UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Before the Honorable James A. Parker

Clerk's Minutes

Case Title: ***Ramah Navajo Chapter et al. v. Sally Jewell, et al.***
Case Number: 90 CV 957 JAP/KBM
Date: January 20, 2016
Court in session: 9:05 am **Court in recess: 12:06 pm**
Courtroom Clerk: Ellen Perry
Court Reporter: John De La Rosa
Type of Proceeding: Hearing on Final Approval of Final Settlement Agreement (Doc. No. 1334) and on Application for Attorneys' Fees and Costs (Doc. Nos. 1313 and 1335).

Rulings: Parties will submit a stipulation on the issue of New Mexico Gross Receipts Tax on the attorneys' fees that will be awarded by this Court.

Attorneys Present for Plaintiffs:

Michael Gross
Bryant Rogers
Lloyd Miller
Don Simon
Lia Carpeneti
Spencer Reid
Tom Bird
Paul Frye
Dan MacMeekin

Attorneys for Defendants:

James Todd
Ryan Parker
Eric Womack

Class Representatives:

President Peter Zah: Navajo Nation
President David Jose: Ramah Navajo Chapter
President John Yellowbird Steele: Oglala Sioux Tribe
Governor Val Panteah and Lt. Governor Birdina Sanchez: Pueblo of Zuni.

Additional persons:

Brian Fitzpatrick: Vanderbilt University Law Professor
Kevin Washburn: former Assistant Secretary of Indian Affairs

9:05 am Court in session. Counsel stated appearances. Court recognizes Kevin Washburn former Assistant Secretary of Indian Affairs.

Mr. Gross introduces agenda for this hearing. Mr. Miller introduces exhibits, and moves for admission of Exhibits 1-4. No objections. Exhibits 1–4 are admitted. Ex 1 is an index of all exhibits in support of the Final Settlement Agreement (FSA) and the Attorneys' Fee Application (Application). Mr. Miller explains Ex. 2, which is renumbered list of Class members and the amount they would receive under the FSA. Ex. 3 is a power point presentation. Ex. 4 is an article by Prof. Brian Fitzpatrick describing an empirical study of attorney's fees in all class actions in federal court during 2006 and 2007.

9:09 am. Mr. Gross addresses the Court and introduces the tribal dignitaries present in the Gallery. Peter Zah, President of the Navajo Nation. David Jose: President of the Ramah Navajo Chapter (RNC), John Yellowbird Steel, President of the Oglala Sioux Tribe, and Gov. Val Pantilla and Lt. Gov. Birdina Sanchez of the Pueblo of Zuni.

Mr. Gross describes this epic case and settlement, which has already been recognized. Other benefits of the settlement are unification of Indian Country. There was not a single objection to FSA or to the Application from any of the 699 Class members. This lack of objections may be a first in Indian Country. There were no objections filed yesterday, the deadline for objections provided to the additional 55 Tribes added to the Class.

Mr. Gross describes other advantages of this case and its decision in the United States Supreme Court. Congress has appropriated $786 million additional appropriations in all fiscal years (FY) since the Supreme Court decision in 2012. We give credit to Mr. Miller for his strategy in winning an 8 to 0 decision in the *Cherokee* case in 2005. This strategy paved the way for our victory in 2012 in this class action. This case presented an even more difficult issue of appropriations law because we had to interpret the "not to exceed" language used in appropriations for tribal contract support costs (CSC). Mr. Rogers will elaborate on the numerous lower court cases in favor of government that interpreted limited appropriations language on CSC. Now, Congress has added appropriations, and we hope they will be permanent. Full payment of CSC to the tribal contractors will achieve the goal in creating parity of program services both in content and quantity. It is notable that no new Class member has requested exclusion.

9:17 am Mr. Gross notes one objection to the FSA by United South Eastern Tribes (USET). Class counsel are familiar with their lawyer, Mr. Chris Cantrell. The objection was unusual because USET requested inclusion in the Class. We

reached accord and they were admitted in class. After receiving USET's objection, Class counsel explored further if there were any tribal entities omitted for the same reason as USET. Ms. Lia Carpeneti will elaborate on that aspect. In sum, we discovered 55 new class members. We expanded Class to 699. As for the tribes not previously given the option to opt out, we mailed notices to them informing them they had the right to opt out. The deadline to opt out expired last night, and there were no requests for opt out. Mr. Christopher Cantrell, counsel for USET, is introduced. Mr. Cantrell confirmed that the USET tribes had no objection to the FSA.

Mr. Gross states that the Class counsel appreciated the USET's effort to add class members. During the notice process for this new group, new addresses were discovered. We published all relevant docs on the Class website: www.rncsettlement.com. We have had 84,000 + hits on the website.

We have received numerous phone calls about the settlement. Most Class members want to know when they can send in claim forms. We informed them that there is a system that will be set in motion after Court approves the FSA. We also published notice of the FSA in Indian publications. The Wall Street Journal published an article about the settlement. The BIA published the settlement on its business center website. All parties participated in a joint press conference on 9/17/15. On 9/23/15, we had a hearing on preliminary approval in this Court. Three Class counsel made personal presentations at NCAI conference, which is the largest gathering in country.

9:23 am Mr. Gross outlines the risks of not settling this matter. In short, it would be a disaster for the Class members because it would require years of further legal proceedings.

9:24 am Mr. Miller addresses the Court. He notes that it is difficult to overstate the magnitude of this settlement. The Class consists of 699 tribes in 35 states. The minimum recovery for any Tribe is $8,000 and the maximum is 56 million to one Tribe. In the FSA, twelve issues are important but I will address only a subset of those today. This was extremely hard fought. Three claims for underpayments of CSC over a twenty year period. Mr. Miller describes the reserved claims, which he describes as quite valuable and were an important feature of this settlement. Claims by Class members with contracts with other federal agencies are reserved. Those agencies do not pay CSC.

Ex. 2 is a list of class members by amount instead of alphabetical. Assuming $4 million Reserve Account and deducting 8.5% for attorneys' fees and costs awarded.

Ex. 2: Of the Class members, 80% are located in this circuit. 25% of the Class members will recover over 1 million. 99% are over $8,000 minimum. In contrast, the BIA paid 2.5 billion for ISDA contracts over the last 20 years. $ 940 million is

another 40% over that, and it is unprecedented. Moreover, at the level that most Tribes will recover, there is plenty of incentive to object, or to opt out and go it alone. Yet, none objected to either the FSA or to the Application.

9:32 am Court questions Mr. Miller about Ex. 2. How did you arrive at amount? Lia Carpeneti will address this in detail. The $8,000 minimum applies to a Tribe who had one contract over one year that received nothing or very little. Even if a Tribe is entitled to zero, we thought $8,000 should be received. The group of 55 additional Class members added after USET's objection received nothing in any year for which they had ISDA contracts. If for example, one Tribe had ten years of contracts, they would get $80,000 from the settlement amount.

Mr. Miller addresses the payment process from the United States' Judgment Fund. There will be certain delays because of the Treasury Offset Program and some Tribes will not be paid right away. Page 6 of the FSA describes this. There will be a deduction of $4 million off the top for expenses to distribute the settlement. This is more than enough for the distribution expenses, and to reimburse the sampled tribes for their expenses, and for the Class representatives' expenses incurred in the three year settlement process. In addition, we left room for unexpected expenses.

Mr. Miller states that the Application requests attorneys' fees equaling 8.5% of the common fund plus 1.2 million in expenses to the present.

The Court questions Mr. Miller about the definition of costs, which includes the gross receipts tax (GRT) that the New Mexico attorneys will have to pay on the fees received here. PSA I-III all included GRT as a cost in addition to the percentage awarded as fees.

9:41 am Court: The amounts of GRT may have been confusing in the notice. The notice states that costs will be approximately 1.6 million, but if costs include GRT, which approach 6 million, there will be a difference from the amount stated in the notice. How was it explained in class notice?

Mr. Miller: Notices did not go that far. Neither of the prior notices had mentioned this. We did tell all Class members where to find fee petition and it refers to GRT. The FSA also mentions GRT, and it was available for review to all Class members. We see GRT as separate from out of pocket expenses. These are funds to be paid separately later. Mr. Miller reads Notice, and Paragraph 10 says that costs include GRT on fees. However, the amount given for costs does not include GRT. The current GRT rate is 7.1875%. and rough math yields an amount of $5,742,000, which will go to state of New Mexico. Class members who do not live in New Mexico might not like this. It was not identified by amount.

Mr. Miller informs the Court that the parties are willing to do a supplemental memo on this issue. Mr. Reid will also address this.

9:42 am Mr. Miller continues. He has never have heard of the United States supporting a fee request. And, the government initiated negotiations on fees without Class counsel asking. The 10% hold back is at the discretion of the Court to secure expenses for class counsel over the next year. The 8.5% is only against $940 million and not on additional appropriations of 786 million. Yet, the benefit is great. Congress created an indefinite appropriation for CSC.

Mr. Miller addresses the Claim Form: Claim form is brilliant and came together cooperatively with the Defendants' attorneys. This pre-printed form will state the dollar amount owed to each Class member. This is so much better than previous settlements. There is no need for claimants to wait for all claims to come in. This issue also illustrates the real risk of decertification. The US government threatened this even at the Supreme Court. This Claim Form avoids decertification and is a document that complies with the Contract Disputes Act (CDA). Much less time will be expended processing the claims with this form, Court asks, as claim is paid, is that when attorneys' fees are paid? No. Attorneys' fees will be paid 10-14 days after receipt of funds from Judgment Fund. If a claimant owes the government money, their claim will be deducted under the Treasury Offset Program. The 8.5% will be out of the amount from the Judgment Fund that is not subject to offset. Court asks if there is a timing problem. When will 8.5% be paid? Once the order approving the FSA is entered plus the 60-day appeal period, the Department of Justice (DOJ) will file a form with the Treasury Department. Then an amount will be made from the Judgment Fund to cover all claims for Class members who do not have an offset owed to the government. Once the Bank gets that amount from the Judgment Fund, it will transfer 8.5% of that amount for attorneys' fees. If certain claimants do not settle with Treasury, the attorneys will not get fees on that amount.

9:48 am Lia Carpeneti addresses the Court on the distribution process and on the identification of Class members. Distribution: The parties began to develop this process after the agreement on the amount of the settlement in late 2014. We used sampling process to help with this. Two pieces of information were helpful. There was high correlation between the amount that tribal contractor was paid and what a contractor was owed. We knew the first number because it came from the BIA payment database. This is also how we identified Class members. The second piece of information from the sampling process came from our effort to stratify each sample by year. We drew samples from each year and gave data regarding relative size of underpayment to the experts. The experts calculated the amounts owed on these claims.

The Parties had to consider two additional issues: the "small tribes" issue and gap year issue. For small tribes, we were concerned that these contractors would be adversely affected if we used the amount paid each year to determine what was owed to these contractors. The gap year issue concerned Tribes that had contracted under the ISDA but which received no CSC payments in any year. In

that case, the overall calculation method did not account for these contractors. We decided to use the $8,000 per year minimum payment for these contractors. If the calculation of a claim was less than $8000, then that contractor would have their claim increased to $8000.

We also addressed incentive awards to Class representatives. We decided on a 20% enhancement, which was also approved in PSA II. Judge Hansen noted the representatives' valuable contributions to settlement process.

During the objection period, we received one objection filed by USET. They were left out of the Class because they never received CSC payments at all in any year. We thought this might be true for other contractors out there that were left out. We figured this out. We looked at a larger database at the Department of the Interior listing BIA contracts. We looked for contractors that may have been left out of the Class. A number of contracts were not under the ISDA so they had to be excluded from list. We used BIA budget codes to identify ISDA contracts, and we pulled out additional contractors. That analysis showed that an additional 55 contractors should have been included in the Class. After identifying these, we had to allocate a settlement amount to them. But our system already allocated 8K minimum payment, and we thought it best to treat them the same way. They will receive $8,000 times the number of years in which they had ISDA contracts. As for the 55 new Class members, $1.9 million will be allocated to them. Less than ¼% of the total amount, and we recalculated what the other Class members would receive. The FSA provided for this by stating that each Class member's distribution percentage may change if new members added. The list of all Class members is found in Doc. 1328-2, and in Ex 2 (which are sorted by size).

After 55 found, next question is whether we needed an additional notice to them. They had received publication notice of the FSA, but 26 had never received notice of a right to opt out of the Class. We determined that this notice was necessary for those 26 Class members. We mailed individual notice of this right and gave them a 30-day objection period. Not one opted out. Thus, this has no effect on the Court's approval today.

10:01 am Mr. Todd addresses the Court about the legal standard to be applied by the Court. The Court gave preliminary approval on September 30, 2015. At that time, the standard was different; however, in the 10th Circuit, courts are required to consider the same standards at the time of preliminary approval. Now the Court is instructed to apply the standard using a higher level of scrutiny than before. The FSA meets the four-part standard. I will address only two, and Mr. Rogers will address two.
The four-part standard is 1) whether the settlement was fairly and honestly negotiated; 2) whether serious questions of law and fact place the outcome in doubt; 3) the value of immediate recovery exceeds what could be produced at a trial; and 4) the parties believe the settlement is fair. In addition, the Court should

consider that no objections were filed as a significant additional factor in evaluating the FSA. .
Mr. Todd addresses the first factor. This case was reached after years and years of expensive litigation over 25 years. Since the 2012 Supreme Court decision, the settlement process has been intense. Mr. Todd joined the case in 2008 when PSA III, was approved. Much of that equitable relief has been implemented.

After the Court ruled against Plaintiffs on summary judgment in 2006, Plaintiffs took an appeal on the issue of appropriations caps, a controlling factor on all three types of claims Plaintiffs had proffered. Within a month of the Supreme Court's decision, the parties began settlement conferences. The parties needed a basis to value the settlement. Months of negotiation over how to value settlement ensued. We decided on a sampling and statistical analysis. But, how to structure the sample was very difficult. We hired experts. After the method for sampling was developed, we needed to collect all documents for sample tribe years. We still had thousands of documents and records in sample process. Plaintiffs employed expert accountants and the government employed forensic auditors. The parties rarely agreed on anything and we fought tribe by tribe, contract by contract. We had compromised on what documents were needed to examine claims. Differences were identified and we finally got a jumping off point to come up with an ultimate settlement amount. It took all three and one half years, with no down time on these negotiations. We worked very hard to produce a settlement to avoid collateral challenges and appeals. We tried to address all issues that have come up in the other cases. The issue with the Treasury Offset Program and attorneys' fees were big issues in other cases. The government supports the Application because it is the product of arms' length negotiations over several months.

10:11 am Court: I complement you on getting certiorari granted in the Supreme Court to clarify the law in this difficult area.

Mr. Todd continues: In this case, the plaintiffs made us aware of the New Mexico GRT early in 2015. They showed us the New Mexico case law allowing this cost to be passed on to the class members.

10:13 am Mr. Rogers addresses the Court. Serious questions of law and fact place the case's outcome in doubt. I will also address the adequacy of this settlement. Mr. Rogers describes the four damage components. There were complex issues related to each component. We never agreed on whether these contracts were fixed cost contracts, as Plaintiffs contended, or cost recovery contracts, as the government contended.

Only ISDA contracts are entitled to this treatment. Historically, many contracts in sampling treated as ISDA contracts that shouldn't have been and vice versa. Then we found where BIA had ISDA contracts but did not pay any CSC at all. Very unpredictable outcome if the parties are required to litigate the damages in this

case. Other issues are the effect of admissions, what documents are necessary as evidence, how to calculate "pass-throughs" and "exclusions," which are negotiated items.

Determining the amount of damages related to the rate miscalculation claim, which was the original claim, presented complex problems. There are different time frames for how the law evolved over time. Thus, damages would be different for certain time periods.

The benchmark issue would also arise. The government chose to use 15% of salaries as a benchmark for CSC. To prove this amount of underpayment, we would have to present 20 years of salary data. And we could only consider salaries related to ISDA contracts.
As for the amount of indirect costs applied to DCSC, the parties disagreed on the method of calculation. No court has ruled on this. Most cases have been settled. Plaintiffs might not win on any of these; therefore, we would recover a much lower amount of damages than $940 million. This is clearly adequate and is reasonable when considering the serious legal and factual issues that would have to be decided at trial.

10:24 am Mr. Rogers describes the many cases decided against the Plaintiffs' position before the case was decided by the Tenth Circuit in 2010. In 1994 Congress began to cap appropriations for CSC. Once caps imposed, Congress' "not to exceed" language was put in appropriations bills. Immediately a question arose about statutory language. The issue was first addressed in 1996 in DC Circuit, which interpreted the language in § 450j-1(b) that payments were "subject to the amount of appropriations" in the ISDA statute and in the ISDA model contract. That court ruled that contractors had no right to recover more than what Congress appropriated. That concept was applied thereafter in CDA cases. The contractors lost 1999 at the Federal Circuit in the *Oglala Sioux Tribe* case. Then the Ninth Circuit decided the Shoshone Bannock case and applied the concept to another statutory provision. Contractors consistently lost.

These cases put us deeper in to the hole of legal interpretation. In 2002 the Tenth Circuit weighed in on non-cap year claims. *Cherokee v. Thompson* was a case against the Indian Health Services (IHS) on unpaid CSC out of lump sum appropriations. The Tenth Circuit ruled against the contractors and was later overturned in 2005 by the Supreme Court. In 2006, Judge Hansen granted summary judgment to the government in this case distinguishing the *Cherokee* holding.

Judge Johnson in 2006 addressed the issue in the *Zuni* case, and came to same conclusion. In 2008, there was the *Tunica Biloxi* case. The court ruled that the statute eliminated contractors' claims in cap years. When this case was on appeal in the Tenth Circuit, but before that court's ruling, the *Arctic Slope* opinion in Fed. Cir came out in 2010. That court distinguished *Cherokee* and rejected the

Ferris doctrine. The court noted that the Tribes knew every year that there was not enough money available for all contractors. To say, our appeal was an uphill battle is an understatement. We had a 16 year history of negative rulings. Nobody would have taken odds that we would win in Supreme Court. It seems easy to look now and say what a victory. The Court compliments Plaintiffs on their loss in battling against *certiorari* in the Supreme Court.

10:37 am Mr. Gross concludes that this was a 25 year odyssey coming to a just and speedy close. Many of the Class members are experiencing abject poverty. The United States has adjusted its relationship to the Tribes since 2012. Assistant Secretary Washburn's leadership was crucial and invaluable in reaching the settlement. We ask the Court to bring it to a conclusion and grant final approval.

10:40 am Court questions Mr. Gross. In your fee agreement with RNC, how did it address GRT? Subject not mentioned. Mr. Gross recounts the history of GRT litigation and the way it evolved after NM Supreme Court ruled in Tribe's favor of Ramah Navajo School Board case. In sum, the burden is on taxpayer. The fact that ISDA shields individual contractors from NMGRT does not mean that we should not request GRT. Judge Hansen awarded GRT on top of the previous fee awards in this case.

I believe that in my fee agreements I included GRT as costs.

Court: Under § VII C of the FSA, the Reserve Account is to be $4 million. What if the amount of costs exceeds $4 million? Mr. Gross: we anticipated it would not go higher than this amount.

Mr. Rogers: If a claimant is subject to a Treasury offset, only their share of the costs comes out of the Reserve Account. For example, if the Treasury offset amounts for all claimants equals $20 million, then the amount from the Judgment Fund deposited into the common fund would be only $920,000,000.

Mr. Todd: In § VII, the number of offsets will impact the Reserve Account minimally. We made it $4 million to account for any of these contingencies, which is twice as much as plaintiffs requested. We anticipate the $4 million will be more than enough. Mr. Rogers agrees. Court asks counsel if there was a chance costs will go over $4 million? Mr. Gross: from present observations, we don't expect to exceed. Mr. Rogers: Treasury offset will be taken off of a tribe's total share. Only their percentage share will be taken out of the Reserve Account.

Recess at 10:49 am

10:59 pm Mr. Reid: Addresses GRT. This will be paid from the total settlement but he agrees that the Notice to the Class members did not specify amount of GRT or the GRT rate. As calculated, GRT will be just under $6 million. But, it really will be much less because the Sonosky firm did much of the work outside of New

Mexico. So the GRT amount will probably be about 4 million. Even if $6 million, it is 2/3 of 1 % of the total settlement amount. GRT was treated as a cost by Judge Hansen and Class members were aware from the previous two settlements. The omission is in Ex. 2 which is estimated dollar share of each class member. It does not include a deduction for GRT, but everything else is deducted. We have decided to the extent the GRT is applied, Class counsel will pay those GRT subject to being reimbursed from what's left over in the Reserve Account at the end of the distribution process. This is offered as a solution, because it has not been clearly explained to individual Class members.

Court: This is an agreement among counsel, do Class Representatives agree? I think it is appropriate to have them agree to this adjustment. I will need something in writing as to the agreement and have Class Representatives sign it as well.

11:04 am Mr. Todd: This is a last minute suggestion and we need to confer about this before we proceed any further. We can do this after presentation on fees. We are not in a position to respond now.

11:05 am Mr. Reid continues. There were two questions from Court at last Friday's telephone conference. Why not use the Lodestar? And why not do a Lodestar cross check.

Court: I'm really only concerned about the Lodestar cross check. I will follow the percentage of the common fund approach. I still wonder why not determine the multiplier as to the Lodestar amount?

Prof. Brian Fitzpatrick called to witness stand. He teaches at Vanderbilt Law School for last 8.5 years. He teaches complex litigation, procedure and federal courts. He was born and raised Albuquerque. He published in 2010 an article in Journal of Empirical Studies, in which he gives the results of a survey of every class action in federal court during 2006 and 2007. He analyzed all types of class action cases and analyzed fees in common fund cases and in fee shifting cases. Ex 4 is the Study. He analyzed 688 settlements, including 23 in district courts in the Tenth Circuit. Mr. Fitzpatrick is tendered and accepted as an expert witness.

Court: I've read your Declaration. On this Application, should I do a Lodestar cross check? The Lodestar method was used only until the mid-1980s because it was seen as bad for class members. It created bad incentives for lawyers to drag on cases and to be indifferent to large settlements. Courts have generally abandoned the Lodestar in class actions. In addition, however, the Lodestar cross check reintroduces all of the bad incentives that courts sought to eliminate. In about 49% of the cases, courts do a cross check. The Tenth Circuit does not require it. Judge Hansen did not do a cross check. In addition to the bad incentives from the Lodestar method, Class counsel may factor the cross check when considering whether to accept a large settlement early in the case. In the academy, the cross check is disfavored. Remember that the Court is fiduciary for all tribes here today. It is important to consider what the Tribes would have negotiated with their attorneys if they hired them separately. This would be done on a purely percentage basis. In retainers, Class counsel entered into a percentage fee agreement. No one in market place does a cross check because a pure percentage

gives the lawyer the best incentives. I recommend that you treat the Class members the same way they would treat themselves in a retainer agreement.

11:16 am Mr. Fitzpatrick addresses the reasonableness of 8.5%. I am an expert in a lot of cases. This request is very conservative and modest from what other courts award and from what counsel generally negotiate. I have seen that in cases with the biggest recoveries, and counsel are awarded in bigger percentage than 8.5%. In the largest, Enron, there was a $6.6 billion common fund and the court awarded a larger percentage. In addition, none of the *Johnson* factors supports a lower percentage.

In case the Court decides to do a cross check, I did a Lodestar cross check in this case. I did an analysis based on number of hours and based on the billing rates nation-wide for partners and associates. The total Lodestar of about $11 million would yield a multiplier of about 7. However, this case has lasted much longer than other cases with lower multipliers. A 7 is not unreasonable.

I have included in my latest declaration a survey of cases with multipliers of 7 or more. Courts are not afraid to award fees that generate large multipliers. He points to the *Allapattah* case, which lasted 15 years and was a billion dollar recovery. The court awarded 31.1% as attorney's fees in that case.

11:20 am Court: in this case, there has been an incidental benefit with $800 million in additional appropriations. Do any other cases use this type of benefit in fee analysis? Not in cases of this magnitude. There are cases involving claims against banks for overdraft fees and bank changes policy so that it charges fewer fees going forward. I have never seen an additional benefit of this magnitude over and above the great benefit to the Class in this settlement.
Court: It is okay to consider this benefit. But, is the added benefit amount appropriate in analyzing the Lodestar multiplier?
Fitzpatrick: The Court has discretion to use this in its analysis, and not unreasonable to consider this. But it is best for the Court to apply percentage method without a cross check.

11:23 am Mr. Reid: There have been two fee awards in this case. In both, Judge Hansen awarded fees on a percentage of the common fund basis without cross check. The first was $76 million and attorneys were awarded 11%. Then Judge Hansen awarded 20% of $29 million in the second settlement. He did so after careful analysis of Tenth Circuit law and using the *Johnson* factors. He concluded, as a matter of law, that the Court should not use the Lodestar cross check in this type of case. Judge Hansen felt that evaluating billable hours was misleading. His rulings are essentially the law of the case since 1999. The second opinion recognized the new decisions against the tribes as greatly increasing the difficulty of settlement. Judge Hansen praised Class counsel's efficiency. That is the lens through which their work has to be viewed in the present. Class counsel have spent just under 20,000 hours, but the results of the settlement are astonishing.

Mr. Reid addresses the *Johnson* factors. Judge Hansen looked at results obtained as the most important factor. PSA I covered five FYs and produced $76 million common fund recovery. That settlement produced a benefit of $90,000 for each class member total and $18,000 per year. Hansen found this result remarkable given risk and difficulty in establishing damages. If you contrast that with this settlement, the gross common fund net of costs is $938,600,000 for 699 class members, which equals $1,343,000 for each class member for 20 year period. Per year it is $67,000 for each class member, which equals an average of 3.7 times the $18,000 per year obtained in PSA I. The FSA is many times more spectacular than the first.

If you do a Lodestar cross check, you would note that PSA I fee award would yielded a multiplier of 6. For this one, 7 is a reasonable one given remarkable settlement amount.

We request 8.5% and that the Court refrain from doing a Lodestar cross check under the law of the case. The facts support this analysis and there has been no change in the law.

11:31 am Court: please discuss the GRT and change in the FSA.
Mr. Todd: We need a recess and need two rooms to confer Class counsel. We will keep it brief.

Recess.

11:56 am Court in session. Mr. Todd: After conference between government and Class counsel, we agree that GRT is an issue of some concern. Para 10 of the notice on estimated costs, which included "applicable GRT," could have been written better. Consequently, the parties agree and will reduce their agreement as stipulation in writing. We agree that the FSA has a Reserve Account provision that all costs in IX A can be paid out of the reserve account, but the amount may not exceed the $4 million. Class counsel has just obtained a draft ruling from the NM Taxation and Revenue Department on out-of-state work. NMTR will not tax those fees for work performed outside of New Mexico. So that should reduce the amount of GRT substantially. Class counsel has agreed to defer submitting its application for reimbursement of the GRT amount they will pay until all costs are paid from the Reserve Account. Class counsel will bear that potential risk that the Reserve Account will not cover their GRT.
Court: Will Class counsel pay any GRT in excess of Reserve Account out of their fees? Yes.

Mr. Gross: Mr. Todd is right on our agreement. Problem is the timing. Fees 90% under FSA are due upon receipt of 940 million and deposit into account. Our GRT is due one month later. We estimate that me and Mr. Rogers will owe about $4 million in GRT. Mr. Rogers explains that the timing is irrelevant. Subject to

court approval of stipulation, when you make the fee award, it will not include GRT, but we will pay GRT. Any money left in the Reserve Account after all expenses deducted will be used to reimburse Class counsel for GRT already paid. Mr. Gross: this arrangement is not unprecedented. The Court used undistributed funds left from PSA II to pay fees for PSA III. We have conferred with Class Representatives, and they agree. Court: Will you get them to sign off on the stipulation? Yes.

Miller: Does the Court want proposed findings and conclusions? Might be helpful. I have prepared findings and conclusions already, but I did have one question. In the Court's award of fees, do I just indicate a percentage? Yes.

Court thanks the parties for their presence and praises the amazing job of counsel on both sides. Court thanks Kevin Washburn. The Court recognizes Mr. Gross, Mr. Rogers, and Mr. Miller for the outstanding job in this case.

12:06 adjourned.