

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ZUNI, on behalf of itself)
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA; *et al*)
)
Defendants.)
_____)

Case No. CIV 01-1046 BB/WPL
Filed Electronically

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS CERTAIN
CLAIMS FOR FAILURE TO EXHAUST (Dkt. No. 59)**

The defendants seek to dismiss on technical grounds portions of a few of the Zuni Tribe’s contract claims that the defendants incorrectly assert were not submitted to a contracting officer, as well as other like claims that have yet to be filed. For these reasons, alone, the defendants’ Motion should be denied.

Moreover, even if some additional claims or portions thereof were not timely submitted, additional agency submissions by the class representative in the context of this class action were not necessary because they would have been a pointless exercise in futility—as Judge Hansen correctly held in the only class action case ever litigated under the Indian Self-Determination Act, *Ramah Navajo Chapter v. Lujan*, No. 90-0957, Mem. Op. of Oct. 1, 1993 (Dkt. No. 95). Motion, Exh. F (reproducing same). Further, the filing of the class action tolled the time to submit additional agency claims under the well-established Tolling Rule of *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). But since the issues regarding

exhaustion and tolling go directly to the issue of class certification and cannot be resolved outside of Rule 23, their consideration should be deferred until the Court has before it the class certification motion next due under Chief Magistrate Judge Garcia’s April 22, 2005 Scheduling and Discovery Order (Dkt. No. 52).

NATURE OF THE ACTION AND ITS HISTORICAL CONTEXT

Background. This class action lawsuit arises under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (“ISDA” or “Act”) and seeks damages for the defendants’ continuing implementation of an unlawful systemwide policy, carried out over the course of several years through a succession of “circulars,” that annually underpaid most of the Indian Tribes in the United States the “contract support costs” that were due under their multi-year contracts with the Government. Pursuant to that unlawful policy, the defendants first miscalculated the “indirect” contract support costs associated with the Tribes’ ISDA contracts, and then failed to pay in full even those miscalculated amounts. As a result, during one three-year period alone, IHS underpaid over 300 Tribal contractors in excess of \$160 million (according to IHS’s own reports covering fiscal years 1995-1997), not even counting the cost of the miscalculation. *See e.g.*, Affidavit of Dr. David Trigg Mather, Dkt. No. 34, at ¶ 33 (describing 1997 underpayments).

The Supreme Court’s *Cherokee III* decision. Following nearly a decade of related contract support cost (“CSC”) litigation against the Indian Health Service (IHS) and 15 years of parallel CSC litigation against the Bureau of Indian Affairs (BIA)—the two principal federal agencies that award ISDA contracts—this year the Supreme Court struck down the circular-based policy IHS employed in the 1990s and awarded damages to two of the affected Tribes. *Cherokee Nation v. Leavitt*, 125

S.Ct. 1172 (2005) (“*Cherokee III*”) (declaring unlawful IHS underpayments in FY1994-FY1997). This class action lawsuit seeks to extend the Supreme Court’s ruling to all other Tribal contractors that fell victim to the same continuing unlawful agency policy.¹

Class action CSC litigation against the Bureau of Indian Affairs (BIA). Modern CSC litigation began in this District. In 1990 the Ramah Navajo Chapter filed suit against the BIA for undercalculating the CSCs annually due under the Bureau’s ISDA contracts. *Ramah, supra*. After a contracting officer denied one test claim submitted under 25 U.S.C. § 450m-1(d) of the ISDA, Ramah in 1990 filed a multi-year class action lawsuit. In 1993 this Court then certified a class of all Tribes contracting with the BIA. *Ramah*, Mem. Op., Dkt. No. 95. In certifying that class the Court specifically rejected one of the arguments resurrected here, that to be a member of the class each Tribal contractor would have to present its own contract claims. *Id.* at 3-5. (Indeed, even Ramah itself only submitted the one test claim.) Following the Tenth Circuit’s decision holding the BIA liable under the ISDA for undercalculating CSCs (under the same policy that remains in effect at IHS to this day), *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), this Court supervised the payment and distribution of two class recoveries in *Ramah*, one in 1999 for \$76 million covering certain CSC underpayments under 1989 through 1993 contracts, and a second in 2002 for \$29 million covering additional CSC underpayments under 1992 through 1994 contracts. *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D. NM 1999); *Ramah Navajo Chapter v.*

¹ Although the defendants claim that, as of 1998, a Tribal contractor’s right to CSC payments has been cut off by certain appropriations language (Motion at 6-7), we do not challenge that contention here because it has no bearing on the issues presented by the defendants’ Motion.

Norton, 250 F.Supp.2d 1303 (D. NM 2002).

Class action CSC litigation against IHS. In the meantime, CSC litigation against IHS multiplied across the country, producing three conflicting circuit court rulings before those conflicts were finally resolved against the Government in *Cherokee Nation III*.² One of those cases was filed in 1999 as a class action, but in February 2001 certification was denied and shortly thereafter the case was dismissed on the merits (on grounds subsequently overruled in *Cherokee III*).³ In September 2001 the Pueblo of Zuni filed the instant class action, and in December 2001 further proceedings were stayed pending the outcome of the *Cherokee Nation* litigation.

Overview of the Zuni litigation. On March 10, 2005 the Zuni Tribe filed a motion to certify a class identical to the *Ramah* class, albeit comprised of Tribes contracting with IHS rather than the BIA. Dkt. No. 26. (A preponderance of Tribes contracts with both.) The defendants responded by filing a motion to stay all class proceedings, to stay all pleading practice (including the filing of any Answer) and to stay all discovery, all pending the defendants' decision whether to file a raft of theoretical "jurisdictional" motions. Dkt. No. 35. Following extensive briefing Chief Magistrate Judge Garcia rejected the basic premise of the defendants' motions and in a Scheduling and

² *Cherokee Nation v. Leavitt*, 125 S. Ct. 1172 (2005) (*Cherokee III*), *aff'g Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) (*Cherokee II*) and *rev'g Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) (*Cherokee I*); *Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002) (*Shoshone IV*) (*overruled by Cherokee Nation III*), *rev'g Shoshone-Bannock Tribes v. Shalala*, 58 F.Supp.2d 1191 (D. Or. 1999) (*Shoshone III*), *Shoshone-Bannock Tribes v. Shalala*, 999 F.Supp. 1395 (D. Or. 1998) (*Shoshone II*), and *Shoshone-Bannock Tribes v. Shalala*, 988 F.Supp. 1306 (D. Or. 1997) (*Shoshone I*).

³ *Cherokee Nation and Shoshone-Paiute Tribes v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) (order on class certification), and 190 F.Supp.2d 1248 (E.D. Okla. 2001) (dismissal).

Discovery Order directed the parties to focus on class certification (Dkt. No. 52), consistent with Rule 23(c)(1)(A)'s directive that class certification proceedings "must" occur "at an early practicable time." Judge Garcia's Order established a tight class discovery schedule, with the understanding the Zuni Tribe would refile its class certification motion within 30 days following the close of discovery. The parties are now deep in the middle of that process (notwithstanding the diversion of considerable time and effort to oppose a third-party intervention motion). It is in this historical and procedural context that the Government's Motion to Dismiss arises.

ARGUMENT

I. The Motion to Dismiss Should Be Denied.

A. The Defendants' Motion Improperly Seeks to Dismiss 1999 and Later Contract Claims That Have Not Been Asserted By the Plaintiff Individually and As to Which the Limitations Period Has Not Expired.

The Defendants seek the dismissal of claims that have not been individually asserted and as to which the limitations period has not run.⁴ That is, they seek to dismiss the Zuni Tribe's individual 1999 (and later) contract claims when the Complaint does not assert any such individual claims (although they are certainly asserted on a *class* basis) and when the 6-year limitations period for submitting a 1999 claim will not run (putting aside class tolling rules) until at least September 30, 2005. Contract Disputes Act (CDA), 41 U.S.C. § 605(a) ("6 years after the accrual of the claim").

⁴ Defendants loosely target certain contract damage claims arising in certain years, but they do not specifically target the particular counts in the Complaint that they seek to dismiss. This omission adds to the vagueness of the Motion, permitting defendants to pass over the fact that all contract claims have parallel statutory claims as to which no exhaustion is required. *See infra* 7 n.5.

This is odd indeed. It should go without saying that a Court has no authority to dismiss a claim that is not yet before it, much less dismiss a claim where the limitations period is still running. Indeed, such additional contract claims may never be submitted if developments in this case make their submission unnecessary. If, as in *Ramah*, justice can be secured in identical circumstances within the framework of a class action and without the pointless submission of additional claims, no class member (including Zuni) will need to pursue individually any 1999 or later claims.

In sum, the defendants err in seeking what would amount to an advisory opinion about post-1998 Zuni claims, and that portion of the defendants' motion must be denied. Moreover, to dismiss such claims now could well have the bizarre result of treating the plaintiff worse than all other class members who, under the *Ramah* rule, would be excused from any past or future technicalities regarding claim submission requirements.

B. The 1996-1998 Miscalculated Rate Portion of Each Year's CDA Claim Is Not Subject to Dismissal.

Once the defendants' Motion regarding 1999 and later claims is rejected, the Court is left with the defendants' motion to dismiss what they coin (Motion at 19) "Claim 2 claims for funding in fiscal years after 1995" through 1998. What the defendants at first blush appear to seek is a flat ruling that would dismiss that portion of each of the Zuni Tribe's CSC claims for those three years that involves IHS's failure to calculate properly the Zuni Tribe's "indirect" contract support costs. But read in the context of their discussion of the Contract Disputes Act's claim submission requirements, the defendants' motion seeks to dismiss only portions of certain CDA claims, and not

any non-CDA claims.⁵

The defendants' Motion should be rejected because the Zuni Tribe's original 22 omnibus test claims over CSC underpayments, including the 15 claims covering its 1996 through 1998 contracts, encompassed the claim that IHS failed to calculate properly the Tribe's "indirect" CSCs that IHS failed to pay. Even assuming *arguendo* those omnibus claims were more limited (and they were not), (1) the plaintiff (just like other absent class members and the *Ramah* class) does not need to

⁵ Since the defendants do not target the parallel statutory causes of action covering all the Tribe's claims, their Motion will not narrow any issues presented in this case. It is well-established that an independent statutory cause of action for money damages exists to remedy CSC underpayments. The ISDA provides:

(a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages * * * .

25 U.S.C. § 450m-1(a). This section establishes two separate and independent causes of action. First, a district court has "original jurisdiction" over any "civil action. . . arising under [the ISDA]," and second, a district court has "concurrent" jurisdiction over any "civil action" under the Contract Disputes Act. Under either type of action, the District Court may order "money damages." *See Shoshone I*, 988 F.Supp. at 1316 (holding in a case where no administrative claim was submitted that a district court has original jurisdiction over a Tribal contractor's claim for money damages caused by the underpayment of CSCs and that no prior "exhaustion" is required) and *Shoshone II*, 999 F.Supp. at 1397 (awarding "money damages"); *Cherokee Nation*, 190 F.Supp.2d at 1257-58 ("Section 450m-1(a) of the ISDA grants district courts 'original jurisdiction' over 'civil actions' with authorization to award money damages. * * * Obviously, Congress intended to give the tribes the option to bypass the agency review process.") Nor could an exhaustion requirement be read into the statute, given the ISDA's command that "[e]ach provision of the [ISDA]. . . shall be liberally construed for the benefit of the Contractor." 25 U.S.C. § 450l(c)(sec. 1(a)(2)). Because the defendants in their opening brief never challenge the Tribe's cause of action under the ISDA paralleling the targeted 1996-1998 CDA claims, those ISDA claims survive the instant Motion.

submit additional CDA agency claims to be part of the putative class; and (2) even if the plaintiff (and other absent class members) did need to submit such claims, the time to submit them has not expired.

1. The Defendants' Motion Rests on a Fundamental Misunderstanding About the 22 Omnibus Test Claims Submitted in April 2001.

In April 2001 the Pueblo of Zuni submitted to its local contracting officer 22 omnibus test claims under the CDA covering each of six years worth of contract claims spanning 1993 through 1998 (including 15 contract claims covering the 1996-1998 period targeted by the defendants). The submission of the claims was, of course, merely a formality. Unlike other exhaustion settings, a contracting officer is not required to evaluate or consider a CDA claim, to decide it, or to issue an explanation of any kind. The officer can simply do nothing and after 60 days of inaction on claims under \$100,000 the contractor may deem the inaction to be a denial and move on to court. 41 U.S.C. § 605(c)(5).

In the case of IHS, for years the agency had consistently either denied (or more commonly ignored) all Tribal CDA claims challenging IHS's continuing implementation of its systemwide policy of underpaying contractors their CSCs. Like other Tribal contractors, the Zuni Tribe therefore had every expectation that any CDA claims it submitted would likewise either be denied or (as happened) ignored. Other Tribes understood that, instead of submitting pointless claims, the common sense reflected in Judge Hansen's ruling in *Ramah* instructed that Tribes should simply await the outcome of either the nationwide class action that had been pending in Oklahoma for two years, or the newer class action the Pueblo filed here, just as they had all awaited the outcome of the

Ramah litigation until a successful outcome produced class member distributions. Still, if the Pueblo of Zuni wished to pursue its own class action as a class representative, the Pueblo needed to submit some test claims. And so it did.

Each of the Zuni Tribe's 22 test claims filed in April 2001 was an omnibus CSC claim, seeking "no less than the above-stated sum in contract support cost funds associated with the Pueblo's operation of [IHS] programs, functions, services and activities operated by the Pueblo under the foregoing contract, as amended." Motion, Exh. A at 1 (emph. added). Each asserted that the minimum amount stated was due because IHS had breached its obligation to pay all CSCs under "[t]he Pueblo's contracts and contract amendments, the Pueblo's funding agreements, the Pueblo's indirect cost agreements and the [ISDA]." *Id.*

Contrary to the defendants' inaccurate characterization of those claims, they were not limited to IHS's "fail[ure] to pay the full amount of Zuni's indirect CSC need, as calculated under Zuni's indirect cost rate," Motion at 8 (what the defendants now call "Claim 1"). Indeed, the claims recited nothing of the kind. Each claim was broad and unlimited, seeking damages for breach of the duty to pay full CSCs (with the precise amount an accounting issue).

Not only was each claim comprehensive in asserting a "no less than" amount, but each used the identical "associated with" wording of 25 U.S.C. § 450j-1(d)(2) that is the foundation of the miscalculated rate claim the defendants now try to argue was somehow excluded. *See* § 450j-1(d)(2) ("Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract") (emph. added); *Ramah*, 112 F.3d at 1461 ("subsection (d)(2) refers to indirect costs 'associated with' a

self-determination contract, but fails to define ‘associated with’), and 1462 (applying Indian canon of statutory construction to subsection (d)(2) to conclude that the system the BIA and IHS use to calculate indirect CSCs miscalculates those costs by excluding some of the costs “associated with” an ISDA contract) (emph. added). The miscalculated component of the CSC underpayment claim was thus preserved in the initial agency submissions.⁶

Any doubt about the Tribe’s intentions (or the contracting officer’s understanding) were made plain from the second wave of letters submitted September 28, 2001 discussing miscalculated rate damages. Those letters clearly informed the contracting officer that “[t]he damages sought in this claim are related to the damages sought in the claim submitted to you by letter dated April 16, 2001, and. . . *they arise out of and are included in the same contract claim presented to you on that date.*” Motion, Exh. C (emph. added). By no stretch can the second wave of letters fairly be read as an acknowledgment that the first set of claims was too limited to include miscalculation damages.⁷

⁶ The Pueblo of Zuni certified to the best of its knowledge at the time the amount of damages sought on account of IHS’s breach of contract, in conformity with the CDA. *See J.F. Shea Co. v. United States*, 4 Cl.Ct. 46, 54 (1983) (“The certification requirement assures that the plaintiff is submitting a claim in an amount it *then* honestly believes is due and that the data furnished *at the time of certification* are accurate and complete to the best of plaintiff’s knowledge and belief.”)

⁷ It is basic CDA law that a good faith certification of the amount of damages sought due to a breach does not lock in the contractor from later quantifying its damages differently, nor does it limit a court’s ability to award damages so long as the breach of contract claim is properly before it. *See AAI Corp. v. United States*, 22 Cl.Ct. 541, 545 (1991) (request for damages may be increased where contracting officer considered the “theory of entitlement,” and summarily denied the claim on the merits without discussing the contractor’s entitlement or damages); *J.F. Shea*, 4 Cl.Ct. at 54 (court need not remand to contracting officer when through the course of normal litigation additional facts develop which increase the amount of the claim); *Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984) (same).

On their face these documents establish that Zuni’s omnibus claims for 1993-1998 embraced all portions of its claims that IHS, by its continuing nationwide policy, had unlawfully underpaid the Tribe all the CSCs to which it was entitled under its contracts and applicable law, including what the defendants now label Claims 1 and 2. Thus, the defendants’ effort to secure dismissal of the miscalculated rate component of the CSC claims for 1996 through 1998 should be denied.⁸

⁸ Even if the original claim letters had excluded the miscalculated rate component of each year’s CSC damage claim, that component of the claims derives from the very same operative facts as the remainder of the claim: that by an illegal and unauthorized agency-wide policy IHS unlawfully calculated and paid to the Tribe less than the full amount of contract support costs associated with the contracts. In terms of liability, proof of either element of the claim will turn on the existence and content of the IHS policy then in place, and the Court’s assessment of the legality of the agency’s actions under that policy.

Under the CDA, the Court of Federal Claims would have jurisdiction over such additional components of one single overall CSC claim. See *Tunica-Biloxi Tribe v. United States*, No. 02-2413 (D.D.C.), Amended Mem. Op. at 15-16 (Jan. 20, 2004)(Motion Exh. E, reproducing same) (separate exhaustion not required for unasserted theory regarding “good faith and fair dealing” in support of submitted claims, and distinguishing other years for which no claim was submitted to a contracting officer), citing *Cerberonics, Inc. v. United States*, 13 Cl. Ct 415 (1987) (later claim for “equitable adjustment” was based on same set of operative facts as agency claim for “fair and equitable fee” and “finance charges”). See also *Diversified Energy, Inc. v. TVA*, 339 F.3d 437, 444-45 (6th Cir. 2003) (permitting “lost profits” to be added to original claim for “liquidated damages”) (“Under the CDA, a district court is not deprived of jurisdiction over a contract claim merely because the contractor changes the amount of his claim or the theory of his damages, so long as the modified claim is “based on the same set of operative facts underlying the claim submitted to the contracting officer”)(citation and internal quotations omitted); *AAI*, 22 Cl. Ct. at 545 (permitting claims in court that “[arise] out of essentially interconnected conduct, services, and same or closely-connected facts”).

Under the CDA the Court would also have jurisdiction over an enlarged claim if, as here, it “spring[s] from the same certified claim,” which is certainly the case here. Compare *Tunica*, at 15 (under *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612, 615 (1990), rule permitting “enlarged” claim does not embrace different claim covering different contract year).

2. Individualized Exhaustion of All Claims Covering All Contracts in All Years is Not Required in this Class Action.

The defendants' Motion argues that if, as they contend, the Zuni Tribe has not submitted agency CDA claims under its 1996-1998 contracts asserting mis-calculation damages, then it cannot recover those damages even though it has asserted precisely those same damages for this same continuing wrong under the three previous years' contracts.

Even assuming the Zuni Tribe did not include in its agency submissions its miscalculated rate damages for its 1996-1998 contracts (although it did), it does not follow that the Zuni Tribe is barred from recovering within a Rule 23 class action. In the context of a class action, exhaustion on every individual CDA claim is not necessary if such exhaustion would be futile and the class representative has properly exhausted at least one representative test claim. Significantly, none of the exhaustion cases the defendants cite deals with class actions and Rule 23.

Futility. In the 1990's IHS adopted a common practice under published internal policies that (1) undercalculated tribal contractors' CSCs requirements, (2) underfunded those requirements, and then (3) uniformly denied all contractor claims brought to challenge those illegal practices. First Am. Comp. Dkt. No. 5; *see also* Dkt. No. 34, Exhs. 2-10. As *Cherokee III* held (and as *Ramah* signals for IHS), the agency's consistent application of these policies and practices from the 1990s to the present violated the ISDA and the contracts awarded thereunder.

The Cherokee Nation and Shoshone-Paiute Tribes submitted test claims and later filed a class action to stop IHS's illegal practices. *Cherokee I*. After class certification was denied, the Pueblo of Zuni promptly submitted its own test claims and later this class action in anticipation of a

favorable decision on appeal of *Cherokee I*. Most other tribal contractors did not pursue any individual CDA claims, and reasonably so, given this Court's previous ruling in *Ramah*. There, Judge Hansen correctly ruled that the failure to exhaust is not a defense against unasserted claims coming within the class "if exhaustion would be futile or would fail to provide adequate relief, or where an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." *Ramah*, Mem. Op. at 3-4, Dkt. No. 95 (Motion Exh. F) (discussing cases). The Court noted that, precisely as is the case here, "the Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms," and thus "it is not necessary that each member of the proposed class exhaust its administrative remedies under the [CDA]." *Id.* at 4.

That description fits to a tee the Zuni Tribe's lawsuit against IHS. For several years it has steadily been IHS's categorical position that IHS circulars are consistent with the law and the government therefore bears no liability for additional CSCs. As far as plaintiff is aware from class discovery, IHS uniformly denied (expressly or by operation of law through inaction) every CDA claim challenging underpayments made as a consequence of the IHS circulars. In that setting it certainly would have been futile for any Tribal contractor to pursue administrative CDA claims.

Judge Hansen also noted that "Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed." *Id.* Here, too, no performance issues are raised by these CSC claims, and thus another rationale in favor of exhaustion—giving the agency a chance to look at performance issues—collapses.

Defendants' Cases. The defendants' cases offer no support for rejecting Judge Hansen's decision, for none establishes that submitting a CDA claim to a contracting officer is a necessary predicate to participating as a member of a CDA class action in a district court. This is important for two reasons. First, with the exception of *Tunica*, none of the cases arose in a class action setting, where very different exhaustion rules come into play (and even in *Tunica* the court ignored the class action aspects due to a prior stay order. *Tunica* at 4 n.5, Motion Exh. E).⁹ Defendants' cases do not challenge the established rule under Rule 23 that exhaustion by putative class members is unnecessary when the class representative has exhausted,¹⁰ and the defendants acknowledge that

⁹ To the extent the district court in *Tunica* charted a different course by disregarding class issues, it is a course this Court expressly rejected after full briefing on the matter. The defendants ought not be permitted an end-run around Magistrate Judge Garcia's prioritization of class issues.

¹⁰ This situation has arisen often in Social Security Administration cases, where courts have looked at the "presentment" requirement as merely the request for benefits, much like the signing of a contract here. But courts have not required class members to otherwise meet the mandatory statutory exhaustion requirements that are required of class representatives for their representative claims. "[T]o require each claimant to pursue his individual administrative remedy [vindicates] no legitimate interest." *Reed v. Heckler*, 756 F.2d 779, 785 (10th Cir. 1985) (citation omitted) (waiving exhaustion of statutory claims for class members "when a statutory interpretation can be universally applied to all eligible claimants"). See also e.g., *Bowen v. City of New York*, 476 U.S. 467, 483-84 (1986) (waiving a mandatory exhaustion scheme where class members "challenged the Secretary's failure to follow the applicable regulations"); *Andre v. Chater*, 910 F.Supp. 1352 (S.D. Ind. 1995) (waiving exhaustion where class action challenged methodology used by Commissioner to determine eligibility benefits); *Linguist v. Bowen*, 633 F.Supp. 846, 858 (W.D. Mo. 1986) (holding class definition not fatally defective for not requiring exhaustion because exhaustion is not required when challenging the effect of an administrative policy); *Larionoff v. United States*, 365 F.Supp. 140 (D.D.C. 1973) (certifying Tucker Act class action following the exhaustion of remedies by only the seven named Plaintiffs), *aff'd United States v. Larionoff*, 431 U.S. 864 (1977).

Contrary to defendants' assertion, in *Honig v. Doe*, 484 U.S. 305, 327 (1988) (cited by Judge Hansen in *Ramah*) the Supreme Court described a statutory scheme where exhaustion was mandatory, not optional. Still, the Court recognized that "parents may bypass the administrative

Zuni timely filed CDA claims here. Motion, Exh. A. This reading of the CDA’s exhaustion requirement is also supported by Congress’ own assessment of the value of exhaustion under the CDA, where Congress permits contractors to opt out of the administrative process after 60 days. 41 U.S.C. § 605(c).

Second, the non-CDA cases cited by the defendants do not support the position that exhaustion is not waivable here. For instance, in *Booth v. Churner*, 532 U.S. 731 (2001) (Motion at 14), the Supreme Court addressed the following exhaustion provision:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (1994). Even though the Supreme Court held that the plaintiff had to exhaust his administrative remedies, *id.* at 741 & n.6, this explicit statutory exhaustion language still permitted a plaintiff class to “satisf[y] the . . . administrative exhaustion requirement through ‘vicarious exhaustion,’ when ‘one or more class members ha[s] exhausted his administrative remedies with respect to each claim raised by the class.’” *Chandler v. Crosby*, 379 F.3d 1278, 1287 (11th Cir. 2004) (citation omitted).

process where exhaustion would be futile or inadequate,” a statement the Tenth Circuit echoed in *Assoc. for Comm. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (“Exhaustion would not be required, however, where it would be futile or fail to provide adequate relief”). The only thing that made exhaustion potentially ‘nonmandatory’ in *Honig* was the Court’s sanction of this well-recognized exception, an exception that operates with even greater force in a CDA class action involving claims against an agency’s policy and which a contracting officer lacks authority to resolve favorably.

Although the defendants also rely on *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (Motion at 14), the Supreme Court there expressly “recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion” (emph. added). Particularly relevant here, “an administrative remedy may be inadequate” because an agency “lack[s] authority to grant the type of relief required” or “has otherwise predetermined the issue before it.” *Id.* at 148. *See also United States v. Copland*, 376 F.3d 61, 67 (2nd Cir. 2004), citing *Booth v. Churner*, 532 U.S. 731, 736 (2001) (“Futility excuses a litigant from a statutory exhaustion requirement ‘where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint’”). Here, a Tribal contractor may well have “nothing to exhaust,” *Booth*, 532 U.S. at 736 n.4, because IHS contracting officers lack any authority to relieve them from IHS circulars. *Johnson Mgt. Group CFC, Inc.*, 00-2 BCA 31,116, 2000 WL 1528761 (HUDBCA Sept. 20, 2000) (“A contracting officer may not exceed his or her authority by disregarding the relevant regulations”), citing *Cooper Realty Co. v. United States*, 36 Fed. Cl. 284, 288-89 (Fed. Cl. 1996). To the extent the purpose of the CDA’s exhaustion requirement is to give the contracting officer the opportunity to pay the claim in advance of litigation, that purpose clearly can not be fulfilled where the contracting officer lacks authority to do so.

3. The Limitations Period for Individual Contractors to Exhaust Pre-1999 CDA Claims Has Been Tolloed by the Filing of this Class Action.

The Defendants bury in footnote the argument that if 1996-1998 miscalculation damages arising out of IHS’s implementation of its illegal circulars have not previously been submitted to a

contracting officer, then the time for submitting those damages has now expired. Motion at 19 n.10. That, too, is wrong. As noted on page 1, under the Tolling Rule announced in *American Pipe - Crown Cork*, the limitations period for Zuni (and all other contractors) to file such claims was tolled as soon as the class complaint was filed (and doubly tolled with the filing of the *Tunica* complaint directed narrowly to those damage claims alone). That tolling continues until a class certification decision is issued in the cases.

Rule 23 Tolling. It is hornbook class action law that the filing of a Rule 23 class action tolls the running of the statute of limitations for all purported members of the class who would otherwise be required to file their own claims. The Tolling Rule recognizes that, in the absence of tolling, “[o]nly by intervening or taking other action prior to the running of the statute of limitations would [plaintiffs] be able to ensure that their rights would not be lost in the event that class certification was denied,” *Crown Cork*, 462 U.S. at 350. It avoids the “needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.” *Id.* at 351.¹¹ Significantly, “the rule of *American Pipe* applies to the government just as it does to private parties,” because “Rule 23 tolling is statutory rather than equitable.” *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000).

¹¹ *See also id.* at 352-53 (“Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint ‘notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.’ [citations omitted] . . . Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.”)

The Tolling Rule covers both the time to file individual suits and the time to submit individual administrative claims. *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994). This is only sensible, because “[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the [agency].” *Id.*, at 360. See also *McDonald v. Sec’y of Health & Human Serv.*, 834 F.2d 1085, 1092 (1st Cir.1987) (holding that *American Pipe* tolling is “generally applicable” to administrative limitations periods, so that after a class action was decertified on appeal, the class members could “go forward from the point where they had left off during the pendency of the class action” and exhaust their administrative remedies); *Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1990) (allowing “claimants who failed to exhaust their administrative remedies or seek judicial review between the time class action was filed and the time the case was decided on its merits” to continue as a “class entitled to readjudication of their claims”).

The Tolling Rule applies here to any unasserted Zuni claims and to the unasserted claims of the class. The defendants do not dispute that the Zuni Tribe timely submitted to a contracting officer the miscalculated damage component of its CDA claims for at least some years (1993-1995), and that the class Zuni asserts is a class of all Tribal contractors that suffered the same damages. The Complaint provided defendants with complete notice of the CSC claim—a challenge to IHS’s historic policies for calculating and paying CSCs—and of the potential number and identity of class members possessing those claims. First Am. Comp. ¶ 53 (all Tribal contractors “contracting with IHS under the ISDA between fiscal years 1993 to the present”). Defendants are in no position to argue they will

be prejudiced by application of the Tolling Rule to all unasserted claims or portions thereof, including the Zuni 1996-1998 miscalculated damage claims (or the like claims of class members).

Equitable tolling. Apart from Rule 23's statutory tolling, the period for filing individual CDA claims has been independently tolled for all class members (including Zuni) by operation of equitable tolling principles, again triggered by the 2001 filing of the class action complaint. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (noting "rebuttable presumption of equitable tolling" in "suits against the United States"); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002) (applying doctrine of equitable tolling to the CDA); *see also Bonneville Associates Ltd. v. Barram*, 165 F.3d 1360, 1367 (Fed. Cir. 1999) (Gajarsa, J., concurring) (suggesting agreement that equitable tolling applies to the CDA); *cf. Kirkendall v. Department of Navy*, 412 F.3d 1273, 1276 (Fed. Cir. 2005) (applying *Irwin* presumption of equitable tolling to exhaustion of administrative remedies).

With particular relevance here, the Tenth Circuit has "suggested that tolling may be appropriate when a plaintiff has been 'lulled into inaction by . . . the courts.'" *Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983), citing *Carlile v. South Routt School District RE 3-J*, 652 F.2d 981, 986 (10th Cir. 1981); *see also Baldwin Country Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (citing *Carlile* approvingly "where the court has led the plaintiff to believe that she had done everything required of her"). Judge Hansen's ruling in *Ramah*, together with the aftermath of that ruling, certainly describes a ruling that lulled Tribal contractors into not filing claims.

Finally, we note that equitable tolling, unlike Rule 23 tolling, is “determined on a case-by-case basis,” *Gonzalez-Aller*, 702 F.2d at 859, based on the particular “facts of the case.” *United States v. Clymore*, 245 F.3d 1195, 1197 (10th Cir. 2001). The facts here are that at the time plaintiff filed this class action, other Tribal contractors could have presented thousands of CDA claims reaching back at least six years to fiscal year 1995. They did not. Plaintiffs would demonstrate at any hearing that Tribal contractors (including Zuni) relied on the fact that Judge Hansen held that no Tribal contractor had to file a CDA claim if the contractor was otherwise covered by a class action; that millions in settlements had subsequently been paid to Tribal contractors in the *Ramah* case, virtually none of whom filed a CDA claim; that the *Ramah* plaintiffs had filed only one CDA claim covering one fiscal year, and this was sufficient for all class members (including the *Ramah* plaintiff itself) to recover for several contracts awarded over the course of several years; that the Zuni’s class action complaint covered their claims; and that general class action practice provides that a class member is not required to pursue its own claims in order to remain protected. In not continuing to file CDA claims after 1998 the Zuni Tribe relied on those same facts.¹²

¹² The factual aspect of equitable tolling precludes dismissal under Rule 12(b)(1). Equitable tolling cannot be addressed through a Rule 12(b)(1) motion because “federal statutory time limitations on suits against the government are not jurisdictional in nature.” *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995); *Mallard Automotive Group, Ltd. v. United States*, 343 F.Supp.2d 949, 954 (D. Nev. 2004) (“if the statute of limitations on a claim against the government is subject to equitable tolling, the statute of limitations issue cannot be resolved on a 12(b)(1) motion.”).

II. The Motion to Dismiss Should Be Held in Abeyance or Denied Without Prejudice Because it Directly Implicates the Interest of the Class.

Courts in class actions routinely reject attempts to adjudicate the merits of a class representative's claims pending the outcome of class certification proceedings, particularly when the issues raised implicate the interests of the class. This is correct and sensible, not only because class proceedings should go forward without regard to the underlying merits of the asserted claims, *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974), but also because class discovery and the ensuing motion practice permits a complete development of all the pertinent facts and law so that, in the event a class is certified, adjustments can be made in light of the Court's ruling and the facts that have been presented.¹³

¹³ The defendants are wrong (again) that having framed their motion as "jurisdictional," this Court has no choice but to address the issue now. Motion at 10-11, citing *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1048 (10th Cir. 2004) and *Payton v. USDA*, 337 F.3d 1163 (10th Cir. 2003). (We say "again" because the defendants unsuccessfully cited the same cases in support of their early effort to stay the entire case, *see* Motion to Stay, at 7 (Dkt. No. 35), where Judge Garcia rejected the argument.) As plaintiff previously noted (*see* Dkt. No. 36, at 8 n.4), in *Grynberg* the district court addressed the relevant "jurisdictional" issue within a larger summary judgment motion, not at an earlier time divorced from the proceedings. 389 F.3d at 1047-1048. When the Tenth Circuit spoke of giving "priority" to "[q]uestions of jurisdiction," *id.* at 1048 (quoting *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000)) it was explaining its own decision to address the district court's ruling on jurisdiction. *Id.* ("we must begin with its [the district court's] conclusion that Grynberg failed to meet the jurisdictional requirements of [the False Claims Act]") (emph. added). (Even in the appellate setting the rule is not hard and fast, as demonstrated in *Vermont Agency*, 529 U.S. at 778-779, explaining that, while the Court usually first considers jurisdictional issues, in litigation against a State it is better first to address issues of statutory interpretation to determine if an underlying cause of action exists.)

The defendants similarly again misuse *Payton v. USDA*, 337 F.3d 1163 (10th Cir. 2003), where, as in *Grynberg*, the district court entered a single ruling addressing both jurisdictional issues and the merits (finding both lack of jurisdiction and, in the alternative, agency compliance with the Administrative Procedures Act). 337 F.3d at 1167. It was only in deciding the appeal that the Tenth

There is no basis for deviating from that sound prudential rule here. As the preceding discussion amply demonstrates, whether by design or accident, the defendants' Motion directly implicates class issues, and thus threatens to cut off the right of hundreds of class members possessing thousands of class claims. True, the defendants' posit their motion as going strictly to the Court's "jurisdiction," but that is too facile, for the Court certainly has jurisdiction under 28 U.S.C. § 1331 and 25 U.S.C. § 450m-1(a) to hear this case. Moreover, the prudential considerations that lead some courts to address a so-called "jurisdictional" motion ahead of class certification issues are not present when the motion will not dispose of the whole case, or even substantially narrow it in the larger scheme of the issues presented.¹⁴

Entertaining the defendants' motion while discovery is ongoing regarding class exhaustion, other class issues, and the circumstances surrounding the very contract claims the defendants' motion now targets (according to their Rule 30(b)(6) designations)—and three months before the class certification motion is due to be filed, followed by a class hearing that would include everything a

Circuit said it would address the jurisdictional issue first. In short, nothing cited supports the defendants' insistence that its Motion must be decided now.

¹⁴ There are more technical reasons for rejecting the defendants' Motion at this time: (1) in effect it is a summary judgment motion that fails to comply with Rule 56, and (2) such motions are heavily disfavored in advance of class certification. Although defendants rely on *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995) to support their election to proceed under Rule 12(b)(1), *Holt* cautions that "a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case." *Id.* at 1003 (citations omitted). This is precisely the situation here, for resolution of the defendants' motion necessarily turns on the Court's construction of the CDA and the ISDA, both of which give rise to the plaintiff's substantive claims.

Rule 12(b)(1) hearing would cover—thus accomplishes nothing. It only begs the question, long before full briefing on class certification will permit the Court to reach a thoughtful answer with the interests of the class in mind, whether the dismissal of a few of the Zuni Tribe’s claims even makes a difference, let alone how issues pertinent to such a motion may impact the interests of the class. Indeed, in certifying a class this Court may well conclude either that a few test claims are sufficient to cover the whole class comprising hundreds of Tribes with several thousand claims challenging a continuing wrong, or, if not, that one or more additional class representatives should be added to represent additional claims (to the extent representation claim-by-claim and year-by-year is deemed necessary and the Zuni Tribe’s test claims are deemed insufficient to cover the whole field).

At root, ruling on the defendants’ motion now thus runs the manifestly unfair potential to cut out of the class a substantial portion of the absent class members and their claims. Rather than make such rulings under the guise of a Rule 12(b)(1) motion, including substantive rulings about what is required of a Tribal contractor in order to recover against the defendants in the context of this class action; what is required of a class member to be in this class; and the tolling rules attendant to this class action, the defendants’ Motion should be either deferred or denied without prejudice until after the Court has taken up the class certification issue.

As noted in the leading treatise on class actions (Newberg, § 1:13):

[C]ourts have taken great pains to assure that the interests of absent class members are protected at all stages following the commencement of class litigation. This emphasis on the protection of absent class members has manifested itself not only in careful court monitoring that the class interests be adequately represented at trial or any compromise or dismissal of the litigation, but also that these interests *not be prejudiced by the mootness or court disposition of the individual claim of the class representative.*

(Emph. added). The cautious course the plaintiff urges here will avoid that very risk of prejudice to the class without creating any additional burdens for the defendants or the Court.

CONCLUSION

For the foregoing reasons, the defendants' Motion to Dismiss should be denied.

Respectfully submitted this 15th day of August 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Plaintiff's Opposition to Defendants' Motion to Dismiss Certain Claims for Failure to Exhaust (Dkt. No. 59)** to the following attorneys of record or their co-counsel this 15th day of August 2005:

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