

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

PUEBLO OF ZUNI, )  
)  
PETITIONER, ) No. 07-503  
) (Civ. No. 01-1046 WJ/WPL)  
v. )  
)  
UNITED STATES OF AMERICA, ET AL. )  
)  
)  
RESPONDENTS. )  
\_\_\_\_\_ )

**OPPOSITION TO PETITION FOR PERMISSION TO APPEAL  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)**

**INTRODUCTION AND SUMMARY**

This case concerns claims by plaintiff Pueblo of Zuni (Zuni), a tribal contractor, which seek damages against the United States for the government’s alleged failure to pay the full contract support costs owed to the Tribe under its contracts with the Indian Health Service. Plaintiff sought certification to bring its suit as a nationwide class action in district court pursuant to Fed. R. Civ. P. 23(b)(3), asserting four claims. After extensive discovery and briefing, the district court denied plaintiff’s motion for class certification in an order entered on May 22, 2007. Zuni now seeks interlocutory review of that decision under Fed. R. Civ. P. 23(f), “insofar as that Order denies class certification for Class Claims 1 and 2.” Pet. 1.

As explained more fully below, interlocutory appeal should be denied because this is not one the rare cases where a litigant has satisfied any of the recognized criteria for immediate review under Rule 23(f). First, the district court’s decision denying class certification is not the “death-knell” for plaintiff’s claims; it will simply have to litigate its

claims individually, as many other contractors have already elected to do. Second, the district's decision denying certification in this case is correct; indeed, it is certainly not "manifestly erroneous." Third, plaintiff fails to identify any novel or unsettled question relating to the law of class actions that is likely to evade end-of-case review. Finally, Zuni has not presented any other argument demonstrating special circumstances warranting immediate review.

## STATEMENT

### *A. Statutory And Regulatory Background.*

The Indian Self-Determination and Education Assistance Act of 1975 (ISDA or Act), as amended, 25 U.S.C. §§ 450-450n, requires the Secretary of Health and Human Services (HHS), "upon the request of any Indian tribe by tribal resolution," to enter into "self-determination contracts" with tribal organizations "to plan, conduct, and administer programs" which the Secretary previously administered for the benefit of Indians pursuant to his statutory authority. 25 U.S.C. § 450f(a)(1). The Indian Health Service (IHS), a component of HHS, is responsible for providing primary health care for American Indians and Alaska Natives throughout the United States, either directly under the Snyder Act and the Indian Health Care Improvement Act, *see* 25 U.S.C. § 13; 25 U.S.C. § 1601; 42 U.S.C. § 2001(a), or by providing funding and support to tribes and tribal organizations under ISDA contracts. *Lincoln v. Vigil*, 508 U.S. 182, 185 (1993).

The ISDA requires the Secretary to provide funding under self-determination

contracts equal to the amount of funds he otherwise would have provided if the programs were operated by IHS. 25 U.S.C. § 450j-1(a)(1). In addition, the Act directs that contract support costs (CSC) be added to the funding amount provided by the Secretary, to cover certain direct and indirect costs that would not have been incurred by the Secretary if IHS operated the programs.<sup>1</sup> 25 U.S.C. § 450j-1(a)(2). CSC can be broken down into three categories: (1) direct CSC, *i.e.*, administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance, § 450j-1(a)(3)(A)(i); (2) "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis" in the first year that a contract is in effect, § 450j-1(a)(5); and (3) indirect CSC, which are administrative costs that are shared by several different programs or services, § 450j-1(a)(3)(A)(ii), 450b(f). IHS's funding of CSC, like all funding under the ISDA, is subject to the availability of appropriations." *Id.* §§ 450j-1(b), 450j(c).

A tribe or tribal organization that wishes to assume responsibility for the planning, conduct or administration of programs or services otherwise provided by IHS may submit a self-determination contract proposal to the Secretary. 25 U.S.C. § 450f(a)(2). The proposal must specify (among other things) the amount of funding requested for the contract. 25 C.F.R. § 900.8(h). The Secretary may decline to enter into a self-determination contract only for certain statutorily-specified reasons, 25 U.S.C. § 450f(a)(2), but must approve any

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<sup>1</sup> The ISDA directs that IHS's ISDA appropriations "may be expended only for costs directly attributable to [ISDA contracts and grants] and no funds . . . shall be available for any [CSC] associated with [any non-IHS] contracts or grants." 25 U.S.C. § 450j-2.

severable portion of a contract proposal that does not support a declination finding, *id.* at 450f(a)(4). If the Secretary issues a contract “declination,” the tribe may pursue an administrative appeals process (§ 450f(b); 25 C.F.R. 900.31), or “exercise the option” to proceed directly in federal district court. *Id.* § 450m-1(a).

A self-determination contract has three components: (1) the contract itself, (2) modifications or amendments to the contract, and (3) annual funding agreements (AFAs). 25 U.S.C. 450l (providing for a model contract); *id.* § 450l(c) (Model agreement, § 1, ¶(e)(2) (providing for written modifications to the contract); *id.* § 450l(c) (Model agreement, § 1, ¶¶(b)(4)(providing for an AFA). The funding levels for an ISDA contract are generally described in an AFA. *Id.* §450l(c) (Model agreement, § 1, ¶ (f)(2) )

Although many self-determination contracts are multi-year, tribal contractors must submit AFA proposals annually, which are then subject to individualized negotiations between the Secretary and the contractor. 25 U.S.C. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. The ISDA does not contain specific formulas or funding amounts. The Act requires, however, with a few exceptions such as a reduction in appropriations, that the funding level for existing contracts shall not be less than in previous years. 25 U.S.C. 450j-1(b)(2); *see also* 25 C.F.R. 900.32.

After the parties’ execution of a self-determination contract and accompanying AFA, all disputes arising under the agreement are subject to the Contract Disputes Act (CDA). 25 U.S.C. 450m-1(a), (d). Pursuant to the CDA, 41 U.S.C. §§ 601 *et seq.*, before a claim may

be brought in federal court, it must first be timely presented to relevant agency's contracting officer. 41 U.S.C. § 605(a); 25 C.F.R. §§ 900.215-900.230.

Alternatively, if the tribal contractor believes that the amount of funding offered by IHS is insufficient, it may suspend performance under the contract. 25 U.S.C. § 450l(c) (Model agreement, § 1, ¶ (b)(5)) Further, the contractor may, after notice, retrocede the program to IHS. *Id.* § 450j(e); 25 C.F.R. §§ 900.20 *et seq.*

#### B. *Congressional Appropriations For CSC.*

During fiscal years prior to 1998, IHS allocated CSC funds on the basis of recommendations in congressional committee reports accompanying IHS's annual appropriations. *See Cherokee Nation v. Thompson*, 311 F.3d 1054, 1058-59 (10th Cir. 2002), *rev'd*, 543 U.S. 631 (2005); *see also, e.g.*, H.R. Rep. No. 158, 103d Cong., 1st Sess, 100, 104 (1993) (recommending that approximately \$135 million of \$1.6 billion lump sum appropriation be used to pay CSC for ongoing programs in fiscal year 1994). Starting in 1998, however, Congress imposed a statutory "cap" on the amount of funds available for the payment of CSC, and this capped amount has since been the basis for CSC allocations by IHS. *See, e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1583 (1997) ("not to exceed \$168,702,000 shall be for payment to tribes . . . for [CSCs] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the [ISDA]").

Because of chronic congressional under-funding, IHS – in consultation with tribal

representatives – developed allocation policies to deal with anticipated appropriations shortfalls. These policies have been memorialized in a series of guidance memoranda or Circulars. IHS Memoranda and Circulars are not binding on tribal contractors, but set forth the internal agency guidelines that IHS officials follow for ISDA contracting and the funding of CSC requests. *See* 25 U.S.C. § 450k(a)(1); 25 C.F.R. § 900.5.

The ISDA does not specify or mandate a formula for calculation of indirect CSC. Rather, the Act requires that tribal contractors and IHS negotiate and agree upon the specific amount of CSC or the specific formula for determining indirect CSC. 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B), 450j-1(b), 450j(c); 25 C.F.R. §§ 900.12, 900.8(h). The parties’ negotiated agreement is then set forth in the ISDA contract.

As a starting point for negotiating indirect CSC, contractors may either use an indirect cost rate, or they may negotiate what are called “indirect-type costs” directly with IHS. Demaray Decl. ¶ 25 (Defs’ Opp’n to Mot. for Class Certification, Ex. F). In addition, IHS has implemented pilot projects for CSC payment that allow contractors to negotiate unique CSC funding terms. *Id.* These procedures have resulted in IHS awarding CSC to its contractors under several different methodologies and guidelines over the years. *Id.*

### *C. Factual And Procedural History.*

1. Since before fiscal year 1993, Zuni has had multiple self-determination contracts with the Secretary through the Albuquerque, New Mexico Area Office of IHS. On April 16, 2001, Zuni notified an IHS contracting officer of twenty-two contract disputes related to its contracts in effect during fiscal years 1993-1998. Zuni alleged that IHS had failed to pay the

full amount of Zuni's indirect CSC calculated under Zuni's indirect cost rate, and sought approximately \$324,195 in additional funding. Zuni thereafter amended seven of its claims on September 28, 2001, asserting that IHS used an improper methodology to calculate its indirect CSC, resulting in an additional \$339,934 owed under this new so-called "miscalculated rate" claim. The total amount in additional CSC claimed by Zuni was \$664,129.

The IHS contracting officer did not issue a decision on the claims within 60 days (*see* 41 U.S.C. § 605(c)(1) & (5)), and Zuni filed this lawsuit in district court as a putative class action, naming the United States, HHS, the Secretary of HHS, and the Director of IHS as defendants. In an amended complaint filed on December 12, 2001, Zuni seeks money damages from IHS based on alleged violations of the ISDA and breach of its ISDA contracts in fiscal year 1993 to the present.

Proceedings in this case were stayed pending the outcome of the appeal in *Cherokee Nation*, 311 F.3d 1054 (10th Cir. 2002), which was then before this Court and involved shortfalls in CSC funding in non-capped fiscal years. In *Cherokee*, this Court held that the tribal contractor was not entitled to full funding of its contracted-for CSC in the absence of sufficient congressional appropriations. A contrary result was later reached by the Federal Circuit in *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), where the appeals court agreed with a decision of the Interior Board of Contract Appeals that IHS's failure to pay full CSC constituted a breach of contract. The Supreme Court granted *certiorari* to resolve the circuit split, and ultimately reversed this Court's judgment. In a decision issued

on March 1, 2005, the Supreme Court held that IHS breached its ISDA contracts with Cherokee by failing to pay the Tribe its full CSCs. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Following the Supreme Court's decision, plaintiff moved on March 9, 2005 to lift the stay.

On May 23, 2005, defendants filed a motion to dismiss the amended complaint in part for lack of subject matter jurisdiction, to the extent that Zuni had failed to first present each of its claims to an IHS contracting officer as required by the CDA. *See* 41 U.S.C. § 605(a). Finding the government's arguments "well-taken," the district court granted the motion in an opinion and order issued on October 11, 2006. *See* Mem. Op. & Order Granting Defs' Mot. to Dismiss Certain Claims 1. Specifically, the court found that plaintiff had not exhausted: (1) all claims for funding of its ISDA contracts in fiscal years after 1998; and (2) claims for additional funding of its ISDA contracts in fiscal years after 1995 based on its miscalculation claims. *Id.* at 23-24.

On June 6, 2006, plaintiff filed the motion for class certification and approval of a class notice that is the subject of the instant appeal. As is pertinent to plaintiff's Rule 23(f) petition, Zuni sought class certification of Claim 1, which seeks contractual damages relating to contracts in effect after fiscal year 1995 based on the agency's failure to fully fund CSC associated with "new or expanded" contracts, and Claim 2, seeking contractual damages relating to contracts in effect after fiscal year 1995, based on IHS's failure to fully fund CSC

associated with “ongoing” contracts.<sup>2</sup> *See* Mem. Op. & Order Denying Class Certification And Denying Motion To Create Sub-Classes and Appoint Counsel For Sub-Class 4 [hereinafter Mem. Op. & Order].<sup>3</sup> These so-called “shortfall” claims “refer to the difference between what IHS estimated as the amount of [CSC] each contractor believed was necessary to run its ISDA programs, and the amount that IHS was able to award for [CSC].” *Id.* at 5.

2. On May 22, 2007, the district court denied plaintiff’s motion for class certification. Mem. Op. & Order 30. As a threshold matter, the court, finding no legal justification to alter its previous ruling granting defendants’ motion to dismiss certain claims on grounds that exhaustion under the CDA is mandatory and jurisdictional, concluded that the “existence of unexhausted claims within the claims of the putative class remains a jurisdictional defect precluding class certification. Mem. Op. & Order 9. The court next concluded that the proposed class definition<sup>4</sup> is “overbroad and unworkable,” and that even if narrowed, class

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<sup>2</sup> Zuni also sought class certification on Claim 3, representing “miscalculation” or “rate-making” claims, and Claim 4, involving both shortfall and miscalculation claims. *See* Mem. Op. & Order 5. Interestingly, plaintiff does not contest the district court’s denial of class certification on those claims, yet it repeatedly cites the *Ramah Navajo Chapter* litigation, where the district court certified a class in a case involving a *rate-making* challenge, as support for its arguments that a class should have been certified on the CSC *shortfall* claims here. However, the relevant authority is *Cherokee Nation v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) (*see* discussion *infra* at 17-18), where a district court denied class certification in a case involving shortfall claims.

<sup>3</sup> After Supreme Court decided *Cherokee v. Leavitt*, the plaintiffs in *Tunica-Biloxi Tribe v. United States*, Civ. No. 02-2413 (RBW) (D.C. Cir.) , another pending putative class action, moved to intervene in the instant case, to certify a sub-class, and for appointment of counsel for the sub-class. The district court also denied Tunica-Biloxi’s requests. Mem. Op & Order 7, 29-30.

<sup>4</sup>The proposed class is defined as:

All Indians Tribes and Tribal organizations that have contracted with the Indian Health Service under the Indian Self-Determination Act

certification “still would be precluded by other difficulties related to the Rule 23(a) prerequisites.” *Id.* at 11.

Turning to Rule 23(a)’s four requirements, the court concluded that except for numerosity and adequacy of counsel, plaintiff failed to satisfy the prerequisites for class certification. The court held that the commonality prerequisite was not satisfied because plaintiff failed to show that contracts among the numerous (well over 200) tribes contain the same material terms and conditions. *Id.* at 16, 24. The court explained that with the exception of the mandatory model contract provisions, the specific terms and conditions of the individual self-determination contracts and AFAs vary greatly. *Id.* at 16. Further, the court noted, the determination of indirect CSC is the result of two levels of negotiations between each tribal contractor and the cognizant agency. *Id.* Thus, the court concluded, “[b]ecause of the individuality of the negotiations, the defenses to each contract are individualized as well. . . . Some tribes signed releases, and others specifically agreed to forego immediate payment of [CSC] with the request for [CSC] deferred in accordance with the Circulars.” *Id.*

The court also held that plaintiff failed to satisfy the typicality requirement. Specifically, the court found that the terms and conditions of the ISDA contracts were sufficiently individualized “so that the question of whether all tribal contractors were underpaid becomes one of the disputed issues.” *Id.* at 20. In addition, the court stated that

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. . . at any time from fiscal year 1993 to the present (2005).

it is not clear that IHS's Circulars were applied consistently and systemwide. *Id.* Further, the court noted that there were several non-typical aspects of plaintiff's claims – *e.g.*, Zuni presented no CDA claims for fiscal years after 1998; it did not adequately present claims related to the indirect cost rate methodology or direct CSC; and plaintiff has been using an out of date indirect cost rate since 2003 which has resulted in both over- and under-recoveries of indirect costs from various federal agencies. Moreover, the court concluded that Zuni's interests are antagonistic to those of the members of the putative class because IHS would be required to reimburse money from limited appropriations in order to refund the Judgment Fund under 41 U.S.C. § 612(c). *Id.* at 22.

Finally, given its conclusion that Zuni's interests are antagonistic to those of the proposed class members, the court held that plaintiff failed to meet Rule 23(a)'s adequacy of representation requirement. Adopting the reasoning of the district court in a virtually identical case, the court stated that “it is difficult, if not impossible, ‘to see how the named Plaintiff can vigorously pursue and protect the claims of potential class members when it could be to their financial detriment.’” *Id.* at 24 (quoting *Cherokee Nation v. United States*, 199 F.R.D. at 366).

The court also rejected plaintiff's contention that it satisfied the prerequisites for class certification under Rule 23(b)(3) – *i.e.*, that “questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior” to other available adjudicatory methods. Mem. Op. & Order 25-29. Dismissing plaintiff's reliance on IHS's use of Circulars, the court reasoned that “[t]he use of the

Circulars as a guide to calculate [CSC] for some of the tribes” does not meet the requirement that common issues predominate over individual issues, because the ISDA contracts “differ with regard to whether the Circulars were used to calculate the [CSC], and with regard to the terms and conditions contained in the contracts.” Mem. Op. & Order 26-27. Finally, the court held that a class action is not superior in this case because there are a number of separate issues that would need to be litigated – such as exhaustion and collateral estoppel to name a few – again raising the specter of numerous mini-trials. *Id.* at 28-29.

## **DISCUSSION**

As this Court has declared, “[i]nterlocutory appeals have long been disfavored in the law, and properly so. They disrupt and delay the proceedings below.” *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006). Review under Rule 23(f) is thus “tightly confined.” *Id.* The advisory committee notes accompanying the rule make clear that a court of appeals has “unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for *certiorari*.” Advisory Comm. Note to Rule 23(f).

The courts of appeals that have addressed the parameters of Rule 23(f) are in general agreement that interlocutory review may be appropriate in three circumstances: (1) when a questionable class certification decision creates a “death-knell situation” for either the plaintiff or the defendant, (2) when the certification decision presents an “unsettled and fundamental issue of law relating to class actions” that is likely to evade end-of-case review, and (3) when the certification decision is manifestly erroneous. *See Chamberlain v. Ford*

*Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005); *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000); *Blair v. Equifax Check Servs.*, 181 F.3d 832, 834-35 (7th Cir. 1999). *See also Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000) (suggesting additional circumstances appellate court may consider: (1) nature and status of the litigation before the district court; (2) likelihood that future events, such as settlement, make immediate appellate review more or less appropriate; and (3) other “special circumstances”). Above all else, the circuits agree that interlocutory review is disfavored. *See, e.g., Chamberlain*, 402 F.3d at 955 (“Rule 23(f) review should be a rare occurrence”); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, LTD.*, 262 F.3d 134, 140 (2d Cir. 2001) (“[T]he standards of Rule 23(f) will rarely be met.”); *Prado-Steiman*, 221 F.3d at 1276 (“interlocutory appeals are inherently disruptive, time-consuming, and expensive, and consequently are generally disfavored” (internal quotation marks and citation omitted); *Waste Mgmt.*, 208 F.3d at 294 (“we intend to exercise our discretion [under Rule 23(f)] judiciously”).

**Plaintiff Has Not Satisfied The Criteria For Interlocutory Review Under Rule 23(f).**

1. *The Denial Of Class Certification Is Not The “Death Knell” of This Litigation.*

Plaintiff contends that interlocutory review is warranted because the denial of certification “will effectively terminate this litigation” (Pet. 12), because “the enormous investment of time and expense required to litigate against the United States . . . does not justify an individual action.” *Id.* at 11. But reviewing courts “must be wary lest the mind

hear a bell that is not tolling.” *Blair*, 181 F.3d at 834. Indeed, plaintiff’s arguments are belied by its own concession that other tribal contractors are already pursuing individual claims. Pet. 12. Furthermore, plaintiff’s contention that immediate review is warranted because denial of class certification sounds the death knell of this litigation is at odds with its argument that the absence of a certified class will cause litigation to proliferate across the nation. *Id.* In any event, Zuni does not explain how granting interlocutory review would prevent putative class members from filing “protective” suits or appeals. *See* Pet. 12-13.

Moreover, as discussed below, even if the denial of class certification creates a death knell situation for plaintiff, the district court’s certification decision is not questionable, “taking into consideration the district court’s discretion over class certification.” *See In re Lorazepam & Clorazepate*, 289 F.3d at 105.

2. *The Denial of Class Certification Was Not An Abuse Of Discretion.*

Zuni next argues that interlocutory review is warranted because the denial of certification was manifestly erroneous in two particulars: (a) the district court improperly considered the merits in making its class certification decision; and (b) the court failed to properly apply Rule 23's standards. Pet. 13. Plaintiff is wrong on both counts.

a. Contrary to plaintiff’s assertions, the district court did not rule on the merits of a “phantom” motion to dismiss against putative class members. Instead, it properly recognized that because the CDA’s exhaustion requirement is mandatory and jurisdictional, the existence of unexhausted claims among the putative class affects the court’s subject matter jurisdiction. Mem. Op. & Op. 9. As defendants argued in opposing class certification, a party seeking

to sue the United States bears the burden of demonstrating a specific waiver of federal sovereign immunity from suit. *See United States v. Sherman*, 312 U.S. 584, 586-87 (1941); *Weaver v. United States*, 98 F.3d 518, 520 (10th Cir. 1996). Moreover, a court’s jurisdiction is a threshold inquiry that should be resolved at the outset of a case. *See J.B. v. Valdez*, 186 F.3d 1280, 1285-87 (10th Cir. 1999) (addressing jurisdictional question before reaching class certification issue); *Davoll v. Webb*, 194 F.3d 1116, 1128 (10th Cir. 1999) (“If the issue implicates subject matter jurisdiction, we have an obligation to address it ‘regardless of normal rules governing the presentment of issues.’”) (citation omitted).

The waiver of federal sovereign immunity for monetary claims contained in the ISDA conditions the waiver on application of the CDA. *See* 25 U.S.C. § 450m-1(a) & (d). The CDA, in turn, requires that before any contract claim may be brought in federal court, it must be timely presented to an agency contracting officer. 41 U.S.C. § 605(a). Because the presentment requirement is mandatory, failure to comply with its terms bars a reviewing court from asserting jurisdiction over that claim. *See, e.g. James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); *see also Tradesman Int’l Inc. v. USPS*, 234 F.Supp. 2d 1191, 1997 (D. Kan. 2002) (“CDA provides detailed procedures for adjudicating government contract disputes”); *cf. In re Agent Orange Prod. Liability Litg.*, 818 F.3d 194, 198 (2d Cir. 1987) (well-settled that federal courts lack jurisdiction over Federal Tort Claims Act class action where administrative prerequisites of suit have not been satisfied by each individual claimant); *Caidin v. United States*, 564 F.2d 284, 286-87 (9th Cir. 1977) (same); *Lunsford v. United States*, 570 F.2d 221, 224-27 (8th Cir. 1977) (same).

Thus, the district court's inquiry into the basis of its jurisdiction here is not inconsistent with this Court's observation in *Shook v. El Paso County*, 386 F.3d 963, 971 (10th Cir. 2004), that the merits of a lawsuit may not be considered in determining the propriety of a class action.<sup>5</sup>

Nor is there any merit to plaintiff's argument that the district court's conclusion regarding the exhaustion issue was "plainly wrong" because it is inconsistent with the class action tolling rule. Pet. 15 (citing *American Pipe and Constr. Co. v. Utah*, 414 U.S. 631 (1973); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990); *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed.Cir. 2007)). The district court did not rule on this issue, it only stated that among those class members who did not present claims, individualized issues of statutes of limitations, timing, and tolling would remain. Mem. Op. & Order 9-10.

In any event, as the D.C. Circuit has explained, "exhaustion" describes two distinct legal concepts: "non-jurisdictional exhaustion," the judicially created doctrine requiring parties seeking to challenge agency action to exhaust available administrative remedies before coming to court, and "jurisdictional exhaustion," where Congress requires resort to the administrative process as a predicate for judicial review. *Avocados Plus Inc. v. Veneman*, 370 U.S. 1243, 1247 (D.C. Cir. 2004). Jurisdictional exhaustion "is rooted, not in prudential

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<sup>5</sup> In any event, the prohibition against looking into the merits applies only to inquiries such as a district court's wide-ranging inquiries into the merits of claims as part of the class certification decision without reference to the criteria for class certification, "not to evaluations of the merits that overlap with consideration of the requirements for class certification." *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 381(5th Cir. 2007).

principles, but in Congress' power to control the jurisdiction of federal courts," and where "a statute does mandate exhaustion, a court cannot excuse it." *Id.* (citations omitted). Because the CDA mandates exhaustion, the district court's consideration of this issue at the class certification stage, in the context of examining its subject matter jurisdiction, was entirely proper.

b. Plaintiff is also wrong in arguing that the district court failed to properly apply Rule 23's standards. The court properly held that the commonality/predominance prerequisites of Rule 23(a)(2) and Rule 23(b)(3a) were not satisfied because plaintiff failed to show that contracts entered into between the IHS and well over 200 tribes contain the same material terms and conditions. Mem. Op. & Order 16. As the court explained, the specific terms and conditions of the individually negotiated self-determination contracts and AFAs vary greatly. *Id.* at 16. The court did not want to hold mini-trials, which would clearly be inimical to the purposes of certifying a class action in the first place. That decision was well within the district court's broad discretion to make class certification decisions. *See Davoll*, 194 F.3d at 1146 (district court did not abuse discretion in denying class certification where it would have had to conduct individualized inquiries to determine whether potential members met class description).

The court's ruling here is further bolstered by the decision in a very similar ISDA case involving the CSC shortfalls issue, where the district court denied class certification. *See Cherokee*, 199 F.R.D. at 363. Regarding commonality, the *Cherokee* district court opined: "The court believes the individualized nature of the contracts in question would necessarily

lead to individualized claims of each tribe in respect to shortfalls. This examination would develop into a set of mini-trials which would defeat the judicial efficiency which a class action is designed to promote.”<sup>6</sup> *Id.* at 363.

Further, plaintiff simply mischaracterizes the Supreme Court’s holding in *Cherokee* as resolving contractual liability for *all* ISDA contractors. Contrary to Zuni’s suggestion, the Court did not invalidate IHS’s use of policies set forth in its Circulars. The *Cherokee* Court reviewed whether the ISDA agreements before it were binding contracts, and concluded that they were. *See* 543 U.S. at 643. The district court therefore aptly concluded that IHS policies are not what lie at the heart of Zuni’s claims. Mem. Op. & Order 19. Zuni seeks monetary relief arising out of its contracts. Plaintiff’s claims do not arise out of an agency-wide policy; indeed there is no agency CSC policy from which money damages could flow. It is the individual ISDA agreements and AFAs that provide a means to obtain contract funding, including CSC. In a related vein, plaintiff also grossly misstates the government’s position in suggesting that in “the wake of the Supreme Court’s liability determination in *Cherokee*,” IHS has conceded liability for all contractors’ CSC claims for all fiscal years. *See* Pet. 15. The government has conceded no such thing.

Plaintiff next finds fault with the district court’s conclusion that because there could

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<sup>6</sup> The tribal contractor in *Cherokee* did not seek an interlocutory appeal of the denial of class certification, and did not raise the issue on its appeal of the district court’s subsequent decision on the merits in favor of the government. *See Cherokee Nation v. Thompson*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001), *aff’d* 311 F.3d 1054 (10th Cir. 2002), *rev’d* 543 U.S. 631 (2005). Zuni fails to mention this directly-on-point decision addressing class certification standards, preferring instead to rely on this Court’s decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), which involved a different agency (the Bureau of Indian Affairs), class certification was not at issue, and where the Court had no occasion to address shortfall claims.

be a variety of different legal and remedial theories for each tribal contractor, Rule 23(a)(3)'s typicality prong was not satisfied. *See* Mem. Op. & Order 21. Plaintiff vigorously maintains that the district court erred by basing its decision on speculation, arguing that “nearly all” putative class members were parties to the model ISDA contract (Pet. 17), whose material terms were identical. Zuni does not dispute, however, and indeed it ignores, the reality that those contracts were accompanied by annual funding agreements, which establish the funding levels for the ISDA contracts. *See* 25 U.S.C. §450l(c) (Model agreement, § 1, ¶ (f)(2)). Thus there was no error in the district court’s conclusion that given the varied terms and conditions of hundreds of AFAs, Zuni’s claims were not typical of the putative class.

Nor was the district court’s determination of the adequacy of representation manifestly erroneous. As the district court observed, under the terms of 41 U.S.C. § 612(c), an agency is required to reimburse the Judgment Fund for judgments awarded out of the agency’s appropriations. Based on this statutory requirement, and given IHS’s limited appropriations, the court concluded that Zuni’s interests are antagonistic to putative class members who would be competing for the agency’s limited funds. In assigning error to this ruling, plaintiff asserts that IHS has never reimbursed the Judgment Fund for a contract damage award. But plaintiff itself errs by speculating that the agency will never reimburse the Fund for an award.<sup>7</sup> The district court committed no error in this regard.

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<sup>7</sup> Plaintiff overstates the “promise” that it alleges IHS made to tribal leaders in 2005. Pet. 19. IHS stated its intent to “work with the Administration and Congress to ensure that CSC litigation does not result in any health services reductions.” Pl. Ex. 19.

3. *No Unsettled Or Fundamental Question of Law Relating To Class Actions is Presented That Would Evade End-Of-Case Review.*

Plaintiff also argues that interlocutory review is warranted because the petition raises several important and unsettled questions of class action law. Pet. 19. But as the foregoing discussion demonstrates, there is not a single issue identified by Zuni that could not be addressed in an appeal after a merits decision. Indeed, plaintiff's allegations "present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Advisory Comm. Note to Rule 23(f). And, of course, interlocutory appeals are disfavored in the law. *See Carpenter*, 456 F.3d at 1189.

4. *There Are No Special Circumstances Warranting Interlocutory Appeal.*

Finally, plaintiff argues that immediate review is necessary to promote equity and efficiency. Pet. 20. But in view of the extensive discovery and motion practice that has already occurred in district court, there is no reason that a resolution of Zuni's remaining contract claims could be not be resolved expeditiously. Because interlocutory appeals are "inherently disruptive, time-consuming, and expensive," *see Waste Mgmt.*, 208 F.3d at 294, no judicial economy would be served by allowing immediate review here.

## **CONCLUSION**

For the foregoing reasons, the petition for interlocutory appeal should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th of June 2007, I served the foregoing “**Opposition to Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)**”

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## DIGITAL SUBMISSION CERTIFICATION

I hereby certify that all required privacy redactions have been made, that the foregoing **“Opposition to Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)”** is an exact copy of the written document filed with the clerk, and that the digital form of the Opposition has been scanned for viruses using Trend Micro OfficeScan program version 6.5 (last virus pattern release date 6/14/07) and is virus-free.

/s Jeffrica Jenkins Lee

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