

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

CHEROKEE NATION OF OKLAHOMA; and)
SHOSHONE-PAIUTE TRIBES OF THE)
DUCK VALLEY RESERVATION, on behalf)
of themselves and all others)
similarly situated,)

Plaintiffs,)

v.)

Civil Action No. CIV99-092-S)

UNITED STATES; DONNA E. SHALALA,)
Secretary of the United States)
Department of Health and Human)
Services; and MICHAEL H.)
TRUJILLO, Director of the Indian)
Health Service, United States)
Department of Health and Human)
Services,)

Defendants.)
_____)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Respectfully submitted,

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INTRODUCTION

Plaintiffs seek class certification in this case when they have yet to identify even a single member of the supposed class, when the issues pertaining to each proposed class member are as widely disparate as their respective customized self-determination contracts with Indian Health Service ("IHS"), and when plaintiffs' interests are so adverse to those of other purported class members that some have actually sued to enforce the very policies that this lawsuit would nullify. Their request for class certification should be denied.

At issue in this case is whether plaintiffs are entitled to federal funding to pay for certain costs (referred to as "contract support costs") incurred by Indian Tribes or Tribal organizations in operating newly self-administered Indian health care programs in fiscal years 1996 and 1997. Defendants will demonstrate on the merits that a statutory spending cap prevents IHS from paying plaintiffs the new contract support costs that they seek. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Sec. 314, 112 Stat. 2681. 2681-288 (1998) ("Section 314"). Moreover, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n ("Act") as well as plaintiffs' contracts with IHS for operating the health care programs, restrict IHS' authority to make payments in excess of Congressional appropriations, as plaintiffs seek here. In disputing defendants' interpretation of their respective contracts and applicable law, plaintiffs seek class certification and purport to represent a class of all other Tribes "that did not receive full contract support cost funding at any time from 1988 to the present." Plaintiffs' Motion for Class Certification and for Approval of Class Notice ("Pl. Class Cert. Motion").

It would be wholly inappropriate to certify this case as a class action. First, in order to identify the purported members of the class as plaintiffs have inadequately defined it, the Court would be thrust into a premature and improper consideration of the merits of the case. Plaintiffs purport to represent a class of Tribes that have not yet received "full" payment of the contract support costs to which they are entitled under their agreements with IHS and under the Indian Self-Determination Act ("ISDA"). The issue at the core of this case, however, is what amount of contract support costs plaintiffs are allegedly entitled to as a matter of law, given the terms of their agreements - which vary significantly - and governing statutes. Therefore, the Court cannot certify a properly definable class without running afoul of Supreme Court authority prohibiting the pre-certification consideration of the merits.

Second, plaintiffs' motion for class certification falls short

of satisfying each of the four prerequisites set forth in Fed. R. Civ. P. 23(a). Plaintiffs' improper class definition cripples their attempt to meet the numerosity requirement: the number of proposed class members who have not received "full" contract support costs will necessarily remain a mystery until this Court resolves the merits of the case. In the same vein, the named plaintiffs' claims lack commonality with those of the purported class members, for the determination of whether a particular Tribe is entitled to "full" contract support costs will entail particularized inquiries into the facts and circumstances surrounding each Tribe's individually negotiated agreements with IHS. The final two prerequisites of Rule 23(a) overlap, in that a proposed class representative's claims cannot be typical of the class's claims, nor can adequate representation be provided, if the interests of the representative and the class are in conflict. Here, the mathematics are simple and place the named plaintiffs and the purported class members directly at odds. IHS is appropriated a fixed sum for Indian health services, so an increase in the contract support costs paid to plaintiffs will result in a decrease in funds already committed to the other Tribes that plaintiffs purportedly represent.

Third, plaintiffs have failed to demonstrate pursuant to Rule 23(b)(3) that class issues predominate over individual issues, and that a class action is the superior method for resolving this case. As mentioned above, a decision as to whether every purported class member is entitled to "full" contract support costs will drown the Court in a multitude of inquiries regarding the terms of the Tribes' respective agreements with IHS, which may be at variance or even in conflict with those of the named plaintiffs or other prospective class members. This action would likely disintegrate into a lengthy series of mini-trials that would unnecessarily burden the Court and subvert the interests of judicial efficiency which class certification is intended to serve.

For these reasons, as set forth more fully below, plaintiffs' motion for class certification should be denied.

BACKGROUND

The "Background" section contained in pages 6-24 of the Memorandum in Support of Defendants' Motion for Summary Judgment, and in Opposition to Plaintiffs' Motions for Summary Judgment sets forth the factual and legal framework of this case and is incorporated herein, as necessary.

ARGUMENT

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982) ("Falcon"), quoting Califano v.

Yamasaki, 442 U.S. 682, 700-01 (1979). A class action may not be certified unless the trial court is satisfied, after "rigorous analysis," that the prerequisites of Rule 23(a) have been met and that the action falls within one of the three categories of Rule 23(b). See Falcon, 457 U.S. at 161. Plaintiffs bear the burden of proving that they satisfy all prerequisites for class certification. Rex v. Owens ex rel. State of Okla., 585 F.2d 432, 435 (10th Cir. 1978), cert. denied, 455 U.S. 941 (1982). Finally, even if the requirements of Rule 23 are satisfied, the decision of whether to certify a class is firmly committed to the trial court's discretion. See Califano v. Yamasaki, 442 U.S. at 703. The perfunctory motion that plaintiffs have filed in this case falls far short of satisfying the requirements of Rule 23.

I. NO SUFFICIENTLY DEFINED OR ASCERTAINABLE CLASS EXISTS

It is axiomatic that for a class action to be certified, a "class" must exist. Rutherford v. United States, 429 F. Supp. 506, 508 (W.D. Okla. 1977). Accordingly, as a threshold matter, the class for which certification is sought must meet a standard that is not explicit in Rule 23, but is implicit in the availability of the class action as a tool of judicial efficiency in litigation: the proposed class must be ascertainable, i.e., susceptible to precise definition. Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992). "This is to ensure that the class is neither amorphous nor imprecise." Id. "[T]he requirement that there be a class is not satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995); accord Rodriguez v. United States Dept. of Treasury, 131 F.R.D. 1, 7 (D.D.C. 1990); Rappaport v. Katz, 62 F.R.D. 512, 513 (S.D.N.Y. 1974), quoting 7 C. Wright & A. Miller, Federal Practice and Procedure § 1760 at 579-83 (1972). Plaintiffs' proposed class definition fails to meet this most basic standard.

Plaintiffs define their proposed class as:

All Indian tribes and tribal organizations operating IHS programs under contracts, compacts or annual funding agreements authorized by the Indian Self-Determination Act, as amended, 25 U.S.C. § 450 et seq., that did not receive full contract support cost funding at any time from 1988 to the present.

Pl. Class Cert. Motion at 1. With respect to this definition plaintiffs explain that "[t]he tribes in this case seek damages for the government's failure to pay the full amount of 'contract support costs' that the Act and their contracts and annual funding agreements require." Plaintiffs' Memorandum in Support of Motion for Class

Certification and for Approval of Class Notice ("Pl. Class Cert. Memo.") at 2.

To determine class membership under plaintiffs' definition, the Court would be required to decide the legal merits of this case, and the definition is therefore inappropriate. The central issue in this action is whether IHS is obligated to provide plaintiffs with the full amount of contract support costs they have requested,¹ despite the statutory admonition, reiterated in plaintiffs' contracts, that IHS' provision of funds is "subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), and despite the mandatory cap on appropriations that are available to pay new contract support costs for the two years in question here, see Section 314. The "full" amount of contract support costs to which plaintiffs are entitled - in light of the provisions in their respective agreements with IHS, the Indian Self-Determination Act, and Section 314 - is the legal question at the very heart of this case.

To identify the members in plaintiffs' proposed class of Tribes that have been denied "full" contract support costs under the Act and their agreements, then, would require the Court to resolve the merits of the complaint. That resolution would differ depending on the circumstances of each prospective class member. However, a class definition that requires the court to determine the merits of the complaint prior to determining class membership is improper under Rule 23. See Crosby v. Social Sec. Admin., 796 F.2d 576, 579-80 (1st Cir. 1986) (rejecting a class of individuals whose application for social security benefits had not been considered "within a reasonable time" because the "within a reasonable time" standard "makes class members impossible to identify prior to individualized fact-finding and litigation"); Hagen v. City of Winnemucca, 108 F.R.D. 61, 63 (D. Nev. 1985) (denying class of individuals whose Constitutional rights had been violated by a city policy holding that the class definition "would require the court to determine whether a person's constitutional rights had actually been violated in order to determine whether that person was a class member"). Moreover, for the Court to pass on the merits of plaintiffs' claims at the class certification stage in order to determine who was included in the class would violate the Supreme Court's prohibition against doing so. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).

In addition, as discussed below with regard to the commonality

¹ As will be explained below in connection with the commonality discussion, the dollar amount of contract support costs requested by any given Tribe is by no means apparent from the face of the Tribe's agreement with IHS and is often ascertainable only through complex factual and even legal assessments.

requirement, inquiring into the myriad individualized questions of fact and law underlying each Tribe's request for contract support cost funding would hardly be "administratively feasible." Davoll v. Webb, 160 F.R.D. 142, 143, 146 (D. Colo. 1995) (proposed class of persons with "disabilities" necessarily includes individualized inquiries and makes class definition "untenable"); see also Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (because of problems in identifying class members, affirmed denial of certification of proposed class of persons "eligible" for energy bill assistance or "discouraged" from applying for assistance), cert. denied, 456 U.S. 917 (1982). Moreover, if the merits of each individual case have to be examined before class membership can be ascertained, class certification would fail to promote the interests of efficiency which class actions are intended to serve. See Gottlieb v. Wiles, 11 F.3d 1004, 1007 (10th Cir. 1993). Because the proposed class is so inadequately defined, class certification should be denied.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE PURSUANT TO RULE 23(a) THAT THEY ARE QUALIFIED REPRESENTATIVES OF THE PROPOSED CLASS

Individual litigants seeking to maintain a class action must meet the prerequisites of Rule 23(a). See Falcon, 457 U.S. at 156; General Tel. Co. of Northwest v. EEOC, 446 U.S. 318, 330 (1980).

Rule 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The failure to satisfy any one of these requirements precludes class certification. See Falcon, 457 U.S. at 161. Moreover, this Circuit imposes a "strict burden of proof on the party seeking certification." Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988); Rex v. Owens, 585 F.2d at 435.

To demonstrate compliance with the requirements of Rule 23(a), a plaintiff must provide direct support for each prerequisite. See Hopper v. Schweiker, 596 F. Supp. 689, 691 (M.D. Tenn. 1984), aff'd mem., 780 F.2d 1021 (6th Cir. 1985), cert. denied, 475 U.S. 111 (1986); Davoll v. Webb, 160 F.R.D. at 143. Conclusory averments or mere parroting of the elements of Rule 23, as presented by the

plaintiffs here, have been consistently rejected by the courts. See, e.g., Falcon, supra; Morrison v. Booth, 763 F.2d 1366, 1371 (11th Cir. 1985). Instead, plaintiffs must make "a convincing argument . . . for each requirement," Hopper v. Schweiker, 596 F. Supp. at 691, and "provide information sufficient for the court to make a reasonable judgment" as to the class issue. Colburn v. Roto-Rooter Corp., 78 F.R.D. 679, 681 (N.D. Cal. 1978). Here, plaintiffs have failed to meet their strict burden of proof with respect to each of the Rule 23(a) requirements.

1. Plaintiffs Have Failed To Establish Class Numerosity

Rule 23(a)(1) requires plaintiffs to demonstrate that "the class is so numerous that joinder of all members is impracticable." Numerosity may not be founded upon mere conjecture as to the size of the proposed class, Pigford v. Glickman, 182 F.R.D. 341, 347 (D.D.C. 1998), and speculative allegations that joinder is impracticable are not sufficient to satisfy this numerosity requirement. See, e.g., Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir. 1989); O'Neil v. Appel, 165 F.R.D. 479, 491 (W.D. Mich. 1996); Liberty Lincoln Mercury v. Ford Marketing, 149 F.R.D. 65, 74 (D.N.J. 1993). As this Circuit has observed, "there must be presented some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement." Rex v. Owens, 585 F.2d at 436 (emphasis supplied).

Here, plaintiffs merely assert that the proposed class "consists of approximately 329 tribes or tribal organizations comprising the '[t]otal number of Tribes [and] Tribal Organizations [c]ontracting or [c]ompacting' with IHS." Pl. Class Cert. Memo. at 5. However, plaintiffs fail to identify how many of these allegedly contracting or compacting Tribes "did not receive full contract support cost funding at any time from 1988 to the present," Pl. Motion at 1, and therefore fall within their proposed class definition. Indeed, in fiscal year 1999, plaintiffs' exhibit indicates that twenty-seven of the Tribes on the list actually received contract support cost funding in excess of 100%. Pl. Class Cert. Memo. Exhibit 5.

The impossibility of determining how many Tribes on the list did not receive "full" contract support cost funding follows directly from plaintiffs' improper proposed class definition. As discussed in Section I above, what constitutes "full" contract support cost funding is a legal conclusion to be reached by evaluating the terms of plaintiffs' individual agreements in light of the Indian Self-Determination Act and Section 314. Thus the likely number of class members cannot be ascertained without a resolution of the legal merits of this case. Whether a proper, specifically defined class (assuming one exists) would meet the numerosity requirement is

impossible to discern because plaintiffs' have not proffered such a class.

Aside from this insurmountable defect, plaintiffs offer no indication of how many Tribes expressly agreed to be placed on IHS' priority list, or queue, for the payment of new contracts support costs and are presumably at odds with plaintiffs in having consented to IHS' policy of distributing its limited funds on a first-come-first-served basis. Plaintiffs' purported class, which extends backward to 1988, also fails to exclude putative class members whose claims in this case are barred by the six-year general statute of limitations, 28 U.S.C. § 2401. See National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex., 40 F.3d 698, 716 (5th Cir. 1994) ("Putative class members whose grievances are barred by the statute of limitations or who cannot allege specific instances of discrimination within the relevant time frame cannot be counted toward computation of the class"). Additionally, plaintiffs erroneously include proposed class members allegedly claiming contract support payments for years other than 1996 and 1997, but plaintiffs lack standing to represent claims originating in other years.² See Falcon, 457 U.S. at 156 ("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members"), quoting East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977); Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

Finally, plaintiffs erroneously include "all" Tribes even though numerous putative class members already have cases involving contract support cost issues either pending or finally adjudicated in a number of federal courts or administrative forums across the country.³ Certification of the proposed class would improperly

² Given the various amendments to the Indian Self-Determination Act since 1988, the effects of other recently enacted statutes, see, e.g., Section 314, and the myriad variations in every annual appropriations act, the inclusion of purported class members with claims every year since 1988 would introduce a multitude of additional legal issues into this case that would only underscore the lack of commonality between plaintiffs' and the purported class members' claims.

³ See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) (challenging Department of Interior disbursal plan for fiscal year 1995 contract support costs); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (seeking additional indirect contract support costs from Department of Interior for fiscal year 1989); Shoshone-Bannock Tribes of the Fort Hall Reservation v.

interfere with the litigation of cases raising similar or related issues in other judicial districts. See Califano v. Yamasaki, 442 U.S. at 702. Also, Tribes that have received previous judicial decisions on their claims cannot be included in the class because their claims would be barred by principles of res judicata. See Robertson v. Isomedix, Inc., 28 F.3d 965, 969 (9th Cir. 1994) ("The doctrine of res judicata bars a party from bringing a claim of a court of competent jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the same parties or their privies").

Even if plaintiffs could identify an ascertainable number of proposed class members, they have failed to demonstrate the impracticability of joinder. See Hum v. Dericks, 162 F.R.D. 628, 634 (D. Haw. 1995) (Noting there is "no magic number," court declined to certify 200 member class where plaintiff had failed to demonstrate that joinder was impracticable). Plaintiffs argue that the alleged geographical dispersion of the proposed class would cause joinder to be impracticable. However, given the vagueness and imprecision of plaintiffs' proposed class, it cannot be ascertained where the purported members reside. If plaintiffs had properly defined the class so as to identify its members, each Tribe could be readily named and located, so their alleged geographical dispersion would

Shalala, 988 F. Supp. 1306 (D. Or. 1999) (seeking additional contract support costs from IHS for 1996) (appeal pending); California Rural Indian Health Bd., Inc. v. Shalala, No. C-96-3526 DLJ (N.D. Cal. filed Sept. 27, 1996) (seeking additional contract support costs from IHS for fiscal years 1996 and 1997); Norton Sound Health Corp. v. Shalala, No. A00-080 CV (D. Ark. filed March 23, 2000) (seeking additional contract support costs for fiscal year 1999 and alleging IHS' failure to pay in accordance with the queue system); Appeals of Cherokee Nation of Okla. v. United States Dep't of Health and Human Servs. (Indian Health Serv.), IBCA Nos. 3877-3879/98 (challenging IHS' denial of additional contract support costs for fiscal years 1994-96); Appeals of Seldovia Village Tribe v. Indian Health Serv., IBCA Nos. 3782,3862-63/97 (challenging IHS' denial of additional contract support costs for fiscal years 1996-97); Ninilchik Traditional Council v. Director, Alaska Area Native Health Servs., Indian Health Serv., Docket No. IBIA 99-72-A (appealing IHS' declination of contract support costs for fiscal year 1999). In addition, IHS has received claims under the Contract Disputes Act for additional contract support costs from the Metlakatla Indian Community, Southcentral Foundation, and Shoalwater Bay Indian Tribe, and claims from the Cherokee Nation of Oklahoma for fiscal years 1998-2000.

pose no obstacle to joinder.⁴ See Daigle v. Shell Oil Co., 133 F.R.D. 600, 603 (D. Colo. 1990); see also, O'Neil v. Appel, 165 F.R.D. 479, 491 (W.D. Mich. 1996).

Plaintiffs' conclusory assertion that the alleged geographical dispersion would increase the financial burden on each class member is both superficial and unavailing. Given that plaintiffs are in effect requesting about \$125 million for the class in this lawsuit, see Fitzpatrick Dec. ¶ 19, it may reasonably be presumed that each of the purported 329 class members has a sizable claim and therefore a strong motivation for individual action. Plaintiffs offer no evidence that the potential class members lack financial resources and the ability to institute their own actions. See O'Neil v. Appel, 165 F.R.D. at 490 (Investments ranging from \$12,500 to \$300,000 provided practical impetus for maintaining individual action); McMerty v. Burtness, 72 F.R.D. 450, 453 (D. Minn. 1976) (Court refused to certify a class numbering 79 members located in seven states, noting that each putative member had a substantial monetary interest in excess of \$4000). Indeed, any such claim is belied by the fact, addressed previously, that there already have been and are still a number of such cases already pending. See supra n.3.

While plaintiffs need not provide a precise number to meet the requirements of Rule 23(a)(1), they are obligated to provide some inkling as to the numbers of persons they purport to represent. See, e.g., Schwartz v. Upper Deck Co., 183 F.R.D. 672, 680-81 (S.D. Cal. 1999). Plaintiffs have provided the Court with no such information to justify the assertion that the class is so numerous that joinder is impracticable. See Williams v. Wohlgemuth, 366 F. Supp. 541, 543-44 (W.D. Pa. 1973), aff'd, 416 U.S. 901 (1974). Nor should the Court attempt to fill in the blanks that left by plaintiffs. "Where, as here, a plaintiff has made no attempt to ascertain the size of the class, courts have refused to engage in speculation on the issue of numerosity." O'Neil v. Appel, 165 F.R.D. at 490 (citing cases). Plaintiffs have therefore left the Court "completely in the dark" as to how many potential class members are involved, Williams v. Wohlgemuth, 366 F. Supp. at 544, and class certification should be denied.

⁴ This nationwide geographical dispersion augurs against nationwide certification because a number of federal district or appellate courts already have cases raising issues similar to those presented herein. See supra n.3. Under such circumstances, nationwide class certification is inappropriate. See Califano v. Yamasaki, 442 U.S. at 703.

2. The Necessity For Assessing Each Contract With Respect To Each Plaintiff And Proposed Class Member Indicates A Lack Of Commonality

Class status cannot be conferred where the allegations of a complaint arise from personal grievances, or factual circumstances or occurrences peculiar or unique to the individual claimant, and are not shown to be a generalized condition for others. Patterson v. General Motors Corp., 631 F.2d 476, 480-81 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). To show commonality, plaintiffs must make a "specific presentation identifying questions of law or fact" that are common to their claims and those of the class members they seek to represent. Falcon, 457 U.S. at 158. "Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'" Id. at 155. The commonality prerequisite "is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 609, 623-24 (1997).

Plaintiffs cannot meet their obligation to show common issues of law and fact because a determination of whether a Tribe received "full" contract support costs (aside from the fact that plaintiffs' use of the term "full" constitutes a legal conclusion)⁵ would require an examination of each contract with respect to each proposed class member for every year in question. The Indian Self-Determination Act does not prescribe or specify any particular amount that may be considered "full" funding of contract support costs for any particular Tribe or Tribal organization. Declaration of Ron B. Demaray ("Demaray Dec.") (attached) ¶ 2. The Act simply prescribes that contract support costs shall consist of the "reasonable" amount for activities which must be conducted by the Tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. Id.; 25 U.S.C. 450j-1(a)(2); see Ramah Navajo Chapter v. Lujan, 112 F.3d at 1461 (Subsection (a)(2) "fails to define 'reasonable costs'").

Neither is there standard language on contract support costs in IHS' contracts, compacts and annual funding agreements ("AFA"s). Demaray Dec. ¶ 4. Instead, individual negotiations with each Tribe or Tribal organization are conducted on a government to government basis. Id. AFAs are negotiated each year with all Tribes and Tribal

⁵ For purposes of discussing class certification, defendants take "full" to mean the total sum of contract support costs requested by a Tribe in a given year.

organizations. Id. Language regarding the provision of contract support costs in these AFAs can and does differ substantially as a result of these individual negotiations and can vary from one year to the next even for AFAs with the same Tribe or Tribal organization. Id. Generally, there is no agreement on the face of any given contract providing a dollar figure for "full" contract support costs that IHS will pay. Id. Thus the Court would be required to conduct a complicated, in-depth analysis of every class members' claim for "full" contract support costs in order to determine whether payment was warranted.

For example, many agreements state a dollar figure that includes contract support costs but also contains clauses in which the Tribe specifically agrees to forego immediate payment of new contract support costs and have its request placed on a priority list or queue, in accordance with IHS's allocation policies set forth in Indian Self-Determination Memorandum (ISDM) 92-2 and IHS Circular 96-04. Id. ¶ 5. In one such agreement the parties "acknowledge[d] that the IHS intends to pay contract support costs according to IHS Circular 96-4." Demaray Dec. ¶ 5; id. Exhibit A. With respect to that agreement, the Tribal organization actually sued IHS to enforce the queue system. Id. ¶ 6. Having reached the top of the list, the Tribal organization was in a position to recover more funding through the queue than it would have received under a different distribution methodology that IHS had recently adopted. Id. ¶ 6; id. Exhibit B.

Many agreements set forth a dollar figure for contract support costs which IHS agrees to pay but also include clauses providing that the Tribe does not waive a right to contract support costs under Section 106(a)(2) of the Indian Self-Determination Act. Demaray Dec. ¶ 7. One such agreement states: "Nothing in this provision shall be interpreted to waive NSHC's right to be paid the contract support costs to which it is entitled in accordance with section 106(a)(2) of the Indian Self-Determination Act." Id.; id. Exhibit A. Since Section 106(a)(2) merely states that contract support costs are to be provided in an amount that is "reasonable" for the activities to be conducted, 25 U.S.C. § 450j-1(a)(2), the Tribe's agreement prescribes no definite amount for "full" funding. Demaray Dec. ¶ 7.

Some agreements for contract support costs on Tribal "shares" of Area or Headquarters administrative support functions, see Declaration of Carl L. Fitzpatrick ("Fitzpatrick Dec.")⁶ ¶ 15, tie the calculation of contract support to estimated amounts for Tribal shares to be assumed by the Tribe or Tribal organization in upcoming

⁶ This Declaration is attached as Exhibit E to the Memorandum in Support of Defendants' Motion for Summary Judgment, and in Opposition to Plaintiffs' Motions for Summary Judgment.

fiscal years. Demaray Dec. ¶ 9. The annual funding agreements provide that requests for contract support on estimated amounts for Tribal shares will be placed on the queue at a particular priority date. Id. Like the Norton Sound lawsuit, the Metlakatla Indian Community has also brought a claim to enforce the queue system for fiscal year 1999. Id.; id. Exhibit C. The IHS decision on this claim provides another example of the particularized analysis necessary to resolve such a claim for contract support costs. Id. ¶ 9.

Some agreements do not state any specific dollar amount for contract support costs but simply cite the Indian Self-Determination Act provisions and indicate that the parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA. Id. ¶ 10. One such agreement expressly states: "The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under this AFA." Id. ¶ 10; id. Exhibit D.

Some agreements provide that contract support will be paid in accordance with a negotiated indirect cost rate, subject to the availability of funds, and consistent with IHS contract support cost policy. Id. ¶ 11. One agreement of this type provides that "[t]he amount of funds allocated to the Nation under this annual funding agreement for contract support shall be established and paid based upon determination of the actual interagency negotiated rate, subject to the availability of funds, consistent with IHS contract support cost policy." Id. ¶ 11.

An indirect cost rate is negotiated annually by the Tribe or Tribal organization either with the Office of the Inspector General in the Department of the Interior or the Office of Cost Allocation in the Department of Health and Human Services. Id. ¶ 12. Tribes may recoup under-recoveries in indirect costs in future years based upon subsequent year adjustments to indirect cost rates. Id. Furthermore, rate agreements require that pass through costs and capital expenditures be deducted from the program base amounts before applying the rate. Id. The Seldovia Village Tribe has sued for additional contract support funds associated with its ongoing programs as a result of a subsequent change in its indirect cost rate. Id.; id. Exhibit F. In order to ascertain what IHS would owe if "full" payment were now required, a complicated calculation would be necessary to resolve this dispute. Id. ¶ 12.

The above examples demonstrate that Tribal agreements with IHS with respect to contract support costs vary based on individual negotiations. Id. ¶ 13. The agreements provide amounts to be paid, generally in accordance with IHS policies, but do not specify

particular amounts to be paid as "full" contract support under the Indian Self-Determination Act. Id. Ascertaining such an amount at this point in time would require particularized assessments of the circumstances pertaining to each Tribe and Tribal organization for every year in question. Id.

The individualized nature of the claims of each plaintiff and the separate, discrete and unrelated determinations that will have to be made with respect to each instance of alleged underpayment illustrates the absence of common issues in this case. The necessity for such individual and discrete inquiries makes these claims inappropriate for class action treatment. See Boughton v. Cotter Corp., 65 F.3d 823, 827-28 (10th Cir. 1995) (In suit alleging exposure to hazardous uranium emissions, individual questions concerning cause and extent of injury predominated over common questions of liability, and class certification was properly denied); Meyers v. South Western Bell Tel. Co., 181 F.R.D. 499, 506 (W.D. Okla. 1997) (Class certification was unjustified where the court would have to prove a preponderance of individual issues regarding the individual plaintiff's claims of fraud and misrepresentation in sale of telephone service); Moore Video Distribs., Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332, 1339 (S.D. Miss. 1993) (Breach of individually negotiated contracts with different terms at different times by a corporate defendants would pose a situation requiring individualized proof that was inappropriate for class certification).⁷ "Individual rather than class litigation is the best way to resolve person-specific contentions when the stakes are large enough to justify individual suits." Frahm v. Equitable Life Assurance Soc'y of the United States, 137 F.3d 955, 957 (7th Cir. 1998); see also Amchem Products, Inc. v. Windsor, 521 U.S. at 617.

Moreover, the prospect in this kind of case that unique, particularized defenses would be raised that relate only to individual claims similarly renders class certification

⁷ See also In re Am. Med. Sys., Inc., 75 F.3d 1069, 1081 (6th Cir. 1996) (Plaintiffs failed to prove commonality in products liability suit, where plaintiff's claims of defect would differ depending upon the model and the year it was issued, and proof would vary from plaintiff to plaintiff because complications with device could be due to a variety of factors); Boley v. Brown, 10 F.3d 218, 223 (4th Cir. 1993) (Class certification was properly denied in action challenging agency's failure to give adequate notice to borrower of foreclosure proceedings, since the determination of whether adequate notice was actually given and, if not, whether any harm resulted depended upon consideration of the unique circumstances pertinent to each class member).

inappropriate. See J.H. Cohn & Co. v. American Appraisal Assocs., Inc., 628 F.2d 994, 999 (7th Cir. 1980); Hardin v. Harshbarger, 814 F. Supp. 703, 708 (N.D. Ill. 1993); Bishop v. New York City Dept. of Hous. Preservation and Dev., 141 F.R.D. 229, 238 (S.D.N.Y. 1992). Finally, because the Court would not be confronted with any common questions of law and fact in the resolution of these claims -- but instead would have to make exhaustive evaluations of each Tribe's individual claim -- certification of a class in this action will not advance "the efficiency and economy of litigation which is a principal purpose of the procedure." American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974); see also Falcon, 457 U.S. at 159; Gottlieb v. Wiles, 11 F.3d at 1007. Accordingly, class certification is improper here.

3. Antagonistic Interests Between And Among The Class And Its Representatives Bar A Finding Of Typicality

The class representatives' claims must be typical of the putative class's claims. Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 189 (D. Kan. 1991). Specifically, "the class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Falcon, 457 U.S. at 156. The requirement of typicality dovetails into the requirement of adequacy of representation. See Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1189 (10th Cir. 1975).⁸ Consequently, an important part of typicality is the inquiry into whether the representative's interests or claims are antagonistic or adverse to those of the class. Id.; Edgington, 139 F.R.D. at 189.

The named plaintiffs in this action are directly at odds with each other and every other purported class member in competing for IHS' finite appropriations to pay their "full" contract support costs. An increase in contract support cost payments to one Tribe will necessarily result in a decrease in funding for other Tribes or Tribal programs. Thus the interests of each plaintiff and class member are antithetical to one another.

For example, for IHS to have paid the Cherokee Nation additional contract support costs of \$3.4 million in 1997, which is the approximate amount claimed in the complaint, see Complaint ¶¶ 31-32, IHS would have been required to deduct \$3.4 million from funding

⁸ "The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" Amchem Products, Inc. v. Windsor, 521 U.S. at 626 n.20.

that was otherwise obligated, for example, to the diabetes program, the epidemiology center, and dental and mental health services. Fitzpatrick Dec. ¶ 18. That money was distributed to the area offices on a recurring basis to be spent for these and other services, or it was kept in the Headquarters reserve fund for needs that arose in those categories during the year. Id. When distributed, the funding was used either for IHS' direct operation of programs or for the Tribes' operation of the programs pursuant to their self-determination contracts.⁹

With respect to plaintiff Shoshone, IHS would similarly have been required to take away funding from other Tribes or programs in the amount of \$3.5 million in order to pay Shoshone the total additional contract support costs it is claiming for 1996 and 1997. Complaint ¶¶ 14-15; Fitzpatrick Dec. ¶ 18. On a class-wide scale, if IHS were required to pay the requested shortfalls in contract support costs to every Tribe that was a party to a self-determination contract or compact in 1996 or 1997, IHS would be required to deduct \$125 million from amounts supporting other Tribal programs. Fitzpatrick Dec. ¶ 19.

Since any relief granted to the named plaintiffs in this case would be detrimental to the interests of the other proposed class members, plaintiffs' claims are not typical of the putative class's claims (nor can plaintiffs adequately represent the interests of the

⁹ This discussion of contract support costs concerns the claims of plaintiffs Cherokee and Shoshone for additional contract support costs arising from their new and expanded programs ("new" contract support costs). However, plaintiff Cherokee is similarly in conflict with other purported class members - as well as plaintiff Shoshone - as to its claim for additional contract support costs for already "existing" programs, for which Cherokee and the other purported class members are already receiving funding. See Pl. 1st Memo. at 21-22. Cherokee received no increase in its existing contract support costs in 1997 beyond the amount it had received the previous year, because the Oklahoma Area Office received no increase in its allocations for contract support costs between 1996 and 1997 and was therefore without additional funds to distribute. Fitzpatrick Dec. ¶¶ 27-29. If IHS were to provide Cherokee with more than \$1.6 million in additional indirect contract support costs which Cherokee is claiming for its existing programs, IHS would be required to reduce the funds provided to other Tribes or used for Tribal programs. Fitzpatrick Dec. ¶ 29.

class).¹⁰ See Amchem Products, Inc. v. Windsor, 521 U.S. at 626 (In asbestos litigation involving limited compensation funds, the interest of the currently injured in receiving generous immediate payments conflicted with the interest of exposure-only plaintiffs in ensuring an ample fund for the future, so named parties could not adequately represent the class); General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980) (In employment discrimination litigation, same plaintiff could not adequately represent class given that conflicts might arise between employees and applicants who, if granted relief, would compete with employees for benefits or seniority); Rivera v. Fair Chevrolet Geo Partnership, 168 F.R.D. 11, 12 (D. Conn. 1996) (Where named plaintiff insisted on a full individual recovery from the class award, while the rest of the class would receive a substantially lower pro rata award, the named plaintiff's interests were antagonistic to the class, and he was not an adequate class representative).

In addition to the foregoing considerations, the interests of the named plaintiffs are antithetical to those of the putative class members who expressly consented to be placed on IHS' queue and await their turn for "full" payment of new contract support costs. Unlike the named plaintiffs, those Tribes have not opposed the queue system, and in fact, some have actually sued to enforce it. Demaray Dec. ¶¶ 6, 9. See East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 405 (Named plaintiffs were not appropriate class representatives given conflict between putative class members who voted to reject merger of collective bargaining units and the demand in plaintiffs' complaint for just such a merger); Mayfield v. Dalton, 109 F.3d 1423, 1427 (9th Cir. 1997) (Named plaintiffs who objected to agency program could not properly represent a class comprised of those who participated in it, which undoubtedly included people who did not oppose it and in fact approved of it and wished the policies fully enforced); see also General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. at 330 ("The typicality requirement is said to limit class claims to those fairly encompassed by the named plaintiff's claims").

Finally, in light of the specific fact-based issues arising from each alleged instance of underpayment, the named plaintiffs likely will focus on their own particular cases rather than issues common to all members of the proposed class. Thus "plaintiffs'

¹⁰ Plaintiffs may argue that the Judgment Fund is available to pay their additional contract support costs. However, the resolution of that legal question would necessitate an impermissible inquiry into the merits of this case. See Eisen v. Carlisle & Jacqueline, 417 U.S. at 177.

energies may end up being directed toward presenting and defending their individual claims at the expense of the class." Allen v. City of Chicago, 828 F. Supp. 543, 553-54 (N.D. Ill. 1993) (citations omitted); see also Edgington, 139 F.R.D. at 194 ("[W]hen the representatives are subject to unique defenses that predictably will become a major focus of litigation then class certification should be denied"). For all these reasons, plaintiffs have failed to meet their burden of showing that their claims meet the typicality requirement.

4. Plaintiffs Will Not Adequately Represent The Class

Rule 23(a)(4) requires the class representatives to be in a position to protect fairly and adequately the interests of the class. Edgington, 139 F.R.D. at 190. The requirement is broken down into an evaluation of whether the representative's claims are sufficiently interrelated and not antagonistic with the class's claims as to ensure fair and adequate representation, and whether the representative's counsel is competent. Falcon, 457 U.S. at 157 n.13; In Re Am. Med. Sys., Inc., 75 F.3d at 1083; Edgington, 139 F.R.D. at 190; see also Amchem, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent").

As demonstrated above in the discussion concerning the overlapping typicality requirement, the interests of the named plaintiffs may well be antagonistic to the interests of the remainder of the class and even to each other. See Fitzpatrick Dec. ¶¶ 3-5, 9, 17-19. Consequently, they cannot meet the first criterion of the adequacy or representation inquiry, and no class should be certified. See General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. at 331 ("[T]he adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class").

In addition, while defendants recognize that plaintiffs' attorneys have abundant familiarity with the Indian Self-Determination Act and has litigated numerous cases thereunder, in this case, the adequacy of their representation should not be presumed. Although they had almost a year to move for class certification, plaintiffs failed to move for class certification until ordered by the Court, even after defendants objected, and despite the requirement that the class certification issue be decided "[a]s soon as practicable" after the commencement of this action. Fed. R. Civ. P. 23(c)(1); see Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273 (10th Cir. 1977) (requiring "the earliest

possible determination" of the class action issue).¹¹ This omission on the part of plaintiffs' counsel placed potential class members in jeopardy of not receiving timely notice of the class proceedings. See Horn, 555 F.2d at 274 ("Part of the rationale for early class status determination lies in the need for timely notice to be given to interested parties under other provisions of Rule 23"); see, e.g., Fed. R. Civ. P. 23(c)(2), (d)(2), (e). It also risked the reversal of a potential decision favorable to the class. See Eisen, 417 U.S. at 177; Horn, 555 F.2d at 273. This failure to protect the interests of the purported class therefore calls into question the adequacy of representation provided by plaintiff' counsel. See East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 405 ("[T]he named plaintiffs' failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive") (citing cases).

The Supreme Court has said that the representation that unnamed class members will receive must be carefully examined without indulging the assumption that if the class were certified "'all will be well for surely the plaintiff will win and manna will fall on all members of the class.'" Falcon, 457 U.S. at 161, quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969). In view of the foregoing, the Court should indulge in no such assumption here. In sum, plaintiffs have failed to show that they would adequately represent the proposed class.

III. PLAINTIFFS HAVE FAILED TO SATISFY THE REQUIREMENTS OF RULE 23(b)(3)

A class may not be certified pursuant to Rule 23(b)(3) in the absence of a showing by the plaintiffs that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

¹¹ Compounding this omission, plaintiffs even urged the Court, over defendants' objection and notwithstanding clear Supreme Court and Tenth Circuit authority to the contrary, to resolve the merits of the case prior to determining whether a class should be certified. See Eisen v. Carlisle & Jacqueline, 417 U.S. at 177; Horn v. Associated Wholesale Grocers, Inc., 555 F.2d at 273.

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

There are two essential elements in a section (b)(3) inquiry. First, plaintiffs must demonstrate not only that common questions of law or fact exist in the class under Rule 23(a), but that these questions predominate over individual questions in the case. Esplin v. Hirschi, 402 F.2d 94, 98 (10th Cir. 1968). Second, plaintiffs must demonstrate that the proposed class action is the superior method of handling the claims of the class members. Id. Plaintiffs cannot make either showing here. Their failure to satisfy the requirements of Fed. R. Civ. P. 23(b)(3) is, standing alone, reason to deny class certification.

1. Individual Questions Predominate In The Proposed Class Action

To support their argument that a class should be certified under Rule 23(b)(3), plaintiffs merely assert that the class members have the same basic claim for unpaid contract support costs and that the government's defense of unavailable appropriations will not differ. Pl. Class Cert. Memo. at 11. This conclusory statement,

however, completely brushes aside the fact that whether each plaintiff is in fact owed the "full" amount of contract support costs set forth in the respective Tribal agreements must be assessed on a case-by-case basis, since neither the Indian Self-Determination Act nor those agreements spell out the answer to the question. An explanation of the fact-specific issues that might arise with respect to each contract is set forth above in the "typicality" discussion and need not be repeated here. See also Demaray Dec. ¶¶ 2-13.

Thus the allegedly common issue concerning plaintiffs' entitlement to "full" contract support costs is in fact laden with, and dependent upon, numerous individual questions and circumstances. These individual issues would not merely predominate over any alleged class issues, but rather, would overwhelm them. Adjudicating these individualized claims would cause this proposed class action to "degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. P. 23(b)(3), Adv. Comm. Note (1966); see Amchem, 521 U.S. at 624 (Given the number and significance of questions peculiar to the several categories of class members, and to individuals within each category, any overarching dispute about the health consequences of asbestos exposure could not satisfy the Rule 23(b)(3) predominance standard); Boughton v. Cotter Corp., 65 F.3d at 828 (Where injuries and liability could differ for individual plaintiffs, trial court properly determined not to certify under Rule 23(b)(3)); Zapata v.

IBP, Inc., 167 F.R.D. 147, 166 (D. Kan. 1996) (Where damages computation would require separate "mini-trials," individual damages determinations would predominate over common issues). As a consequence, certification under Rule 23(b)(3) should be denied.

2. A Class Action Would Not Be Superior For The Fair And Efficient Adjudication Of The Controversy

The management difficulties attending the adjudication of this case as a class action would be antithetical to the objective of judicial efficiency that underlies the treatment of cases as class actions. The class action device is not appropriate when it cannot achieve sufficient "economies of time, effort, and expense." See Amchem, 521 U.S. at 615; Gottlieb, 11 F.3d at 1007. The number of purely individual questions in this matter precludes such economies. See Castano v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) ("The greater the number of individual issues, the less likely superiority can be established").

Nor would individual lawsuits, which are the superior method for resolving this case, be a waste of judicial resources.¹² Courts

¹² Plaintiffs' claim that only one other federal court action concerning IHS contract support cost issues has ever been filed, Pl. Memo. at 11-12, is erroneous and misleading. See supra n.3. Regardless of whether the action is in a federal or administrative forum, and regardless of whether it is against the Department of Interior or IHS, the issues raised may be similar to those raised by the purported class members in this case. Therefore, class certification could interfere with those actions and complicate these proceedings. The number and variety of issues surrounding contract

would not be adjudicating identical issues in different forums; rather, they would be analyzing each Tribe's individual circumstances with respect to the alleged underpayment of contract support costs. This separate assessment of the individual questions in the matter is the fair and superior method of adjudicating these controversies, especially given the logistical difficulties of conducting individual inquiries with respect to potential plaintiffs spread across the country.

All of these factors demonstrate that the proposed class action is not superior to individual lawsuits for the "fair and efficient" adjudication of the matters in controversy. Because individual questions also predominate over any common questions in this matter, the proposed class action does not satisfy the requirements of Rule 23(b)(3).¹³

CONCLUSION

For the reasons set forth above, plaintiffs' motion for class certification should be denied.

support costs that have prompted these other actions and that involve proposed class members only reinforce the fact that a class should not be certified.

¹³ Plaintiffs cite Ramah Navajo Chapter v. Lujan, No. CIV 90-0957LH (D.N.M. Nov. 18, 1993), to support their argument that class certification is justified. Whether or not that case is analogous (which plaintiffs fail to explain), if the considerations before that district court were identical to the considerations before this Court, then class certification in Ramah was clearly erroneous. In any event, that decision is not binding on this Court.

Respectfully submitted,

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Dated: April 19, 2000

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2000, a copy of Defendants' Opposition to Plaintiffs' Motion for Class Certification was served upon plaintiffs' counsel as follows:

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