

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,)

vs.)

Case No. 99-092-S CIV)

UNITED STATES OF AMERICA;)
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,)

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
CLASS CERTIFICATION AND
FOR APPROVAL OF
CLASS NOTICE**

Defendants.)
_____)

Plaintiffs Cherokee Nation and the Shoshone-Paiute Tribes (“Tribes”) respectfully move for certification of a class pursuant to Federal Rule of Civil Procedure 23(b)(3). The proposed class includes 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.

I. Nature of the Case

This case involves the government’s liability for “contract support cost” (CSC) funding

due Indian tribes pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.*, and the various contracts, compacts and funding agreements that are entered pursuant to that Act.¹

This action arises out of contracts between tribes and the IHS, and is thus a counterpart to other class litigation long pending in this Circuit by tribes against the Bureau of Indian Affairs. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (class action to recover contract damages for indirect cost underpayments from 1989 to the present).

As the dispositive briefing reflects, CSC funding is essential to the contracting regime established under the Act. The Act thus requires both that the Secretary must contract with a tribe upon demand, 25 U.S.C. § 450f(a)(1), and that full contract support funding must be added to those contracts. 25 U.S.C. § 450j-1(g) (West Supp. 1988). The Act then defines in exceptional detail the precise costs that qualify as CSC under the Act. 25 U.S.C. § 450j-1(a)(2)-(6). *See also* Pls. Mem. at 23-24.

The 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. Each of the representative Tribes has entered into a self-determination contract or self-governance compact with IHS for the operation of IHS programs serving its respective community. Pls. Mem. 15-17, 20-21 (and exhibits cited therein). Neither received the full amount of contract support funding specified in the Act. Pls. Mem. 17-19, 21-23 (and exhibits cited therein). The government’s failure to

¹ A full discussion of the Act, the nature of this case, and the nature of the claims presented is set forth in Pls. Partial Summ. Judg. Mem. at 2-21 (filed July 23, 1999) (“Pls. Mem.”). In this motion, we use the term “contract” to refer to both contracts negotiated pursuant to Title I of the ISDEA, and compacts negotiated under Title III.

uphold its obligation to provide full funding under the Tribes' self-determination contracts has forced each of the representative Tribes to make substantial cuts in their programs, thus depriving their beneficiaries of crucial health services. *Id.*

The procedural posture of the case is as follows. The parties stipulated to litigate certain dispositive motions first and to defer certification issues until the Court resolved those motions. The Court so ordered and the Tribes then moved for partial summary judgment to establish the government's liability for unpaid contract support costs. The Tribes simultaneously moved for a declaratory judgment that Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681-288 (1998), does not affect their claims. The government opposed these motions and filed a cross-motion for summary judgment. Once these were fully briefed, the government moved for an order requiring a determination of class certification issues prior to consideration of the dispositive motions. The Court granted this motion, and the Tribes now move for class certification under Rule 23(b)(3).

II. The Tribes Meet Rule 23's Criteria for Class Certification.

Federal Rule of Civil Procedure 23 is "intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments." *Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993). To maintain a class action under Rule 23, the representative Tribes must meet the four prerequisites of Rule 23(a): numerosity, commonality, typicality and adequate representation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

Once these prerequisites are satisfied, the Tribes must establish that the class action falls

within one of Rule 23(b)'s three subsections. Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," and Rule 23(b)(2) permits class actions for declaratory and injunctive relief, such as civil rights cases involving class-based discrimination. *See Amchem*, 521 U.S. at 614 (*quoting* Fed. R. Civ. P. 23(b)(1)(A)). Rule 23(b)(3) captures situations where common questions of law or fact "predominate" and a class action is "superior to other available methods" to resolve the matter. Fed. R. Civ. P. 23(b)(3).

While class action certification is committed to the discretion of the trial court, *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982), any uncertainty should be resolved "in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the [litigation] so require." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 356 (D. Colo. 1999). This liberal approach also finds support in the fact that a court has the discretion to alter, expand, subdivide or modify the class definition or the certification order. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982); *Taco Bell*, 184 F.R.D. at 356; *Queen Uno Ltd. v. Coeur D'Alene Mines Corp.*, 183 F.R.D. 687, 690 (D. Colo. 1998); *Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 645 (D. Utah 1998). In exercising this discretion, a Court is not to conduct "a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

A. Rule 23(a) requirements

Considering the presumption in favor of class certification, the Tribes readily meet the four prerequisites for a class action. Under Rule 23(a), a class action is appropriate 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.

Each of these factors supports certification here.

1. Numerosity

First, the number of tribes affected by the government's actions is far too numerous for joinder to be practicable.

To satisfy the numerosity requirement, a plaintiff need only demonstrate that joinder is impracticable, not impossible. *See Ditty*, 182 F.R.D. at 641. In determining whether joinder is impracticable, the relevant factors to consider are “the class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members, and the ability of class members to institute individual lawsuits.” *Taco Bell*, 184 F.R.D. at 357.

According to a September 1999 report prepared by the Indian Health Service,² the proposed class consists of approximately 329 tribes or tribal organizations comprising the “[t]otal

² *Indian Health Service, Contract Support Cost Data* (developed for Headquarters East) (IHS Division of Financial Management) (Sept. 1999) (“IHS 1999 Report”) (attached hereto as Plaintiffs’ Exh. 90).

number of Tribes [and] Tribal Organizations [c]ontracting or [c]ompacting” with IHS. *Id.*³ These 329 tribes and tribal organizations reside in some 35 states, covering Alaska to Florida, a fact that also weighs heavily in favor of numerosity. *See Taco Bell*, 184 F.R.D. at 358. Because of this enormous dispersal, actual joinder would substantially increase the financial burden on each class member. Thus, the proposed class meets Rule 23(a)(1)’s numerosity requirement.

2. Commonality

Second, the claims of the class members share common questions of law or fact. Here, “commonality requires only a single issue common to the class.” *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (*quoting K.L. v. Valdez*, 167 F.R.D. 688, 690 (D.N.M. 1996)) (internal quotations omitted). The class does not need to share every issue in common; the class members’ claims only need to be based on the same legal or remedial theory. *See Taco Bell*, 184 F.R.D. at 359. Thus, “the putative class must share a discrete legal question of some kind.” *Hart*, 186 F.3d at 1289.

The common fact in this case—the government’s failure to pay the full amount of contract support costs due each contracting tribe in the country—gives rise to the common legal issue: whether the Indian Self-Determination Act, and the IHS contracts that implement the Act, require the government to pay tribes full contract support cost funding. The fact that the amount of funding each tribe seeks to recover varies does not alter the discrete and common legal question they all share.

³ A court may also employ “common sense assumptions” to support a finding of numerosity. *Id.* at 358 (*citing Civic Ass’n of Deaf of New York City, Inc. v. Guiliani*, 915 F. Supp. 622, 632 (S.D.N.Y. 1996) and Robert Newberg, *Newberg on Class Actions* § 3.03 at 3-17 & n.58 (3d ed. 1992)); *see Ditty*, 182 F.R.D. at 641. In other words, the impracticability of joinder is dependent not on an arbitrary numerical limit but upon the circumstances surrounding the case. *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76 (10th Cir. 1977).

Thus, all tribes share both a common question of fact and a common question of law, either of which satisfies the commonality requirement.⁴

3. Typicality

Third, the claims for full payment of contract costs asserted by the Tribes are typical of the entire class's claims. Like commonality, "differing fact situations of class members do not defeat typicality . . . so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). *See also Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975). When inquiring into this requirement, a court must compare "the claims or defenses of the representative with the claims or defenses of the class." *Id.* One court framed the issue as a matter of two elements: the defendant's conduct and the plaintiff's legal theory. The named plaintiffs must share these two elements with other members of the class to satisfy the demand of Rule 23(a)(3). *Ditty*, 182 F.R.D. at 642 (*citing Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

The representative Tribes have the same legal claim as do the other class members. They, like the others, were denied their full CSC funding entitlement. If they were newly contracting IHS programs in the mid-1990s (as is the case with both representative Tribes), an IHS circular placed them on a "Queue" for one or more years, instead of paying them. Pls. Mem. at 14-15, 19 n.19, 22 n.22. If they were operating IHS programs under older contracts, they were (like the Cherokee

⁴ As specified in the First Amended Complaint, ¶ 42, the common claims at issue here do not include claims unique to a particular tribe, such as a dispute over a disallowed item of cost in a tribe's annual audit.

Nation) not fully paid under the same policy (which limited payments either to committee-reported amounts or, in later years, to overall amounts set forth in appropriations acts). *Id.* at 14. Either way, they were underpaid relative to the full amount specified in the Act and their contracts.⁵

According to IHS's latest estimates, as of fiscal year 1999 there were 189 tribal contracts then on the IHS "Queue" awaiting CSC payments anywhere from one to six years. IHS 1999 Report at 9-15. Of 193 tribal contracts not on the IHS "Queue," 139 were underpaid between a high of \$1,440,399 to a low of \$2. *Id.* at 21-24. IHS's own data—data which the plaintiffs believe understate the true level of underpayments—show that the representative Tribes' claims are typical of the claims of the class.

Similarly, the government claims a common defense to all these claims: alleged lack of available appropriations and, for certain years, section 314 of the FY 1999 Appropriations Act. Thus, the representative Tribes' claims, including the defenses to those claims, are typical of the claims of other class members.

4. Adequate Representation

Finally, the Tribes will adequately represent the interests of the class members. Like commonality, the requirement of adequate representation under 23(a)(4) overlaps with typicality, though the "adequacy" component has a "constitutional dimension, since it would violate due process to

⁵ As the *Ramah v. Lujan* litigation confirms, they were also underpaid because their indirect cost requirements (the largest component of CSC) were undercalculated due to an inaccurate indirect cost rate. 112 F.3d at 1463. Both the BIA and the IHS calculated tribal CSC requirements using the same erroneous indirect cost rate.

bind a class member to a ruling against inadequate class representatives.”⁶ *Queen Uno*, 183 F.R.D. at 694 (internal citations omitted). A court may find adequacy of representation “where the named plaintiffs have no antagonistic or conflicting interests with those of the class and where class counsel is qualified, experienced and able to conduct the proposed litigation.” *Id.*; *see also Ditty*, 182 F.R.D. at 642. Thus, the representative plaintiffs must have common interests with the class members and demonstrate that they will vigorously prosecute those interests through qualified counsel. *See Taco Bell*, 184 F.R.D. at 361.

The Tribes have no conflicting interests with members of the class. Under the Tribes’ legal theory, each tribe is entitled to its full amount of contract support costs under the Act itself as well as its self-determination contract with the government. Moreover, the Tribes’ claims are sufficiently large to assure aggressive advocacy on behalf of the class. Accordingly, the Tribes have no conflicts of interest with other tribes in the potential class.

The Tribes’ counsel is also experienced and capable of conducting this litigation in the best interests of each member of the class. Thus, the “adequacy” component is satisfied too.⁷

⁶ To allay any constitutional concerns surrounding this flexible class action option, Rule 23(b)(3) provides members the right to “opt out” of the class. Once the class members have received “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,” Fed. R. Civ. P. 23(c)(2), a class member may choose to participate or withdraw from the class. Thereafter, the potential class member is “either [a nonparty] to the suit and ineligible to participate in a recovery or to be bound by a judgment, or . . . [the member is a full member in the class] who must abide by the final judgment, whether favorable or adverse.” *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 549 (1974).

⁷ The attorneys for plaintiffs are highly experienced and capable in litigation in the field of contract support costs under the ISDEA, having *inter alia* successfully represented the plaintiff tribes in *Ramah Navajo School Board & Puyallup Tribe v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or.

B. Rule 23(b)(3) requirements

The Tribes seek to qualify the class under Rule 23(b)(3), which requires that: (1) questions of law and fact common to the members of the class must predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In evaluating these two requirements, especially the second one, a court must consider the following nonexhaustive factors:

(A) the interest of members of the class in 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; and (D) the difficulties likely to be encountered in the management of the class action.

Id. An evaluation of these relevant factors demonstrates that the Tribes have fulfilled the requirements of Rule 23(b)(3).

1997), on reconsideration, 999 F. Supp. 1395 (D. Or. 1998), on remand, 58 F. Supp.2d 1191 (D. Or. 1999), pending on appeal, Nos. 98-36022 and 99-35951; *Appeals of Cherokee Nation*, 1999 WL 440047 (June 30, 1997), appeal dismissed on jurisdictional grounds *sub nom.* *Shalala v. Cherokee Nation of Oklahoma*, 2000 WL 290337 (Fed. Cir. 2000) (unpublished order dismissing government's appeal from a determination of liability for unpaid contract support costs). In addition, plaintiffs' counsel represents class plaintiffs in *Pueblo of Zuni v. United States, et al.*, No. 00-365 (D.N.M.) (Complaint filed Mar. 14, 2000) (prosecuting claims against the Bureau of Indian Affairs for unpaid direct contract support costs); and certain so-called "DCA" class members participating in the partial settlement entered in *Ramah Navajo Chapter v. Babbitt*, No. 90-0957 (D.N.M.) (*see Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Babbitt*, 65 F.R. 4989 (Feb. 2, 2000)), all of these cases involved or currently involve similar legal issues pertaining to contract support costs. Neither plaintiff nor its counsel have any interests that might cause them not to vigorously represent the class.

1. Predominance

In determining “predominance,” the Court looks primarily at liability. *See Queen Uno*, 183 F.R.D. at 695. The critical question is “whether there is ‘material variation’ in the defendants’ posture towards the different plaintiffs.” *Ditty*, 182 F.R.D. at 643 (*quoting Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)). Variation in damages among class members does not defeat a claim for class certification. *Id.* at 644 (*citing Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970)). Thus, if no material variation exists among the claims of the class members or the defenses of the defendants, a court should find that common issues predominate. *Id.*

As indicated earlier, the basic claim for unpaid CSC is the same for all class members. So too will the government rely on the same defense: appropriations have not been available to fully pay contract support costs in past years, and certain alleged limits cut off any government liability for unpaid CSC. As a result, the government’s posture will not materially vary across the class in relation to the plaintiffs’ claims. Indeed, though the exact quantum of each class member’s claim will differ, the class’s theory of recovery and the government’s defense will not. The class’s common issues thus predominate over individual issues.

2. Superiority

The class action is also a superior vehicle for adjudicating this case.

First, the individual tribes who have been harmed by the government’s actions do not have a great interest in individually controlling the prosecution of separate actions, primarily because of the extraordinarily high costs of litigation against a formidable defendant. In the meantime, the lack of

full contract support costs has compelled tribes to reduce their programs and services.⁸ Proceeding as a class action will minimize each class member's overall litigation costs while resolving their one common issue—the liability of the government for the failure to pay full contract support costs. Absent a class, the costs of litigation would multiply and far outweigh the benefit that could be obtained for a large number of class members. *E. g.*, IHS 1999 Report at 9-15 (fifth column).

Second, only one other federal court action concerning IHS contract support cost issues has ever been filed.⁹ Insofar as relevant here, that action strictly concerns the IHS Queue and has been pending since 1996. With this one case only now in the appellate briefing stage and facing a vigorous defense, other class members are hardly encouraged to enter the fray on their own. The lack of other litigation suggests strongly that individual tribes simply do not have the resources to prosecute individual actions regardless of the ultimate amounts at stake.

Finally, management of the proposed class poses relatively little difficulty because the theory of recovery for each of the plaintiffs is identical.

III. Conclusion

The Tribes meet the requirements of Rules 23(a) and (b)(3) for certification of a class.

This class is defined as

all Indian tribes and tribal organizations operating IHS programs under

⁸ U.S. General Accounting Office, Report to Congressional Committees, *Indian Self-Determination Act—Shortfalls in Contract Support Cost Need to be Addressed* (1999) (“GAO Report”) at 38-43 (discussing impact of CSC shortfalls).

⁹ *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), on reconsideration, 999 F. Supp. 1395 (D. Or. 1998), on remand, 58 F. Supp.2d 1191 (D. Or. 1999), pending on appeal, Nos. 98-36022 and 99-35951.

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.

In the *Ramah* litigation the New Mexico federal court certified a similar class as

follows:

The class consists of all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, or its amendments. The class includes all “grantees” as well as “contractors.”

Ramah Navajo Chapter v. Lujan, No. CIV 90-0957LH (D.N.M. Nov. 18, 1993). That class was recently expanded to include damage claims for the BIA’s annual underfunding of all tribes, even at the miscalculated indirect rates. 65 F.R. at 4991 (Part VI) (publishing, in part, an opt-out notice for class members). In light of this precedent, the authorities cited above, the fact that the instant claims mirror the “*Ramah*” BIA claims, and the presumption favoring class certification, the Tribes respectfully request that the Court grant its motion to certify a class.

Respectfully submitted this 5th day of April 2000.

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I hereby certify that I mailed,
or caused to be mailed, a true and
correct copy of the foregoing document
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