UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

Plaintiffs

v.

SALLY JEWELL, Secretary of the Interior, *et al.,*

Defendants.

No. 90-cv-957-JAP/KBM

JOINT MOTION FOR PRELIMINARY APPROVAL OF FINAL SETTLEMENT AGREEMENT; FOR ORDER DIRECTING NOTICE TO BE SENT TO THE CLASS; SETTING FAIRNESS HEARING

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(e), the parties jointly move this Court for an Order: (i) granting preliminary approval of the settlement agreement negotiated by the parties and attached as Exhibit A; (ii) directing notice be issued to the class in the form attached as Exhibit B; and (iii) setting a fairness hearing approximately four months after this Court issues an order granting preliminary approval of this settlement. In support of this Motion, the parties state as follows.

II. BACKGROUND

1. In 1990, the Ramah Navajo Chapter brought suit against the Government in this Court claiming that the Department of the Interior ("DOI") improperly calculated indirect cost rates for Tribes and tribal contractors entering contracts or self-governance agreements

(collectively known hereafter as "contracts") with the Bureau of Indian Affairs ("BIA") to take over operation of certain BIA programs, services, functions, or activities pursuant to the Indian Self Determination Act of 1975 ("ISDA"), Pub. L. No. 93-638, *as amended*, 25 U.S.C. § 450 *et seq*. On October 1, 1993, this Court certified a class of all Tribes and tribal contractors that have BIA ISDA contracts or compacts, *see* Order, Doc. No. 96, and Class Counsel mailed a notice to all Class Members on March 21, 1994. *See* Notice of Class Action, Doc. No. 124. On September 8, 1998, this Court granted preliminary approval of the parties' First Partial Settlement Agreement ("PSA-I"), and directed that notice of PSA-I be sent to the Class. *See* Order, Doc. No. 197. On May 14, 1999, this Court granted final approval to PSA-I to resolve plaintiffs' "rate claim" for fiscal years 1989–1993, and the government agreed to pay $76,200,000 to approximately 320 Tribes and tribal contractors. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999), Doc. No. 285.

2. On September 30, 1999, this Court granted plaintiff Ramah Navajo Chapter's motion to amend its complaint to add a "shortfall claim," alleging that the BIA had otherwise failed to pay tribal contractors their full amount of indirect costs, and granted the Oglala Sioux Tribe's motion to intervene to also assert the shortfall claim. *See* Order, ECF No. 347. That Order also directed that notice of plaintiff's shortfall claim be sent to the class. *See id.*

3. On March 27, 2002, this Court: (i) granted the Pueblo of Zuni's motion to intervene to assert a shortfall claim and a "direct contract support cost claim" ("DCSC claim") alleging that the BIA failed to pay tribal contractors their direct contract support costs; (ii) granted plaintiff Ramah Navajo Chapter's motion to amend its complaint to assert the DCSC claim; and (iii) directed that notice be sent to the Class regarding the addition of this new claim. *See* Stip. Orders, ECF Nos. 633-634.

4. On September 9, 2002, this Court granted preliminary approval of the parties' Second Partial Settlement Agreement ("PSA-II") and directed that notice of PSA-II be sent to the Class. Order, ECF No. 679. On December 6, 2002, this Court granted final approval of PSA-II to resolve plaintiffs' shortfall claims for fiscal years 1989–1993 and direct contract support cost claims for fiscal years 1989–1994, and the government agreed to pay $29,000,000 to approximately 224 Class Members. *See Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002), ECF No. 733. The Court reserved for further litigation any monetary claims for fiscal years 1994 forward for indirect contract support cost claims, any monetary claims for fiscal years 1995 forward for DCSC, and all claims for equitable relief. *See id.*

5. On May 21, 2008, this Court granted preliminary approval of the parties' Third Partial Settlement Agreement ("PSA-III"), and directed notice of PSA-III be sent to the Class. Order, ECF No. 1139. On August 27, 2008, this Court granted final approval to PSA-III, which reformed the indirect cost rate system for tribal contractors operating ISDA programs. *See* Order, ECF No. 1138.

6. On June 18, 2012, the Supreme Court ruled that the plaintiffs' claims were not barred by the government's appropriations law defense. *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). Although the Supreme Court upheld the plaintiffs' right to full payment of contract support costs, the amount of those unpaid costs was contested for those years that had not yet been determined. Since July 2012, the parties have engaged in intensive arms-length bargaining. The parties have met in person at least 24 times, engaged in dozens of phone calls, and exchanged hundreds of emails and spreadsheets. The parties each retained auditing and statistical experts to assist them with valuing plaintiffs' claims in the course of these negotiations.

7. Class Counsel are experienced in litigation and, particularly, in prosecuting claims under the Indian Self-Determination and Education Assistance Act, as well as other Indian tribal claims, and have adequately represented the Class's interests in negotiating this settlement.

8. The named Class representatives also participated in the settlement negotiations. Representatives of the Named Plaintiffs were present during almost all in-person negotiations with the Government, and were regularly consulted throughout the negotiation period. They frequently consulted in private with Class Counsel by telephone, email, and in person. Each has advanced its own expenses, including those for transportation and accommodations.

9. The protracted and intensive settlement negotiations showed that the parties are far apart on many factual, legal and accounting issues materially affecting the calculation of the total amount of unpaid contract support costs from FY 1994 through FY 2013, and the resulting damages. If the case were not settled, the resolution of these issues would likely require litigation lasting many more years. Final negotiations were assisted by the active participation of U.S. Magistrate Judge Karen B. Molzen.

10. The parties have agreed upon the Final Settlement Agreement ("FSA") that is the subject of this motion.

III. KEY TERMS OF THE FINAL SETTLEMENT AGREEMENT

The FSA negotiated by the parties contains the following terms:

1. After the judgment becomes final and non-appealable, the Government will pay the Class a Settlement Amount of Nine Hundred Forty Million Dollars ($940,000,000), plus post-judgment interest from the date of this Court's entry of final judgment, less the share of any Class Member that this Court may allow to opt of out of this Settlement. Payment of the Settlement Amount will release the Government from all claims for underpayment of contract supports costs for fiscal year 1994 through fiscal year 2013, except for certain claims of

individual tribal contractors preserved in the Agreement. Payment of the Settlement Amount is the Government's sole obligation under this Agreement. If, however, this Court were to permit 15 or more Class Members to opt out of the Class, and their share of the settlement were to exceed fifteen percent (15%) of the Settlement Amount, the Government would have the right to declare the FSA null and void.

2. Any Class Member may object to the FSA or request other relief by complying with the procedures and deadlines set forth in the Class Notice to be sent to Class Members upon approval by this Court. Any ruling of this Court pertaining to the FSA may be appealed as provided by law.

3. The Agreement provides for the Settlement Amount to be divided into: (i) the Net Settlement Amount to be distributed to Class Members; (ii) a Reserve Account to be used to pay for the cost of administering this settlement; and (iii) an amount for attorneys' fees and costs incurred in securing this FSA and recovering the Settlement Amount for the benefit of the Class and for supervising the distribution of the Net Settlement Amount.

4. The parties agreed that the speediest, least expensive, fairest, and most accurate method for distributing the Net Settlement Amount to each eligible Class Member is to use the statistical and accounting analyses which helped the parties negotiate the settlement amount. Those analyses disclosed that the amount of contract support costs paid to each Class Member closely correlates with its unpaid contract support costs. Using that correlation, each eligible Class Member's share will be determined by a ratio between (a) the amount of contract support costs that allegedly should have been paid as determined by the parties' negotiations based on the data collected from the sample of Class Members, and (b) the contract support costs paid to each Class Member during the settlement years. Each Class Member with a BIA ISDA contract

or compact in a given year will receive a minimum of approximately $8,000 for that year. The shares of the named Class Representatives will be enhanced by twenty percent (20%) in recognition of their contributions in achieving this settlement. The methodology used for distributing the Net Settlement Amount to each eligible Class Member and information on the sampling process is more fully explained in Appendix 2 of the attached FSA.

5. The FSA provides that, to be eligible for a share of the Net Settlement Amount, a Class Member must have entered into a Title I contract or Title III or Title IV compact or agreement under the ISDA with the BIA under the ISDA during any of the years FY 1994 through FY 2013 and must file a claim on a form to be provided by the Settlement Administrator, substantially conforming to that set out in Appendix 3. Each form sent to a Class Member will set forth the amount of money that the Class Member is entitled to receive from the Net Settlement Amount. Each Class Member's share of the Net Settlement Amount will be determined according to the methodology and distribution percentages set forth in the Distribution Appendix that is attached to the FSA. The Agreement further provides that, if by the end of the Claims Period, any Class Member has not timely submitted a claim form through the Settlement Administrator, or has disclaimed in writing its share of the Net Settlement Amount pursuant to the distribution percentages set forth in the Distribution Appendix, that Class Member's share of the Net Settlement Amount shall be reallocated to all other Class Members that have timely submitted claims in proportion to each such Class Member's share of the total Net Settlement Amount; provided, however, that unclaimed (but not disclaimed) amounts exceeding in the aggregate ten million dollars $10,000,000 will be repaid to the United States Treasury.

6. The FSA will establish a Reserve Account in the amount of Four Million Dollars ($4,000,000) that will be deducted from the Settlement Amount, deposited in an account established in the same manner as the Designated Account approved by the Court in which the Settlement Funds will be held for the benefit of the Class, and used to pay the costs of administering the FSA and distributing the Net Settlement Amount among eligible Class Members. Interest accruing on the Net Settlement Amount after calculation of Class Member shares will also be deposited into the Reserve Account. Class Counsel will, with the approval of the Court, retain a qualified Settlement Administrator to administer and distribute the Net Settlement Amount to Class Members. The fees and expenses of the Settlement Administrator will be paid from the Reserve Account. The Settlement Administrator will implement the distribution process for paying Class Members after all timely appeals (if any) have been resolved or the time for appeals has expired.

7. Any amount remaining in the Reserve Account after the initial distribution will be distributed to the Class in a second distribution, together with any undistributed funds from the Net Settlement Amount or interest accruing on the Reserve Account or the Net Settlement Amount. If the remaining amount is too small to justify the expense of distribution, Class Counsel may request the Court's approval to donate the remaining funds to a charitable organization.

8. Class Counsel, with the approval of the Court, will appoint a certified public accountant to serve as a Class Monitor. The Class Monitor will report to Class Counsel and the Government and will independently review and confirm or correct the work of the Settlement Administrator and certify its conclusions to the Court, including the accuracy of the Settlement Administrator's Class-Member share calculations, before any payment is made to a Class

Member. The Class Monitor will also verify that Claim Forms submitted by Class Members are properly completed and will verify that each Class Member that files such a Claim Form is paid its share. The fees and expenses of the Class Monitor will be paid from the Reserve Account.

9. The Settlement Amount will also be reduced by the amount awarded by this Court for attorneys' fees and costs incurred in securing this FSA and recovering the Settlement Amount for the benefit of the Class and for supervising the distribution of the Net Settlement Amount. As provided in Section IX of the FSA, Class Counsel intend to apply for an award of 8.5 percent of the Settlement Amount plus its reasonable costs in achieving this FSA, currently estimated to be $1,500,000. The Government supports the amount of attorneys' fees requested as fair and reasonable. The U.S. Court of Appeals for the Tenth Circuit prefers the award of attorneys' fees in class actions to be based upon a percentage of the Settlement Amount (the Class common fund). *See, e.g., Uselton v. Commercial Lovelace Motor Freight, Inc.,* 9 F.3d 849, 853 (10th Cir. 1993). The application will be filed no later than the issuance of notice to the Class, and the notice will set out Class Counsel's fee and costs request. The parties will ask that the application be heard at the same time the motion for final approval of the FSA is heard. Class Members will have the right to object to the fee request.

10. Class Counsel will oversee the work of the Settlement Administrator and the Class Monitor regarding distribution of the Net Settlement Amount. The attorneys' fees and costs approved by the Court will cover prior services in achieving this settlement and all future services in supervising the post-judgment distribution of the Net Settlement Amount, including the submission of periodic reports to the Court and securing approvals respecting implementation of the settlement as required by the FSA. The FSA contemplates that the Court may reserve from the approved attorney's fee award no more than ten percent (10%) of the total fee award to

ensure that Class Counsel responsibly oversee the administration of the Net Settlement Amount. Class Counsel's duties will end upon this Court's granting a motion for approval of an accounting showing final distribution of the Settlement Amount, at which time any reserved portion of the attorneys' fee award will be paid to Class Counsel.

IV. CLASS ACTION SETTLEMENT APPROVAL PROCESS

Approval of a class action settlement is a two-step process. First, counsel submit the proposed terms of settlement, and the Court makes a preliminary fairness evaluation. If the Court preliminarily approves the settlement, the Court should further direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which time arguments and evidence may be presented in support of and in opposition to the settlement. Fed. R. Civ. P. 23(e)(2); Manual for Complex Litigation (4th), §§ 21.632-21.634, at 320-322 (2004). The class notice should set forth, among other things, the date of the fairness hearing and the procedure by which objections to the settlement may be made.

Second, at the fairness hearing, the Court will hear objections, if any, and make a final determination of the fairness of the settlement. Manual for Complex Litigation, *supra*, § 21.634, at 322. After the fairness hearing, the Court will make a final determination as to whether the proposed settlement is fundamentally fair, adequate and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002).

In this case, only the first step—preliminary approval and the notice to be directed to Class Members—is presently before this Court.

A. Preliminary Approval Standard of Review

In determining whether a proposed settlement is fair, reasonable and adequate, the Court should consider the following factors:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp., 314 F.3d at 1188; *In re Motor Fuel Temperature Sales Prac. Litig.*, 258 F.R.D. 671, 680 (D. Kan. 2009). While the Court should consider these factors in depth at the final approval hearing, they are a useful guide at the preliminary approval stage as well. *See In re Motor Fuel Temp Sales Prac. Litig.*, 258 F.R.D. at 680; *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). The purpose of preliminary approval is to determine whether the proposed settlement is within the range of possible approval, *i.e.*, whether there is any reason not to notify class members of the proposed settlement and proceed with a fairness hearing. *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154, 2012 WL 6085135, at *4 (D. Kan. Dec. 6, 2012) (citing 4 Robert Newberg, Newberg on Class Actions § 11:25 at 38 (4th ed. 2002)).

B. This Court Should Grant Preliminary Approval to the Final Settlement Agreement

This Court should grant preliminary approval to the FSA, because the FSA satisfies the standard for preliminary approval. First, the FSA was reached after years of expensive and sometimes contentious litigation, and is the product of years of complex, technical, and sometimes contentious negotiations. Over the course of these negotiations, the parties worked hard to develop and implement a plan to settle the case in a fair and efficient manner. Rather than evaluate the thousands of contracts, compacts, and annual funding agreements at issue in this case on an individual basis, the parties have engaged expert statisticians to design and implement a method for taking a statistically valid sample of this universe. All parties made diligent efforts to locate and obtain the relevant documents identified in the sample, including the

contracts, compacts, annual funding agreements, audits, indirect cost rate proposals and agreements, trial balances and other relevant information. The parties each engaged expert accountants to evaluate the financial information contained in these documents in an attempt to determine an appropriate settlement amount for each of the sampled years of the sampled tribal contractors, known as "tribal years." The parties' statisticians extrapolated the results of the accountants' analyses back to the universe of contracts, compacts, and annual funding agreements at issue in this case to help determine an agreed-upon settlement amount for the entire class, and then evaluated the results of that analysis to help the parties determine an appropriate way to distribute an appropriate share of the Net Settlement Amount to each Class Member. In the judgment of the parties, the data from the sampling process together with BIA CSC payment records provide by far the most expedient and equitable basis for distributing the Net Settlement Amount to Class Members. The Agreement thus provides appropriate monetary relief to all Class Members for their class-based claims.

Second, serious questions of law and fact exist, placing the ultimate result of the litigation in doubt. Although the Supreme Court upheld the plaintiffs' right to full payment of contract support costs, no court has ever opined on how damages for breach of an ISDA contract should be measured, and the Government does not admit liability in the FSA here. Nor has any other court allowed tribes and tribal contractors to pursue ISDA claims as a class. *See, e.g., Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). Moreover, as revealed by the negotiations between the parties, the amount of damages to which plaintiffs would be entitled were they to prevail is subject to considerable debate.

Third, the value of an immediate recovery far outweighs the mere possibility of future relief after protracted and expensive litigation. The protracted and intensive settlement

negotiations showed that the parties are far apart on many factual, legal, and accounting issues materially affecting the calculation of the total amount of unpaid contract support costs and the resulting damages. If the case were not settled, the resolution of these issues would likely require litigation lasting many more years. The costs of continued litigation are high, and it is possible that the class could receive much less in the way of pecuniary relief. Finally, there is a risk that the class could be decertified.

Finally, counsel on both sides and the Class Representatives support the FSA as fair and reasonable. The support of counsel is "entitled to great weight." *In re Bankamerica Corp. Securities Litig.*, 210 F.R.D. 694, 702 (E.D. Mo. 2002). Class Counsel are experienced in litigation and, particularly, in prosecuting claims under the Indian Self-Determination and Education Assistance Act, as well as other Indian tribal claims. The named Class representatives also participated in the settlement negotiations. Representatives of the Named Plaintiffs were present during almost all in-person negotiations with the Government, and were regularly consulted throughout the negotiation period. They frequently consulted in private with Class Counsel by telephone, email, and in person. The Class Representatives [have signed/support] the FSA. Such assent also supports the fairness of the settlement. "The representatives' views . . . may be entitled to special weight because the class representatives may have a better understanding of the case than most members of the class." *Id.* at 703 (citing Manual for Complex Litigation (3d) at § 30.44 (1994)).

Accordingly, this Court should grant preliminary approval to the FSA.

C. Rule 23 Notice Standard of Review

1. Provision of Notice

Rule 23(e) requires that all class members be given notice of any proposed class action settlement in a manner directed by the Court. *See* Fed. R. Civ. P. 23(e)(1)(B). This may require

individual notice to class members who can be identified with reasonable effort. Fed. R. Civ. P. 23 Cmte. Notes on Rules–2003 amend. (individual notice to all class members that can be identified with reasonable effort "may [be] require[d]" when, as here, "class members are required to . . . fil[e] claims to participate in the judgment . . . ."). However, actual notice to all class members is not required. *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944, 946 (10th Cir. 2005) (neither Due Process nor Rule 23 "require *actual* notice to each party intended to be bound by the adjudication of a representative action;" actual notice provided to 70 percent of class deemed sufficient).

2. Contents of Notice

In addition, to ensure the class members are properly informed of the proposed settlement and its potential to bind class members, the notice should:

- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;
- provide information regarding attorneys' fees;
- indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to the settlement; and
- prominently display contact information of class counsel and the procedure for making inquiries.

See Manual for Complex Litigation (4th), *supra*, § 21.633 at 321-22; *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336 (1st Cir. 1991) (discussing Rule 23(e)'s notice requirements). A notice is "adequate if it may be understood by the average class member." 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:53, at 167 (4th ed. 2002).

D. The Parties' Proposed Class Action Settlement Notice Complies with Rule 23

This Court should approve the parties' proposed Notice of Class Action Settlement and direct it to be sent to Class Members.

First, the Notice will be directed in a reasonable manner to all Class Members. Under the terms of the FSA, Class Counsel will: (i) send the Notice to all Class Members whose addresses can be found with reasonable efforts through first-class mail to their last known address, as confirmed by the BIA's records; (ii) publish the Notice in either Indian Country Today or News From Indian Country and to at least one internet website focused on providing news and information to Indian country; and (iii) shall post the Notice on the Class website at www.rncsettlement.com. Additionally, defendants will: (i) make their best efforts to send a copy of the Notice to each and every Class Member by first-class mail and, where available, by email; and (ii) publish the Class Notice on the Interior Business Center's Indirect Cost website, www.doi.gov/ibc/services/Indirect_Cost_Services/indian_tribes.cfm, and on the BIA's website, www.bia.gov.

Second, the proposed "Notice of Proposed Settlement of Class Action Lawsuit," which is attached as Appendix 1 to the FSA, includes the required key components for a notice . The draft Notice describes the essential terms of the FSA. It also discloses the incentive award of a twenty percent enhancement to each Class Representative's share of the Net Settlement Amount. It provides information regarding attorneys' fees and costs. It will indicate the time and place for the fairness hearing, and it prominently displays the contact information of Class Counsel and the procedure for making inquiries.

Also pursuant to Rule 23(e), the Notice will provide Class Members with instructions on how to access a complete copy of the FSA on Class Counsel's website. Finally, the Notice will inform Class Members of their right to file and serve objections regarding the FSA or the attorneys' fees and costs requested by Class Counsel up to 45 days after the postmark date of the Class Notice mailed by Class Counsel.

E. At the Settlement Stage, This Court Should Limit the Opportunity of Class Members to Request Exclusion From the Class to Those Class Members That Have Not Previously Had That Opportunity

Consistent with its past orders, this Court should exercise its discretion and decline to give those Class Members who have already had an opportunity to opt out an additional right to request exclusion at the settlement stage. Rule 23(e)(4) provides that, when a class action was previously certified under Rule 23(b)(3), a court "may refuse to approve the settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." The Advisory Committee notes to the 2003 Amendment to Rule 23(e) state that:

> The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing.

Fed. R. Civ. P. 23 Cmte. Notes on Rules–2003 amend. *See also In re HealthSouth Corp. Securities Litig.*, No. 07-11908, 2009 WL 1684422, 334 Fed. Appx. 248, 254 n. 12 (11th Cir 2009) ("In any case, as the word 'may' in Rule 23(e)(4) makes clear, that '[t]he decision [to allow a second chance to opt out at the settlement stage] is wholly within the discretion of the district court.'"). Applying Rule 23(e)(4), many courts have rejected requests to provide existing class members that have already been given the opportunity to opt out at an earlier stage with an additional opportunity to opt out at the settlement stage. *See, e.g., Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 354 (6th Cir. 2009) (Objector's "clients, at any rate, received a second opt-out opportunity. What he wants is a third one, which the district court permissibly denied."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114-15 (2d Cir. 2005) (objecting class member "was required to opt out at the class notice stage if it did not wish to be bound by the settlement."); *Class of Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992) ("Nor is

the district court's approval of the Consolidated Settlement flawed because it did not require that members of the class be afforded an[other] opportunity to opt out of the resulting settlement."); *Lowery v. City of Albuquerque*, No. 09-457-JB, 2013 WL 1010384, *42 (D.N.M. Feb. 27, 2013) ("Because the class was notified twice before of their ability to opt out, the Court cannot conclude that the Second Proposed Settlement is unfair because it did not allow class members to opt out a third time at the settlement stage."); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, *3 (E.D. Pa. May 11, 2004) ("We are aware of no significant developments since the original opt-out that would require us to provide for a second opt-out period. . . . Moreover, Class members still have the opportunity to object to the terms of the Settlement.") (citing Manual for Complex Litigation (4th) § 21.611 (2004)).

In this case, the Court previously provided Class Members the opportunity to request exclusion from the Class after the Class was certified and after the Shortfall and DCSC Claims were added. *See* Class Notice (Rate Claim), Doc. No. 124 (Mar. 21, 1994); Order Approving Class Notice (Shortfall Claim), Doc. No. 378 (Dec. 17, 1999); Order Approving Class Notice (DCSC Claim), Doc. Nos. 634-35 (Mar. 27, 2002).[1] In response to the March 21, 1994, notice, four tribes timely requested exclusion from the Class: (i) the Navajo Nation; (ii) the Confederated Tribes of Siletz; (iii) the Eastern Shoshone Tribe; and (iv) the White Mountain Apache Tribe. *See* Requests for Exclusion, Doc. Nos. 130, 131, 134 & 136 (May-June 1994). All four tribes requested and were granted permission to re-enter the Class and all four tribes then negotiated individual recoveries. *See, e.g.*, Orders, Doc. Nos. 247, 250, 251, 462 & 519-22.

[1] We note that the Court's Opinion and Order certifying a nationwide class of all federally-recognized tribes and tribal contractors that have BIA ISDA contracts did not specify whether it was certifying the class pursuant to Rule 23(b)(2) or (3). *See* Doc. Nos. 95-96. In allowing absent Class Members to request exclusion from the class, however, the Court treated the class as certified under Rule 23(b)(3).

In granting preliminary approval to PSA-I, PSA-II, and PSA-III, this Court exercised its discretion, consistent with Rule 23(e)(4), and declined to give existing Class Members an additional opportunity to request exclusion from the Class. *See* Order Granting Prelim. Approval to PSA-I, Doc. No. 197 (Sept. 8, 1998) "(No Class Member in existence prior to April 12, 1994 . . . may opt-out now."); Order Granting Prelim. Approval to PSA-II, ECF Nos. 678-79 (Sept. 9, 2002) (declining to give existing Class Members additional right to opt out); Order Granting Prelim. Approval to PSA-III & Directing Notice of PSA-III, ECF Nos. 1138, 1140 (May 19, 2008) (same).

Consistent with this Court's past exercises of discretion declining to give Class Members an additional right to request exclusion at the settlement stage, the proposed Notice for the FSA informs those Class Members that have previously received an opportunity to opt out that they will not have an additional right to request exclusion at the settlement stage. Any Class Member that believes such designation is erroneous may, of course, object to such designation, just as they may object to any other aspect of the proposed FSA.

In regard to the Court's discretion to allow Class Members the right to request exclusion at the settlement stage arising under Rule 23(e)(4), we note that the proposed FSA provides:

> In the event the Court authorizes 15 or more Class Members to opt out and the amount that shall be retained by Defendants exceeds 15 percent of the Settlement Amount, the Defendants shall have the exclusive right to declare this FSA null and void. Defendants will notify Class Counsel in writing of any such declaration no more than 15 days after the Court's decision granting such Opt Outs, after which such right shall expire.

FSA § V.E. Thus, allowing Class Members that have already had an opportunity to request exclusion another opportunity to do so at the settlement stage could imperil the FSA for the rest of the Class.

The parties have, however, identified 74 Tribes and tribal contractors that first entered into BIA ISDA contracts after the March 27, 2002 notice offering Class Members the opportunity to request exclusion. These new Class Members have not yet had an opportunity to request exclusion from the Class. Rule 23(c)(2)(v) provides that "[f]or any class certified under Rule 23(b)(3), the court must direct notice that clearly and concisely states, in plain language: . . . that the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P 23(c)(2)(v). In granting preliminary approval to PSA-I, this Court approved a notice providing that "[o]nly new Class Members who first became Class Members after April 12, 1994, the date the original notice of this class action was sent, shall have the right to file a notice of intent to opt-out of this class action at this time." Order Granting Prelim. Approval to PSA-I, Doc. No. 197. Consistent with this Court's prior Order allowing new Class Members to request exclusion from the Class, the present Notice informs those class members that have not yet received an opportunity to opt out that they have a right to request exclusion from the Class.

V. CONCLUSION

This Court should grant the parties' Joint Motion for Preliminary Approval, approve the content of the class notice, direct that opt outs should be limited to those class members that have not yet had an opportunity to opt out of the class, and direct that the Notice be sent to class members and published in the manner provided by the FSA.

Dated: Sept. 16, 2015

Respectfully Submitted,

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