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,)
)
Defendants.)
)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE
(Substitute)

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I. INTRODUCTION

This case involves the failure of the Indian Health Service to provide contract support costs as required by statute and by contract to the tribes and tribal organizations that agreed to administer federal health care programs for their people. A district court has certified a similar case against IHS's sister agency–involving the failure of the Bureau of Indian Affairs to provide contract support costs as required by the same statute and by contract–as a class action.[1] Indeed, the government ultimately settled a portion of that case and paid a very substantial sum.[2] Significantly, while the government opposes class certification here on all conceivable grounds, it dodges the fact that *Ramah*–the most closely parallel case–was litigated as a class action, with considerable success and without any government appeal on the issue. The *Ramah* case underscores that class certification is entirely appropriate here.

The Complaint here alleges that although the Indian Self-Determination Act mandates that tribes receive full contract support costs in accordance with section 106(a)(2) and the contracts entered under the Act, the government did not follow that mandate. The complaint seeks damages for all tribes that contracted with IHS but did not receive the required contract support costs.

Despite the government's protestations against use of the term "full" contract support costs, it knows full well that there have long been "shortfalls" in contract support costs and that those "shortfalls" are the subject of this action. In fact, the government itself has provided annual reports to

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[1] *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM Order Approving Second Amended Notice of Class Action (D.N.M. Mar. 27, 1994) (Pl. Exh. 94).

[2] *Ramah Navajo Chapter v. Babbitt*, No. CIV 90-0957 LH/WWD Memorandum Opinion and Order Approving Partial Settlement Agreement (D.N.M. May 14, 1999) (Pl. Exh. 85).

Congress and periodic reports to all tribes specifying each and every tribe facing such shortfalls and/or the total amounts of those shortfalls. *See* Pl. Exhs. 2, 90-93. This case seeks recovery of those shortfall amounts. While the government may no longer be comfortable with the term "full," its disagreement is but semantic jousting. The scope of the claim is clear from the Complaint, and the proposed class definition is readily understandable. The plaintiffs seek simply to recover the difference between the contract support amounts received by each tribe (if any) and the full amounts calculated under section 106(a)(2) of the Act.

Beyond semantics, the government's opposition is largely an effort to muddy the waters by highlighting the complexity of IHS's contract support situation–a complexity entirely of IHS's own making. For example, the government suggests that some tribes have had differing positions with respect to the application of the IHS "Queue" policy, depending on whether or not they rose to the top of that Queue in a given year. But how tribes responded to IHS's allegedly illegal position that not all tribes would get fully paid in a given year is irrelevant here–where the claim is that all tribes should have been paid in full. Likewise, the fact that tribes may not be situated identically in terms of damages quantification–the source of the government's greatest objection–is wholly beside the point.

The Complaint alleges that all tribes share a common interest in receiving the full amount of their contract support cost requirements specified under section 106(a)(2) of the Act. 25 U.S.C. § 450j-1(a)(2). Likewise, the central legal issue here–whether that section means what it says and requires that tribes receive their contract support costs as provided in the Act–is a predominant issue common to all tribes contracting or compacting with IHS. To be sure, collateral matters relating to contract support cost quantification, as to which tribes could have differing situations, may well exist.

And under the government's view of the merits, the tribes are not all situated the same. But "the merits" are for another day. The claim in this case, viewed fairly and without regard to whether the plaintiffs will prevail on the merits, is clearly appropriate for litigation through a class action.

II. NATURE OF THE CASE

The government's strident opposition to virtually every contention compels a return to the basic nature of this case, all of which is set forth without disagreement in the parties' pending motion for summary judgment.[3]

Most of the undisputed facts are summarized in tabular form in Plaintiffs' Exhibit 69.[4] The Indian Self-Determination Act authorizes the Secretary to enter into contracts, compacts, and annual funding agreements with tribes and tribal organizations.[5] The Act specifies the program funding amount to be transferred from the Secretary to the contracting tribe, 25 U.S.C. § 450j-1(a), and

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[3] In the discussion which follows, the plaintiffs are drawing strictly from informal discovery, extant government documents, the undisputed facts elicited in the course of dispositive motion practice, and the government's own factual acknowledgments in its briefs. It is entirely proper for the court to consider these facts so that it can understand the nature of the plaintiffs' claims and thus determine whether class certification is appropriate. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)) (noting that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'") (citations omitted); *Castrano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (court may go beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable law in order to make a meaningful determination of the certification issues"). At the same time, plaintiffs agree the Court should not go further and assess the merits of the claim or defenses, nor is it necessary for the Court to do so in order to resolve the pending certification motion.

[4] Pl. Exh. 69 accompanied the Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action, filed Oct. 19, 1999.

[5] Pl. Exh. 69, ¶¶ 1-4.

directs that "contract support costs" "shall be added" to that amount, § 450j-1(a)(2).

IHS has generally paid contract support costs in accordance with the policies set forth in Indian Self-Determination Memorandum (ISDM) 92-2 and IHS Circular 96-04.[6] The contract support costs, specified in the Act and elaborated upon in ISDM 92-2 and IHS Cir. 96-04, include "indirect" costs and "direct" costs, with the main component being indirect costs.[7] Indirect costs are defined in the Act, 25 U.S.C. § 450b(f), and they are determined by application of a formula which depends upon a tribe's indirect cost rate agreement usually approved by the Office of the Inspector General (OIG) of the Department of the Interior.[8]

The OIG fixes a tribe's indirect cost rate pursuant to Office of Management and Budget (OMB) Circular A-87, and that rate is then applied to the program funds paid by IHS.[9]

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[6] Pl. Exh. 69, ¶ 6; Gov't Summ. J. Br. at 15, 18-19 (filed Sept. 7, 1999).

[7] Pl. Exh. 69, ¶ 7; Pl. Exh. 95 at 5, 8, 17, 23, 25 & 65 (various annual IHS budget justifications to Congress explaining indirect costs are "approximately 80%" of total contract support cost requirements).

[8] Pl. Exh. 69, ¶ 9 (including Gov't Response); Pl. Exh. 95 (various annual IHS budget justifications to Congress) at 5 ("Negotiations of indirect costs need for tribal contractors is performed between the contractor and the Inspector General of the Cognizant Agency"), 8, 17, 23, 25, 65 & 77 (all same); *id.* at 23, 65 & 77 (adding that the "cognizant agency" "is the Department of the Interior for virtually all contracts").

[9] Pl. Exh. 4 (ISDM 92-2 at 6-7); Pl. Exh. 5 (IHS Circular 96-04 at 6-7). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1456, nn.1 & 2 (10th Cir. 1997) (describing the process by which an indirect cost rate is determined and then applied to calculate a tribe's indirect cost requirement associated with its self-determination contract). *See also Alamo Navajo School Bd. Inc. and Miccosukee Corp.*, 1997 WL 759441 (IBCA Dec. 4, 1997), *appeal dismissed in part sub nom. Babbitt v. Alamo*, 185 F.3d 880 (Fed. Cir. 1998) (unpub. disp.), and *reversed in part sub nom. Babbitt v. Miccosukee Corp.*, ___ F.3d ____, 1999 WL 989060 (Fed. Cir. 1999) (unpub. dis.), slip op. at 7-8 (¶ 12) (describing the formula for calculating indirect contract support costs) (Pl. Exh. 14); *Cherokee Nation*, 1999 WL 440045 (IBCA June 30, 1999), *appeal dismissed on*

Historically, a similar formula-driven process has set the bulk of the amounts payable under the Act as "direct" contract support costs, comprising 15% of salaries to cover "such benefits as workers' compensation and unemployment taxes."[10]

The parties agree that in various years IHS experienced shortfalls in paying the contract support cost amounts calculated under 25 U.S.C. § 450j-1(a)(2) of the Act.[11] A major part of the shortfall in IHS payments for contract support costs is reflected on the "Queue" or "Priority List" that IHS established and periodically updated under ISDM 92-2 and IHS Cir. 96-04 for ranking (and either paying or not paying) contract support cost requirements associated with newer contracts and compacts.[12] Although IHS data made available to date is historically less detailed regarding the level of

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jurisdictional grounds sub nom. Shalala v. Cherokee, __ F.3d __, 2000 WL 290337 (Fed. Cir. 2000) (unpub. dis.), slip op. at 6 (describing the indirect cost rate formula) (Pl. Exh. 15); U.S. General Accounting Office, *Indian Self-Determination Act–Shortfalls in Contract Support Costs Need to be Addressed* ("GAO Report") at 20 (describing in Figure 1.1 the "Formula for Determining the Funding for Indirect Costs") (Pl. Exh. 2).

[10] GAO Report at 46-47 (Pl. Exh. 2). *See also* ISDM 92-2 at 5-6 (describing direct CSC computations) (Pl. Exh. 4); IHS Circular 96-04 at 5-6 (same) (Pl. Exh. 5).

[11] Pl. Exh. 69 ¶¶ 17-20 (including Gov't Response and referenced Fitzpatrick Decl.); GAO Report at 34 (graphically depicting "IHS' Shortfalls in Contract Support Costs, Fiscal Years 1989 through 1998") (Pl. Exh. 2).

[12] Pl. Exh. 69, ¶¶ 15-16; Pl. Exh. 6. *See also* Pl. Exh. 91 (reproducing twelve IHS "Queue" lists generated at various times since 1994); Pl. Exh. 9 (containing an example of an IHS shortfall report to Congress prepared pursuant to former 25 U.S.C. § 450j-1(c) (repealed)); Pl. Exh. 92 (containing similar IHS report to Congress prepared in response to H.R. Rep. No. 104-173 (1996)); Pl. Exh. 93 (setting forth detailed tribe-by-tribe IHS analyses on impact of alternative FY 1999 appropriation funding levels on contract support cost payments).

CSC shortfalls associated with ongoing programs,[13] a detailed IHS 1999 analysis of every contracting tribe in the country has previously been filed with the Court.[14]

These are the undisputed facts in which the current dispute arises. They show that contract support costs are essentially formula driven and that IHS contract support cost payments to tribes over the years have been insufficient to fully pay these amounts, resulting in annual "shortfalls" (IHS's preferred terminology). Whether or not the government is liable for these shortfalls, in whole or in part, remains to be seen. Insofar as the pending motion is concerned, however, the proposed class comfortably meets all of the requirements of Rules 23(a) and 23(b)(3), just as the virtually identical class was certified in the mirror-image *Ramah* litigation pending against IHS's sister agency.

III. ARGUMENT

Notwithstanding the government's innuendo that class actions are somehow disfavored, Gov't Opp. at 4-5, the very cases the government cites emphasize that "[c]lass 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.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). As the Supreme Court put it well, "'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be

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[13] *But see* Pl. Exh. 95 at 56 (FY 1997 IHS Budget Justification discussing CSC shortfall for ongoing contractors).

[14] Pl. Exh. 90 (filed April 5, 2000 under cover of Plaintiff's Motion for Class Certification).

litigated in an economical fashion under Rule 23.'" *Id.* (quoting *Yamasaki*, 442 U.S. at 701).[15] The Tenth Circuit has likewise stressed that the class action device is "intended to promote the efficient resolution of claims 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). The plaintiffs here invoke Rule 23 to further these salutary goals.

Indeed, even when there is some doubt in the matter, caution dictates that certification should occur, for as the Tenth Circuit has instructed, any error in such matters should be made "in favor and not against the maintenance of a 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) (emphasis added); *see Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 356 (D. Colo. 1999) ("Because of the flexible nature of class certification, I am to favor the procedure").[16]

As the Rule, itself, contemplates, a court may issue a conditional order that can be altered or amended anytime before a decision on the merits, Fed. R. Civ. P. 23(c)(1), and in the course of the litigation may also divide a class into subclasses with respect to particular issues as warranted,

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[15] *See also Falcon*, 457 U.S. at 159 (noting "'the efficiency and economy of litigation which is a principle purpose of the [class action] procedure,'" citing *American. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974)), and at 161 (Burger, C.J., concurring) ("[T]he purpose of Rule 23 is to promote judicial economy by allowing for litigation of common questions of law and fact at one time").

[16] *See also Boughton v. Cottler Corp.*, 65 F.3d 823, 871 n.1 (10th Cir. 1995) ("[T]he court can keep both of its options open by certifying the class with the idea of later decertifying the class should the evidence show that certification was not warranted").

Fed. R. Civ. P. 23(c)(4).[17] While the determination on class certification is committed to the discretion of the trial court, *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982), a court generally weighs these supervisional tools when determining whether to certify a class and freely employ such tools in order to maintain the class. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §§ 3.25, 3.31 (3d ed. 1992) [hereinafter "Newberg"] (to eliminate conflicts, courts have used initial subclasses, intervention, class redefinition or limitation, opt-out provisions or party realignment);[18] *see also Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972) ("Had the discretion [which is] lodged in the trial court by Rule 23(c) and (d) as to determination of classes and subclasses, conditional orders, imposing conditions, prescribing measures to prevent undue complication, etc., been properly exercised, we would have given its decision weighty deference.").

The Federal Rules of Civil Procedure authorize a Rule 23(b)(3) class precisely for situations where a class action "is not as clearly called for" under the balance of the Rule, but "may nevertheless be convenient and desirable." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615

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[17] *See also Falcon*, 457 U.S. at 160 (noting that this "flexibility enhances the usefulness of the class-action device").

[18] *See also* Newberg, §§ 3.32 (courts may form subclasses along lines of conflicting interest on issues of monetary relief); 4.23 (courts may limit actions to common issues only); 4.26 (courts may reduce individual damage issues through bifurcated trials of liability and damage issues, use of masters or magistrates, class decertification after liability trial accompanied with notice to class on how to provide individual damages, use of the defendant's records to compute amount of damages, and other devices); and 4.32 (to remedy problems of complexity, courts may use devices such as conditional class certification, limitation of class to particular issues, bifurcated trials, common proof of class damages, use of liaison and lead counsel for the parties, and others). The Supreme Court frequently relies upon Newberg in its consideration of class action issues. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, __, 119 S. Ct. 2295, 2309, 2310 (1999); *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379, 396 n.5, 399 n.11(1996).

(1997) (quoting Adv. Comm. Notes on Fed. R. Civ. P. 23). The Advisory Committee intended Rule 23(b)(3) to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615. Over time, class action practice under Rule 23(b)(3) has proven an effective and adaptable "means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one." *Id.* at 617-18. Given the modern evolution in class action litigation and the compelling facts presented here–a class action dominated by one central issue which in a single proceeding can resolve as many as 329 potential individual claims for each of the several years covered by this suit–the requested class should be certified.

A. The Tribes Comprise an Ascertainable Class.

The government bases virtually its entire opposition to class certification on semantic gamesmanship, deliberately misreading a clear definition which accurately describes the precise membership of a class that is well-known to IHS, and which IHS has itself described in the very same way. Not only is this class ascertainable in theory, it has been ascertained in fact and with painstaking accuracy–by IHS. IHS has identified each and every tribal contractor in the United States that has been paid less than its full entitlement under the Act, right down to the dollar. *See*, *e.g.*, Pl. Exh. 90-92. Under these circumstances, to suggest that the class is not well-defined is disingenuous at best.

The plaintiffs have advanced a definition intended to convey in non-technical terms the essence of the class, so that it can be readily understood by all who qualify and elect to remain a member or opt-out:

> 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.

This definition is certainly "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) aff'd 194 F.3d 1116 (10th Cir. 1999).[19]

IHS's own documents identify this readily ascertainable class. Only a few months ago, IHS reported to Congress and to all interested tribes the full amounts tribal contractors were entitled to be paid under the Act during certain years. Pl. Exh. 90.[20] IHS itself termed the identified amounts "CSC Need," *id.* at 4, and the "CSC Requirement," *id.* at 5. It expressed the total CSC "need" or "requirement" in terms of it being "100%" funded. *Id*. The same list itemized each and every dollar IHS actually paid against that "100%" CSC "need" or "requirement," and then calculated by tribe and in the aggregate the resulting "shortfall." *Id*. at

4, 5, 6, 27-70.[21] As a result, IHS determined that in FY 1999, 302 of 329 tribes were paid less than

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[19] Although the class here is readily definable, under Rule 23 the class need only be "capable of identification at some later time." *Medicare Beneficiaries' Defense Fund v. Empire Blue Cross Blue Shield*, 938 F. Supp. 1131, 1140 (E.D.N.Y. 1996).

[20] Those amounts include the full CSC amounts calculated for tribally contracted programs listed on the Queue (Pl. Exh. 90, at 10-15, cols. headed "DCSC" and "IDC") and the full amounts calculated for tribally contracted programs not listed on the Queue (*id*. at 21-24, col. headed "New Total CSC Need").

[21] For the "Queue" portion of the claim, and for the underpayment of CSC associated with ongoing older contracts, Congress mandated IHS through fiscal year 1998 to annually report all shortfall data, 25 U.S.C.A. § 450j-1(c) (West 1988), *repealed* Pub. L. 105-362, § 801(g), 112 Stat. 3288 (1998). *See*, *e.g.*, Pl. Exh. 9. Since 1999, IHS has voluntarily continued to do so.

"100%" of their "CSC Requirement" or CSC "need" and therefore suffered a "shortfall."

The plaintiffs have proposed a definition intended to describe this situation. We have proposed the class in terms of whether its members received "full" CSC funding, because that phrase is clear, simple and straightforward. Indeed, in explaining its own requests to Congress each year, IHS has at times used the very same term–"full" CSC funding–to describe the very same facts (while at other times using the term "shortfall").[22] There is neither merit nor credibility to the argument that "full" CSC funding describes a state of affairs that is not readily ascertainable.

In objecting to the term "full" CSC funding, IHS also argues that plaintiffs somehow

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For the "other federal agencies" portion of the claim, both liability and damage computations have been developed in the mirror-image *Ramah* litigation pending on remand from the Tenth Circuit.

[22] *See*, *e.g.*, Pl. Exh. 95, at 53 (IHS budget justification for FY 1997), explaining:

> In fiscal year (FY) 1995, the IHS was not able to provide full CSC funding to all new and expanded contracts eligible for payment from the Indian Self-Determination (ISD) fund.

(emphasis supplied) and adding:

> IHS was not able to fully fund the remainder of the FY1995 contract support cost need from the ISD Fund [in FY 1996].

(emphasis supplied). *See also id.* at 11 ("IHS is making efforts to fully fund [CSC]").

"Full funding" is but one term commonly used by IHS and understood by all. Thus IHS frequently speaks in terms of the "need for [CSC]," Pl. Exh. 95, at 5, 8, 17, 23, 25, 50, 53-55, 65-66, 71, 77-78, 81; "the amount required to fund the need for [CSC]," *id.* at 5, 15, 17, 23, 25; amounts "required for CSC" or "CSC requirements," *id.* at 11, 55, 66, 78; and "contract support shortfall needs," "[CSC] shortfall needs," a "shortfall" or "[CSC] shortfall," and "[CSC] shortfall requirements," *id.* at 24, 27, 50, 55-57, 66-67, 78. IHS is ill-positioned to now argue after all these years that by referencing these same terms the class definition is either unclear or makes unfair assumptions about the government's ultimate liability in this case.

propose a class defined by whether the underlying damage claim for failing to pay "full" CSC funding will succeed. This is clearly not so. The simple fact is this: nothing in the class definition assumes an outcome on the merits. It simply describes a state of affairs: tribes were underfunded in their CSC requirements, and they will now have that underfunding adjudicated, up or down.

The government's argument also ignores the general rule that a court will take the allegations of the Complaint as true for purposes of resolving a motion for class certification. *See In re Great Southern Life Ins. Co. Sales Practices Litigation*, ___ F.R.D. ___,2000 WL 284216, at *2 (N.D. Tex. 2000); *In re Intelcom Group, Inc. Securities Litigation,* 169 F.R.D. 142, 145 (D. Colo. 1996); *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 489 (D. Wyo. 1994); *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351, 369 (N.D. Okla. 1977). A possible lack of merit in the plaintiffs' claim is thus no more reason to reject certification than is likelihood of success a permissible reason to grant it. *Eisen*, 417 U.S. at 177. If the Court assumes the truth of the Tribes' allegation that class members did not receive their full contract support cost requirements as specified by IHS's own analyses, the class membership is readily ascertainable.

Further the government's opposition avoids the ample factual information available to the Court. In applying Rule 23's factors courts typically <u>do</u> analyze the substantive claims and defense of the parties, *see Joseph v. General Motors Corp.*, 109 F.R.D. 635, 637-38 (D. Colo. 1986), because a motion for class certification may well involve "considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Coopers & Lybrand v. Livesay*, 437

U.S. 463, 469 (1978). This is not improper under *Eisen*,[23] for "there is a distinction between identifying the issues that the case will present, for purposes of determining whether the requirements of Rule 23 have been met, and deciding those issues on the merits." *Id.*; *Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995). As the Tenth Circuit has observed, "*Eisen* did not rule out specific consideration of any aspect of the merits of a case before determination of the class action issue . . . [but] generally support[ed] the proposition that the class action determination should precede the final trial on the merits." *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 274 (10th Cir. 1977). *See also supra* at 3 n.3.

Determining whether tribes have received their full contract support costs as specified in IHS's 1999 report does not require the Court to resolve the ultimate issue of liability. The Court need only look at IHS's own documents to see that hundreds of tribes have experienced shortfalls in contract support. Whether or not that underpayment results in liability remains to be seen, though surely that liability is no more assumed by IHS's "shortfall" calculations than it is by the proposed class definition. As the Answer and the dispositive motions make clear, that liability will turn, not on the full CSC amounts calculated under § 106(a)(2), but on the proper interpretation of <u>other</u> provisions of law, namely the ISDA's "availability" clause and the FY 1999 Appropriation Act's Section 314 rider. Gov't Opp. at 1.

Thus, the plaintiffs have properly defined the class in objective terms that "avoid[ ] problems of circular definitions which depend on the outcome of the litigation on the merits before class

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[23] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

members may be ascertained, and do[ ] not require the court to engage in an impermissible consideration of the merits of the claims in connection with its class certification determination." *Thrope v. Ohio*, 173 F.R.D. 483, 488 (S.D. Ohio 1997) (quoting Newberg, § 6.14 at 6-61).[24]

How to best define the class and the accompanying Notice is, of course, a matter for the Court's sound discretion, balancing the interest in precision with lay comprehensibility. If the Court wishes, other formulations are certainly possible:

- "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~~ experienced a shortfall in the payment of full contract support cost funding requirements at any time from 1988 to the present."[25]

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[24] Even if the proposed definition did require the Court to determine the merits of the case (and we believe it does not), the proper course is not to deny class certification but to amend the class definition, either at the outset or in the course of proceedings. As the Supreme Court has noted "[t]he purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation." *Eisen*, 417 U.S. at 184.

In taking an active role, courts often exercise their discretion in the life of a case to modify a class definition or to divide a class into subclasses, particularly when faced with a definition that may require a determination into the merits to determine precisely who is a class member (a situation not present here). *See*, *e.g.*, *Toney v. Rosewood Care Center Inc.*, 1999 WL 199249, at *5 (N.D. Ill. 1999) ("In light of the risk that such a definition would require the parties to delve into the merits of class members' claims in order to determine the membership of the . . . sub-class, the court will exercise its broad discretion to redefine [the subclass]."); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63-64 (D. Nev. 1985) (noting that although the plaintiff's definition was insufficient in that it would require a determination of the merits, "[t]his does not defeat plaintiff's attempt at defining a class" and modifying the definition). Since a court retains "this power to designate sub-classes or decertify the class upon a proper showing as the case progresses," a court need not decide whether subdivision of a class is necessary at the initial certification stage. *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 832 n.6 (8th Cir. 1977), cert. den. 434 U.S. 856 (1977); *see Toney*, 1999 WL 199249, at *8 (court may modify the class or sub-class definition as the discovery process unfolds).

[25] This alternative uses IHS's preferred terms "shortfall" and CSC "requirements," while retaining the word "full" so that the "shortfall" is in relation to something. Other variations could refer to

Alternatively, the Court could follow the course taken by Judge Hansen in the *Ramah* case, using a definition that recognizes that every tribal contractor is a potential class member in one or more of the years at issue, and describe the class this way:

> ! “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.”[26]

Whatever the course chosen by the Court, this class is readily identifiable. The government's objections regarding the ascertainability of the class thus lacks merit.[27]

B. The Proposed Class Meets Rule 23(a)'s Prerequisites.

The parties agree that to maintain a class action under Rule 23, the Tribes must first

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“full contract support cost <u>needs</u>,” another term frequently used by IHS, including in IHS's expression of the CSC “level of need funded” (or “LNF”) in a particular year. *See, e.g.*, Pl. Exh. 90 at 5, 6.

[26] *See* Pl. Exh. 94.

[27] Pl. Exh. 90 shows class membership for FY 1999, a year when no new contracting activities occurred due to a congressional moratorium. Pub. L. 105-277, § 328, 112 Stat. 2681, 2681-291 to 2681-292 (Pl. Exh. 76 at 7). Since it is based on year-end FY 1998 data, it also reflects the same class membership as existed in FY 1998. And since the only changes with regard to underpaid “Queue” contractors in prior years relate to the payment of Queue amounts each year out of the $7.5 million ISD Fund, IHS's own earlier versions of the Queue will show precisely which tribal contractors had “Queue” claims up through particular years. *See*, *e.g.*, Pl. Exh. 91 (multiple Queue lists). In this last respect, the plaintiff Shoshone-Paiute Tribes are a case in point. They were on the Queue as unpaid for FY 1995 and FY 1996, Pl. Exh. 91, at 6, 11, 13, 14 & 17. But once they were paid beginning in FY 1997, they were removed from the Queue and thus no longer appear on it. Pl. Exh. 90 at 10-15. The same is true of many tribes which, like the Shoshone-Paiute, were removed from the Queue at some point once annual contract payments began being made. *Cf.*, IHS analysis of the Chugachmiut, Coeur D'Alene, Jamestown, Kaw, and Tulalip tribes, all of which were on some prior Queue lists because of earlier non-payments (Pl. Exh. 91), but all of which appear as fully paid in FY 1999 (Pl. Exh. 90 at 48 (Chugach), 64 (Kaw) & 68 (others)).

meet the four prerequisites of Rule 23(a)–numerosity, commonality, typicality and adequate representation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). The government's objections on each of these counts are without merit.

1. The class is so numerous that joint is impracticable.

Contrary to the government's thin assertion, the Tribes easily meet Rule 23(a)'s numerosity requirement. To satisfy the numerosity requirement, a plaintiff need only demonstrate that joinder is <u>impracticable</u>, not <u>impossible</u>. *See Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 641 (D. Utah 1998); *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 603 (D. Colo. 1990). 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. 357 (D. Colo. 1999).

The Tribes easily meet the numerosity requirement on class size alone. When a class involves "hundreds" of members, "the impracticability of bringing all class members before the court has been obvious, and the Rule 23(a)(1) requirement has been easily met." Newberg, § 3.05 at 3-24 (adding that in such cases "the issue ordinarily receives only summary treatment . . . and has often gone uncontested"). *See also* Newberg, § 3.05 at 3-25 to 3-26 (joining as few as 40 raises "presumption" of impracticability). While "no set formula" exists, *Rex v. Owens*, 585 F.2d 432, 436 (10th Cir. 1978), the Tenth Circuit has observed that class actions have been deemed viable for actions with as few as 17 to 20 members. *Id.* But "[c]ertainly, when the class is very large–for example, numbering in the

hundreds–joinder will be impracticable." Newberg, § 3.05 at 3-25.[28]

The government casually responds that the plaintiffs "merely assert that the proposed class consists of approximately 329 tribes,'" Gov't Opp. at 10. But IHS's own publication establishes numerosity down to a gnat's eyelash. Pl. Exh. 90. And for purposes of impracticable joinder, whether the number be 329 or two dozen fewer[29] is immaterial; either way Rule 23(a)'s numerosity requirement is met.[30]

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[28] *See also In re American Medical Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) ("When class size reaches substantial proportions, however, the impracticality requirement is usually satisfied by the numbers alone"), *petition for cert. filed* ___ U.S. ___ (Mar. 9, 2000).

[29] The government points out that according to Pl. Exh. 90, over two dozen tribal contractors were not underpaid their "CSC requirements" in FY 1999, based on FY 1998 year-end data. But in prior years, one or more of them certainly were, for the Duck Valley Shoshone-Paiute Tribes are a case in point (Pl. Exh. 90 at 24, line 163). *See also supra*. __ n.___.

[30] Even if IHS's own records were unreliable, a "good faith estimate" of the number of class members is all that is required:

> [T]he prevailing view is that the plaintiff need not allege the exact number or identity of class members. A contrary rule would foreclose most class litigation because of the impossibility of identifying all class members at the outset and would make large class suits unduly burdensome because of the great expense involved in identifying members.

Newberg, *supra*, at § 3.05. The plaintiffs have provided both a good faith estimate of the class size and the evidence from the defendants supporting that estimate. For the government to now pretend that class membership is unknowable is, as one court put it, "pure sophistry." *Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980). *See also Bremiller v. Cleveland Psychiatric Institute*, 898 F. Supp. 572, 576-77 (N.D. Ohio 1995) ("[G]iven that the class members are past and present employees of Defendant CPI, defendants cannot claim complete ignorance as to the identities of the class members nor can they use this ignorance to try to defeat class certification."); *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y. 1995) (when membership is in the hundreds and pertinent information for the exact number is within the defendants' control, class certification was proper).

Here, the potentially 329 class members at issue hail from every corner of the country, including the furthest reaches of roadless Alaska. The government's argument that such geographic dispersion is irrelevant and no bar to joinder is simply contrary to the law. *See Taco Bell*, 184 F.R.D. at 358; *Alvarado Partners, LP. v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990) (noting geographic dispersion in finding joinder impracticable).[31]

To leave the resolution of CSC claims to voluntary joinder simply assures that most claims will never be litigated, either here or anywhere else, simply because most Indian tribes (many of which are among the poorest of the poor) have no available resources to pursue these claims. The argument is particularly harsh in this setting, for the government has a trust responsibility to Indian tribes, 25 U.S.C. § 450n(2), yet it now seeks to erect every possible obstacle to its trust beneficiaries' efforts to have their day in court on serious and substantial claims.

2. Questions of law or fact are common to the class.

Rule 23(a)'s common question requirement, is likewise easily met here, as it is in most cases,[32] for the plaintiffs need only to assert "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)) (emphasis added). That issue can be either a common question of law or fact.

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[31] *See also Mullen v. Treasure Chest Casino, Inc, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (joinder not practicable where 100 to 150 class members were geographically dispersed); *In re the Drexel Burnham Lambert Group, Inc.* 960 F.2d 285, 290 (2d Cir. 1992) (describing several hundred member class "dispersed throughout the United States," and finding that "[i]ndividual adjudication of each claim would take many years, and would drastically increase the legal expenses for all of the parties. Joinder of all claims into one proceeding would be expensive, time-consuming, and logistically unfeasible. Thus, Rule 23(a)(1) has been satisfied").

[32] *See* Newberg, § 3.10 at 3-50.

Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982). As a result, summary judgment rulings on this requirement are the norm. Newberg, § 3.10 at 3-50 n.143 (citing *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975)). Here what is common, of course, is that all members of the class were underfunded in their contract support cost requirements as a result of an agency policy that deliberately failed to fully fund those costs.

The government's effort to cloud this common issue of law is unavailing. The government does not so much disagree that there is something "common" here, as it insists that a determination of each class member's CSC entitlement (presumably after liability has been established) will turn on each tribal contractor's particular circumstance. But by law, and regardless of variation, all self-determination contracts incorporate the funding provisions of the Act, and the Title III self-governance statute likewise incorporates the funding provisions of the Act. The CSC claim here is ultimately based on that Act, as is the government's defense. Each class member's claim is thus based on the same legal or remedial theory–whether the Indian Self-Determination Act, and the IHS contracts that implement the Act, require the government to pay tribes the amount of "shortfalls" experienced in the designated years and acknowledged in IHS's own reports. *See Taco Bell*, 184 F.R.D. at 359. Clearly, the government has applied the same general policy to all tribes over several years: refusing to pay shortfalls after allegedly running out of funds. Because this policy is the central focus of the litigation for each individual tribe, the class easily meets the commonality requirement. *See Thrope*, 173 F.R.D. at 488.

IHS's arguments regarding the difficulty of calculating each tribe's annual CSC shortfall, Gov't Opp. at 21, is not only a classic exercise in obfuscation, it is irrelevant under Rule 23(a).

Moreover, in every year covered by this litigation IHS has undertaken the precise calculation the government now claims is so elusive and generated detailed congressional reports on the growing "shortfalls." *See, e.g.*, Pl. Exhs. 10, 92, 95. Particularly given the largely formulaic nature of these costs, *supra* at 4-5, the government's objections lack foundation.

In any event, "the presence of individual issues does not destroy commonality." *Lewis v. National Football League*, 146 F.R.D. 5, 9 (D.D.C. 1992). A common question of law, such as the validity of the IHS policy and practice here, satisfies the commonality requirement even if factual situations vary case to case. *See Milonas*, 691 F.2d at 938 ("As we have stated previously, every member of the class need not be in a situation identical to that of the named plaintiff."); *Like v. Carter*, 448 F.2d 798, 802 (8th Cir. 1971) (stating that "[f]actual differences are not fatal if common questions of law exist).

In sum, "[n]owhere in the rule is there a requirement that all questions of law and fact be common to the class." Newberg, § 3.11 at 3-59. Because this action is based on the same statute which is incorporated into each individual tribe's contract, all members of the plaintiff-class share at least one common question of law. And that is enough.[33]

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[33] The government goes on at length about how different tribal contractors' funding agreements may say different things, supported by a Declaration from Mr. Ron Demaray, Director, IHS Division of Self-Determination Services discussing language in a few such agreements. These variations make no difference here for at least six reasons. First, the language of these documents must comply with the Act, and any language that is inconsistent with the Act would be of no legal effect; the government by contract simply cannot excuse itself from complying with the law. Second, to the extent the contract passages cited by the government address the amount to which a particular tribe is entitled, that is a question of damages, which does not affect the propriety of class certification.

Third, to the extent the government suggests that certain tribes have agreed to be paid

3. The Cherokee and Shoshone-Paiute's claims are typical of the common class issues.

In imagining the "antagonistic interests" between the named plaintiffs and the class members, the government improperly finds itself relying on one of its merits defenses (albeit one that is in the end not well taken), contrary to *Eisen*. Thus the government argues that IHS has finite appropriations to pay tribes, and that the representative plaintiff's claims cannot be typical of the potential class's claims because any relief granted to one tribe would negatively impact every other tribe.[34] Gov't Opp. at 23-28. Essentially, then, by supposing that the plaintiffs are litigating over a

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less than the full amounts to which they were entitled that would be a matter of defense, and again not a reason for rejecting class certification. Fourth, although the government suggests that by these clauses some tribes have waived their contract support cost rights under the Act, none of the cited clauses in fact does so. Even the highlighted NSHC clause specifically preserves that tribal contractor's rights under "section 106(a)(2)" of the Act. Demaray Declar. at 3-4. *See also*, Demaray Declar. at 6 (quoting another funding agreement providing that the tribal contractor "shall receive contract support as specified in sections 106(a)(2) and (3)"). (If such waivers exist, no doubt the government would share them with the Court.) Fifth, even the presence of some variation would not negate the commonality in the statutory claim shared by all tribal contractors, a claim which the very cited contract clauses show also infuses the contract claims and thus clearly "predominates" across the entire class. Finally, if in the course of the litigation genuine substantive variations arise that meaningfully affect the rights of different tribal contractors, the Court can always exercise its supervisory powers over the class as appropriate. *See supra* at 8 n.18.

[34] In drawing the Court into the merits of the case, the government relies on its "reduction clause" defense, a defense based thinly on the second half of the Section 106(b) proviso, 25 U.S.C. 450j-1(b). Gov't Opp. at 24-26. Since we are extremely reluctant to enter into "the merits" in the context of this certification motion, suffice it to say that the parties' dispositive briefs show beyond a shadow of a doubt that IHS never even considered (no less relied upon) the Section 106(b) reduction clause when it decided not to pay one penny more in contract support costs each year. Instead, IHS's conduct at all relevant times was dictated by a 1992 decision to never pay more than certain sums irrespective of how much might be legally available or how much might be paid without reducing on-

limited fund (usually a basis for class certification) the government argues no class member could ever have a claim typical of the others' because the alleged adversity defeats the typicality.

This strange argument simply ignores the time-worn test for typicality. "Typicality" merely requires that a class action plaintiff "demonstrate that other members of the class he purports to represent . . . have the suffered the same (or similar) grievances of which he complains." *Taylor v. Safeway Stores*, 524 F.2d 263, 269 (10th Cir. 1975); *see Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977). In other words, the presence of "differing fact situations of class members does 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).[35]

As discussed earlier, this case comfortably presents questions of law "common to the class," and the representative plaintiffs' claims are typical of those common class issues. *Supra* at 19-21. Since the underlying legal theory for each class member's claims is the same as the theory for the

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going programs serving other tribes. Pl. Exhs. 4 &5; Gov't Summ. J. Br. at 15, 18-19 (filed Sept. 7, 1999). As for IHS's repetition of the canard that "any relief granted to the named plaintiffs" will be "detrimental to the interests of the other proposed class members" because "IHS would be required to deduct" any recovery "from amounts supporting other Tribal programs," Gov't Opp. at 25, we respectfully refer the Court to the plaintiffs' briefs on the Judgment Fund issue, and the bar against use of agency appropriations to pay litigative awards. Pl. Declar. J. Br. at 13-15 (filed July 23, 1999); Pl. Summ. J. Reply Br. at 35 (filed Oct. 19, 1999).

[35] *See also Drexel Burnham*, 960 F.2d at 291 ("Rule 23(a)(3) is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability"); *Powers v. Stuart James Co.*, 707 F. Supp. 499, 503 (M.D. Fla. 1989) (explaining that typicality assures "that where all interests are sufficiently parallel, all interests will enjoy vigorous and full presentation"); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); Newberg, § 3.13 at 3-77.

representative plaintiffs–and the government does not argue otherwise–Rule 23(a)(3)'s "typicality" requirement is easily met.

The government's opposition on this score reveals a fundamental misunderstanding of the nature of this case. Each injured class member shares the claim that the Indian Self-Determination Act required the government to fully fund the tribe's contract support cost requirements. Each injured class member also shares the claim that once the government executed a contract (and certainly once contract performance was concluded), the contract likewise required the government to fully fund the tribe's CSC requirements. And to vindicate these claims, the representative plaintiffs have brought a suit for money damages under the Contract Disputes Act. Again, this is not a suit to invade IHS's finite appropriation. *Supra* at 3-6, 21 & n.34. If IHS has violated the law under either of plaintiffs' theories of recovery, a damages award will follow.[36]

The government insists that the named class representatives and many other class members' interests "are antithetical" to some other class members "who expressly consented to be placed on IHS's Queue and await their turn for 'full' payment of new contract support costs." Gov't Opp. at 26. But given IHS's policy, the tribes that took over new programs had no choice in the

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[36] Since fiscal year 1998, Congress has imposed a statutory cap on the amount that IHS may pay for contract support costs. While the plaintiffs believe the United States remains liable for the balance of the contract obligation that IHS was prohibited from paying in fiscal year 1998 and thereafter, once again the resolution of that entire issue has absolutely nothing to do with IHS's finite appropriations. Even in the one case where tribes were litigating against the Bureau of Indian Affairs over the handling of the BIA's appropriation (as opposed to a later lawsuit for damages), the fact that many tribes had a stake did not support the government's argument that there was an indispensable-party issue (a different way of expressing the same ill-considered argument against "typicality" advanced here). *See Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1350-52 (D.C. Cir. 1996).

matter. Moreover, even if a tribal contractor at the top of the Queue in FY 1999 is pursuing a contract claim arguing it should have been fully paid that year (the year when IHS abandoned the Queue system), that contractor is still seeking the same relief as the representative plaintiffs and the balance of the class: full payment. It simply has an additional theory for pursuing that claim in FY 1999. (Of course, the class as presently defined will also seek to recover that contractor's damages for non-payment in earlier years.)

With the "first-come-first-served" Queue process now abandoned, *see* IHS Circular No. 2000-01, it is ludicrous to suggest that some members of the class would actually oppose any recovery of damages for years when they did not receive contract support costs at all. But, of course, if such a tribe exists, it may opt out upon appropriate notice.[37] All tribes that experienced shortfalls over the subject period have the same claim in this respect, and the class plaintiffs' claims are typical of those claims.[38]

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[37] Again, the issue is not whether the plaintiff tribes "oppose[ ] the Queue system," Gov't Opp. at 26, but whether IHS had a legal obligation to pay the full amounts due under Section 106(a) of the Act regardless of how CSC requests were ranked.

[38] The government's opposition to class certification reflects a certain "divide and conquer" approach. First, IHS adopts a policy which says that all but a privileged few tribes on the Queue will receive no contract support costs in any given year. Then fiscal year 1999 comes along and two of those privileged few who are at the top of the Queue, and to whom IHS has committed to fully pay, are not paid. No tribe in that position would oppose the right of any other tribe to be fully paid contract support costs due under applicable law. But just as surely, such a tribe will want to be paid in accordance with its contract.

None of this, of course, gets to typicality or commonality, neither of which can be altered by the fact that a class member may have an entirely different and additional claim that it elects to pursue on its own, and that is unique to it. The government's arguments do not suggest anything else at work here, and certainly nothing that would undermine the entire class under Rule 23(a).

Despite the representative plaintiffs' pursuit of claims typical of the common claims held by all class members, the government argues that some absent class members' claims may be subject to a statute of limitations defense.[39] But typicality is determined with reference to the defendant's actions being complained of and that caused injury, not the particularized defenses the defendant may have against certain class members. *See Toney*, 1999 WL 199249, *8. The named plaintiff's ability to represent the class is impaired only when the named representative's claim is subject to a unique defense that is inapplicable to other members. *Hagen v. Winnemucca*, 108 F.R.D. 61, 65 (D. Nev. 1985); *see J.H. Cohn & Co. v. American Appraisal Associates*, 628 F.2d 994, 998-99 (7th Cir. 1980). The government has raised no such issue here, and none appears in the pending dispositive motions.

Finally, the government argues that the named plaintiffs are not typcial of the proposed class because their representative claims only arise in FY 1996 and FY 1997. But those claims are surely typical of all claims, and nowhere does the law require a representative's claims to be identical to the member's claims; if it did, there would never be any Rule 23(b)(3) damage classes.

The Cherokee and Shoshone-Paiute claims are just as typcial of all class members claims as the *Ramah* class representative's FY 1990 claim was representative of all claims through FY 1993 (now settled), and remains representative of additional claims from FY 1994 to date (still in litigation). The theory of recovery for the representative years are the same; only the numbers change.

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[39] While the government presents this argument under numerosity and commonality, the argument actually targets typicality because it is made against the representative plaintiffs. Given that all three requirements overlap significantly, the tribes discuss the issue here.

For all years, the representative plaintiffs contend the ISDA requires full payment of CSC, and an award of damages if payment is not made. And for all years, the defendants argue there can be no liability because, as they see it, there were no available appropriations. Thus the plaintiffs' claims, and the representative years they have asserted are typical of all class members and all covered years.[40] They have precisely the same interest and have suffered precisely the same injury as all other class members in all covered years, which is all that "typicality" requires, nothing more. The identity of claims for each year disposes of any fear that "the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the class will suffer." *J.H. Cohn*, 628 F.2d at 999.[41]

4. The class representatives will fairly and adequately protect the interest of the class.

The Tribes also comfortably meet Rule 23(a)(4)'s adequate representation requirement. 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

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[40] The named plaintiffs have already demonstrated their vigor in pursuing these claims for all years. Indeed, even though the representative claims cover only two representative years, the class representatives have in their pleadings addressed all years. If it would accomplish anything, the Cherokee Nation can always further amend the complaint to assert continuing claims in each subsequent year through FY 2000. *See* Pl. Exh. 91 at 64, final col. (showing continuing shortfalls of $2,561,578).

[41] Notwithstanding the government's assertion, differences in the amount of damages across class members are immaterial. Indeed, most courts either decline to consider such an argument or reject it. Newberg, § 3.16 at 3-87. "If differences in the amounts of individual damages would make a class action improper, a class action for damages would never be possible, because variations in amount of damages among class members are inevitable unless they happen to be factually identical, which is not required under Rule 23." *Id.* at 3-87 to 3-88.

conduct the proposed litigation." *Queen Uno Ltd. v. Coeur D'Alene Mines Corp.*, 183 F.R.D. 687, 694 (D. Colo. 1998) (internal citations omitted); *see Toney*, 1999 WL 199249, at *9; *Ditty v. Check Rite*, 182 F.R.D. 639, 642 (D. Utah 1998).

Contrary to the government's claims, the interests of the named plaintiffs do not conflict with the interests of the remainder of the class. Moreover, "[o]nly those material conflicts pertaining to the issues common to the class will bar a class action," Newberg, § 3.23 at 3-130 to 3-131, and no such conflicts exist here. The government's opposition ultimately is based on the same misunderstanding reflected in its challenge to "typicality." Since there is no conflict between the representatives and the class, there is no impairment of the representative plaintiffs' ability to fairly and adequately represent the class.[42] Further, even if some class members disagreed with the plaintiffs, that divergence of interests does not preclude class certification. *See Horton v. Goose Creek Independent School District*, 690 F.2d 470, 486-87 (5th Cir. 1982); *Hedge v. Lyng*, 689 F.Supp. 884. 890-91 (D. Minn. 1987). As long as the defendant vigorously opposes certification (as the government certainly does here), the defendant ably represents the interests of those dissenting members. *Horton*, 690 F.2d at 487; *Hedge*, 689 F. Supp. at 891.[43]

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[42] As the Supreme Court has noted, "[t]he commonality and typicality requirements . . . tend to merge. . . . Those requirements . . . also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 158 n.13.

[43] In fact, were the court to deny class certification on the basis of a conflict, the Tenth Circuit instructs that the plaintiff be given "a reasonable opportunity to propose subclasses after denial of class certification where the denial is based on the structuring of the class and where the problems in the broad class might be remedied by forming subclasses." *Quintana v. Harris*, 663 F.2d 78, 80 (10th Cir. 1981). *See, e.g., Lyon v. United States*, 94 F.R.D. 69, 76 (W.D. Okla. 1982) (court informed plaintiff by letter of the opportunity to propose certifiable subclasses).

Instead of clarifying its "conflict" objection, the government launches an attack on class counsel. Notwithstanding that "the competence and experience of class counsel . . . will most often be presumed in the absence of proof to the contrary," Newberg, § 3.24 at 3-133 to 3-134, the government complains that class counsel did not move soon enough to certify the class. Gov. Opp. at 28-29. Putting aside that (1) this case is less than one-year old, and (2) the government points to no prejudice, it bears recalling that the government and the Court agreed–in open court and in writing–that the best interests of the class and the interest in judicial economy counseled in favor of deferring class certification until the government's initial challenges were resolved. Joint Proposed Scheduling Order, lodged May 7, 1999; Minute Order entered May 10, 1998. Though the Court ultimately revised this order of procedure, there was ample authority for the original pretrial plan so long as the government acquiesced.[44]

As the cases discussed by the parties in the course of briefing the certification procedure reflect, defendants are always free to seek a dismissal (and, they often hope, a speedy

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In any event, potential conflicts over damages issues do not foreclose a finding of adequacy of representation because the court may form subclasses or use other devices when the conflict arises:

> Potential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy and may be resolved, when the need arises, by the formation of subclasses at the relief stage. Still other conflict problems have been eliminated by the court's use of initial subclasses intervention, class redefinition or limitation, opt-out provisions, or party realignment.

Newburg, § 3.25 at 3-136 to 3-139 (internal footnotes omitted).

[44] *See* Pl. Opp. to Defs. Mot. for Determ. of Class (filed Jan. 14, 2000).

victory) by bypassing the class certification process. That is what the government did here. But then the defendants' strategy changed. When it did, the defendants argued that early class certification would "prevent[ ] a potential multitude of additional lawsuits." Def. Mot. for Determ. of Class issues, at 4 (filed Dec. 29, 1999). They urged that "such certification would prevent class members from filing similar lawsuits in this and other forums," *id*. emphasizing, too, the need to avoid "a flurry of lawsuits" on the heels of an adverse liability determination against the plaintiffs. All that, of course, is now history, for once again the government has shifted position, now desperately opposing class certification on any conceivable basis.

The government's tactics and shifts aside, the short procedural history of this case hardly bespeaks a lack of attention to class counsel's responsibilities.

To the contrary, and contrary to the government's scurrilous representations to the Court, class counsel has undertaken a steady and responsible campaign to maintain close communication with all putative members of the class. On no fewer than three occasions, class counsel has done a general mailing to all class members known to IHS, using IHS's own mailing list furnished as a courtesy by the IHS Division of Tribal Programs. Pl. Exh. 97. These mailings have informed class members of the nature of the case and its evolving procedural posture. They have informed class members of counsel's email address, leading to numerous follow-up inquiries.

Class counsel also long ago established a website, located at www.cscclass.net, containing all the parties' (including the government's) significant filings in the case. Class counsel has attended and made presentations about the case at every major national Indian meeting in the United States since the filing of the suit (including biannual meetings of the National Congress of American

Indians (NCAI), of the National Indian Health Board, and of all Self-Governance Tribes; the typically monthly meetings in 1999 of the NCAI National Policy Workgroup on Contract Support Costs; and nearly all meetings of IHS's own Contract Support Cost Work Group). At every possible opportunity, class counsel has communicated to tribal leaders and tribal health care administrators the nature and status of this case. The government's attempt to impugn class counsel's ability to adequately represent the class is, with all due respect, unfounded, uninformed and ignorant.

C. The Proposed Class Comfortably Meets Rule 23(b)(3)'s Additional Requirements.

The Tribes satisfy the twin additional requirements under Rule 23(b)(3) 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) the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." As the plaintiffs pointed out in their motion to certify, the relevant factors in assessing "predominance" and "superiority"–the "interest [of class members] in individually controlling the prosecution . . . of separate actions," "the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class," "the desirability . . . of concentrating the litigation of the claims in the particular forum," and the "manage[ability]" of the class action, *see* Rule 23(b)(3)(A)-(D)–all strongly favor certifying this class.

1. The common questions presented predominate over any questions unique to individual members.

The government repeats its assertion that the class members' entitlement to "full" contract support costs necessitates an evaluation of "numerous individual questions and circumstances," Gov. Opp. at 31-32, once again ignoring that IHS itself has already completed most of that evaluation,

see Pl. Exh. 90. But that is not even the point.

The point, as noted earlier, is that the claim against IHS for unpaid contract support costs is not only common to all members of the class; it is the predominant and central feature they all share. IHS's own documents over a long period confirm the agency's own perception that all class members are 'in the same boat' and have not received full contract support cost funding for the same reason. No individual issues here threaten to predominate over that common issue. To meet predominance in the Tenth Circuit, the plaintiffs' claims only need stem from "a common course of conduct." *Esplin*, 402 F.2d at 100.[45] Here, IHS has applied the same policy to all tribes seeking contract support costs. Not only is this course of conduct common to all class members, but each class member's claim ultimately depends on the resolution of the legality of that conduct. When the common issue is the central issue, it will predominate over any factual differences and permit certification of the entire controversy. *See In re AH Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (noting that "if such separate issues predominate sufficiently (*i.e.*, is the central issue), [the court can] certify the entire controversy").

Even if the government is right that damages claims need eventually to be individually reassessed, "such needed individual proof of damages will not preclude a finding of predominance."[46]

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[45] The predominance requirement does not require that the common issue be the dispositive issue, although it is in this case. *See* Newberg, § 4.25 at 4-82 ("Most courts have agreed on what the predominance test does not entail: the test was not meant to require that the common issues will be dispositive of the controversy or even be determinative of the liability issues involved.").

[46] Newberg, § 4.26 at 4-90 to 4-91 (citing *Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 103 (1966)) and noting variety of judicial tools available in the quantification stage); *Lockwood Motors v. General Motors Corp.*, 162 F.R.D. 569, 581 (D. Minn. 1995)(noting courts routinely find predominance satisfied despite need for individualized damages

In fact, the court can resolve such damages issues through any number of procedural devices, such as a bifurcated trial on liability and damage issues, use of masters, identification of aspects of individual damages proofs that are common, establishment of common damages formulas, use of pilot or test cases, use of subclasses, or use of the defendant's records or other available sources to determine the amount. *See Rendler v. Gambone Brothers Development Co.,* 182 F.R.D. 152, 159-60 (E.D. Penn. 1998); Newberg, § 4.26 at 4-91 to 4-97. Here, the plaintiffs have already provided two such devices–the government's own records and formulae–as two indications of how to complete damages quantification.[47]

The defendants' lengthy digression into the damages quantification issues merits a further brief response. First, although the Act speaks of the term "reasonable" CSC costs, 25 U.S.C. § 450j-1(a)(2), IHS has long interpreted this requirement to mean the indirect rate formula and the direct cost process described *supra* at 4-5 and in the extensive exhibits and authorities referenced there. Second, that process is for the most part formula driven.

Thus, if IHS illegally shorted tribes by removing newly–contracted programs from the IHS indirect cost base, the remedy will be to recalculate the tribes' indirect cost requirement by multiplying the tribes' rate that year by the omitted amount. Likewise, if IHS shorted tribes by simply paying them less than their full calculated IHS share of indirect costs, again the remedy will be to simply recalculate the correct amount. And if all indirect cost rates were artificially depressed by the same

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determinations as long as the "fact" of injury is common to the class)

[47] Newberg, § 4.33 at 4-139 to 4-140 (proof of individual damages may be accomplished by use of defendants' records and by statistics or formulae).

error that led to the BIA's underpayments in *Ramah v. Lujan*, again the damages computation will be the formula already established in that case and now in use in the course of the settlement claims process. Finally, if IHS shorted tribes by not paying "direct" contract support costs, the bulk of the remedy will be the '15% of direct program salaries' formula heretofore applied by IHS. *Supra* at 5.

While these formula calculations may not account for all possible damages, they represent the overwhelming bulk of them. Most importantly, those formulas do not involve competing views about what is "reasonable" and they do not require mini-trials for each class member. Of course, whatever the risk in this regard, the "risk is better addressed down the road, if necessary by altering or amending the class, not by denying certification at the outset." Newberg, § 4.26 at 4-97.

2. Class resolution is superior to other available methods for fairly and efficiently adjudicating the controversy between contracting tribes and the government.

Despite the flexibility with which trial courts approach class certification and the wide array of tools available today for managing class actions, the government dwells on imagined management difficulties. Gov't Opp. at 33-34. Here, again, the government focuses on the "individual inquiries" allegedly necessary to determine damages, an inquiry IHS has in the main already conducted. Apparently the government hopes the Court will simply disregard the government's own analyses, reports and findings. Particularly considering Pl. Exh. 90, as well as the formulaic nature of most damages issues here, the government's insistent that this action is somehow unmanageable rings hollow.[48] But again, should circumstances warrant, the Court can always modify the class (or, at the

[48] In fact, one court has recognized a presumption against denying class certification for management reasons. *In re Potash Antitrust Litigation*, 159 F.R.D. 682, 700 (D. Minn. 1995).

extreme, even decertify the class) as administrative difficulties arise. *See* Fed. R. Civ. P. 23(c)(1) & (4).

The government also points to the unremarkable fact that out of as many as 329 potential class members with a new claim for each of the past twelve years (as many as 3,948 claims), nine tribes have initiated claims at some level, ranging from four claims simply filed with a contracting officer, to one case pending on appeal in the Ninth Circuit. Gov't Opp. at 12 and n.3.[49] This hardly weighs against the propriety of the class. While the extent and nature of other litigation can suggest an interest in individual litigation, it may also indicate the compelling need for a class action, as is the case here. *See* Newberg, § 4.30 at 4-120 to 4-121 ("class actions are intended in part to eliminate the waste of judicial resources caused by duplicative individual actions"). Furthermore, "[a] class action will ordinarily be superior to repetitive individual suits." *Id.* at 4-121. If any claimants wish to pursue one or more of those claims on their own, they are free to do so by opting out.[50] (Indeed, that is the whole point of the opt-out procedure.) But even a dozen opt-outs hardly compromises the ability of the representative claimants to adequately represent all those who remain within the class.

It bears repeating that a federal district court has certified, and the Tenth Circuit has approved, a class action in nearly identical circumstances. *Ramah Navajo Chapter*, *supra*. As

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[49] In their zeal, the government even suggests that litigation arising out of BIA contracts somehow has a bearing on the composition or membership of the class. Gov't Opp. at 12, n.3.

[50] If the Court sees fit, it can also affirmatively exclude those class members claims that have secured merits judgments by adding an appropriate exclusion to the class definition or class notice. *See Califano v. Yamasaki*, 442 U.S. at 689 (describing such a "precautionary" exclusion), and 703 (noting district court's "sensitivity to ongoing litigation of the same issue in other districts" in sustaining class certification of a nationwide class).

originally filed, the *Ramah* case challenged the government's indirect cost rate procedures for producing a diluted rate which led the BIA to underpay indirect contract support costs calculated on that rate. The class approved by the Court consisted 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., as amended" "includ[ing] 'grantees' as well as 'contractors.'" *Ramah v. Lujan*, No. CIV 90-0957 LH (D.N.M. Mar. 24, 1994) (Pl. Exh. 94 at 3). Of course, individualized damage issues exist in any such case (as in most Rule 23(b)(3) class actions), but the government ultimately settled the first portion of the *Ramah* case for some $76.5 million, Pl. Exh. 85, and a claims process is now underway to distribute the judgment funds recovered in that phase. More recently the class claims have been enlarged to include the BIA's annual shortfall in meeting all tribes' undercalculated CSC requirements.[51] Particularly, given its review by the Tenth Circuit, the *Ramah Navajo Chapter* case stands as powerful precedent in this Circuit for the superiority of a class action to address the failure of the United States to fully pay tribal contractors their contract support costs as determined under the Indian Self-Determination Act.

IV. CONCLUSION

Contract support cost issues are of necessity complex because quantification turns largely on each tribe's indirect cost rate. But the *Ramah Navajo Chapter* case demonstrates the utility and wisdom of certifying a class, as well as the susceptibility of damages calculations to class-wide relief. Certification permits the class representatives to go forward while hundreds of tribal contractors,

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[51] *Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Bruce Babbitt*, 65 Fed. Reg. 4989 (Feb. 2, 2000).

serving many of the most poor and marginalized communities in America, struggle to deliver the highest quality health care possible within their limited resources. In the end, it is a way for justice to be done for all.

Respectfully submitted this 1st day of May 2000.

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