

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;)
MICHAEL O. LEAVITT, Secretary of the)
United States Department of Health and)
Human Services; and)
CHARLES W. GRIM, Director of the)
Indian Health Service, United States)
Department of Health and Human Services,)
)
Defendants.)
_____)

Case No. CIV 01-1046 BDB/WPL

**PLAINTIFF’S OPPOSITION TO
EXPEDITED MOTION BY TUNICA-
BILOXI TRIBE AND RAMAH NAVAJO
SCHOOL BOARD TO INTERVENE,
ESTABLISH SEPARATE CLASSES,
APPOINT INTERIM COUNSEL, AND
EXTEND CLASS CERTIFICATION
DISCOVERY PERIOD (Dkt. No. 54,
filed May 23, 2005)**

INTRODUCTION

On November 22, 2002, over a year after this case was initiated, Michael P. Gross, lead counsel for applicant-intervenors, filed in this Court on their behalf a so-called “miscalculated rate claim” against the Secretary of Health and Human Services and other federal officials. *Tunica-Biloxi Tribe, et al. v. United States, et al.*, No. 02-1465 (D.N.M.). As a matter of litigation strategy, after the Tenth Circuit ruled in favor of the Government in a comparable suit, *Cherokee Nation of Oklahoma, et al. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002)(“*Cherokee I*”), Mr. Gross decided to forsake this Court’s jurisdiction, voluntarily dismissed the complaint in Docket No. 02-1465, and, in the hope of finding a more favorable judicial environment, refiled the same miscalculated rate claim in the District of Columbia. *Tunica-Biloxi Tribe, et al. v. United States*, No. 02-2413 (D.D.C.) (“*Tunica*”).

Unfortunately for applicant-intervenors, in the D.C. proceedings Mr. Gross' clients suffered a series of significant procedural and substantive setbacks. *See generally*, Amended Mem. Op. (Exh. 1) and Amended Order (Exh. 2) of Jan. 20, 2004. More specifically, the D.C. District Court: (1) dismissed three federal employees from the suit, including Timothy G. Vigotsky, director of the National Business Center (Exh. 2 at 2); (2) dismissed all claims predating fiscal year 1995 for both plaintiffs (Exh. 1 at 9-15; Mem. Op. of Jan. 22, 2004 (Exh. 3) at 1); (3) dismissed all claims alleging a violation of the duty of good faith and fair dealing or alleging a breach of trust (Exh. 1 at 37-40; Exh. 2 at 1, 2), a ruling the court sustained upon reconsideration (Exh. 3 at 2-8; Third Amended Order of Mar. 2, 2004 (Exh. 4) at 1, 2); (4) rejected damage claims arising in fiscal year 1998 and thereafter (the so-called "cap years"), unless discovery could show that actual contract support appropriations from those years still remained unspent (Exh. 1 at 23-26); and (5) pending a determination into "the validity of plaintiff's [*sic*] remaining claims," denied without prejudice a motion for class certification (Order of Jan. 22, 2004 (Exh. 5) at 1).¹ When the *Tunica* plaintiffs then sought, "[w]ith scant further explanation," to undertake discovery beyond the scope of the Court's Order, Magistrate Judge Robinson granted the Government's motion for a protective order. Order of May 11, 2004 (Exh. 6). With the consent of the plaintiffs, further proceedings in *Tunica* have since then been stayed.

Meanwhile, Lloyd B. Miller and his law firm, counsel for the Cherokee Nation and the

¹ Adding to the difficulties facing applicant-intervenors, Judge Walton directed additional briefing on whether these plaintiffs could assert any claims at all after fiscal year 1996 due to their failure to have then-current indirect cost rates. Exh. 1 at 29.

Shoshone-Paiute Tribes as well as counsel for the Pueblo of Zuni herein, secured a reversal of *Cherokee I* by an 8-0 vote (Rehnquist, C.J. abstaining) in the Supreme Court. *Cherokee Nation, et al. v. Leavitt, et al.*, 125 S.Ct. 1172 (2005) (“*Cherokee III*”) (also affirming a decision in favor of the tribal contractor in *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) (“*Cherokee II*”) in which Mr. Miller and his law firm also represented the successful plaintiff). In light of this decision and the disappointing results he had so far achieved in the District of Columbia, Mr. Gross again reversed field and sought to return the *Tunica* claim to New Mexico by: (1) petitioning the Multi-District Litigation Panel pursuant to 28 U.S.C. § 1407 to transfer *Tunica* back to this Court; and (2) now moving to intervene in this case as an alleged matter of right on the ground that Mr. Miller, the victor in *Cherokee III*, is not an adequate class counsel. Interestingly, Mr. Gross’ Complaint in Intervention for Ramah and Tunica-Biloxi contains all the claims by these parties that have already been dismissed by the D.C. District Court in *Tunica*.

Mr. Gross’ litigation tactics are far more than forum shopping. By attempting to shift jurisdictions and moving to take over this case, he clearly is seeking improperly to circumvent adverse rulings established as the law of the case by the D.C. District Court in *Tunica*. Be that as it may, and as the following discussion will demonstrate, applicant-intervenors have no grounds for intervening as a matter of right and their request for permissive intervention should be denied. Moreover, the notion that Mr. Miller and his firm, who saved the claims in this case through their extraordinary efforts in the *Cherokee* litigation, should be replaced as interim class counsel by Mr. Gross, who is losing many of the same claims in *Tunica*, makes absolutely no sense.

STATEMENT OF THE CASE

1. Nature of the action. This case was brought by the Pueblo of Zuni and seeks to recover damages for the defendants' failure to pay the full amounts promised in contracts awarded under the Indian Self-Determination Act, Pub. L. 93-638, *as amended*, 25 U.S.C. § 450 *et seq.* ("ISDA"). The issues presented involve the repeated failure of the Indian Health Service (IHS) of the U.S. Department of Health and Human Services to pay the "contract support cost" ("CSC") amounts that the ISDA mandates must be paid annually to contractors under 25 U.S.C. § 450j-1(a)(2). Litigation against IHS over such matters is not new.²

Shortfall claims. The largest category of damages claims here is a mirror image (but in the form of a class action) to the identical claims resolved in *Cherokee III*, where the Supreme Court determined that "the Government's promises are legally binding," *id.* at 1175, and where the Court accordingly held the United States liable in damages for IHS's failure to pay full contract support costs ("CSCs") in fiscal years 1994 through 1997. These claims are known as the "shortfall claims," for they seek damages for the Government's failure to pay the "shortfall" between (1) the amounts the Government calculated as the required payment and (2) the amounts actually paid.

Miscalculated rate claims. The second category of damages claims asserted here alleges that IHS *miscalculated* the "indirect" CSCs required to be paid, such that the Government is liable for

² See, e.g., *Cherokee I, II, and III*; *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F.Supp. 1395 (1998), *on remand* 58 F.Supp.2d 1191 (1999), *rev'd sub nom. Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660 (9th Cir. 2002); *In re Seldovia Village Tribe*, IBCA No. 3862, 03-2 BCA 32,400 (Oct. 20, 2003); *Tunica-Biloxi Tribe, et al. v. United States*, No. 02-2413 (D.D.C.); *Confederated Tribes of the Grand Ronde Community of Oregon v. United States*, No. 03-2244C (Fed. Cl.).

more than the mere shortfall between the amounts calculated as payable and the amounts actually paid. These are called the “miscalculated rate claims,” and they involve the correct share that IHS is required to pay under the ISDA out of the total pooled “indirect” (or administrative) overhead costs required to run all of a contractor’s operations. These claims are based upon the proposition that, in order to calculate the amount of “indirect” CSCs associated with ISDA contracts, the agency erroneously applied a standard government-wide OMB accounting system designed to calculate “indirect cost rates” for all recipients of federal contracts and grants. Since that accounting system assumes (contrary to the facts) that each grant or contract funding agency is required by law to pay its proportionate share of the total pooled “indirect costs” required for a contractor’s audited overhead operations, it is claimed that application of the accounting system led incorrectly to an understatement of the share of the costs that are properly allocable to agencies (like IHS) that by law actually are required to pay those costs. The Tenth Circuit in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), struck down this same practice in the context of Bureau of Indian Affairs ISDA contracts.

The lump sum years and the cap years. The Government underpaid IHS’ ISDA contracts over a period of years (and continues to do so today). Those years break down into two periods, albeit with an overlap: First, through fiscal year 1997 Congress appropriated to IHS a lump sum amount of between \$1.3 and \$1.4 billion dollars that was legally available to pay the CSCs due under the annual contracts. *Cherokee III*, 125 S.Ct. at 1177 (citing appropriations acts). Second, beginning in fiscal year 1999, Congress capped at an insufficient “not to exceed” amount the total IHS appropriations that were legally available to pay collectively all the ISDA contracts, the so-called

“cap years.” Fiscal year 1998 is the overlap year, because in that year Congress did not cap the legal availability of the lump sum appropriation to pay CSCs associated with “initial or expanded” ISDA contracts, but it did cap the total amount payable collectively to “ongoing” contracts. Pub. L. 105-83, 111 Stat. 1543, 1582-1583 (1997).³ The “shortfall” and the “miscalculated rate” claims each arise in lump sum and cap years.

2. Proceedings to date. The Pueblo of Zuni filed this action on September 10, 2001, Dkt. No. 1, and filed a First Amended Complaint on December 12, 2001. Dkt. No. 5. Both complaints asserted in detail both the shortfall and miscalculated rate claims.⁴ On December 28, 2001 the Court entered a stay pending the outcome of the Tenth Circuit *Cherokee I* litigation, Dkt. No. 8, an Order which was lifted on March 17, 2005 following the Supreme Court decision in *Cherokee III*. Dkt. No. 32. On April 19, 2005, Chief Magistrate Judge Garcia convened a Rule 16 scheduling conference. At the time the parties were in sharp disagreement over virtually all aspects of pretrial practice, including class certification proceedings, *see e.g.* Dkt. Nos. 35-42, 45, matters which Judge Garcia for the most part resolved in plaintiff’s favor.

³ Ramah and Tunica err in repeatedly stating that 1998 was simply a cap year, *see* Dkt. No. 54, Exh. A at 13 (par. 39); Dkt. No. 55 at 2.

⁴ *See* Dkt. No. 1 at 10-11 (pars. 19-20); Dkt. No. 5 at 10-11 (pars. 19-20), 30-32 (pars. 67-73). To support a fictitious story that neither Zuni nor its counsel knew anything about the miscalculated rate claim, Tunica and Ramah counsel initially misstated that “[T]he complaint did not include or articulate the miscalculation claim.” Dkt. No. 56 at 5 (par. 17). That sworn statement was untrue, as Mr. Gross’ “Erratum” admits. Dkt. No. 60. Equally untrue, but still uncorrected, is the allegation that “*Zuni* was initially filed only on the ‘shortfall claim,’ The miscalculation claim was added in summary form as a tagalong when *Zuni* counsel learned Intervenor intended to file *Tunica*.” Dkt. No. 54 at 2 (par. 4). The record plainly shows Mr. Gross’ first *Tunica* action did not come for another 14 months.

On April 21, 2005 the Court entered a scheduling Order directing the Government to file its Answer within 30 days, and further directing that class discovery proceed for a 90-day period, to be followed by class certification motions. Dkt. No. 52. At the Court's request, plaintiff Zuni withdrew a pre-discovery motion to certify a class comprised of all ISDA contractors contracting with IHS. Dkt. No. 51, withdrawing Dkt. No. 26. Pursuant to the Court's April 21 Order (and absent extensions of the discovery period), in August 2005 a fresh certification motion will be filed that takes advantage of all intervening class discovery.

On May 23, 2005 the Government filed its Answer, together with a limited motion to dismiss directed strictly to the Zuni Pueblo, but not to the class. Dkt. Nos. 58, 59. The motion seeks dismissal of Zuni contract claims post-dating fiscal year 1998. The motion also seeks dismissal of Zuni miscalculated rate claims post-dating fiscal year 1995. Also on May 23, Tunica and Ramah filed their Motion to Intervene, Establish Separate Classes, Appoint Interim Counsel, and Extend Class Certification Discovery Period.

ARGUMENT

I. APPLICANT-INTERVENORS HAVE NO RIGHT TO INTERVENE UNDER RULE 24(a).

A. Duplicative Litigation Must Be Rejected.

A threshold issue here presented is whether applicant-intervenors, as prospective parties to duplicative litigation, even have standing to seek intervention in this case. As previously pointed out (p.1, *supra*), 14 months after this case was initiated applicant-intervenors filed a separate suit in this Court covering the miscalculated rate claim, then voluntarily dismissed that action and promptly

refiled in the District of Columbia. Applicant-intervenors' D.C. district court case, while many claims and parties have been dismissed, is nonetheless still extant.

Applicant-intervenors' proposed Complaint in Intervention here is "in form substantially identical" to the Second Amended Class Action Complaint in *Tunica*. Dkt. No. 54 at 2 (par. 5); *see* Exh. 7. On its face, therefore, the Tunica and Ramah intervention motion is designed not so much to protect an otherwise unprotected interest, but rather to escape the adverse law of the case established in *Tunica*. Parties may not play games with federal district court jurisdiction, filing and litigating duplicative suits in the hope of finding one favorable forum. *O'Hare Int'l Bank v. Lambert*, 459 F.2d 328, 331 (10th Cir. 1972) ("It is well established in this Circuit that where the jurisdiction of a federal district court has first attached, that right cannot be arrested or taken away by proceedings in another federal district court."); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2nd Cir. 2000) ("As a part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit."). As the Tenth Circuit stated in *Cessna Aircraft Company v. Brown*, 348 F.2d 689 (10th Cir. 1965):

The rule is that the first federal district court which obtains jurisdiction of parties and issues should have priority and the second court should decline consideration of the action until the proceedings before the first court are terminated. The simultaneous prosecution in two different courts of cases relating to the same parties and issues "leads to the wastefulness of time, energy and money."

348 F.2d at 692 (footnotes omitted, emphasis supplied).

As applicant-intervenors state in support of intervention (Dkt. No. 55 at 3-4), a purpose of Rule 24 is to reduce "a multiplicity of suits where common questions of law or fact are involved." The problem with their argument is that by filing separately in the D.C. district court applicant-

intervenors have already created a multiplicity of suits. Nor may applicant-intervenors solve this problem by a voluntarily dismissing *Tunica* under Rule 41 (a)(1), since under that Rule, given the prior dismissal of the same action in this Court, such a “dismissal operates as an adjudication on the merits. . . .”

In short, the Tunica-Ramah attempt to submit a duplicative complaint in this case should be rejected without even reaching Rule 24.

B. Applicant-Intervenors Do Not Meet the Standards for Intervention under Rule 24(a).

Applicant-intervenors have moved to intervene as of right, purportedly in accordance with Rule 24(a), which provides for intervention -

upon timely application . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

The Rule thus provides four criteria that must be satisfied to qualify for intervention as of right: (1) the application must be timely; (2) the applicant must claim an interest in the subject matter of the action; (3) the disposition of the suit needs adversely to affect the applicant’s ability to protect its claimed interest; and (4) the applicant’s claimed interest may not be adequately represented by existing parties. *See Utah Assoc. of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (quoting *Coalition of Az/NM Counties v. Dept. of Interior*, 100 F.3d 837, 840 (10th Cir. 1996)).

In the present posture of this case, applicant-intervenors do not meet any of the standards for intervention as of right: (1) the application is untimely because it is premature; (2) applicant-intervenors have no interest in Zuni claims against the Government based exclusively upon Zuni

contracts with IHS, which at this time is the sole subject matter of this action; (3) applicant-intervenors would not be bound by any decision in this case (absent future class certification) and, in any event, can fully protect their interests in *Tunica*; and (4) applicant-intervenors do not allege that Zuni Pueblo is not an adequate class representative and their attacks upon Zuni counsel, to the extent relevant under Rule 24(a), are wholly without any factual basis.

1. Applicant-intervenors have no present interest in the subject matter of this case and, accordingly, their application for intervention is premature. The Tenth Circuit requires that an intervenor's interest in the proceedings be direct, substantial and legally protectible. *Coalition*, 100 F.3d at 840; *see also In re Kaiser Steel Corp.*, 998 F.2d 783, 791 (10th Cir. 1993) (quoting *United States v. Perry County Bd. Of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978)). As noted above, this case presently involves only Zuni claims against the Government for the breach of Zuni contracts with IHS, and has been so treated in the federal defendants' motion to dismiss. Indeed, at the request of the Court, plaintiff has withdrawn its pre-discovery motion for class certification so that specific issue is not currently pending. Applicant-intervenors have no direct or substantial interest in Zuni's agreements, and, accordingly, their application is untimely because it is premature.⁵

Applicant-intervenors insist nonetheless that they may intervene now under Rule 24(a) because there is a putative class which may (and hopefully will) be certified at some point in the

⁵ Applicant-intervenors allege that the collapse in March 2005 of a 2003 joint prosecution agreement among counsel "necessitat[ed] this motion." Dkt. No. 54 at 2 (par. 6). Not true, but irrelevant. The claimed right to intervene asserted by Tunica and Ramah depends upon the nature of their interests, not upon whether the relationship of their counsel with Zuni counsel is amicable.

future. This contention is based upon the erroneous assumption (discussed *infra* at pp. 14-15) that the present representation of the putative class is not adequate. But Rule 23 separately addresses intervention issues for class members and recognizes their interests upon certification. Thus, upon certification of a Rule 23(b)(3) class, the ensuing class notice must inform absent class members of their right at that point, not earlier, to “enter an appearance through counsel if the member so desires.” Rule 23(c)(2)(B). Even then, the right under Rule 23(c)(2)(B) is an individual right, not a right of a class member to intervene by bringing its own class action and demanding to represent the class. The latter result would make certification by the Court a futile act - a consequence the Rules clearly do not contemplate.

2. Applicant-intervenors’ interests will not be adversely affected by this action. As the Tenth Circuit has pointed out, “the question of impairment is not separate from the question of existence of an interest.” *Clinton*, 255 F.3d at 1253 (citing *Natural Res. Def. Council v. United States Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345 (10th Cir. 1978)). Since the applicant-intervenors have no present interest in this case (*see* p. 10, *supra*), their interest cannot be impaired by its disposition. Just as the Zuni plaintiff here fortunately is not bound by the rulings in *Tunica* by the district court in another Circuit, so too, absent certification, will *Tunica-Ramah* not be bound by the rulings of this Court on a Zuni cause of action. *See, e.g., Chevron USA Inc. v. School Bd. Vermillion Parish*, 294 F.3d 716, 720 (5th Cir. 2002) (holding that district court’s order did not bind members of putative class because no class action was certified); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n.1 (9th Cir. 2000) (holding a summary judgment against an uncertified class only bound named members, with no res judicata effect on claims of unnamed members of

purported class). Moreover, applicant-intervenors already have asserted and can protect their interests in the *Tunica* action.

As a rationale for claiming “impairment,” applicant-intervenors candidly state that “[t]he fact that class discovery is now underway in *Zuni* but stayed in *Tunica* disadvantages applicants.” Dkt. No. 55 at 5. Possibly true, but entirely the product of Tunica-Ramah’s own decision to change course and to abandon the District of Columbia. It is the stay in *Tunica* and the lengthy process for securing an MDL transfer that impairs applicant-intervenors’ march to discovery, not any activities in this case. Applicant-intervenors need only withdraw their transfer motion and reactivate their case before Judge Walton in order to conduct the discovery they say they seek.

Applicant-intervenors also contend that their rights are being impaired because, as they see it, the miscalculated rate claim which is the sole subject of their Complaint (Dkt. No. 55 at 3) has been “subordinated” to the shortfall claims, which have also been asserted in this case. *Id.* at 5. The Court is told that “major avenues of discovery in relation to class certification [for the miscalculated rate claim] will be foreclosed” absent intervention. How applicant-intervenors could foretell the scope of plaintiff’s discovery before they saw it, or that the miscalculated rate claim would in the future be slighted, is never really explained.

Applicant-intervenors next complain that “Counsel for *Zuni* has performed no discovery as to the miscalculation claim.” *Id.* Another incorrect assumption. Applicant-intervenors simply overlook the Government’s core position that what makes these cases not class worthy is not the nature of the claims (shortfall or miscalculated rate), but the fact that the claims involve contracts, and each contract supposedly varies one from the next. While we dispute that proposition, Judge Garcia

at the April 19, 2005 scheduling conference urged the parties to prioritize undertaking a joint sampling of the thousands of contracts in contention. The next day Zuni counsel proposed a detailed written protocol to defendants' counsel for this purpose. Between then and May 25, 2005, extensive discussions and consultations followed, the parties reached final agreement and they selected and confirmed the identity of the chosen contracts. Given the Government's opposition to class certification, this exercise was a key and vital part of the class discovery process, yet applicant-intervenors either did not know of it (despite having their counsel at the scheduling conference) or chose to ignore it.

Moreover, contrary to applicant-intervenors' argument regarding discovery, following a month of research, drafting and preparation - interrupted from time to time by the exchange of possible pre-settlement protocols regarding the *Cherokee III* shortfall claims in lump-sum years (as also instructed by Judge Garcia on April 19), and further interrupted by the contract sampling protocol just discussed - Zuni on May 27, 2005 served upon the defendants a comprehensive first set of interrogatories, document production requests and admissions. If necessary, once responses to this discovery are received, depositions will follow in July.⁶

In short, applicant-intervenors' claimed grounds for "impairment" cannot withstand scrutiny.

3. Applicant-intervenors' interests are more than adequately represented by the Pueblo of Zuni. The last standard for intervention under Rule 24(a)(2) is whether the applicant's claimed

⁶ Tunica-Ramah tries to fault Zuni lead counsel Miller for taking a long-planned vacation. Dkt. No. 55 at 5. That vacation will end June 22, in all likelihood before the defendants fully respond to the Zuni discovery requests. In any event, Zuni Pueblo is represented by Mr. Miller's law firm, which includes many attorneys experienced in the applicable law who can act during his absence.

interest “is adequately represented by existing parties,” in this case the Zuni Pueblo. According to applicant-intervenors, “[t]he ultimate issue is adequacy of representation.” Dkt. No. 55 at 6. Applicant-intervenors’ focus on the “adequacy” issue, however, is not directed at all to the adequacy of Zuni Pueblo to represent their interest - a subject on which their moving papers are silent - but rather to the adequacy of counsel to represent the putative class under an entirely different Rule (a matter we discuss separately, *infra* at pp.16-23). This omission is critical, and to the Tunica-Ramah application fatal, because the law presumes adequacy of the existing party’s representation “when the objective of the applicant for intervention [*i.e.*, prosecution of miscalculated rate claims] is identical to that of one of the parties [Zuni].” *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986); *see also Kiamici R.R. Co. v. Nat’l Mediation Bd.*, 986 F.2d 1341, 1345 (10th Cir. 1993) (same).

Actually Zuni Pueblo is a far superior representative of the putative class - all Indian tribes and tribal organizations that have been underpaid on their IHS contracts - than either Tunica-Biloxi or Ramah. Zuni has asserted both shortfall and miscalculated rate claims in both lump sum years and cap years. In their proposed Complaint in Intervention, on the other hand, applicant-intervenors assert only miscalculated rate claims.

In order to escape this obvious flaw in their alleged ability to represent the putative class, applicant-intervenors argue that the miscalculated rate claims are a separate class (Dkt. No. 55 at 2 and elsewhere), a question that the Court has yet to consider. Such a bifurcation of the class, among other problems and duplications of effort, could mean that the Government’s liability in cap years would be determined in two separate proceedings, one for shortfall claims and a second for

miscalculated rate claims, presumably (as Tunica-Ramah ask) with two sets of class counsel.⁷ That course would hardly carry out Rule 24's purpose to avoid a multiplicity of overlapping suits.

II. APPLICANT-INTERVENORS' REQUEST FOR PERMISSIVE INTERVENTION UNDER RULE 24(b) SHOULD BE DENIED.

Applicant-intervenors' request for permissive intervention under Rule 24(b) should be denied for many of the same reasons already discussed showing that they are not entitled to intervene under Rule 24(a). This conclusion is particularly appropriate where, contrary to the well-settled rule in this Circuit (*see pp. 7-9, supra*), applicant-intervenors are seeking through intervention to escape adverse rulings on their claims in a previously-filed suit elsewhere.

The cases cited by applicant-intervenors in support of permissive intervention before class certification (Dkt. No. 55 at 10-11) all are inapposite: (1) there is here no class defect that need be cured, as asserted in *Bromberg v. Michigan Educ. Ass'n-NEA*, 178 F.R.D. 148 (E.D. Mich. 1995); (2) there is here no infirmity in the legal position of the original plaintiff, as asserted in *McCausland v. Shareholders Mgt. Co.*, 52 F.R.D. 521 (S.D. N.Y. 1971); and (3) there is here no aspect of the litigation that Tunica-Ramah are needed to illuminate, as asserted in *DeGregorio v. O'Bannon*, 86 F.R.D. 109 (E.D. Pa. 1980). The fact that Tunica-Ramah counsel might handle the case differently than Zuni counsel "is not sufficient to challenge the adequacy of representation." *Bumgarner v. Ute*

⁷ As part of their moving papers, applicant-intervenors go so far as to ask that their attorney, Mr. Gross, be declared "interim class counsel" for "all" cap year claims, which, by its terms, would include the shortfall claims in cap years. Dkt. No. 54 at 5 (par. E). That would be a rather unusual outcome since the proposed Complaint in Intervention, like *Tunica*, does not assert a shortfall claim for any years. How an attorney can serve as class counsel for a claim his clients do not assert, or why the Court should approve such an illogical appointment, is left unaddressed.

Indian Tribe of the Uintah and Oray Reser., 147 F.2d 1305, 1308 (10th Cir. 1969), citing *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (“Mere differences of opinion among attorneys is not of itself inadequate representation within the meaning of the Rule [24(a)(2)]”); *see also Te-Moack Bands of Western Shoshone Indians of Nev. v. United States*, 18 Cl. Ct. 82, 87 (1989) (same).

III. APPLICANT-INTERVENORS’ COUNSEL HAS NO RIGHT TO BE APPOINTED “INTERIM COUNSEL” UNDER RULE 23(g)(2)(A).

Applicant-intervenors and their counsel (four solo practitioners headed by Mr. Gross) also seek to have Mr. Gross appointed “interim counsel” under Rule 23(g)(2)(A). As a preliminary matter, plaintiff suggests that no issue involving Rule 23(g)(2)(A) is properly presented to the Court. There is only one party and one counsel in this case, and “[o]rdinarily such [*i.e.*, pre-certification] work is handled by the lawyer who filed the action.” Advisory Committee Notes, Fed. R. Civ. P. 23 (2003 Amendments). Since applicant-intervenors are not parties to this action and, as heretofore demonstrated have no right to intervene, Mr. Gross is simply ineligible to secure appointment as interim counsel.

Assuming, *arguendo*, that circumstances were otherwise and the appointment of interim counsel were an open question, the issue before the Court would not be a beauty contest among competing legal teams, but only whether Mr. Miller and his law firm, as the initial lead counsel, are qualified to continue to serve. As the following discussion will show, they are eminently qualified and, accordingly, whatever abilities the Gross group may possess are irrelevant.

- A. The record amply demonstrates Zuni counsel’s adequacy to represent the class and to be appointed as interim counsel.

Although “the competence and experience of class counsel . . . will most often be presumed

in the absence of proof to the contrary,”⁸ here Mr. Miller’s 27-year record of achievements demonstrates his and his firm’s superb qualifications in the specific legal areas pertinent to this litigation, namely in litigation against IHS over CSCs and in class action litigation. *See* Exh. 8 (Résumé and *Curriculum Vitae* of Lloyd Benton Miller).

The most powerful evidence of his skills and experience as an advocate is Zuni counsel’s extraordinary service to tribal contractors generally in a 10-year battle with IHS spanning three major cases and multiple administrative board, district court, and appellate court decisions, all culminating in a unanimous ruling against the Government in *Cherokee III* that, *inter alia*, reversed a prior Tenth Circuit ruling in the Government’s favor. The United States already has paid \$12.6 million in damages to the Cherokee Nation in the Federal Circuit portion of that case, with additional damages under negotiation for the portion of the case returned to the Eastern District of Oklahoma. It would be difficult to conceive of a more spectacular victory for tribal contractors than *Cherokee III*, a victory that speaks for itself in terms of Zuni counsel’s adequacy to represent the class. Indeed, without this victory in the Supreme Court, the current claims would not exist.

Beyond the *Cherokee* cases, this Court is already familiar with Mr. Miller’s work in the “*Ramah*” litigation against the BIA, where the Zuni Tribe filed a class action to litigate claims that class counsel before then had never filed in *Ramah*. Those claims challenged the BIA’s failure to pay “direct” CSCs back to fiscal year 1992. *See Pueblo of Zuni v. United States*, Case No. CIV00-0365 LH/WWD (D.N.M.), consolidated into *Ramah Navajo Chapter, et al. v. Norton*, Case No.

⁸ Conte and Newberg, *Newberg on Class Actions*, § 3.24 at 3-133 -134 (4th ed. 2002).

CIV90-0957. The suit led directly to a partial settlement in 2002 of \$29 million. *Ramah Navajo Chapter, et al. v. Norton*, 250 F.Supp.2d 1303 (D.N.M. 2002) (approving settlement).⁹ Zuni counsel also appeared before this Court in an earlier phase of the *Ramah* litigation, where Mr. Miller successfully represented certain absent class members whom class counsel had initially (and wrongfully) excluded from a 1999 class settlement. See *Ramah Navajo Chapter v. Lujan*, 50 F.Supp.2d 1091 (D.N.M. 1999); *Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Babbitt*, 65 Fed. Reg. 4989 (Feb. 2, 2000) (discussing, *inter alia*, the so-called “DCA” class members’ claims).

These are not Zuni counsel’s only involvement with the ISDA, CSCs, and IHS contracting issues. Mr. Miller was also deeply involved in lobbying the 1988 Amendments to the ISDA (and in the enactment of Federal Tort Claims Act-related measures that preceded and followed those Amendments). He crafted the tribal proposal that became the 1990 Technical Amendments. He was the lead tribal drafter for the massive 1994 ISDA Amendments upon which much of the recent litigation has depended. More recently, Mr. Miller played a central role in securing the 2000 ISDA Amendments adding Title V to that Act (and in resisting amendments that would have weakened tribal rights to CSCs), and he has frequently been invited to testify before Congress and to provide congressional staff training on issues pertaining to CSCs.

⁹ Mr. Miller’s filings for the Pueblo of Zuni not only preserved the direct CSC claims, but also added an additional year, representing millions of dollars for the class. In recognition of his expertise on the direct CSC claim, Mr. Miller was appointed – by agreement with Mr. Gross – as co-lead counsel for that claim, and he has continued to engage in nearly completed negotiations on the claim with the Government.

On the regulatory front, Mr. Miller served on the ISDA Title I Negotiated Rulemaking Committee and co-chaired its drafting committee; served as a legal advisor to the ISDA Title V Negotiated Rulemaking Committee; has been an active member of the IHS Contract Support Cost Work Group since its inception in the mid-1990s; and has been the lead tribal attorney participating in the BIA Contract Support Cost Work Group established in 2003 to develop the BIA's first contract support cost policy. He also served on, and was retained to author, the 1999 Report of the National Congress of American Indians on Contract Support Costs.

In other related litigation Mr. Miller and his firm successfully challenged an illegal BIA CSC practice in *Ramah Navajo Sch. Bd., et al. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (the first ever appellate decision on CSCs); successfully enforced ISDA tribal contractor rights against a health insurer in *Yukon-Kuskokwim Health Corp. v. Trust Ins. Plan for Southwest Alaska*, 884 F.Supp. 1360 (D. Alaska 1994); and successfully secured a tribal exemption for ISDA contractors from the National Labor Relations Act, *Yukon-Kuskokwim Health Corp. v. Int'l Brotherhood of Teamsters, Local 959, AFL-CIO, CLC.*, 341 NLRB No. 139 (May 28, 2004), on remand from *Yukon-Kuskokwim Health Corp. v. Nat'l Labor Relations Bd.*, 234 F.3d 714 (D.C. Cir. 2000), reversing 328 NLRB 101 (1999) and 329 NLRB 86 (1999).

In addition to this large body of ISDA-related work, Mr. Miller is also highly experienced in class action matters, having served by dual federal and state court appointment as Plaintiffs' Liaison Counsel since 1989 in the historic EXXON VALDEZ oil spill litigation, and having also served in that case as Lead Class Counsel for the Alaska Native Class. *See e.g., In re the EXXON VALDEZ*, 296 F. Supp.2d 1071 (D. Alaska 2004) (remitting 1994 punitive damage award to \$4.5

billion), on remand from 270 F.3d 1215 (9th Cir. 2001); *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997) (dismissing additional economic injury claims under maritime law over and above \$20 million compensatory damage award).¹⁰

B. Mr. Gross' Attacks Upon Mr. Miller's Qualifications as Class Counsel Lack Substance or Credibility.

In an effort to undercut Zuni counsel's otherwise impeccable credentials, applicant-intervenors' counsel levies a series of charges against Mr. Miller's conduct in this case and elsewhere. Not one of these accusations has the slightest merit.

1. Contrary to Mr. Gross' suggestion of inadequate pleading of the miscalculated rate claim (Dkt. No. 56 at 6, par. 17 ("cursory, conclusory allegations")), the First Amended Complaint asserts two causes of action covering the miscalculated rate claim. *See* p.6, n.4, *supra*. Particularly in this era of "notice" pleading, the allegations of the Complaint are plainly sufficient to state a claim. Certainly the federal defendants so read the Complaint since their motion to dismiss is partially directed to eliminating certain miscalculated rate claims.

2. Mr. Gross faults Zuni counsel for failing to "name either the Secretary of the Interior or Chief of the National Business Center as parties-defendant" (Dkt. No. 56 at 5, par. 17), whom he describes as "necessary and indispensable" (Dkt. No. 54 at 3, par. 7). Nonsense. If that statement were true, applicant-intervenors would be in even greater trouble in *Tunica* because Judge Walton there dismissed the Chief of the National Business Center from the suit.

¹⁰ Mr. Miller has not worked alone in these matters, and credit for the achievements noted goes widely, including to several members of his firm's CSC litigation team. Information regarding the Sonosky firm is available on the web at www.sonosky.net.

The First Amended Complaint does not name these federal officials as defendants because the underpayments were made by IHS and suing the above-identified individuals is not necessary to recover damages for that wrong from the United States. Moreover, and contrary to Tunica-Ramah's assertions, the fault here lies not in the rate-setting accounting system administered by the agencies charged with setting rates for the Government; rather (as the Tenth Circuit held in *Ramah Navajo Chapter*, 112 F.3d 1455) the fault lies with the IHS's (and the BIA's) having adopted that system to determine their indirect CSC payment requirements under the ISDA.¹¹

3. Tunica-Ramah counsel additionally charges that plaintiff's class certification motion was "defective in its presentation of the miscalculation claim," mentioning it only in passing. Dkt. 56 at 7, par 23; *see also* Dkt. No. 55 at 8. Zuni correctly did not focus large portions of the withdrawn class certification motion on the merits of the miscalculated rate claim because the merits are less significant at the certification stage. *See, e.g.*, criteria for maintaining a class action set forth in Rule 23(a) and (b)(3). Restating at length the well-known nature of the miscalculated rate claim at the certification stage was thus unnecessary. This is particularly true here, for this Court has already certified a class (in 1993) where the miscalculated rate claim was the only claim presented (*Ramah Navajo Chapter*, Dkt. No. 95), a matter Zuni counsel brought to the Court's attention in the now-withdrawn *Zuni* class motion.

¹¹ To the extent reform of the rate setting system itself is in order for other reasons (such as to address the "carryforward" issue), such relief is already being pursued against the very same defendants in the *Ramah* case. An agency need be ordered only once to conform its conduct with the law. The carry-forward issue is hardly an "essential element[]" of the miscalculated rate claim, Dkt. No. 55 at 6, as best demonstrated by the simple fact that Tunica and Ramah counsel never even pled it in the successful *Ramah* litigation.

4. Contrary to applicant-intervenors' assertion (Dkt. No. 55 at 5), Zuni has not postured the miscalculated rate claim in some position inferior to the shortfall claim. There is but one class of IHS contractors, just as there was in *Ramah* but one class of BIA contractors (although the two classes overlap to the extent a given tribal contractor contracts both with the BIA and the IHS). Zuni seeks to certify that single class of IHS contractors, so that the class then can pursue each claim. Nothing in any pleading in this case suggests otherwise, although (in a suggestion Tunica-Ramah ought to welcome) the now-withdrawn class certification motion did point to the Court's discretion eventually to establish subclasses for the various claims.

There is one sense in which featuring the shortfall claim is logical at this stage of the proceedings: the Supreme Court in *Cherokee III* has just sustained the shortfall claim. The same cannot be said of the miscalculated rate claim, which the Government now sharply contests in reliance on intervening statutory amendments. In seeking class certification, surely it is a sound tactic for class counsel to focus attention on the single claim that even the Government must admit cannot be contested on the merits.

5. Applicant-intervenors emphasize the fact that certification was denied in another CSC claim handled by Mr. Miller. *Cherokee Nation v. United States*, 199 F.R.D. 357 (E.D. Ok. 2001), cited in Dkt. No. 55 at 8 and Dkt. No. 56 at 5, par. 16. The fact that in 2001 the Oklahoma district court in *Cherokee I* exercised its discretion not to certify a class is hardly persuasive (or even relevant) here, particularly when the reasons for not granting certification in *Cherokee I* were subsequently rejected by the Supreme Court. Moreover, applicant-intervenors' counsel hardly does the class any service by suggesting arguments the Government might make in opposing class

certification here. *See* Dkt. No. 55 at 5 (referring to “a shortfall claim that has not proven classworthy”).

6. Despite Tunica and Ramah’s suggestion otherwise (Dkt. No. 55 at 7), the Government does not challenge plaintiff’s exhaustion of its miscalculated rate claims in fiscal years 1993 - 1995. On the other hand, applicant-intervenors’ alleged “scrupulous[] exhaust[ion]” of their own claims (*id.*) is somewhat weakened by Judge Walton’s dismissal of their claims for several years precisely on “exhaustion” grounds. *See* Exh. 1 at 9-15.

7. Finally, Mr. Gross charges that “Zuni counsel in the *Cherokee* case elevated the interests of individual clients. . . to the detriment of the class” and showed a “willingness to sacrifice class cap year claims generally. . . .” Dkt. No. 55 at 9; *see also* Dkt. No. 56 at 6, par. 20. This cryptic statement apparently reflects Mr. Gross’ own intemperate, pre-oral argument comments upon one of Mr. Miller’s *Cherokee III* briefs. As Mr. Miller then advised Mr. Gross, his concerns were overblown and unrealistic - and so it turned out. The Supreme Court in *Cherokee III* not only validated the lump sum year shortfall claims asserted in this case and made possible the continued prosecution of this suit, but also, contrary to Mr. Gross’ fears, said not one word, adverse or otherwise, about class actions, cap years or the remaining claims in this case which, of course, were not before the Court. Significantly, key passages in the *Cherokee III* opinion (drawn directly from Mr. Miller’s brief) actually point to arguments in support of cap year claims. Although personal differences between applicant-intervenors’ counsel and Zuni counsel may have “destroyed applicants’ confidence in his dedication to pursuing cap years” (Dkt. No. 55 at 9), opposing counsel’s subjective opinion is not the proper yardstick for a Rule 23(g)(2) assessment.

CONCLUSION

Applicant-intervenors and their counsel are understandably frustrated with the setbacks they have suffered in *Tunica* and with their lack of forward progress, particularly since the decision in *Cherokee III*. But their frustration is the natural outcome of a series of strategic choices they made beginning in 2001, and applicant-intervenors must deal with those issues in the context of their own litigation. In the event MDL transfer of *Tunica* to this District occurs in the next few months – and Zuni has, at Tunica and Ramah’s request, consented to that transfer in the interest of judicial efficiency – there will be ample opportunity for the Court and the parties to sort out how best to proceed from that point forward. For the time being, however, no basis exists in law, equity or logic for granting any aspect of the applicant-intervenors’ motion. The motion should be denied.

Respectfully submitted this 7th day of June 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the following documents:

- 1) Plaintiff's Opposition to Expedited Motion By Tunica-Biloxi Tribe and Ramah Navajo School Board to Intervene, Establish Separate Classes, Appoint Interim Counsel, and Extend Class Certification Discovery Period (Dkt. No. 54, filed May 23, 2005); and
- 2) Exhibits 1-8 [thereto]

to the following attorneys of record this 7th day of June 2005:

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