaustion of an appropriation to pay some contractors absolved it of the responsibility to pay other contractors, no contract rights would be secure and the certainty necessary for the integrity of the federal contracting process would be fatally undermined. Slip op. at 38 ("It is 'important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services.'") (quoting *Cherokee*, 543 U.S. at 644).

The government also errs in mischaracterizing the Panel as having "ignore[d] the funding limitation imposed by Congress," and violating the

limitations set forth in the Anti-Deficiency Act (31 U.S.C. § 1341) and even the Appropriations Clause (U.S. Const. art.1, § 9, cl. 7). Pet. at 10. But all the Panel has done is to apply the familiar, longstanding and bedrock *Ferris* Rule of government contract law: that if funds are legally available to pay a contractor (as they were here and in *Cherokee*), and if the agency instead spent those funds elsewhere (as it did here and in *Cherokee*), then there is a *damages* remedy—not a remedy for more appropriations, but a *damages* remedy—under the Contract Disputes Act for the government's breach of contract in failing to pay the full amount due under the contract. Slip op. at 44-45; *Cherokee*, 543 U.S. at 642-43. To say that in such circumstances the Judgment Fund is being misused to "pay CSC beyond the capped CSC appropriation[]" (Pet. at 11) is to conflate unpaid contract amounts with an award of damages for breach of contract, a distinction the Panel fully understood. Slip op. at 44-45. When a contractor is underpaid in breach of its contract, a damages remedy is available to remedy the wrong. The government's erroneous contention that this violates the Anti-Deficiency Act, or even the Constitution, cannot possibly be right, for this would deny contract damages to *any* government contractor on *any* claim once an agency has spent its appropriation, no matter how fully the contractor performed its obligations and no matter how fully the government received the benefits of the bargain.

D.

Moving even further afield (and into a new argument never presented to the Panel), the government now suggests the Panel's decision will compel the Secretary to violate a provision of the ISDA which states that the Secretary "is not required" to reduce funding for non-contracting tribes in order to "make funds available" to a contracting tribe. § 450j-1(b).[5] The government reasons that if its failure to pay a contracting tribe constitutes a breach of contract subject to a payment of damages from the Judgment Fund, the Secretary may ultimately have to repay the Judgment Fund from subsequently appropriated funds. Pet. at 12 (discussing § 450j-1(b)). That repayment, the government contends, might result in a reduction of funds available for services to non-contracting tribes.

But repaying the Treasury for the amount paid in damages from the Judgment Fund is not the same as "mak[ing] funds available to another tribe … under this Act" (§ 450j-1(b)). In any event, the whole scenario is a contrivance, for in truth the Secretary rarely repays Treasury for such damage awards. *See* Judgment Fund: Treasury's Estimates of Claim Payment Processing Costs under

[5] The government also repeatedly cites 25 U.S.C. § 450j(c)(1) as a makeweight for the proviso. Pet. at 1, 2, 4, 6, 12. But the legislative history of § 450j(c)(1) clearly establishes that the section is directed at the "out-years" of a multi-year contract, *see* Tribes' Op. Brf. at 48-49, and this appeal does not involve "out-years."

the No FEAR Act and Contract Disputes Act, GAO-04-481, at 9-10 (April 28, 2004). Further, agencies are not required to reimburse the Judgment Fund from current appropriations if to do so would "disrupt ongoing programs or activities." Comp. Gen. Op. B-217990.25-O.M. (Oct. 30, 1987). As the District Court said in an earlier opinion in this litigation, "Such a shell game would clearly be inequitable and the Court will retain jurisdiction to ensure that the Government does not engage in such charlatanism…." *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1095 (D.N.M. 1999). The government's new § 450j-1(b) argument gets it nowhere.

In short, the government's argument would create instability and uncertainty in the funding of ISDA contracts, while the Panel's decision adheres to Congress's stated intent to stabilize the funding regime for these contracts, particularly in the funding of contract support costs. *See*, *e.g.*, S. Rep. 100-274, at 2, 23, 30 (1987); S. Rep. 103-374, at 3, 12 (1994).

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing en banc should be denied.

RESPECTFULLY SUBMITTED:

/s/ Michael P. Gross
MICHAEL P. GROSS
M.P. Gross Law Firm, PC
Counsel of Record and Class Counsel
460 St. Michael's Drive, No. 401
Santa Fe, New Mexico 87505
Telephone: (505) 995 8066
Facsimile: (505) 989 1096
mike@mpgrosslaw.com

C. BRYANT ROGERS
Co-Class Counsel for Appellants
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
P.O. Box 1447
Santa Fe, New Mexico 87504
Telephone: (505) 988 8979
Facsimile: (505) 983 7508
cbrogers@nmlawgroup.com

LLOYD B. MILLER
Co-Class Counsel for Appellants
Sonosky, Chambers, Sachse, Miller & Munson, LLP
900 West Fifth Ave., Ste. 700
Anchorage, Alaska 99501
Telephone: (907) 258 6377
Facsimile: (907) 272 8332
lloyd@sonosky.net

DANIEL H. MACMEEKIN
Dan MacMeekin, Attorney at Law
1776 Massachusetts Ave., N.W., Ste. 801
Washington, DC 20036
Telephone: (202) 223 1717
Facsimile: (202) 223 1459
dan@macmeekin.com
Of counsel on the brief

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2007 in a proportionally spaced Times New Roman typeface in a 14-point font.

/s/ *Daniel H. MacMeekin*

Dated: July 19, 2011

CERTIFICATION OF DIGITAL SUBMISSION

All required privacy redactions were made. A virus check was performed on the electronic document, using AVG Anti-Virus (version 10.0.1390, last updated July 18, 2011), and no virus was detected.

/s/ *Daniel H. MacMeekin*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2011, I caused a copy of the foregoing to be filed electronically with the Court using the Court's CM/ECF system. Service will automatically be made on the following counsel through the CM/ECF system:

John S. Koppel
John.Koppel@usdoj.gov

Geoffrey D. Strommer
gstrommer@hobbstraus.com

/s/ *Daniel H. MacMeekin*