

**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.

Case No. CV 01-1046 WJ/WPL

UNITED STATES OF AMERICA; et al.,

Defendants.

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

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GLOSSARY OF TERMS

Abbreviation	Term
AFA	Annual Funding Agreement
Def. Ans. FAC	Defendants' Amended Answer to First Amended Complaint (Dkt. No. 252)
BIA	Bureau of Indian Affairs, U.S. Department of the Interior
CSC(s)	Contract support cost(s)
DEF _____	Defendants' document production Bates numbers
Def. Adm.	Defendants' Admissions
DCA	Division of Cost Allocation, U.S. Department of Health and Human Services
DHHS	U.S. Department of Health and Human Services
DOI	U.S. Department of the Interior
FAC	First Amended Complaint (Dkt. No. 5)
HQ-DFM	Division of Financial Management, IHS Headquarters
HQ-OTP	Office of Tribal Programs, IHS Headquarters
IHS	Indian Health Service
ISD	Indian Self-Determination
ISDA	Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, as amended (codified at 25 U.S.C. §§ 450a-458aaa-18)
NBC	National Business Center, U.S. Department of the Interior
OIG	Office of Inspector General, U.S. Department of the Interior
OTP	Office of Tribal Programs, IHS Headquarters
PL _____	Plaintiff's document production Bates numbers
Pl. Exh.	Plaintiff's Exhibits accompanying Memorandum in Support of Motion for Class Certification and for Approval of Class Notice

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.

Case No. CV 01-1046 WJ/WPL

UNITED STATES OF AMERICA; et al.,

Defendants.

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

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(b)(3), Plaintiff Pueblo of Zuni respectfully moves the Court for certification of the following class:

All Indian Tribes and Tribal organizations that have contracted with the Indian Health Service under the Indian Self-Determination Act, 25 U.S.C. §§ 450 - 458aaa-18, at any time from fiscal year 1993 to the present (including FY 2005).

Class certification is sought with respect to the following four claims:

1. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of the Defendants' common course of conduct of denying full funding of contract support cost requirements associated with "new or expanded" contracts.
2. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of the Defendants' common course of conduct of denying full funding of contract support cost requirements associated with "ongoing" contracts.

3. Claims under the ISDA for statutory or contractual damages relating to contracts in effect at any time during fiscal year 1995 to the present and arising out of Defendants' common course of conduct of denying full funding of contract support costs by use of a methodology for determining indirect administrative contract support costs that undercalculates those costs.

4. Claims falling substantively within either Claims 1, 2 and/or 3, but relating to contracts in effect for fiscal years 1993 or 1994.

The measure of damages sought for the class is the total of the shortfalls during the claim period resulting from the Defendants' underfunding of contract support cost requirements pursuant to Class Claims 1 and 2, and the additional amounts that Defendants would have paid but for the miscalculation of contract support costs as described in Class Claim 3. A proposed Order and Notice accompany this Memorandum as Pl. Exhs. 1 and 1A.¹

II. SUMMARY OF ARGUMENT

Rule 23 is "intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments." Gottlieb v. Wiles, 11 F.3d 1004, 1007 (10th Cir. 1993).

This is a paradigm class action case. It follows the Supreme Court's decision in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005), which unanimously declared illegal the Government's contracting practices under the ISDA – practices which resulted in the chronic underfunding of thousands of Government contracts with hundreds of identically-situated Indian Tribes administering critical Federal health care services. Those Tribal contractors now seek to vindicate their rights.

The putative class consists of hundreds of Tribes which, because of the Government's

¹ Although Plaintiff does not believe subclasses are necessary, if in the course of the litigation the Court determines that subclasses have become appropriate, four subclasses could be established reflecting the four claims.

contracting practices since 1992, were unlawfully deprived of tens of millions of dollars in “contract support costs” to which, as the Supreme Court held, they were clearly entitled by law. As we show in Part III, the claims at issue here arose out of a single statutory scheme and a single course of conduct, involving Government contracting and accounting practices that were consistently applied to deny all class members the funding to which they were entitled by law.

As we then show in Part IV, each element of Rule 23’s test for class certification is readily satisfied. The hundreds of Tribal contractors across the country with identical claims could not practicably be joined, and would therefore be deprived of any ability to recover on their claims absent certification. Both questions of law, and of fact, are common, as to both the claims asserted by the class and the principal defenses interposed by the Government. The Pueblo of Zuni, as class representative, has alleged claims that are typical of the class as a whole, and has clearly demonstrated its capacity to fully and effectively pursue those claims on behalf of the class.

Although the Government doubtless will insist that the many common questions do not predominate because each Tribal contractor had a materially different contract, this is clearly wrong. First, it is not true as a factual matter. A stipulated sampling of the class members’ contracts shows that almost all are based upon a single “model” contract whose relevant terms were dictated verbatim by Congress, and that all contain terms which, for purposes relevant here, are materially identical.

Second, even were this not so, the provisions of the contracts themselves do not control, for the question before this Court is what the statute requires, not what individual contracts may say. That explains why, in deciding the Cherokee case, the Supreme Court relied solely on the statute, and did not even refer to, much less base its decision on, the provisions of any individual contract

(notwithstanding the Government's urging otherwise).

Finally, not only is class certification the superior and efficient way to proceed, it is the only just way to proceed. Absent class certification, the burdens and costs of litigation will discourage scores, if not hundreds, of Tribal contractors from seeking to vindicate their rights in court, while multiplying manifold the difficulties and expenses on those that do. Particularly in a setting where the Government shoulders a heavy trust responsibility to protect and advance the interests of Tribes, and specifically to provide for the health of Tribal members, it is unconscionable for the Government to escape its liability, confirmed by the Supreme Court, arising from its illegal conduct toward these Tribes – the result that will follow if the Tribes are denied their day in court through the means that are readily available under Rule 23. In short, by certifying the class this Court will “secure the just, speedy and inexpensive determination of every action” arising out of the Government's illegal conduct. Fed. R. Civ. P. 1.

III. STATEMENT OF THE CASE

A. Nature of the Case

This class action lawsuit arises under the Indian Self-Determination Act, 25 U.S.C. §§ 450 - 458aaa-18 (ISDA or Act). The action seeks both statutory and contract damages for the Defendants' continuing course of conduct and implementation of a systemwide practice, carried out over several years through a succession of unauthorized “Circulars,” that annually underpaid hundreds of Tribal contractors the “contract support costs” which the ISDA requires must be paid in connection with

contracts awarded by the Indian Health Service (IHS).²

The Court in its Memorandum Opinion and Order on Motions Relating to Intervention (Dkt. No. 145, Oct. 18, 2005) succinctly summarized the case this way:

Plaintiff contends that Defendants violated the ISDA by (1) failing to properly calculate the Tribes' "contract support cost" requirements, (2) failing to pay the properly calculated amounts required to be paid, and (3) failing to fully pay even the Tribes' undercalculated "contract support cost["] requirements.

Id. at 2. The parties and the Court have coined the last item the "shortfall claim" (now, Class Claims 1 and 2), and the first two items the "miscalculated rate claim" (now, Class Claim 3). Id. at 3.³ Both claims have long been the subject of separate class action litigation in this District arising under the same statute against IHS's sister agency the Bureau of Indian Affairs (BIA).⁴ In contrast, to date litigation against IHS has generally proceeded only on an individual basis.⁵

² For ease of reference, this Memorandum uses the term "Tribes" and "Tribal contractors" to include "Tribal organizations" contracting under the Act. 25 U.S.C. § 450b(i). Unless context indicates otherwise, this Memorandum also uses the term "contract" to include "self-determination contracts," § 450b(j), self-governance "compacts," § 458aaa-3, and "annual funding agreements," the same conventions the Supreme Court used in Cherokee, 543 U.S. 631 ("Cherokee III"). Finally, this brief uses the terms "Secretary" and "Indian Health Service" (IHS) interchangeably because, in so far as pertinent here, the ISDA's mandates are directed to Federal programs operated by the Secretary, and within the Department of Health and Human Services (DHHS) those programs are carried out by IHS.

³ See First Amended Complaint (FAC) (Dkt. No. 5), Counts III-VI (stating the shortfall claim), Counts I & II (stating the miscalculated rate claim).

⁴ Ramah Navajo Chapter v. Norton, Case No. 90-0957 LH/KBM (D. N.M.) ("Ramah"), Order of Oct. 1, 1993 (granting class certification) (Pl. Exh. 2). See also Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) ("Ramah I") (sustaining class miscalculated rate claim against the BIA), on remand sub nom. Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091 (D. N.M. 1999) ("Ramah II") (approving \$76 million class settlement of miscalculated rate claim against the BIA and IHS for fiscal years 1989-1993, and reserving later claims), and Ramah Navajo Chapter v. Norton, 250 F. Supp. 2d 1303 (D. N.M. 2002) ("Ramah III") (approving \$29 million class settlement of pre-1994 shortfall and other CSC claims against the BIA, and reserving later claims). The BIA is an agency within the Department of the Interior (DOI). IHS is an agency within DHHS, and was created when the BIA's health functions were transferred from DOI under the 1954 Transfer Act, 42 U.S.C. §§ 2001-2004b.

⁵ E.g. Cherokee III, 543 U.S. at 635-636 (consolidating two cases involving two Tribes, Cherokee Nation, et al. v. Thompson, 311 F.3d 1054 (10th Cir. 2002) ("Cherokee I") and Thompson v. Cherokee Nation, 334 F.3d 1075 (Fed. Cir. 2003) ("Cherokee II")); Shoshone-Bannock Tribes v. Leavitt, 408 F. Supp. 2d 1073 (D. Or. 2005) (reinstating

This action seeks class relief on behalf of all Tribal contractors on both the “shortfall claim” (Class Claims 1 and 2) and the “miscalculated rate claim” (Class Claim 3). The shortfall claims are precisely the type of claims the Supreme Court resolved against the Government in Cherokee III, and the miscalculated rate claims are precisely the type of claims the Tenth Circuit resolved against the Government in Ramah I. Class Claim 4 embraces both types of claims for a discrete two-year period as to which Plaintiff expects Defendants to interpose additional common defenses. (The shortfall claims are also the same type of claims the BIA settled in Ramah III, 250 F. Supp. 2d at 1305-1306.)

B. Statutory Background

Congress in the 1975 Indian Self-Determination Act committed this Nation to “the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of [Federal] programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 450a(b). To carry out this commitment, Congress required that Defendant Secretary enter into contracts under which Tribal contractors would be paid certain promised amounts in return for administering the Secretary’s Federal hospitals, clinics or other programs that “a Government agency would otherwise provide.” Cherokee III, 543 U.S. at 634. See 25 U.S.C. §§ 450a(b), 450f(a)(1). In this sense, ISDA contracting is a form of ‘out-

one Tribe’s judgment against IHS); Appeals of Seldovia Village Tribe, 03-2 BCA ¶ 32400, 2003 WL 22422891 (Int. Bd. Cont. App. Oct. 20, 2003). See also Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001) (denying class certification in the Cherokee I litigation), discussed infra at 58-64, Part IV-D. But see Tunica-Biloxi Tribes v. United States, Case No. 1:02CV02413(RBW) (D.D.C.) (uncertified class action by two Tribes prosecuting miscalculated rate claims). The one notable exception to this individual litigation against IHS arose in Ramah II, where the first Partial Settlement Agreement (“Ramah II PSA”) also included certain class miscalculated rate claims against IHS. Pl. Exh. 3, Ramah II PSA at DEF027813, sec. 3.a.iii, and 3.a.iv(3); 50 F. Supp. 2d at 1109 (Order approving Ramah II PSA).

sourcing,' albeit with special requirements. E.g., Cherokee III, 543 U.S. at 643-644 (applying to the ISDA general contract principles controlling the Government's reliability as a contracting partner).⁶

Between 1975 and 1988 Congress witnessed IHS's "consistent failures ... to administer self-determination contracts in conformity with the law," and its "systematic[] violat[ions]" of contractors' rights. S. REP. NO. 100-274, at 37 (1987), reprinted in 1988 U.S.C.C.A.N. 2620. See also id. at 8, 12, 30-32 (discussing agency failures). Far and away "the single most serious problem with implementation of the Indian self-determination policy ha[d] been the failure of the ... [IHS] to provide funding for the indirect costs associated with self-determination contracts." Id. at 8 (emph. added). This "practice ... require[d] tribal contractors to ab[s]orb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting." Id. at 33. See also id. at 9-10 (discussing problem). IHS's failure to pay in full various contract "indirect costs" (later enlarged to "contract support costs") also resulted in a "tremendous drain on tribal financial resources" (id. at 7), because Tribal contractors were compelled to "subsidize" the contracted programs. Id. at 9. In considering amendments, the Senate Indian Affairs Committee cautioned: "*It must be emphasized that tribes*

⁶ The ISDA's most direct antecedent is President Nixon's Message to Congress, [1970] Pub. Papers 564, 567, quoted in part in S. REP. NO. 100-274, at 3 (1987). Although Tribal contracting has vastly improved the quality and relevance of federally-funded IHS services, anemic federal funding levels for those services has left reservation communities funded at less than one-half the national average level of healthcare funding for Americans, and considerably less than the Government spends on federal prisoners. U.S. Comm'n on Civil Rights, Broken Promises: Evaluating the Native American Health Care System 98-99 (Sept. 2004) (available at www.usccr.gov/pubs/nahealth/nabroken.pdf). This crisis is made worse by the fact that the Government owes a trust responsibility to provide health care for Indian Tribes, born of treaties, land cessions, and other Government conduct. Id. at 21-25, discussing inter alia Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); the Snyder Act, 25 U.S.C. § 13; and the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 - 1683. See also COHEN'S Handbook of Federal Indian Law 220-228, 677-678 (Michie 1982); COHEN'S Handbook of Federal Indian Law 418-422, 1344-1346, 1378-1379 (LexisNexis 2005) (both discussing trust responsibility).

are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts.” Cherokee II, 334 F.3d at 1081, aff’d sub nom. Cherokee III (quoting S. REP. NO. 100-274, at 8-9) (italics in original). Concerned that Tribes would soon “choose ... to retrocede the contract[s] back to the Federal agency,” id. at 13, the Committee declared that “[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services.” Id. at 12.

In time, Congress twice substantially rewrote the Act to constrain as much as possible the Secretary’s contracting discretion, and to guarantee full funding of all contract costs, including contract support costs (CSCs).⁷ As the D.C. Circuit later noted, by these amendments Congress “clearly expressed ... its intent to circumscribe as tightly as possible the discretion of the Secretary” Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1344 (D.C. Cir. 1996). Indeed, “[p]recisely *because* the Secretary had consistently failed to behave in a reasonable manner ... Congress elected specifically to cabin the Secretary’s discretion under the Act.” Id. at 1345 n.9 (italics in original). In 1994 Congress imposed a mandatory contract on IHS, the exact terms of which were prescribed verbatim in the statute. 25 U.S.C. § 450l(c). On top of that, Congress directed that “[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs ... from the Federal Government to the Contractor[.]” Id. at sec. l(a)(2).

⁷ Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994).

Congress further made plain that the ISDA involves the execution of an enforceable “contract ... between a tribal organization and the appropriate Secretary,” 25 U.S.C. § 450b(j). As the Supreme Court later noted, the Act “uses the word ‘contract’ 426 times,” “set[s] forth a sample ‘Contract,’” and provides “that if the Government refuses to pay, then contractors are entitled to ‘money damages’ in accordance with the Contract Disputes Act.” Cherokee III, 543 U.S. at 639, discussing inter alia §§ 450l(c), 450m-1(a). The multi-year mandatory Contract, in turn, is supplemented by an Annual Funding Agreement (or “AFA”) which provides additional details for the coming year. § 450l(c), sec. 1(c)(2) and (f)(2). See also § 458aaa-4 (similar provision for compacts).

Lastly, the amended Act “relieve[s] tribes and the Government of the technical burdens that often accompany procurement,” Cherokee III, 543 U.S. at 640, by exempting (since 1988) all ISDA contracts from the federal procurement and acquisition system. §§ 450b(j), 450j(a).

C. The ISDA’s Funding Provisions

Congress in the Act carefully specified in § 450j-1(g) that “[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [subsection 450j-1(a)].” This command is echoed in the mandatory model contract provision, guaranteeing that the contract amount “shall not be less than the applicable amount determined pursuant to [subsection 450j-1(a)].” § 450l(c), sec. 1(b)(4). The referenced subsection 450j-1(a), in turn, requires in relevant part that:

(2) There shall be added ... **contract support costs** which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management

See also § 450j-1(a)(3), (5) (describing the eligible CSCs that “shall be added” to the contract) (emph. added throughout this paragraph).

As the Supreme Court explained, “[c]ontract support costs’ can include indirect administrative costs, such as special auditing or other financial management costs, § 450j-1(a)(3)(A)(ii); they can include direct costs, such as workers’ compensation insurance, § 450j-1(a)(3)(A)(i); and they can include certain startup costs, § 450j-1(a)(5).” Cherokee III, 543 U.S. at 635. “Indirect administrative costs” typically include pooled overhead costs such as personnel and financial management systems costs that benefit all of a contractor’s operations, including the ISDA-contracted portion of those operations. As the Tenth Circuit discussed in Ramah I in connection with these costs, Congress commanded that “[n]othing 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.” 112 F.3d at 1461 (quoting § 450j-1(d)(2)).

The described CSCs cover the “reasonable costs” which tribal contractors must “incur ‘to ensure compliance with the terms of the contract and prudent management.’” Cherokee III, 543 U.S. at 635. See also Ramah I, 112 F.3d at 1461 (describing these “fixed” costs). Since CSCs include the necessary fixed overhead costs of running contracted Federal programs, when IHS fails to pay CSCs a Tribe must either divert contracted funds that it would have otherwise used for patient care, or else it must subsidize those costs from other Tribal funds. By requiring that CSCs be fully paid, the ISDA is structured to ensure that Tribal contractors are not faced with this Hobson’s choice.

Congress in its 1988 Amendments also devoted a lengthy section of the Act to cataloguing specific prohibitions against contract reductions, ending a rampant agency practice of funding its

own agency operations at the expense of fully paying ISDA contracts. § 450j-1(b)(1) - (b)(4). These and related provisions were necessary because IHS and the BIA repeatedly used their appropriations to finance their own operations in priority to their statutorily-mandated contract obligations, thus failing to reserve sufficient funding to pay those contract obligations in full. S. REP. NO. 100-274, at 30 (§ 450j-1(b) “prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government”); Cherokee III, 543 U.S. at 642 (pressure upon agency’s budget to accomplish some other “potentially ... very important purpose” does not excuse the legal obligation to pay CSCs).

Lastly, Congress directed the Secretary to annually furnish it with “an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted.” § 450j-1(c)(2). Because the agencies historically underfunded ISDA contracts, these reports were “needed by the Congress in order to provide reliable and objective data on which to base funding needs for indirect costs.” S. REP. NO. 100-274, at 32.

D. IHS’s Internal Circulars and Policies

IHS’s longstanding history of improper conduct motivated Congress in 1994 to withdraw from the Secretary any “delegated authority” over CSC issues, including any authority both to promulgate regulations on CSC issues, and to impose non-regulatory requirements upon Tribes concerning CSC issues. Ramah Navajo Sch. Bd., 87 F.3d at 1350 (noting “ISDA’s absolute ban on the imposition of such policies” regarding CSCs (emph. added), and discussing § 450k(a)(1) (which provides that “the Secretary ... may not ... impose any nonregulatory requirement, relating to self-determination contracts”)). See also S. REP. NO. 100-274, at 20 (amendments bar imposition of

unpublished “administrative policy directives” such as “the [ISD] Memoranda and the [ISD] Advisories”); 25 C.F.R. § 900.5 (unpublished requirements are not binding). Thus, beyond the specific topics listed in § 450k(a)(1) – which notably do not include CSCs – Congress made plain that “no further delegated authority is conferred.” S. REP. NO. 103-374, at 14 (1994); Ramah Navajo Sch. Bd., 87 F.3d at 1350 (discussing same).

Nonetheless, from 1994 to the present IHS continually imposed upon Tribal contractors a succession of non-regulatory internal CSC Circulars, and it applied those Circulars to unlawfully reduce the CSC amounts IHS would pay Tribal contractors. As Plaintiff alleges, IHS’s course of conduct under these Circulars led directly to the shortfall and miscalculated rate claims.⁸

IHS’s CSC Circulars were applied uniformly across the Nation. They were developed by the IHS Headquarters Office of Tribal Programs (HQ-OTP), the office with primary responsibility for CSC issues.⁹ The Circulars were specifically intended to instruct all agency personnel how to “determine” CSC requirements and how to “allocate” CSCs.¹⁰ The Circulars were intended to be

⁸ FAC ¶¶17-24, 31 (Dkt. No. 5). The four IHS Circulars are Indian Self-Determination Memorandum (ISDM) 92-2 (Pl. Exh. 4, DEF02586-DEF02594), superseded by IHS Circular 96-04 (Pl. Exh. 5, DEF29438, DEF02595-DEF02608), IHS Circular 2000-01 (Pl. Exh. 6, DEF02617-DEF02639), IHS Circular 2001-05 (Pl. Exh. 7, PL12065-PL12107), and IHS Circular 2004-03 (Pl. Exh. 8, PL12042-PL12064).

⁹ Pl. Exh. 9, Depo. of Doug Black, HQ-OTP Director, at 7:18-19 (noting HQ-OTP has “policy responsibility for contract support costs”); 26:13-16 (same); 34:9-25 (agreeing that since 1991 or 1992, HQ-OTP “has been responsible for developing the procedures to identify the need for contract support costs”); 35:13-19 (agreeing HQ-OTP “developed policies to guide the allocation of funds made available for contract support costs”); 60:6-8 (“the office [OTP] was charged with developing the circular and presenting it to the [IHS] director for adoption”).

¹⁰ As explained by HQ-OTP Director Black (Pl. Exh. 9, Black Depo at 13:1-13), the Circulars –

... give our own Indian Health Service staff some guidance and how to determine what the contract support costs need for individual tribes is, how you go about doing that, how we allocate any contract support costs that we have in the agency, ... the process that we use to collect data that eventually become reflected in the [CSC] shortfall report that’s submitted to Congress. [par. return omitted] They’re really instructions to our own area office staff in an attempt to ensure as best we can some

absolutely binding upon all agency personnel, and they were “mandatory,” “not discretionary.”¹¹

Under the CSC Circulars (until approximately 2003) the Headquarters Division of Financial Management (HQ-DFM) (or its predecessor) had “primary responsibility for approving the final amount of [CSCs] needed for an individual tribe”. Pl. Exh. 9, Black Depo. at 18:25-19:13. HQ-DFM also centrally compiled and maintained the “Queue” – “a listing of tribes with the [new or expanded] [CSC] requirements that we were unable to meet during the specific year” Id. at 52:15-18. As the HQ-DFM Director in 1999 explained to the House Resources Committee:

The review of ISD requests is not a unilateral prerogative of the Area Offices. The Area cannot commit or obligate funds to a Tribe for which they have never received a CSC allocation. The allocation of CSC to an Area Office does not occur until such time as the ISD request is approved by Headquarters. This process was deliberately established to assure that CSC is allocated equitably, consistently, and within the funding established by the IHS Services Appropriation and Congressional Directives and earmarks. To allow funding decisions to be made on a decentralized basis would jeopardize the integrity of the appropriation as well as equity and consistency of the IHS contract support cost policy.¹²

In this and other ways, the CSC Circulars assured consistent treatment of all Tribal contractors, both in the determination of what IHS called “contract support cost requirements” and in the allocation

consistency across the board in all of those areas.

¹¹ In a March 27, 2000 Memorandum to Area Directors, IHS Headquarters Division of Financial Management Director Carl Fitzpatrick cautioned: “It should be noted that CSC allocations pursuant to IHS Circular 2000-01 are not discretionary. The allocation methodologies contained in IHS Circular 2000-01 are mandatory; Area offices have no discretion to depart from these instructions.” Pl. Exh. 10 (PL11994) (emph. in original). Pl. Exh. 9, Black Depo. at 62:11-13 (explaining “circulars are policy. They’re requirements that Indian Health Service staff must follow”) and 68:16-18 (“this whole circular is binding on our agency personnel. That’s the intention of the circular”).

¹² Contract Support Costs Within the Indian Health Service and the Bureau of Indian Affairs (Part II): Hearing Before the House Comm. on Resources, 106th Cong., 1st Sess. (Aug. 3, 1999) (response of Carl Fitzpatrick), reproduced in part at Pl. Exh. 11 (quote at PL12209) (emph. added). See also Pl. Exh. 12, Expert Report of Dr. David Mather (Sept. 9, 2005), at PL10476 (“Headquarters staff reviews each ISD proposal for new and expanded CSC funding for consistency and compliance with CSC policy before the ISD amounts are finalized.”).

of IHS appropriations to pay those requirements.¹³ Plainly, there was no “way a tribe could get out of this, that a tribe could be paid outside this system, that they could not have to be on the queue” as an unpaid contractor.¹⁴

Beyond the CSC Circulars, IHS Headquarters carried out additional policies to assure consistency across all Areas and all contractors. For instance, IHS periodically developed standardized contract language on CSC issues and directed Area Office staff to seek to add such language to all contracts – notwithstanding the ISDA’s prohibition on the imposition upon Tribes of any non-regulatory requirement concerning CSCs – a practice which continues to this day.¹⁵ The IHS Director would also communicate CSC policies to Tribal contractors through periodic “Dear

¹³ “Contract support cost requirements” (or “CSC requirements”) is a term of art employed by IHS to describe the amount IHS “determined” a Tribal contractor was entitled to in CSCs, before assessing whether IHS would or would not pay that requirement. See e.g. IHS Circular 2000-01 (Pl. Exh. 6, DEF 02619) (“CSC Requirement. The full amount of CSC need (Indian Self-Determination Fund[] [ISD] plus ongoing contracted or compacted programs) as determined under this Circular pursuant to [§ 450j-1], as amended.”); Pl. Exh. 13, Depo. of Ron Demaray, HQ-OTP, Director of Self-Determination Services, at 31:22-32:6 (“Q Are you familiar with the phrase contract support costs requirement? A Yes. Q Is it, in fact, defined in your circulars? A Yes. Q Okay. So there is nothing vague about that term? [Objection.] THE WITNESS: Within our circular, it is not vague.”); Pl. Exh. 9, Black Depo. at 100:14-21 (reviewing Circular’s definition of “CSC requirements”); and 100:22-24 (“Q. Is that your understanding of the term? A. That’s my understanding of the term as requirement equals need.”) Throughout this Memorandum the Plaintiff uses this term of art in the same manner as IHS.

¹⁴ Pl. Exh. 9, Black Depo. at 81:10-13 (agreeing with counsel’s question). See also id. at 114:23 - 115:6 (agreeing that “the queue policy, the circular, [was] applied equally to all tribes without exception” and that “the goal of the circular [was] to have this consistency”).

¹⁵ Pl. Exh. 9, Black Depo. at 26:1-11 (explaining that “over the past 10, 12, 13 years” HQ-OTP worked with other offices “to develop language that we’ve offered to our [A]rea staff”); Pl. Exh. 14, IHS Contracting Officer Diego Lujan Depo. at 17-18 and 18:23-24 (describing “mandatory language from headquarters”); Pl. Exh. 15 (DEF29715) (“**Sample language provided to Area Offices for inclusion in contracts and compacts in 1997**”) (emph. in original); Pl. Exh. 16 (PL11564-PL11567) (e-mail correspondence among IHS staff discussing 2005 CSC AFA language which Areas were “direct[ed] . . . to include”); Pl. Exh. 17 (PL10226 - PL10228) (July 18, 2005 Memorandum from IHS Director Grim to Area Directors instructing IHS to decline to award certain contracts if a Tribe refuses to add certain CSC language). See also Southern Ute Indian Tribe v. Leavitt, No. CV05-988 WJ/LAM (D. N.M.) (challenging IHS refusal (or “declination”) to award a contract based upon a Tribe’s rejection of new CSC language demanded by IHS).

Tribal Leader” letters.¹⁶

1. IHS Conduct Under the CSC Circulars Involving Shortfalls

During the 1990s IHS’s common course of conduct under the Circulars produced CSC payment shortfalls in a three-step process.

First, IHS designated all contracts either as “ongoing” contracts or as “new or expanded” contracts.¹⁷

Second, IHS determined all CSC requirements for the “ongoing” contracts, but then chose to limit total CSC payments to those contracts to the amounts mentioned in appropriations committee reports. (That is, even though IHS each year had sufficient legally available appropriations to pay all CSCs due under the “ongoing” contracts, it elected to limit payments to internally budgeted amounts that were insufficient.) This led to systematic and repeated underpayments.

Cherokee II, 334 F.3d at 1087-1088.¹⁸

¹⁶ See e.g. Pl. Exh. 5 (DEF29438), May 21, 1996 Letter from IHS Director Trujillo to Tribal Leaders transmitting IHS Cir. 96-04; Pl. Exh. 18 (PL12211 - PL12212), Feb. 13, 2006 Letter from IHS Director Grim to Tribal Leaders explaining allocation of CSC appropriation; Pl. Exh. 19 (PL10229 - PL10230), April 21, 2005 Letter from Director Grim to Tribal Leaders regarding Cherokee III decision.

¹⁷ May 8, 2006 Defendants’ Amended Answer to First Amended Complaint (“Def. Ans. FAC”) (Dkt. No. 252) ¶ 30 (admitting that “[i]n allocating contract support costs during the period FY 1993 through FY 1997, IHS considered two separate categories of tribal contracts: (a) ‘ongoing’ (also called ‘existing’) contracts, and (b) ‘new or expanded’ (also called ‘initial or expanded’) contracts”); Pl. Exh. 4, ISDM 92-2, sections 4 (“New and Expanded Contracts”) (DEF02587-DEF02590) and 6 (“Ongoing Contracts”) (DEF02592-DEF02593). Occasionally IHS would also divide a Tribe’s contract into “ongoing” and “new or expanded” pieces. (For instance, the “ongoing” dental program portion of a contract could be separated from a “new” nursing program portion of the same contract.)

¹⁸ Def. Ans. FAC ¶ 31(a) (Dkt. No. 252) (admitting that “[d]uring the period FY1993 through FY1997, IHS annually limited its total [CSC] payments to ‘ongoing’ contracts to the total amount recommended in appropriations committee reports for that purpose”); Pl. Exh. 20, Def. Obj. and Resp. to Requests for Admissions (“Def. Adm.”) No. 25 (admitting that “in each of fiscal years 1994 to 1998, congressional committee reports specified funding for IHS to award as CSC to tribal contractors with ongoing ISDA contracts and IHS allocated this amount for this purpose”); Pl. Exh. 9, Black Depo. at 137:4-8 (“our assumption was that there was in fact a de facto cap in the sense that only that funding that had been specifically appropriated for CSC could be used for that purpose”).

Third, IHS would rank the “new or expanded” contracts on a “Queue” list on a ‘first come first served’ basis, and then chose to limit total CSC payments to contracts at the top of the list to \$7.5 million, the amount Congress annually placed in a special “Indian Self-Determination Fund,” see, e.g. Pub. L. No. 104-134, 110 Stat. 1321-189 (1996). Cherokee II, 334 F.3d at 1082 n.3, 1089-90. This conduct, too, led to systematic and repeated underpayments.¹⁹

In the annual allocation of IHS appropriations to pay CSCs under these two categories, the Circulars were exacting and allocations were carefully controlled by Headquarters.²⁰ From the mid-1990s to the present this common course of conduct annually produced tens of millions of

¹⁹ Def. Ans. FAC ¶ 31(b) (Dkt. No. 252) (admitting that “during the period FY 1993 through FY 1997, IHS, in general, only used the ISD Fund to pay [CSCs] associated with ‘new or expanded’ contracts. IHS distributed the ISD Fund among ‘new or expanded’ contracts on a first come-first served basis,” and further “admit[ting] that some contracting tribes requesting funding for [CSCs] for new and expanded contracts did not receive the requested funding in the year in which the request was made”); Pl. Exh. 20, Def. Adm. No. 22 (admitting it was IHS’s position that “(1) from fiscal years 1993 through 1998, Congress earmarked a sum of money for IHS to use to award CSC to tribal contractors operating ‘new and expanded’ contracts; (2) using this earmark, IHS awarded CSC to tribal contractors appearing at the top of the ... ‘IHS Queue,’” and further admitting that “some tribal contractors operating programs or services under new or expanded contracts had to wait several years on the [Queue] List before being awarded CSC associated with administering those contracts”); Pl. Exh. 9, Black Depo. at 73:4-7 (“We prioritized tribal requests for funding of [CSCs] during this time on a first come, first serve basis and that’s what the policy speaks to”) (discussing IHS Cir. 96-04). See also House Resources Committee, Oversight Hearing on Contract Support Costs, 106th Cong., 1st Sess. (Feb. 24, 1999), reproduced in part at Pl. Exh. 21 (PL12028-PL12031) (discussing process regarding “ISD Queue” and acknowledging at PL12031 that some Tribes went unpaid on the “Queue” for “4 years”) (hereinafter “Feb. 1999 Hearing”).

²⁰ The HQ Office of Tribal Programs, along with the HQ Office of Finance and Accounting (a.k.a. HQ-DFM), were responsible for approving the amount of individual CSC requirements as well as the individual CSC allocations to Area Offices for payment to specific Tribes. Supra at 12-14. See also, e.g., Pl. Exh. 9, Black Depo. at 76:8 - 78:5 (discussing DEF26508 (Pl. Exh. 22), Feb. 26, 1996 e-mail from HQ-OTP Assoc. Dir. Ron Demaray to IHS Area Office staff regarding distribution of \$6.4 million for ISD CSC requirements from FY 1996 ISD appropriation). As HQ-OTP Director Black explained, “The money is actually allocated – after the need is determined and the funding formulas are applied to the amount of increase that we may have in [CSC], the money is actually allocated from headquarters down to the area office for transfer into the tribe.” Id. at 70:11-16. The Headquarters offices are also responsible for “allocating . . . increases [in an appropriation] that we might receive for [CSCs],” and “[IHS] ha[s] a methodology that the [D]irector has put into place . . . that specifies, I think, pretty clearly on how increases to the [CSC] appropriation are to be allocated and distributed.” Id. at 9:18 - 10:14.

dollars in contract underpayments relative to the contractors' CSC requirements.²¹ IHS annually documented this fact in detailed Area and Headquarters CSC "shortfall" reports, as well as in periodic internal reports and reports prepared for Congress or Congressional committees.²² In Cherokee III the Supreme Court squarely rejected these practices as contrary to the ISDA and the contracts executed thereunder in fiscal years 1994-1997.²³

As appropriations laws changed, IHS's actions changed too. First, when Congress in fiscal year 1998 earmarked within IHS's general multi-billion dollar appropriation a smaller lump sum amount for CSC payments to all Tribal contractors for "ongoing" contracts (approximately \$169 million that year), IHS continued to underpay most "ongoing" contracts, but now by reference to the Appropriations Act earmark rather than a committee report. Pub. L. No. 105-83, 111 Stat. 1543,

²¹ See Defs' Petition for a Writ of Certiorari in Thompson v. Cherokee Nation, No. 03-853 (Dec. 2003), at 27 (found at www.usdoj.gov/osg/briefs/2003/2pet/7pet/2003-0853.pet.aa.pdf) ("As a result [of pending class actions] the Indian Health Service could face liability of up to \$100 million"); Department of the Interior and Related Agencies Appropriations Hearings Before a Subcomm. of the House Comm. on Appropriations, 105th Cong., 2nd Sess. (1998) (regarding CSC shortfalls), reproduced in part at Pl. Exh. 23 (PL12150) (describing shortfall and detailing "the annual CSC shortfall for fiscal years 1994 through 1997"); Pl. Exh. 20, Def. Adm. No. 29 (admitting that for 1997 alone "IHS reported a total of \$81,956,000 in estimated CSC 'shortfall'"); Pl. Exh. 24, IHS "Contract Support Cost History" (identifying annual shortfalls of \$2,500,000 (1994), \$20,000,000 (1995), \$43,000,000 (1996) and \$81,996,000 (1997)). See also REPORT TO CONGRESSIONAL COMMITTEES: INDIAN SELF-DETERMINATION ACT, SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 34 (GAO June 1999), reproduced in Pl. Exh. 25 at PL10388 (depicting shortfalls in IHS payments of CSC requirements) ("1999 GAO Report").

²² Supra 17 n.21. See also Pl. Exh. 20, Def. Adm. No. 12 (admitting "that as a general matter ... CSC 'shortfall,' as that term is specifically defined in any particular report prepared pursuant to 25 U.S.C. § 450j-1(c), usually took into account both an estimate of CSC need associated with 'ongoing' contracts and a rough estimate of CSC need associated with 'new and expanded' contracts"). See also Pl. Exh. 26, IHS May 1997 Report to Congress, and Pl. Exh. 27, examples of national Shortfall Reports summarized by Area (DEF32220) and Area Shortfall Reports listing individual Tribes' shortfalls (DEF32243, DEF32229) (both detailing millions in annual underpayments); Pl. Exh. 28, Affidavit of Dr. David Trigg Mather at ¶ 4 (previously filed at Dkt. Nos. 140-141, with exhibits) (describing IHS reports and data).

²³ 543 U.S. at 646 (addressing IHS's improper reliance on committee report language to limit payments to "ongoing" contracts: "The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding") and at 644 (addressing IHS's reliance on the ISD Fund to limit payments to "new or expanded" contracts: "Nor can we find sufficient support [for IHS's failure to pay] in the other statutory provisions to which the Government points") (citing "[ISD] Fund" provisions of the four annual Appropriations Acts).

1582-83 (1997). Second, when Congress in fiscal year 1999 expanded this CSC statutory earmark to cover all ISDA contracts, IHS continued its underpayment practices, but now by reference to the capped appropriation for both “ongoing” and “new or expanded” contracts. Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-279 (1998). These two practices continue to this day, and in fiscal year 2005 alone IHS estimates that it underpaid Tribal contractors another \$74.2 million in CSC requirements. Pl. Exh. 29 (PL12213 - PL12214).²⁴

The fact of massive underpayments of the IHS-calculated CSC requirements owed to the proposed class from fiscal years 1993 through 2005 is not seriously disputed. Supra at 17 nn.21 & 22. Nor does IHS seriously dispute that the Secretary’s annual proposed budget request generally failed to include sufficient amounts necessary to pay all CSC requirements. Pl. Exh. 24 (compare “HHS Department Budget” with “Total Tribal CSC Need”).²⁵ What is disputed is Defendants’ legal liability for all the shortfalls. That is, the Defendants continue to contest their liability, even during the same four years covered by Cherokee III, arguing (incorrectly, we submit) that the Court’s decision there only disposed of one isolated defense. See e.g., Defs. Opp. to Plf. Mot. to Compel Discovery, at 2 (Dkt. No. 158) (“[T]he Cherokee decision concerned the viability of one particular

²⁴ The “cap” on CSCs in fiscal year 1998 only involved “contract support costs associated with ongoing contracts.” 111 Stat. at 1583. The “cap” in fiscal year 1999 involved CSCs related to all contracts. 112 Stat. at 2681-278-279 (“not to exceed \$203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between [IHS] and a tribe or tribal organization pursuant to the [ISDA]”).

²⁵ This is so even though in the 1988 Amendments, the Senate Indian Affairs Committee specifically faulted the Secretaries for “fail[ing] to request from Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts.” S. REP. NO. 100-274, at 9; id. at 12 (“the Secretary. . . should request the full amount of funds from the Congress that are adequate to fully fund tribal indirect costs”). See also Cherokee III, 543 U.S. at 642 (in order to avoid failing to meet contract obligations, agencies should, inter alia, “seek[] added funding from Congress”).

defense to an ISDA breach of contract claim, namely, insufficient congressional appropriations.”) Thus, even the issue resolved in Cherokee III evidently remains to be litigated – or relitigated – here, notwithstanding that the appropriations law issues the Defendants raised in Cherokee III were actually stated to be the Government’s “sole defense” to CSC shortfall claims throughout the mid-1990s. Cherokee III, 543 U.S. at 636 (emph. added).²⁶

2. IHS Conduct Under the Circulars Involving the Miscalculation of Indirect CSCs

IHS’s continuing course of conduct under the Circulars also led to a second way in which Plaintiff alleges CSCs were underpaid. Historically IHS, like the BIA, has borrowed the “indirect cost rate” accounting system developed under diverse OMB accounting guidelines (hereinafter, the “OMB accounting rate”), and has used those OMB rates as a proxy to calculate indirect administrative CSCs due under the Act. In so doing, Plaintiff contends, IHS has miscalculated the indirect CSC requirement owed to the nearly 90% of Tribal contractors that had OMB rates. Pl. Exh. 36, “Appendix A” to Defs. Resp. to Inter. (showing 294 (or 88%) of 334 listed Tribal contractors with OMB rates). Pl. Exh. 39, Zawodny Aff. ¶ 12, p.5.

As recipients of federal funding, Tribal contractors typically secure OMB accounting rates

²⁶ No other reason explains the underpayments. HQ-OTP Director Doug Black was asked “[W]hy did underpayments occur during that period (referring to fiscal years 1995-1998)?” Pl. Exh. 9, Black Depo. at 58:15-16. Mr. Black answered: “If you’re talking about, once again, why are we or were we unable to pay the entire need during those years, we paid what we could based on the [CSCs] that Congress appropriated to the [IHS]”. Id. at 58:21-25. See also id. at 59:1-7 (agreeing with the statement: “it’s your position that Congress did not appropriate enough [CSCs] to pay those contracts in full”); 46:2-20 (“Q. Why didn’t the [IHS] pay full [CSC] requirements in 1997? ... A. We paid what we had the appropriations - - we paid the amount of [CSCs] for which we had appropriations to [IHS] for [CSCs]”). Mr. Black offered no other reason for the acknowledged shortfalls in the payment of CSC requirements.

from their “cognizant federal agency” under one of two OMB Circulars.²⁷ The principles in the OMB Circulars are applied consistently to all recipients of federal funding, regardless of the programs they run or their location. In so far as pertinent to the miscalculated rate claims, the OMB Circulars governing ISDA Tribal contractors are materially identical.²⁸

OMB rates are strictly an accounting device. Yet, without any command in the ISDA to do so, IHS has historically borrowed those OMB accounting rates as a proxy for determining the indirect administrative cost portion of the ISDA contract price, and has done so uniformly for all contractors with OMB rates. This practice is the basis of the miscalculated rate claim.²⁹

²⁷ See Cost Principles for State, Local and Indian Tribal Governments, OMB Circular A-87 (2004), relocated at 2 C.F.R. pt. 225, and Cost Principles for Non-Profit Organizations, OMB Circular A-122 (2004), relocated at 2 C.F.R. pt. 230. Earlier versions of A-87 and A-122 are found, respectively, at 60 Fed. Reg. 26484 (1995) and 63 Fed. Reg. 29794 (1998). OMB does not actually issue rates. Instead, the appropriate “cognizant federal agency” for each contractor issues the rate, 2 C.F.R. pt. 225, App. E, § E.1, and for most Tribes that agency is the Department of the Interior (DOI). Pl. Exh. 39, Zawodny Aff. ¶ 12, p.5. Prior to 2000, DOI assigned the rate-making function to its Office of Inspector General (OIG). Thereafter this function was transferred to DOI’s National Business Center (NBC). For Tribal contractors whose cognizant agency is DHHS (mostly Alaska contractors organized as nonprofit corporations), the Secretary has assigned the rate-making function to the DHHS Division of Cost Allocation (DCA). See generally Pl. Exh. 36 at 7-49, “Appendix A” to Defs. Resp. to Interrog.

²⁸ See e.g. Pl. Exh. 30, Depo. of Inge Montich, NBC Indirect Cost Coordinator and Supervisory Auditor, at 28:15-18 (referring to “the general principles of the OMB Circulars,” and stating that “the general principles are in all – all across, all of the Circulars”) and 36: 9-17 (with regard to “determin[ing] what goes in the indirect cost pool,” agreeing that the “principles are through all Circulars the same”); Pl. Exh. 31, Depo. of Patrick Smith, DHHS-DCA Senior Accountant, at 32:10-12 (“we treat the Alaska nonprofits the same as any of our other nonprofits, other states, other areas”); Pl. Exh. 32, Expert Report of James M. Sizemore, Sept. 9, 2005, at PL10458, pt. A. See also Pl. Exh. 33, Depo. of Tasha Dunn, Moss Adams, C.P.A., at 89:24-90:4 (“the differences [between two rate setting agencies] are more in format than in content,” and noting their treatment of “allowable costs” is “fairly similar”), and 128:9-13, 18-21 (“all tribes are following the same method of preparing their indirect cost rate ... different tribes operate different programs, but I don’t think that that has any bearing on how their rate was calculated or how the funding was determined.”). While there are a few different types of OMB rates available, see 2 C.F.R. pt. 230, App. A, §§ E.1.c & E.1.e.; 2 C.F.R. pt. 225, App. E, §§ B.6 & B.7, the IHS CSC Circulars apply all rates in the same manner. Infra at 20-21 n.29.

²⁹ See Pl. Exh. 4, at DEF02591 (ISDM 92-2) (“The amount of indirect costs expected to be incurred under awards by recipients with rates which have been negotiated or are being negotiated with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose”) (emph. added); Pl. Exh. 5, at DEF02601 (IHS Cir. 96-04); Pl. Exh. 6, at DEF02625 (IHS Cir. 2000-01); Pl. Exh. 7, at PL12073 (IHS Cir. No. 2001-05); Pl. Exh. 8, at PL12050 (IHS Cir. 2004-03) (all to same effect). See also Pl. Exh. 9, Black Depo. at 115:20-116:9 (“Does it matter that a tribe had an indirect rate determined by OIG at the time instead of DCA? ... A. For

Understanding the miscalculated rate claim requires a brief explanation of the OMB rate process. Under the OMB Circulars, an “indirect cost rate” is a theoretical exercise, typically calculated by dividing a contractor’s total anticipated indirect costs (sometimes called its “indirect cost pool”) by the contractor’s total program funds from all contracts and grants (i.e., its total “direct costs” or total “direct cost base”). The formula can be expressed as [indirect cost pool] ÷ [total direct cost base]. This formula generates a percentage known as the contractor’s “indirect cost rate.” 1999 GAO Report 19-20 (Pl. Exh. 25, at PL10373-PL10374); Pl. Exh. 32, Sizemore Expert Report (PL10460) (both explaining formula). The OMB rate is then applied to the “direct costs” of each individual contract or grant to determine the theoretical amount of “indirect costs” to be allocated to each contract or grant. Id. at PL10468 (chart); OMB Cir. A-87, 2 C.F.R. pt. 225, App. E, § C.2.a; OMB Cir. A-122, at 2 C.F.R. pt. 230, App. A, § D.2.

What makes use of the OMB’s exercise in the different context of determining CSC requirements inaccurate (and ultimately unlawful) is that it assumes that every contract or grant contributes to the indirect cost pool at the calculated indirect cost rate. In fact, this is not the case.

That is, the OMB accounting rate is built upon the false assumption that all funding agencies permit a Tribal contractor to spend a designated share of each contract or grant on indirect costs, in amounts reflecting the OMB rate. The process therefore assigns to each funding source (for example, each of ten \$10,000 grants) a theoretical share of the indirect cost pool (for example, a \$25,000 pool) at the appropriate OMB rate (in this example, 25%). Under this accounting system,

purposes of determining what their requirement might be? Q. No, for purposes of determining where they’re going to be on the queue. A. It did not matter. Q. How about for purposes of determining their requirement? A. No.”); Id. 117:11-19 (same).

each \$10,000 grant is allocated 25% in indirect costs (or \$2,500) toward a theoretical \$25,000 pool.³⁰

In fact, however, one particular agency may not permit any portion of its grant to be used for administrative costs.³¹ This can be illustrated with a simplified example. When an agency does not pay administrative costs, the total indirect cost pool (here, \$25,000) will receive less than has been projected because of the ‘non-paying’ agency (here, \$2,500 less). Thus, if the theoretical OMB system is used to actually fund a contractor’s pooled administrative costs, the system will “short” that pool to the extent any agency fails to pay its share. If the total indirect cost pool is needed regardless of whether the contractor has nine or ten grants, the inclusion of the tenth grant in the calculations dilutes the rate that would have been set had the tenth grant been excluded. Without the tenth grant, each of the nine grants actually contributing to the pool would contribute \$2,778 ($25,000 \div 90,000 = .27778 \times 10,000$). But in the OMB accounting world such exclusions are not permitted.³²

³⁰ OMB Cir. A-87, 2 C.F.R. pt. 225, App. A, § C.3.b (“Allocable costs”) (“All activities which benefit from the governmental unit’s indirect cost . . . will receive an appropriate allocation of indirect costs.”); Pl. Exh. 32, Sizemore Expert Report, at PL10463-PL10464 (discussing same).

³¹ This is common for Indian Tribes. See, e.g., Pl. Exh. 30, Montich Depo. at 88:1-6 (discussing common Justice Department “COPS” grants: “I am aware that they don’t—they don’t seem to pay any indirect costs because tribal organization pointed out and trying to eliminate it from the base, which we cannot allow. And generally what I have seen, there are zero recoverable indirect costs”); Ramah I, 112 F.3d at 1463 (recognizing that Justice Department grants did not “include[] funding for their apportioned share of the indirect costs pool”).

³² Supra at 22 n.31. See also Pl. Exh. 32, Sizemore Expert Report, at PL10465-PL10466 (illustrating dilution); Pl. Exh. 31, Smith Depo. at 14:9 -15:6 (“Q. If an awardee is funded by many sources but one of the sources, for instance, doesn’t recognize indirect costs or won’t pay or won’t permit the recovery of indirect costs, can the awardee exclude that award from its indirect cost calculations, exclude it from the base? A. No. . . . They cannot shift cost[s]. So if they do not fully recover under one award, those costs cannot be, . . . reimbursement put back into the indirect cost rate computation. And also that – if that – whoever is funding that award, that program, that program is not excluded from the indirect cost rate computation. Q. So they will be included even if they don’t actually recognize the rate for any purpose, that agency doesn’t recognize the rate? A. . . . [W]hen we review the indirect cost rate proposals, we do not take into consideration if an awarding agency underfunds a particular program. We’re not even aware of that in most cases.”) (emph. added). Ultimately, to the extent the non-paying grants that should be excluded grows significantly, the size of the indirect cost pool necessary to support only the remaining contracts and grants will necessarily shrink. This phenomenon was studied and accounted for during settlement of the Ramah case, and DOI-NBC has developed a

The disconnect between the OMB accounting system and the ISDA contract price calculation system is apparent on the face of the OMB Circulars: those authorities expressly caution that indirect cost rates are not to be used as a funding mechanism.³³ Yet, that is precisely what IHS here has done. The Defendants admit that they consistently used OMB accounting rates to determine the indirect administrative CSC requirements to be paid under the Act; they admit that IHS’s CSC Circulars did not permit any deviation from this methodology; and they admit that IHS did not – and under its CSC Circulars could not – make adjustments to account for the grants and contracts that do not contribute to the indirect cost pool.³⁴

The ISDA does not instruct IHS to use the OMB accounting rate as a proxy for the

template that illustrates the adjustments necessary to deal with this phenomenon, see www.NBC.gov/icshome.html, “Litigation Update,” Attachment 2.

³³ OMB Cir. A-87, 2 C.F.R. § 225.20 (“The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award.”) (emph. added); Pl. Exh. 31, Smith Depo. at 13:8,11-12 (“A. This rate is then used by ... the [DHHS], DCA, But it is not part of the funding process.”); Pl. Exh. 32, Sizemore Expert Report at PL10461 (“indirect cost rates ... are not a funding mechanism”); Pl. Exh. 30, Montich Depo. at 29:19-24 (“Q. ... [W]hat bearing does the Circular have on the amounts that funding agencies actually pay the contractor? A. Actually, the Circular doesn’t have any bearing because the Circular, in negotiating the indirect cost rate, is not a funding function.”); Id. at 34:15-17 (“Q. ... [T]his system of indirect cost negotiations is an accounting tool. A. Right.”).

³⁴ Def. Ans. FAC ¶ 19 (Dkt. No. 252) (“for contracting tribes with negotiated rates, most of these negotiations follow the criteria set forth in OMB Circular A-87”); see Pl. Exh. 20, Def. Adm. No. 19 (Defendants “admit that for those tribal contractors whose indirect CSC awards are made by reference to an indirect cost rate issued by the Office of the Inspector General, the National Business Center, or the Division of Cost Allocation, [in determining CSC requirements] IHS did not adjust those rates during fiscal years 1993 through the present to account for agencies, if any, whose funding is included in the tribal contractors’ direct cost base but do not actually contribute to the tribal contractor’s indirect cost pool.”); Pl. Exh. 9, Black Depo. at 98:17-21 (“Q. If a tribe has an indirect cost rate, isn’t it true that under the circular, you calculate their indirect cost contract requirements according to that rate? A. Yes.”), and 95:3 -11 (Q. “And if a tribe today wanted the Indian Health Service to make some adjustment to its indirect cost contract support requirement based on the Ramah case, would the tribe be able to do so?” [Objection] THE WITNESS: A. “We have not - - once again, my answer, as I understand the question, would be no.”) See also id. at 100:25 - 101:5 & 101:8-17 (to same effect); 111:7-112:9 & 113:17-23 (both indicating no upward adjustment of CSC requirements is allowed); Pl. Exh. 13, Demaray Depo. at 173:1-11 (agreeing with statement “if a tribe has an indirect cost rate, don’t all of these [IHS CSC] circulars say that the indirect [CSC] requirement is generated based on the application of the rate to the program less pass-throughs”).

calculation of indirect administrative CSCs. Indeed, the use of OMB accounting rates was the very methodology the IHS and BIA used before the 1988 Amendments, and the Tenth Circuit in Ramah I squarely held that Congress in those Amendments prohibited that methodology. Thus, this Circuit has already concluded that Congress directed the Secretary to pay all indirect administrative CSCs, including those “associated with” carrying out an ISDA contract, and not merely the indirect costs yielded by borrowing the unadjusted OMB rate. 112 F.3d at 1462-63.³⁵

E. Facts Applicable to Plaintiff Pueblo of Zuni

The Zuni have continuously occupied their present reservation and much of the surrounding area for more than 1,500 years. During this entire time, and despite repeated waves of incursions, the Zuni have retained their traditional culture, language and religion. Zuni Tribe of New Mexico v. U.S., 12 Cl.Ct. 607 (Cl.Ct. 1987). The Pueblo of Zuni is now the largest of the New Mexico Pueblos, with a population of nearly 10,000. <http://www.census.gov/main/www/cen2000.html>. The Pueblo is the principal component of IHS’s Zuni-Ramah Service Unit within the IHS Albuquerque Area (the other Service Unit Tribe being the Ramah Navajo Chapter).

Since long before 1993, the Pueblo has carried out various ISDA contracts with IHS. FAC ¶ 48 (Dkt. No. 5); Def. Ans. FAC ¶ 48 (Dkt. No. 252). The Pueblo’s six contracted programs are Audiology (Otitis Media), Community Health Representative, Emergency Medical Services, the Wellness Program (Diabetes), the Teen Health Center, and the Recovery Center. Id. Since the 1994

³⁵ Ramah I, 112 F. 3d at 1463 (“By including the Department of Justice [grant] funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989”). Pl. Exh. 32, Sizemore Expert Report, at PL10463-PL10467 (generally illustrating and discussing problem created by allocating indirect costs to grants that limit indirect cost recoveries).

ISDA Amendments, each of the Pueblo's contracts executed with IHS has been in the form of the mandatory Model Contract specified in § 450/(c) plus an associated Annual Funding Agreement ("AFA").³⁶

Under the Pueblo of Zuni's 1993-1998 IHS contracts (the representative claims and years), the Pueblo alleges it had both a contractual right and a statutory right to be paid on all of its ISDA contracts, collectively, at least \$1,256,968 in CSC requirements (as calculated by IHS) plus \$339,934 in additional indirect administrative CSCs under the "miscalculation claim" (for a total of \$1,596,902). FAC ¶ 50 (Dkt. No. 5). Of this amount, the Pueblo alleges IHS paid only \$932,773, leaving \$664,129 in total damages claimed for all unpaid CSCs. *Id.* For a time, the Pueblo of Zuni appeared on a "Queue" list because IHS classified at least one of its contracts as "new or expanded," and thus did not pay the Pueblo its full CSC requirements at that time.³⁷ (Class Claims 1 and 4.) The Pueblo has also regularly been underfunded its CSC requirements associated with several of its ongoing contracts. FAC ¶¶ 75, 78 (Dkt. No. 5). (Class Claims 2 and 4.) Thus, the Pueblo appears on numerous IHS Area CSC shortfall reports, as well as shortfall reports prepared for Congress. *E.g.* Pl. Exh. 27 (DEF32243).

With respect to the miscalculated rate claim (Class Claims 3 and 4), since at least fiscal year 1993, the Pueblo of Zuni's OMB rate has been set by the Department of the Interior (first through the OIG and in more recent years through the NBC, *supra* at 20 n.27). Pl. Exh. 36, at 20,

³⁶ *E.g.* Pl. Exh. 34, ISDA Contract 242-95-0019 (PL04148-PL04172); FAC ¶ 48 (Dkt. No. 5); 25 U.S.C. §§ 450/(a), (c).

³⁷ Pl. Exh. 20, Def. Adm. 23, at 22 (admitting Zuni appeared on the Sept. 7, 1994 Priority List); Pl. Exh. 35, FY 1994 ISD Requests (DEF 19857).

“Appendix A” to Def. Resp. to Interrog. (Albuquerque Area). Pursuant to IHS’s CSC Circulars, IHS borrowed those OMB rates to determine the Pueblo’s indirect administrative CSC requirements. Thus, the Pueblo’s OMB rates were never adjusted to account for the Pueblo’s various state and federal grants that do not permit the recovery of any share of administrative costs. See Pl. Exh. 20, Def. Adm. No. 19. This resulted in the alleged miscalculation of the amount of indirect CSCs associated with the IHS contracts. FAC ¶¶ 50, 67-68 (Dkt. No. 5).³⁸

As a result of the CSC underpayments, the Pueblo used contract program funds that would have otherwise gone to providing health care, to pay a portion of the administrative costs of operating the contracted programs (Pl. Exh. 37, Pinto Depo. at 88-89), forcing the Pueblo to delay providing or improving important health care services.³⁹ Pl. Exh. 38, Garcia Depo. at 50-52. The Pueblo also used general Tribal revenues and a Tribal land claims trust fund to cover portions of the CSC underpayments. Pl. Exh. 37, Pinto Depo. at 83:19-25 and 85:4-24. See also 1999 GAO Report 7 (Pl. Exh. 25, at PL10361) (summarizing similar impacts suffered by other Tribes).

Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, and 25 U.S.C. § 450m-1(c) of the ISDA, the Pueblo submitted claims with IHS for CDA damages over these amounts. (No

³⁸ See also Pl. Exh. 37, Depo. of Bryceson Pinto, Pueblo of Zuni, Acting Tribal Administrator, at 62:1-6 (“consideration needs to be given that the current method includes all those other agencies that don’t contribute to the contract support cost; and, therefore, the rate doesn’t truly reflect what we believe should be collected for the administrative costs to administer the programs”) and 66:19-21 (“I guess the way I could state it would be that the rate doesn’t truly reflect what the tribe believes is due as far as contract support costs go, that there’s a fault with the rate”); Pl. Exh. 38, Depo. of Margaret Garcia, Pueblo of Zuni, Health Services Division Director, at 43:22-23 (“The amount that is identified by the funding agency is less than the actual need”).

³⁹ Pl. Exh. 48, Pl.’s Supp. Interrog. Resp. No. 12, at 2-3 (Sept. 2, 2005) (delay in providing hearing aids and audiology services to school children); Pl. Exh. 38, Garcia Depo., at 50:16-18 (“the person needing the hearing aid in January would then finally be able to get their hearing aid maybe October, November”), 50:22-51:4 (discussing delays in purchasing equipment and getting training for the EMS program) & 50:14-17 (substance abuse program delays).

similar agency process exists for the Pueblo's parallel statutory damage claims under the ISDA.) The IHS contracting officer did not issue a decision on any of the CDA claims within the 60 days provided by statute, and each claim was thereupon denied by operation of law.⁴⁰ The Pueblo then filed this action, joining its CDA claims with its independent statutory damage claims.⁴¹

F. The Parties' Contract Sampling

Shortly after the stay was lifted the Defendants noted their position, opposed by the Plaintiff, that the Government's liability to each contractor is individualized and not susceptible to class treatment, primarily because (as the Defendants now claimed) all liability issues turn on the language in each contract and because (as Defendants also urged) most contracts are materially different.⁴²

Although the Plaintiff believes most contracts are, in fact, materially identical in so far as pertinent to this lawsuit, the Plaintiff's more fundamental response is that particular contract clauses are irrelevant in light of the ISDA's specific and overriding statutory commands, and because the Supreme Court in Cherokee III correctly assessed the Government's liability within a framework that

⁴⁰ Def. Ans. FAC ¶ 51 (Dkt. No. 252) (admitting "that Plaintiff submitted some CDA claims related to some of its ISDA contracts in effect during fiscal years 1993-1998" and "that the contracting officer has not issued a decision to date on the submitted claims"); 41 U.S.C. § 605(c)(1) and (5) (a contracting officer's failure to issue a decision within 60-days for claims of \$100,000 or less "will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter.").

⁴¹ FAC ¶ 51 (Dkt. No. 5). See also 41 U.S.C. § 609(a)(3) (permitting suit within one-year from the denial of a CDA claim); 25 U.S.C. § 450m-1(a) (granting district courts both original jurisdiction and concurrent jurisdiction with the Court of Federal Claims over damage claims arising under the ISDA) and (c) (making CDA applicable to ISDA contracts). See also Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1316-1317 (D. Or. 1997) (holding that a district court has original jurisdiction over a Tribal contractor's claim for money damages caused by a refusal to pay CSCs), rev'd on other grounds sub nom. Shoshone-Bannock Tribes v. Secretary, DHHS, 279 F.3d 660 (9th Cir. 2002).

⁴² See e.g., Defs. Reply to Plf's Opp. to Defs. Mtn. to Stay Briefing on Class Cert. and to Stay Disc. (Dkt. No. 39), at 5-6 ("after the decision in Cherokee Nation [III], what remains to be decided are highly individualized claims for CSC ... [W]hat is left are primarily individualized defenses specific to each IHS contractors' ISDA contract and related documents and to individual tribal contractors' course of conduct in pursuing their demands for additional CSC").

looks strictly to those statutory commands. See also infra at 63 n.82; LaBarge Products, Inc. v. West, 46 F.3d 1547, 1552 (Fed. Cir. 1995) (“if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor’s protection, the contractor is not bound by estoppel, acquiescence, or failure to protest”) (citations omitted).

To accommodate the parties’ sharply divergent positions, class discovery was voluntarily structured to include an agreed-upon sampling of contracts during three sample years (fiscal years 1994, 1997 and 2001). In each of those years the parties sampled one self-determination contract or compact from one-sixth of all Tribal contractors (or roughly 50 contracts per year). Pl. Exh. 39, Zawodny Aff., Attach. 1.⁴³ The parties agreed to use the sample for purposes of briefing this Motion, including introducing summaries of the contracts. Stip. filed May 6, 2006 (Dkt. No. 254).⁴⁴

The 1997 and 2001 Sampling (Class Claims 1, 2 and 3). The Pueblo continues to maintain that the ISDA, rather than individual contract clauses, controls the Government’s liability. Nonetheless, the sampling shows that there exists a high degree of uniformity among relevant provisions of the 1997 and 2001 sampled self-determination contracts and compacts. For instance, nearly all 1997 and 2001 self-determination contracts have identical (or extremely similar) clauses.

⁴³ Self-determination “contracts” are entered into under Title I of the ISDA, §§ 450-450n. Self-governance “compacts” were originally entered into under Title III of the Act (a temporary demonstration project) until Title III was replaced in 2000 with Title V. For Title III, see Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296 (1988), as amended, (adding Title III) formerly reprinted at 25 U.S.C. § 450f note (1988). For Title V, see Pub. L. No. 106-260, 114 Stat. 711 (2000), 25 U.S.C. §§ 458aaa - 458aaa-18. The funding provisions in Title III (§ 303(a)(6)) and Title V (§§ 458aaa-7(c) and 458aaa-18(b)) concerning CSCs incorporate or mirror Title I’s provisions at § 450j-1(a) & (b).

⁴⁴ The parties were unable to agree on whether the sample constitutes the universe of contracts that would be admissible. The Pueblo believes the universe must be limited to the sample in order to preserve the sample’s integrity (plus the Pueblo’s contracts and the contracts at issue in the Cherokee cases to the extent they provide guidance on the holding in Cherokee III). But the Pueblo anticipates the Defendants will also seek to introduce other contracts, too. The Pueblo maintains that going beyond the sample in this manner defeats the purpose of the random sample exercise by introducing additional ‘cherry-picked’ contracts.

Particularly relevant here are the clauses addressing (1) the purpose for which the contract was entered; (2) the funding amount; (3) the inapplicability of other guidelines, manuals and policies; (4) the incorporation of an annual AFA setting out the amount of funds; (5) how the contract should be construed; and (6) a requirement that the Secretary act in good faith.⁴⁵ This uniformity is unsurprising, for nearly all of these self-determination contracts are based upon the mandatory Model Contract that Congress embedded into the statute in 1994. Supra at 8.

Typical of these is the Pueblo of Zuni's 1997 contract (Agreement No. 242-97-0050). Pl. Exh. 40, DEF03749-DEF03783. For instance, that contract provided under "PURPOSE" (DEF03754):

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portion thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor:

This clause, taken verbatim from the Model Contract provision set forth in § 450l(c), sec. 1(a)(2), is identical to nearly all 104 of the sampled 1997 and 2001 self-determination contracts. Pl. Exh. 39, at Attachs. 3 and 4. The Pueblo's 1997 contract also provided under "FUNDING AMOUNT":

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

⁴⁵ Pursuant to the parties' Stipulation (Dkt. No. 254) and F.R.E. 1006, relevant provisions from the sampled contracts are summarized and presented in four charts at Pl. Exh. 39, Zawodny Aff., Attachs. 2-5. These charts include 1994 Sample Contracts; 1997 Sample Contracts; 2001 Sample Contracts; and 1994, 1997 and 2001 Sample Compacts.

Pl. Exh. 40, DEF03755. This clause, too, is taken verbatim from the Model Contract (§ 450l(c), sec. 1(b)(4)), and is identical to nearly all of the 104 sampled 1997 and 2001 self-determination contracts. Pl. Exh. 39, Zawodny Aff., Attachs. 3 and 4. Again, this is to be expected, for the 1994 Amendments mandated that IHS use the Model Contract.

Although the sampling of the far fewer self-governance compacts reveals a bit less uniformity, the variations are not material to the issues presented here. For instance, all of the 1997 and 2001 compacts (like the compacts at issue in Cherokee III), state that “[t]his Compact shall be liberally construed to achieve its purposes” (or similar language). Similarly, nearly all the 1997/2001 compacts state that the annual funding amounts shall be paid “[s]ubject only to the appropriation of funds by the Congress and adjustments pursuant to [§ 450j-1(b)] of the [ISDA]” (again, just as do the Cherokee III compacts). And all provide (with occasional variation):

In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret all federal laws and regulations in a manner that facilitates this Compact.

Finally, most provide that the total funds to be paid shall be determined in accordance with the ISDA, although a very few (including the Cherokee III compacts) do not say this.

In fact, the only material differences among all the 1997/2001 sampled contracts and sampled compacts appear to reflect: (1) immaterial variations in model contract language adopted by a very few IHS Areas; (2) that the relatively fewer Tribal compactors also had language reflecting additional purposes (e.g., to enhance flexibility in transferring contract funds); and (3) that in 1997 two of the over 40 sampled contractors had not yet entered into a new post-1994 style contract (despite passage of the 1994 Amendments mandating such a contract).

The relatively short annual AFAs that supplement each master contract are generally uniform in format and content within each of IHS's 12 Area Offices, though less uniform across different Areas.⁴⁶ Even still, substantively the AFAs are the same in that they specify an amount to be paid, often by reference to the contractor's OMB rate (echoing IHS's CSC Circulars), and many also cite the IHS Circular then in effect. For instance, the Pueblo of Zuni's 1997 AFA states an amount for both "direct" CSCs (\$16,460.00) and "indirect" CSCs (\$19,287.00) based on the Pueblo's current OMB rate. (Pl. Exh. 40 at DEF03781; see also id. DEF03782 ("SECTION 5-AGREEMENT SUPPORT COSTS/INDIRECT COST FUNDING".)) Similarly, the Cherokee FY 1996 AFA at issue in Cherokee III provided specific sums for indirect CSCs by reference to the Cherokee's OMB rate. (Pl. Exh. 41, Cherokee Nation FY 1996 AFA, Sec. Two (DEF04539), and Sec. Six (DEF04541).) So, too, the Shoshone-Paiute Tribes' FY 1996 AFA sets out amounts of direct and indirect CSCs with reference to the Tribes' OMB rate, while also referring to ISDM 92-2. Pl. Exh. 42, Sec. 7(b), PL12226. These variations in subsidiary AFA language could not possibly result in material variations bearing on the Defendants' liability – particularly given that the Supreme Court in Cherokee III considered these same clauses for two different Tribal contractors spanning four years. In all events, the statute, and not the AFAs' terms, is controlling.

The 1994 Sampling (Class Claim 4). As a general proposition, the sampled 1994 contracts

⁴⁶ For instance, the Pueblo's 1997 AFA was virtually identical to all other sample AFA's within the IHS Albuquerque Area (save, of course, for the listed IHS programs under contract and the associated funding amounts). Pl. Exh. 14, Depo. of Diego Lujan, IHS Abq. Area, Senior Contracting Officer, at 61:4-12, 68:2-21 (reviewing the funding provisions of the Albuquerque Area 1997 and 2001 sample contracts and indicating that the provisions are not different in any material respect); id. at 61:19 - 62:24 (the Albuquerque Area has adopted "basic language" and a "format [for AFAs] that came along with the model agreement"); and id. at 156:12-157:22 (e.g., "They [Albuquerque contractors] weren't treated any differently" with regard to "implementing model contract terms," "calculating [CSCs]," or "how [IHS would] pay or allocate [CSCs] to tribal contractors").

are substantively identical inter se, but as a group are markedly different from the later contracts. Pl. Exh. 39, Attach. 2 (1994 Sample Contracts). This reflects the fact that before Congress in 1994 mandated the Model Contract, IHS had for nearly 20 years demanded that Tribal contractors employ a different standard contract – one that relied heavily on the federal procurement rules reflected in IHS and DHHS federal acquisition regulations (FARs). Thus the sampled contracts in effect in 1994 consistently contain (or incorporate by reference) a laundry list of federal procurement clauses then appearing in Titles 41 and 48 of the Code of Federal Regulations. E.g., Pl. Exh. 43 (excerpts of Pueblo’s 1994 contract); see also 41 C.F.R. 3-4.60 (1976); 48 C.F.R. 352.280-4 (1987). But this, too, was patently illegal, because years earlier Congress in 1988 had expressly exempted ISDA contracts from all federal procurement requirements. 25 U.S.C. §§ 450b(j), 450j(a).⁴⁷

It is the difference between the 1994 contracts (as a group) and the later contracts (as a group), together with anticipated defenses the Government will seek to impose as to those earlier contracts (such as limitations defenses, the absence of the 1994 Amendments as controlling law, and possibly other federal acquisition clauses), which explains the Pueblo’s proposal to carve out fiscal year 1993 and 1994 claims for separate treatment as Class Claim 4.

IV. ARGUMENT

Rule 23 is “intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments.”

⁴⁷ S. REP. NO. 100-274, at 18-19 (“the system of federal acquisition regulations contained in Title 41 of the [C.F.R.] should not apply to self-determination contracts”) & 29 (“[§ 450j(a)] is amended by providing that federal procurement laws and the system of federal acquisition regulations contained in Title 41 and Title 48 of the [C.F.R.] shall not apply to Indian self-determination contracts”). Cherokee III, 543 U.S. at 640 (discussing same).

Gottlieb v. Wiles, 11 F.3d 1004, 1007 (10th Cir. 1993). To maintain a class action under Rule 23, the representative Tribe must first meet Rule 23(a)'s four prerequisites: numerosity, commonality, typicality and adequate representation. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

Once these prerequisites are satisfied, the Tribal contractor must then establish that the class action falls within one of Rule 23(b)'s three subsections. Rule 23(b)(3), the subsection applicable here, captures situations where common questions of law or fact "predominate" and a class action is "superior to other available methods" to resolve the matter. Fed. R. Civ. P. 23(b)(3).

While class action certification matters are committed to the sound "discretion of the trial court," Anderson v. City of Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982), this Circuit has long instructed that uncertainties should be resolved "in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the [litigation] so require." Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968) (finding district court erred in not certifying securities class action); Harrington v. City of Albuquerque, 222 F.R.D. 505, 508-509 (D. N.M. 2004) (citing Esplin, 402 F.2d at 99) (granting class certification in civil rights action challenging mandatory union share deductions). In part, this is because a district court retains discretion to alter, expand, subdivide or modify the class definition or the certification order, and even to decertify the class, as later developments warrant.⁴⁸

⁴⁸ Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982) ("judge remains free to modify [the certification order] in the light of subsequent developments in the litigation"); Colo. Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 356 (D. Colo. 1999) ("Taco Bell") ("certification is discretionary with the trial court judge, and may be altered, expanded, subdivided or abandoned as the case develops") (granting class certification in disability rights case) (citation omitted); Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp., 183 F.R.D. 687, 690 (D. Colo. 1998) ("certification is not irreversible and the Court may alter or amend it before a decision on the merits") (citations omitted) (certifying securities class action); Ditty v. Check Rite, Ltd., 182 F.R.D. 639, 645 (D. Utah 1998) (quoting Esplin) (certifying class action involving debt collection practices).

The liberal interpretation a district court gives Rule 23 does not negate a court's duty also to "engage in its own 'rigorous analysis' of whether 'the prerequisites of Rule 23(a) have been satisfied.'" Shook v. El Paso County, 386 F.3d 963, 968 (10th Cir. 2004) (quoting Falcon, 457 U.S. at 161). "In doing so, the court must accept the substantive allegations of the complaint as true, although it 'need not blindly rely on conclusory allegations which parrot Rule 23' and 'may consider the legal and factual issues presented by plaintiff's complaints.'" Id. at 968 (citations omitted).

At the same time, however, a court is not to conduct "a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).⁴⁹ In sum, "[a]lthough 'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' the court's responsibility is to 'carefully apply the requirements of Rules 23(a).'" Shook, 386 F.3d at 971 (citing Falcon, 457 U.S. at 160).

The propriety of a class of ISDA Tribal contractors presenting CSC claims was addressed by this District in Ramah, where Judge Hansen certified a class of Tribes contracting with the BIA. Ramah, Order and Mem. Op. of Oct. 1, 1993 (Pl. Exh. 2, PL12040) (holding that individual class member exhaustion was unnecessary where 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").

⁴⁹ See also Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988) ("[I]n making the class certification determination on remand, the district court should avoid focusing on the merits underlying the class claim."); In re Great Southern Life Ins. Co. Sales Practices Litig., 192 F.R.D. 212, 215 (N.D. Tex. 2000) ("the court may only inquire into whether the requirements of Fed.R.Civ.P. 23 have been satisfied, and may not consider whether plaintiffs have stated a cause of action or will prevail on the merits") (granting class certification regarding life insurance fraud); In re Intelcom Group, Inc. Securities Litig., 169 F.R.D. 142, 145 (D. Colo. 1996) ("my inquiry is limited to whether the requirements of Rule 23 have been satisfied. I may not consider the underlying merits of the claim") (certifying securities fraud class).

Like here, the class claims at issue there included both miscalculated rate claims (i.e., alleging the BIA failed to calculate properly administrative CSC requirements), and (as later amended) shortfall claims (where the BIA failed to pay in full even the undercalculated amounts). The Court rejected the Government’s arguments against certifying the class. Ramah eventually resulted in two class settlements totaling over \$100 million in damages, disposing first of the miscalculated rate claims arising in fiscal years 1989 through 1993 against the BIA and IHS, and later of the “shortfall” and “direct CSC” claims for limited years. Supra 5 n.5.

A. The Proposed Class Meets Rule 23(a)’s Requirements

Plaintiff Pueblo of Zuni submits that the class readily meets Rule 23(a)’s four initial prerequisites for any class action, namely that - -

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

To satisfy the numerosity requirement, a plaintiff need only demonstrate that joinder is “impracticable,” not impossible. See Ditty, 182 F.R.D. at 641; Daigle v. Shell Oil Co., 133 F.R.D. 600, 603 (D. Colo. 1990). In determining whether joinder is impracticable, courts have identified the relevant factors as “class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members, and the ability of class members to institute individual lawsuits.” Taco Bell, 184 F.R.D. at 357 (certifying disability class); Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (holding district

court erred in not certifying public benefits class). However, when a class involves “hundreds” of members, “the impracticability of bringing all class members before the court has been obvious, and Rule 23(a)(1)’s requirement has been easily met” without reference to other factors.⁵⁰

While “no set formula” exists, Rex v. Owens, 585 F.2d 432, 436 (10th Cir. 1978), the Tenth Circuit has observed that class actions have been deemed viable in cases with as few as 17 to 20 members. But “[c]ertainly, when the class is very large, for example, numbering in the hundreds, joinder will be impracticable.” 1 Newberg § 3:5, at 246 (emph. added). See also In re American Medical Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) (“[w]hen class size reaches substantial proportions ... the impracticability requirement is usually satisfied by the numbers alone”).

Based on class size alone the class defined in this case easily meets Rule 23(a)’s numerosity requirement. IHS’s documents reveal that by fiscal year 1998 at least 329 Tribal contractors in 35 states had an ISDA contract with IHS. Pl. Exh. 44, at DEF22765 (1999 Contract Support Cost Data Report) (noting “329” Tribal contracts). IHS has, in fact, accounted for each of the hundreds of Tribal contractors for each year the contractor had a contract, from 1993 through 2001. Pl. Exh. 36, “Appendix A” to Defs. Resp. to Inter. (e.g. listing 323 Tribal contractors with 1997 contracts).

Although unnecessary to the numerosity analysis (because it goes to the merits), we also note that, by IHS’s own records, the overwhelming majority of these Tribal contractors (and likely all of them) were not fully funded their CSCs at some point during the class period. For instance (and without distinguishing between “new or expanded” and “ongoing” contracts), IHS admits that in

⁵⁰ Alba Conte and Herbert B. Newberg, 1 NEWBERG ON CLASS ACTIONS § 3:5, at 246 (4th ed. 2002) (hereinafter “Newberg”), adding that in such cases “[t]he issue ordinarily receives only summary treatment ... and has often gone uncontested.” Id. See also id. at 247 (joining as few as 40 raises “presumption” of impracticability).

fiscal year 1998 over 75% of all contractors (“approximately 250 tribal contractors”) suffered shortfalls in the payment of their IHS-calculated CSC requirements (Pl. Exh. 20, Def. Adm. No. 4), a computation that does not account for Tribal contractors which (again, under IHS’s calculations) were fully paid in 1998 but had shortfalls in previous or subsequent years (for instance, because IHS placed them on the ISD Queue in earlier years).⁵¹ IHS records also show scores of contracts placed on the various IHS Queues during the 1990s. Id. at 37 n.51. Further, the Defendants’ discovery responses show that nearly 90% of Tribal contractors have OMB accounting rates that IHS used to determine their indirect administrative CSC requirements. Supra at 19.

Whether the precise number of Tribal contractors experiencing CSC shortfalls during the class period is 334 or a little less, or whether the number of contractors with OMB indirect cost rates

⁵¹ IHS’s 1999 Report (based on fiscal year 1998 data), reports that only 59 of 329 Tribal contractors were fully paid their “CSC requirements,” leaving 270 with shortfalls. Pl. Exh. 44, at DEF22778 (listing 5 at over 100% funding), DEF 22781-22782 (listing 54 at 100% or more). However, some of the Tribal contractors listed as fully paid in 1998 were certainly underpaid in prior years. See, e.g., Pl. Exh. 44, at DEF22782, line 163 (regarding “Duckvalley” [sic] Shoshone-Paiute Tribes, one of the FY 1996-1997 claimants in the Cherokee III case). See also Cherokee, 199 F.R.D. at 361 (noting that the “Plaintiffs’ have identified 296 tribes out of a potential 329 tribes who were underpaid or experienced a shortfall as a result of defendant’s failure to pay.”).

Although it is prudent at this stage not to delve too deeply into the merits of the claims, the Defendants acknowledge that each year scores of Tribal contractors suffered shortfalls in payment of their IHS-calculated CSC requirements. For instance, the number of unpaid ISD Queue contractors (those associated with Class Claim 1) rose from 70 at the end of FY 1995 (see Pl. Exh. 45, FY 1998 IHS Justification of Estimates for Appropriations Committees, at IHS-117 (DEF01481)), to 136 by the end of FY 1998. Pl. Exh. 44, 1999 IHS Report including ISD Queue #99-8.17.0 (DEF22765, DEF22768-DEF22774); see also Pl. Exh. 26, IHS REPORT TO CONGRESS ON CONTRACT SUPPORT COST FUNDING IN INDIAN SELF-DETERMINATION CONTRACTS AND COMPACTS at 6 (May 1997) (DEF22595-DEF22596) (showing 105 Tribal contractors on the Queue). Many Tribal contractors on the Queue went unfunded for all 4 years. Supra 16 n.19. The 1998 data also show that at least 140 of the listed 329 Tribes contracting with IHS that year suffered CSC requirement shortfalls related just to their ongoing contracts (those associated with Class Claim 2), Pl. Exh. 44 (DEF22765, DEF22766), while another 122 suffered shortfalls associated with both their ongoing contracts and their “new or expanded” contracts listed on the Queue (DEF22777-22778, lines 10 through 131). See also Pl. Exh. 9, Black Depo. at 24:2-16 (explaining that from IHS shortfall reports “you could identify, for any given year . . . the number of tribes that had either a contract or a compact and were paid [CSCs]” and agreeing that one could “identify which tribes had shortfalls off that same report in the payment of [CSCs]” “with regard to total need as negotiated by the Indian Health Service and the individual tribe vis-a-vis the amount actually paid”).

is 294 or a little more, it is clear that Rule 23(a)'s numerosity requirement is readily met by the hundreds of Tribal contractors contracting with IHS each year.⁵²

Although the numbers alone are conclusive for “numerosity,” we also note that the roughly 300 class members at issue hail from every corner of the country, from the Everglades of Florida to the North Slope of Alaska. Such geographic dispersion is an additional factor that weighs heavily in favor of finding the class too numerous to practicably join. Taco Bell, 184 F.R.D. at 358; Alvarado Partners, L.P. v. Mehta, 130 F.R.D. 673, 675 (D. Colo. 1990) (noting geographic dispersion in finding joinder impracticable). In assessing a similar class motion in Cherokee, the Eastern District of Oklahoma agreed that “geographic diversity of the potential class members makes joinder impractical, if not impossible.” Cherokee, 199 F.R.D. at 362.⁵³

Two additional factors under the Taco Bell analysis weigh in favor of certification: “the financial resources of class members, and the ability of class members to initiate individual lawsuits.” Taco Bell, 184 F.R.D. at 357. To leave the resolution of CSC claims to voluntary joinder

⁵² The Plaintiffs have provided both a good faith estimate of the class size and evidence from the Defendants that supports that estimate. A “good faith estimate” of the number of class members is all that is required. 1 Newberg § 3:5, at 241. See also 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: Civil § 1762, at 177 (3d ed. 2005) (“a party seeking class certification need not show the exact number of potential members in order to satisfy this prerequisite ...”). See also German v. Federal Home Loan Mortgage Corp., 885 F. Supp. 537, 552-553 (S.D.N.Y. 1995) (“where the estimated class membership is only in the ‘hundreds,’ and ‘the exact number of class members could not be determined because pertinent information was within the defendants’ control,’ class certification is proper”). Additionally, “the court may make ‘common sense assumptions’ to support a finding that joinder would be impracticable.” Cherokee, 199 F.R.D. at 361 (citation omitted) (finding putative class of Tribal contractors satisfied numerosity).

⁵³ See also Mullen v. Treasure Chest, LLC, 186 F.3d 620, 624-625 (5th Cir. 1999) (joinder not practicable where 100 to 150 class members were geographically dispersed); In re the Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290 (2d Cir. 1992) (describing several hundred member class “dispersed throughout the United States,” and finding that “[i]ndividual adjudication of each claim would take many years, and would drastically increase the legal expenses for all of the parties. Joinder of all claims into one proceeding would be expensive, time-consuming, and logistically unfeasible. Thus, Rule 23(a)(1) has been satisfied.”).

simply assures that most claims will never be litigated, either here or anywhere else, simply because most Tribal contractors (many of which serve the poorest of the poor) have no available resources to pursue these claims, and because nearly half of the Tribal contractors' claims are too small to warrant the cost of pursuit on an individual basis,⁵⁴ particularly when success on the claim will most certainly require litigation.⁵⁵ While these issues are addressed more fully in the discussion of superiority, infra 54-57, such economic factors are also relevant to numerosity.⁵⁶

2. Commonality

“[C]ommonality requires only a single issue common to the class,”⁵⁷ comprised of either a common question of law or fact.⁵⁸ Thus, this requirement is “easily met in most cases.” 1 Newberg § 3:10, at 274-277. Here there are numerous common issues of law and fact alleged in the

⁵⁴ For instance, IHS data for one year's snapshot shows that 175 of 329 Tribal contractors suffered FY 1998 CSC shortfalls valued by IHS at less than \$100,000. Pl. Exh. 44 (IHS 1999 CSC Shortfall Report), at DEF 22800-DEF 22827; see also Dkt. No. 34, Mather Aff. in Support of Plaintiff's Motion for Class Certification Filed March 9, 2005, ¶ 36 (noting that in FY1999 approximately 144 Tribal contractors had CSC requirement shortfalls under \$50,000); Pl. Exh. 20, Def. Adm. No. 5 (acknowledging that IHS Area Office reports and IHS reports for Congress show that shortfalls “ranged from a few dollars for some tribal contractors to several hundred thousand dollars” for others).

⁵⁵ Already seven Tribal contractors have been denied their claims in surprisingly similar denial letters. Pl. Exh. 46 (sampling two post-Cherokee III denials). From Defendants' discovery Plaintiff knows of no granted claims.

⁵⁶ See also Eisen, 417 U.S. at 161 (small amount of damages created “[e]conomic reality ... that ... suit proceed as a class action or not at all”); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (because of economic unfeasibility over “a multiplicity of small individual suits for damages, aggrieved persons may be without effective redress unless they may employ the class-action device”).

⁵⁷ J.B. ex rel Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999) (quoting K.L. v. Valdez, 167 F.R.D. 688, 690 (D. N.M. 1996)) (internal quotations omitted); see also Harris v. Gen. Dev. Corp., 127 F.R.D. 655, 661 (N.D. Ill. 1989) (“a single issue common to all the members is adequate to meet the commonality requirement”) (certifying employment discrimination class).

⁵⁸ Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982) (“In determining whether the typicality and commonality requirements have been fulfilled, either common questions of law or fact ... will be deemed sufficient. Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist”) (civil rights class certification proper).

Complaint and the Answer.

At the most general level, what is common is that the Defendants entered into materially identical contracts each year with a class of Tribal contractors, under an identical statute and an identical set of agency Circulars. The Defendants claimed that Congress failed to appropriate sufficient sums to pay the CSC requirements associated with those contracts, and on that basis the Defendants invoked the common terms set forth in the Circulars to underpay the contracts.

These Circulars were strictly applied in a uniform and consistent manner across the class, both to determine each Tribal contractor's CSC requirement, and to calculate each year how much of that CSC requirement (if any) would be paid. Each year the application of the IHS Circulars chronically underfunded the CSC amounts owed scores of Tribal contractors under the Act. Supra at 17 nn.21 & 22, 37 n.51. In underpaying the Tribal contractors, IHS positioned itself behind common legal defenses concerning the nature of its obligations under the ISDA and the meaning of the relevant appropriations Acts. See Cherokee III, 543 U.S. at 636 (noting the Government's "sole defense" consists of the argument that it had insufficient appropriations); Ramah I, 112 F.3d at 1462 (making statutory arguments applicable to all contractors with indirect cost rates). Similarly, in now defending this suit IHS acknowledges it is positioning itself behind common defenses. Def. Ans. FAC p.1 n.1 (Dkt. No. 252) ("Many, if not all, of these defenses also would apply to the claims of putative class members") (emph. added).

This common course of conduct is interwoven with several common legal issues, key among them being whether the Indian Self-Determination Act, and the IHS contracts that implement the Act, entitle each Tribal contractor to be paid in full the CSC amounts required under 25 U.S.C. §

450j-1(a), including the CSC requirements IHS determined for each contractor. By law, and regardless of variation, all self-determination contracts and compacts incorporate the same funding provisions of the Act, namely section 450j-1(a), including the full amount of CSC requirements calculated by IHS, regardless of limiting language in the IHS Circulars. The CSC claims here are ultimately based on that Act. Similarly, the government's defenses cannot escape being assessed under the mandates of the Act. Each class member's claims are thus based on the same legal or remedial theory: whether the ISDA and the implementing IHS contracts require the government to pay Tribal contractors the full amount of CSCs defined in Section 450j-1(a). See Taco Bell, 184 F.R.D. at 359 (“Not every issue must be common to the class so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory.”).⁵⁹

The foregoing generalized issues of fact and law break down into numerous discrete common issues including common legal defenses (although groups of legal issues and defenses would likely be resolved by a single ruling of law, while others might well become moot):

1. Whether during the class period IHS imposed upon Tribal contractors a succession of CSC Circulars that controlled the calculation and payment of CSC requirements.
2. Whether IHS's CSC Circulars are contrary to law as in excess of the limited authority Congress delegated to the Secretary under the ISDA.
3. Whether IHS's sole reason for not paying in full CSC requirements at the time they were due was the last sentence of 25 U.S.C. § 450j-1(b) and IHS's perceived lack of available appropriations.
4. Whether IHS's use of OMB accounting rates to calculate indirect administrative CSC requirements was contrary to law.

⁵⁹ As specified in the First Amended Complaint at ¶ 57, the common claims at issue here do not include claims unique to a particular Tribe, such as a dispute over a disallowed item of cost in a Tribe's annual audit.

5. Whether the rule of Cherokee III regarding the availability of lump-sum appropriations applies to other ISDA contractors in FY 1993-FY 1997 (and to new or expanded contracts in FY 1998).
6. Whether the rule of Cherokee III regarding the availability of lump-sum appropriations applies to an earmarked lump-sum amount for the payment of CSCs that is sufficient to pay any ISDA contract, although insufficient in amount to pay all such contracts collectively.
7. Whether the Defendants are barred from invoking the ISDA's "availability of appropriations" clause because they executed ISDA contracts while simultaneously failing to seek sufficient appropriations to pay all those contracts.
8. Whether, the ISDA confers upon the Secretary "contract authority" to bind the United States to the full contract amount irrespective of agency appropriations to pay such contracts.
9. Whether a Tribal contractor has a statutory right under the ISDA to be paid all CSCs required by § 450j-1(a), independent of the Tribe's contract rights under the CDA.
10. Whether a Tribal contractor has waived (or is estopped from raising) claims to additional funding during the class period because it either acquiesced or expressly agreed to IHS's common practices under its CSC Circulars.
11. Whether "releases" executed as part of the contract "close-out" process were intended to release (and/or had the effect of releasing) the Defendants from liability for unpaid CSCs.
12. Whether the filing of a class action complaint tolls the time for absent class members to file individual lawsuits under the ISDA or administrative claims under the CDA.
13. Whether the doctrine of laches forecloses a claim under the ISDA or the CDA even though a Tribal contractor has timely filed a claim and/or initiated a lawsuit within six years after accrual of the claim.
14. Whether the named Plaintiff's exhaustion of its administrative remedies is sufficient to relieve absent class members of any burden individually to exhaust such remedies.
15. Whether, prior to the Supreme Court's decision in Cherokee III, it was IHS's general practice either to deny or to fail to take action on CDA claims involving unpaid CSCs.

16. Whether terms added to an ISDA contract or AFA that are inconsistent with the ISDA are void and unenforceable.
17. Whether “limitation of cost” clauses relieve the Defendants of liability for failure to pay full CSC requirements.
18. Whether the Defendants violated either their duty of good faith and fair dealing, or their trust responsibility to the Tribes, by representing to Tribal contractors that appropriations to pay CSCs in full were unavailable.
19. Whether the Defendants’ continued imposition of various federal procurement rules on Tribal contractors after 1988 was contrary to law.
20. Whether the CDA’s six-year statute of limitation applies to claims arising out of contracts awarded prior to October 1, 1995.

As a general proposition, most of these common issues of law or fact will be implicated in any individual litigation brought by a Tribal contractor (although, again, in many instances a ruling on one issue could encompass or moot others).⁶⁰

To be sure, once class liability is established each class member’s ultimate recovery will turn on each contractor’s particular circumstance. (For instance, in Ramah II the ultimate pay outs to Tribal contractors from the first partial settlement had to be calculated in a claims process, and ranged from a few dollars to a few million dollars.) But that does not negate the common issues of fact and law that will establish (or defeat) the Government’s liability to all class members. Thus, the fact that one Tribe is small and contracts only a nursing program, while another Tribe is large and

⁶⁰ Two issues cover many, but not all, potential class members. First, it appears from the Defendants’ document production that 110 contractors executed 276 releases during the period Oct. 1, 1993 through May 31, 2005 (including four releases executed by Plaintiff Pueblo of Zuni). Pl. Exh. 39, Zawodny Aff. ¶ 10, p.4 (summarizing materials produced by Defendants); see also id. at Attach. 7 (sampling of releases). The Defendants’ common legal defenses over these releases only impacts those 110 Tribal contractors. Second, approximately 10% of the class members do not have indirect cost rates and thus are not affected by Class Claim 3. See Pl. Exh. 36, Defs. Resp. to Inter. “Appendix A.” Supra at 19.

contracts an entire hospital, is immaterial to the ultimate issues presented.⁶¹ More importantly, “the presence of individual issues does not destroy commonality,” Lewis v. Nat’l Football League, 146 F.R.D. 5, 9 (D.D.C. 1992), and a common question of law (such as the validity of IHS policy and practice) easily satisfies the commonality requirement even if individual factual situations vary.⁶²

In sum, because this action is at root based on a single statute that has been incorporated into each individual contract, and because that statute trumps any arguably inconsistent contract terms, all members of the plaintiff class share at least all of the common questions of law that are rooted in that statute. And that is more than enough.

3. Typicality

Third, and borrowing from Rule 23(a)(3), “the claims ... of the [Tribe] are typical of the claims ... of the class.” Like commonality, “differing fact situations of class members do not defeat typicality ... so long as the claims of the class representative and class members are based on the same legal or remedial theory.” Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988). See also Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270 (10th Cir. 1975) (“Any inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class.”) One court framed the issue as a matter of two elements, “the

⁶¹ As this Court has noted, “global CSC [damage] calculations are not relevant to the class certification issues.” Dkt. No. 205, Mem. Op. & Order at 15 (Feb. 13, 2006); see also id. at 3-4 (“difficulties in quantifying class damages are not relevant to issues of class certification”). Nonetheless, Defendants agree that existing data regarding overall shortfalls can be used as a “starting point” for ultimately quantifying total global amounts owed to the class on Class Claims 1 and 2. Defs’. Opp. to Plf’s. Mtn. to Comp. Disc. (Dkt. No. 158) at 7 (citing Defs. Exh. A, Demaray Dec. ¶¶ 20, 30) (Amended Demaray Dec. refiled at Dkt. No. 162, Exh. 1).

⁶² See Milonas, 691 F.2d at 938 (“As we have stated previously, every member of the class need not be in a situation identical to that of the named plaintiff.”); Like v. Carter, 448 F.2d 798, 802 (8th Cir. 1971) (“Factual differences are not fatal if common questions of law exist.”).

defendant’s conduct and the plaintiff’s legal theory,” so that to satisfy Rule 23(a)(3)’s demand, the named plaintiff must share both these elements with other class members. Ditty, 182 F.R.D. at 642 (quoting Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)). Importantly, “the requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other class members.” 7A FEDERAL PRACTICE & PROCEDURE § 1764, at 266-268.

The representative Tribe here has the same legal claim as do all other class members. The Pueblo of Zuni entered into standard ISDA contracts, both before and after the Model Contract was enacted.⁶³ The Pueblo was treated just like any other Tribal contractor when it came to how IHS determined its CSC requirements.⁶⁴ When IHS calculated the Pueblo’s indirect administrative CSC requirements by strict reference to the Pueblo’s OMB rate, IHS treated the Pueblo identically to all other Tribal contractors with OMB rates. Supra 19-24; Pl. Exh. 13, Demaray Depo. at 52:7-11 (Pueblo was “part of the overwhelming majority” of Tribes with indirect cost rates).

The Pueblo of Zuni, like other Tribal contractors in the class, was also denied its IHS-calculated CSC requirement, pursuant to IHS’s written policy not to pay such requirements. FAC ¶ 50 (Dkt. No. 5). When the Pueblo, like other contractors, was newly contracting certain IHS programs in the mid-1990s, IHS’s CSC Circulars placed the Pueblo and other contractors on a

⁶³ See e.g., Pl. Exh. 43, Pueblo of Zuni Contract No. 242-93-0003 (excerpts of standard pre-1994 ISDA contract referencing FAR clauses); Pl. Exh. 13, Demaray Depo. at 47:21-22 (referring to Zuni’s FY 1996 contract as “typical of the model contract”) (emph. added).

⁶⁴ Pl. Exh. 14, Lujan Depo. 156:12-157:22 (e.g., “They weren’t treated any differently” with regard to “implementing model contract terms,” “calculating [CSCs],” or “how [IHS] pay[s] or allocate[s] [CSCs] to tribal contractors.”); see also Pl. Exh. 9, Black Depo at 121:8-11 (“Our area offices determine [CSC] requirements based on the guidance in the circular. Therefore, it ought to be a consistent manner of doing it.”).

“Queue” for one or more years, instead of paying them their CSC requirements associated with those contracts. Supra at 25 n.37. When the Pueblo, like other contractors, was operating IHS programs under older contracts, the Pueblo and other contractors were again underpaid their CSC requirements under the same CSC Circulars.⁶⁵ Either way, the Pueblo was underpaid its CSC requirements for the same reason that other class members were underpaid.

All of the issues listed earlier in connection with the “commonality” discussion, including alleged common facts, common claims and common defenses, are presented both by the Pueblo of Zuni’s claims and by all other class members’ claims. That is because the IHS Circulars were applied consistently, systemwide. Although the precise amount of damages suffered by each Tribal contractor will vary, that does not foreclose a finding of typicality. Thus, under Rule 23(a)(3) the Pueblo’s claims “are typical of the claims ... of the class.”⁶⁶

Similarly, the relevant provisions of the Pueblo’s contracts are typical of, and not materially different than, other Tribes’ contracts. For instance, with respect to Class Claims 1, 2 and 3, the

⁶⁵ Pl. Exh. 5 (IHS Circular 96-04), at DEF02607 (discussing how to allocate funding when “pool” for ongoing contracts is “not adequate to meet all awardee’s requirements”); Pl. Exh. 9, Black Depo. at 50:2-20 (responding to counsel’s question “Are you aware that the Pueblo of Zuni was underpaid its contract support costs during the period 1993 to 2001 on some of its contracts?” with the question “When you say underpaid, are you talking about . . . the fact that we might not have been able to pay the negotiated need or requirement for the tribe based on the appropriations for contract support costs that we had available?” and then answering: “If that’s the case, I don’t know in Zuni’s personal case, but certainly as we said earlier, the appropriation that we’ve been receiving for contract support costs has not been sufficient to fund the need or requirement of tribes.”); id. at 50:21-25 (“Q. Would Zuni be alone if they were underpaid in 1996? A. Once again, if you’re talking about it within the context of their total need vis-a-vis the appropriation for CSC, they would not be alone”) (emph. added).

⁶⁶ Of 139 Tribal contractors not on the “Queue” but underpaid in FY 1998, the shortfalls ranged between a high of \$1,440,399 to a low of \$2. Pl. Exh. 44, IHS 1999 Report at DEF22779-DEF22782. The Pueblo’s \$31,760 shortfall puts it right in the middle of the percentage of CSC requirements funded that year (i.e., 70th out of 139). Id., at DEF022780. Moreover, even an alleged “great variance in damages sought by the named class members” does not preclude a finding of typicality. Olden v. LaFarge Corp., 203 F.R.D. 254, 269-270 (E.D. Mich. 2001).

parties' sampling effort confirms that the Pueblo's contracts mirror the ISDA's statutory contract, including clauses concerning (1) the purpose for which the contract was entered; (2) the funding amount; (3) inapplicability of other guidelines, manuals, and policies; (4) incorporation of an AFA setting out the funding amount; (5) how the contract should be construed; and (6) a duty on the Secretary to act in good faith. Supra 28-30. These same clauses appear in most other 1997 and 2001 self-determination contracts, and are similar to comparable compact provisions. Similarly with respect to Claim 4, the Pueblo's contracts for fiscal years 1993 and 1994 reflect the standard IHS "procurement" contract still issued at the time – a contract which incorporated IHS's old federal acquisition regulations concerning ISDA contracts. Supra 31-32.

In sum, the Pueblo's claims are typical of the claims of the class (as are the Government's defenses to those claims), and the Pueblo has no antagonistic or conflicting interests with other class members.⁶⁷

4. Adequate Representation

Finally, the Pueblo and its attorneys will adequately represent the interests of the class. Like commonality, the requirement of adequate representation under Rule 23(a)(4) overlaps with

⁶⁷ The Defendants' miss the point in focusing on differences in programs being contracted, in indirect cost rates, and the like, see e.g., Defs. Reply to Mtn. to Stay Briefing on Class Certification and to Stay Discovery (Dkt. No. 39), at 5-6 ("[A]fter the decision in Cherokee Nation [III], what remains to be decided are highly individualized claims for CSC ... [W]hat is left are primarily individualized defenses specific to each IHS contractors' ISDA contract and related documents and to individual tribal contractors' course of conduct in pursuing their demands for additional CSC"). Naturally, every Tribal contractor is different one to the next, just as every person is different. But Rule 23(a)(3) asks not whether the class representative is himself typical of others, but whether his or her "claims" are typical. Just as widely divergent purchasers of stock – from pension funds, to doctors to day-traders – may assert common "claims" when confronted with illegal stock manipulation, so too, the diverse Tribal contractors here are asserting common claims in the face of the agency's illegal failure both to fully fund IHS CSC requirements, and to calculate correctly those requirements (together with the agency's various defenses to those claims).

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

a. The Pueblo Will Vigorously Prosecute the Class’s Claims

As the past year has vividly demonstrated, the Pueblo of Zuni will vigorously prosecute the claims presented here, just as it has since 2000 vigorously prosecuted similar claims against the BIA in the Ramah litigation.⁶⁸ In the Ramah-Zuni litigation the Pueblo successfully prosecuted class claims against the BIA to a June 2001 \$29 million settlement (which also encompassed smaller “shortfall” claims). 250 F. Supp. 2d at 1306 (noting consolidation of cases and approving settlement). Following the settlement of these claims against the BIA, the Pueblo in September 2001 instituted this action to vindicate similar claims against IHS.

Notwithstanding withering discovery burdens imposed by Defendants in this case, the Pueblo remains committed to litigating these claims to a successful conclusion. At the same time, its own

⁶⁸ See Pueblo of Zuni v. United States, No. CIV 00-0365 LH/WWD (D. N.M.) (consolidated into the Ramah litigation in 2002). See also Ramah III, 250 F. Supp. 2d at 1305-06 (noting Pueblo of Zuni represents class of Tribal contractors with “claim[s] for unpaid direct [CSCs] under 25 U.S.C. § 450j-1(a)(2), (3), and (5) and represents [CSCs] that are neither included in the indirect cost pool nor in the Secretarial amount portion of a self-determination contract.”).

claims are sufficiently large to assure its aggressive advocacy in this respect. Further, the Pueblo is free of any antagonistic or conflicting interests vis-a-vis the class, a matter already discussed supra 44-47 in connection with the “typicality” of the Pueblo’s claims.

In sum, the Pueblo’s conduct in this five-year old litigation, its performance in the Ramah-Zuni BIA litigation, and its significant personal stake in this case, all establish that the Pueblo will adequately champion the interests of the class here.

b. The Tribe’s Counsel Is Experienced

The Tribe’s counsel is similarly experienced and capable of conducting this litigation in the best interests of all class members. Although “the competence and experience of class counsel ... will most often be presumed in the absence of proof to the contrary,” 1 Newberg § 3:24, at 417-418, here class counsel’s record over the course of nearly 30 years, together with the record of achievements of his firm, readily demonstrate counsel’s requisite experience in this highly specialized field.⁶⁹

The most powerful evidence of counsel’s requisite skill in matters directly pertinent to the instant case is counsel’s service to tribal contractors in the 10-year battle with IHS spanning three major cases and multiple administrative board, district court, and appellate court decisions (including both the Cherokee cases and the Shoshone-Bannock litigation), all culminating in the unanimous 2005 Supreme Court decision in Cherokee III. It would be difficult to conceive of a more important victory for Tribal contractors in this narrow field of practice than Cherokee III, a victory that speaks

⁶⁹ Pl. Exh. 47, Aff. of Lloyd B. Miller (attaching Résumé); see also Sonosky, Chambers, Sachse, Endreson & Perry, LLP website found at www.sonosky.net (describing practice areas and experience).

for itself in terms of counsel's adequacy to represent the class in an action that seeks in significant measure to spread the benefits of Cherokee III to all other similarly-situated Tribal contractors. Indeed, without the Supreme Court victory, the current claims would not exist.

Counsel's work in this District is also known through counsel's services in the Ramah class action litigation pending against the BIA. Counsel represented the Pueblo of Zuni in the 2000 Zuni litigation that was subsequently consolidated into the Ramah case, and that (as noted earlier) has to date produced a \$29 million settlement.⁷⁰ (Zuni counsel also appeared in this District in an earlier phase of the Ramah litigation, where counsel successfully represented certain absent class members whom Ramah class counsel had initially excluded from an earlier 1999 class settlement. Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Babbitt, 65 Fed. Reg. 4989, 4990-91 (Feb. 2, 2000) (Part IV) (discussing the "DCA Tribes" represented by counsel).

In addition to litigating these and other cases arising under the ISDA,⁷¹ counsel has also been deeply involved over a twenty-year period in various ISDA-related legislative and regulatory

⁷⁰ Counsel's filings for the Pueblo in that case both preserved the "direct CSC" claims and captured an additional year that other class representatives were post hoc unable to pursue (translating into several million dollars for the class). Following consolidation of the Zuni case into the Ramah case, Zuni counsel was appointed co-lead counsel for the direct CSC claim. In counsel's leadership role on that claim, counsel and the Pueblo have recently concluded two years of negotiations with the BIA on that agency's first CSC policy, a policy which for the first time recognizes the right of Tribal contractors to receive "direct" CSCs under their contracts with the BIA. BIA Nat'l Policy Mem. No. NPM-SELFD-1 (May 8, 2006).

⁷¹ For instance, counsel successfully challenged an illegal BIA practice of penalizing certain tribal contractors by making excessive contract underpayments in Ramah Navajo Sch. Bd. (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 Bhd. of Teamsters, 341 N.L.R.B. No. 139 (May 28, 2004), on remand from Yukon-Kuskokwim Health Corp. v. NLRB, 234 F.3d 714 (D.C. Cir. 2000), rev'g 328 N.L.R.B. 101 (1999) and 329 N.L.R.B. 86 (1999).

activities, all as noted in Pl. Exh. 47.⁷² More generally, counsel has considerable experience in class action matters outside the Ramah litigation, having served since 1989 by dual Federal and State court appointment as Plaintiffs' Liaison Counsel in the EXXON VALDEZ oil spill disaster litigation (and having also served there 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), pending on appeal sub nom. Baker v. Exxon Corp., No. 04-35174 (9th Cir.) (appeal of \$4.5 billion punitive damage award); Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997) (dismissing certain economic injury claims under maritime law in excess of a stipulated \$20 million compensatory damage award).

Beyond these specific areas of greatest direct relevance to this Motion, counsel and his firm (comprising 29 attorneys in 5 offices) have since 1976 devoted nearly all of their professional efforts to representing Indian Tribes and related Tribal organizations in a diverse array of matters specialized to Native American affairs.

Based upon these qualifications and experiences, the Pueblo of Zuni respectfully submits that counsel is qualified to serve as lead class counsel in this action.

B. The Proposed Class Meets Rule 23(b)(3)'s Requirements

⁷² This includes frequently testifying before Congress on various proposed ISDA amendments and oversight hearings; service on the negotiated rulemaking committees that developed implementing regulations for the 1994 and 2000 ISDA Amendments; and membership on the IHS and BIA CSC workgroups formed over the years to discuss CSC policy issues. See e.g., Indian Self-Determination and Education Assistance Act: Hearing on S. 2172, The Tribal Contract Support Cost Technical Amendments of 2004 Before the Committee on Senate Indian Affairs, 108th Congress, 2d Sess. (2004) (statement of Lloyd Miller) located at 2004 WL 939458; Oversight Hearing before the Senate Committee on Indian Affairs on Contract Support Costs: Hearing on Contract Support Costs Before the Senate Committee on Indian Affairs, 106th Congress, 1st Sess. (1999) (testimony of Lloyd Miller) located at 1999 WL 719752; Indian Contracts for Health and Education Services: Hearing on S. 2036, the Indian Self-Determination Contract Reform Act of 1994 Before the Senate Committee on Indian Affairs, 103rd Congress, 2d Sess. (1994) (testimony of Lloyd Miller) located at 1994 WL 266993; Oversight Hearing on the Indian Self-Determination Act: Hearing on Indian Self-Determination Before the United States House of Representatives Natural Resources Committee's Subcommittee on Native American Affairs, 103rd Congress, 2d Sess. (1994) (testimony of Lloyd Miller) located at 1994 WL 392934.

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

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of the class action.

Id. An evaluation of these factors demonstrates that the proposed class meets the requirements of Rule 23(b)(3).

1. Predominance

In determining “predominance,” the Court looks primarily at liability. See Queen Uno, 183 F.R.D. at 695. The critical question here is “whether there is material variation in the defendants’ posture towards the different plaintiffs.” Ditty, 182 F.R.D. at 643 (quoting Esplin, 402 F.2d at 99) (internal quotations omitted). Where no material variation exists among the class members’ claims or the defendants’ defenses, a court should find that common issues predominate. Ditty, 182 F.R.D. at 644 (citing Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 798 (10th Cir. 1970)).

Here, the Defendants’ posture toward the class has been uniform, as reflected in the CSC Circulars. As a consequence, the class members’ basic claims for unpaid CSCs are identical: under the ISDA and the ISDA contracts, each Tribal contractor had a right to full payment of CSCs,

including payment of the CSC requirements calculated by IHS, and the higher amounts IHS would have paid had it not miscalculated CSCs. The Defendants breached that right by application of the IHS Circulars. So, too, the Government can be expected to claim a variety of common defenses to deny any liability for unpaid CSCs. In these respects, the Government's posture will not materially vary across the class in relation to individual Tribal claims or the Government's defenses. Indeed, although the exact quantum of each class member's ultimate recovery will differ, the class's theory of recovery and the Government's main defenses will not. Common issues thus predominate.

In contrast to the common issues the class seeks to litigate, the only individual issues presented concern the actual amount of damages each Tribe is entitled to recover. On this score, it is well established that, as long as the "question of basic liability can be established readily by common issues," and only the calculation of damages potentially requires individual examination, differences in damages sought do not preclude a finding of predominance.⁷³

A rule that allowed differences in damage calculations to defeat predominance would effectively eliminate the class action tool for most claims (including antitrust and securities claims)

⁷³ Gold Strike, 436 F.2d at 798 (certifying antitrust case because the effect of competition on plaintiffs could be shown on a classwide basis and "[t]he fact that there may have to be individual examinations on the issue of damages has never been held ... a bar to class actions"); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 428 (4th Cir. 2003) (noting, even where individualized inquiries are necessary with respect to damages, "if 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied'") (emph. added) (citation omitted); Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) ("Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain") (citing In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 139 (2d Cir. 2001)); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) (certification appropriate in toxic tort case where individual damage issues were overshadowed by common liability issues based on a single course of conduct); Taco Bell, 184 F.R.D. at 362-363 (certification appropriate for claims that Taco Bell lines were inaccessible to disabled customers, even though damages for each class member would depend on an individual determination of how many times that person visited the restaurants); Heastie v. Cmty. Bank, 125 F.R.D. 669, 674-675, 679 (N.D. Ill. 1989).

which under long-standing jurisprudence are traditionally understood to be particularly appropriate under Rule 23(b)(3). In re Visa, 280 F.3d at 140. Where, as here, all of the issues relevant to determining liability are common, and the only significant potential variances involve damages, the predominance requirement is easily satisfied.

Moreover, there is every indication here that individual damage assessments will not be necessary to secure a final judgment in favor of the class and against the Defendants. With respect to the shortfall claim, the Defendants have already collected massive data on global, class-wide damages, and have themselves used that data as a “starting point” for computing the Government’s classwide exposure in this case. Supra at 44 n.61. Plaintiff submits that this and similar work by the class’s own expert Dr. Mather will provide the Court with a reasonable basis to award damages to the class as a whole. So, too, with respect to the miscalculated rate claims, mathematical formulas have already been developed and are available to the parties’ experts and to the Court, just as they were in Ramah II, to permit entry of a judgment in favor of the class for a global damage award. The Court would then not be involved in any individual damage quantification issues, a matter that would instead be addressed by a separate class claims process (just as occurred after entry of the Ramah II and Ramah III judgments). In short, no individualized issues need ever come before this Court.

2. Superiority

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

First, with rare exception usually involving very large contract underpayments, the individual Tribal contractors that have been harmed by the Government’s actions do not have a great interest in individually controlling the prosecution of separate actions – primarily because of the

extraordinarily high cost of litigation against formidable Defendants. Moreover, the lack of full CSCs has already compelled many Tribal contractors to reduce their programs and services, further compromising their ability to commit resources to individual battles with the Defendants. Supra at 26. Proceeding as a class action will massively reduce each class member's overall litigation costs (and equally the burden on this and other courts) while resolving at once all common issues going to the Government's ultimate liability. Absent a class, the costs of litigation would multiply astronomically and far outweigh the benefit that could be more efficiently achieved through the class device.

Tellingly, only a very few federal court actions concerning IHS CSC issues have to date ever been filed. Supra at 5-6 n.5 (partial listing). The Shoshone action strictly concerned the IHS Queue and initially consumed five years before it was resolved on appeal against the Tribe. Shoshone-Bannock Tribes v. Secretary, DHHS, 279 F.3d 660 (9th Cir. 2002). Although the Tribe more recently secured post-judgment relief, 408 F. Supp. 2d 1073, the vigorous defense mounted there by the Defendants, like the nearly 10 years of claims and litigation leading to Cherokee III, burdened the Tribe with substantial fees and costs and will mightily discourage most other class members from entering the fray on their own (at least absent exceptionally large claim amounts or other unusual circumstances).⁷⁴ While some Tribal contractors may be able to take the relatively inexpensive step of filing a claim with a contracting officer, most will be unable to appeal the

⁷⁴ For instance, in the Cherokee III consolidated cases one case involved damages of \$8.5 million (plus interest) Cherokee III, 543 U.S. at 636, while on remand a portion of the second case was just resolved for \$3.7 million plus substantial interest. Cherokee Nation and Shoshone Paiute Tribes v. United States, No. 99-092-S CIV (E.D. Okla.), Consent Judgment entered April 26, 2006 (Dkt. No. 180).

inevitable contracting officer denial that IHS is accustomed to issuing in this arena. Supra 39 n.55. Thus, without a class, potentially hundreds (if not thousands) of claims covered by the Supreme Court's Cherokee III decision will go unvindicated. Certainly justice will not be achieved if a federal agency is able to get off 'scot free' and escape the natural consequence of its actions against hundreds of Tribes after a definitive Supreme Court ruling finding those actions illegal.⁷⁵

The contrary argument is also particularly harsh in this setting, for the Government has a trust responsibility to Indian Tribes that it would avoid if it successfully erected an obstacle to its beneficiaries' efforts to have their day in court on serious and substantial claims. 25 U.S.C. §§ 450n(2), 450l(c) sec. 1(d)(2). See also Shoshone-Bannock, 408 F. Supp. 2d at 1081-1082 (noting trust responsibility as added reason for reinstating judgment against same Defendants over CSC shortfall claims).⁷⁶ The ISDA expressly reaffirms the Government's trust responsibility with respect to self-determination contracts. §§ 458aaa-3(a), 458aaa-15(a); see also 25 C.F.R. § 900.4. Certifying this class and permitting these claims to proceed on their merits is consistent with the Government's responsibility to protect and promote the interests of Indian Tribes. The class device

⁷⁵ It is noteworthy that even in 2005, after the Cherokee III decision and after the Defendants in their Motion to Dismiss signaled their intent to argue that "exhaustion" is required by every putative class member (Dkt. No. 59, pp. 13 n.5, 19 n.10; Dkt. No. 132, p. 13 n.6), only 50 Tribal contractors presented 124 CDA claims to IHS covering fiscal years 1994-1997 (Pl. Exh. 39, Zawodny Aff. ¶ 13), even though the class of 334 contractors had a potential universe of 1,336 contract claims during those four years (334 x 4 years) – and perhaps many more given that many Tribal contractors (like Zuni) have multiple IHS contracts for different IHS programs. Pl. Exh. 36, Defs. Resp. to Inter. "Appendix A." In the litigation arena, only three other cases or appeals are pending (so far as Plaintiff has been able to determine). See Tunica-Biloxi, supra at 5-6 n.5; In re Seldovia Village Tribe, IBCA Nos. 4704-4710; Confederated Tribes of Grand Ronde v. United States, Case No. 03-2244C (Ct. Fed. Cl.).

⁷⁶ The "undisputed existence of a general trust relationship between the United States and the Indian people" is well established. United States v. Mitchell, 463 U.S. 206, 225 (1983) ("Mitchell II"). Accordingly, when dealing with Indian tribes the Federal Government has an "overriding duty ... to deal fairly with Indians" and must act in accordance with its trust responsibility. Morton v. Ruiz, 415 U.S. 199, 236 (1974); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 n.30 (1978) (citing Mitchell II). See also supra at 7 n.6.

is thus far superior in assuring that Justice will in the end be done.

Finally, management of the proposed class poses relatively little difficulty for the Court because the theory of recovery for each of the Tribal contractors is identical. To the extent contested questions arise as to the exact amount of CSCs owed to any individual contractor, the Court remains free to appoint a special master to adjudicate such issues. Indeed, it is the alternative of potentially over two dozen individual actions in this District and hundreds of individual actions across the country that underscores the vast superiority of employing the class action device here. Moreover, IHS has already agreed to litigate older miscalculated rate claims on a class basis. Supra at 5 n.4.

C. Proposed Class Claim 4 Also Meets the Prerequisites of Rule 23(a) and Rule 23(b)(3)

As explained briefly supra at 31-32, Class Claim 4 is proposed in order to address issues unique to fiscal year 1993 and 1994 claims which it is anticipated the Defendants will raise.

For instance, Defendants will likely argue that the Federal procurement and acquisition regulations included in those older contracts (including the so-called ‘limitation of cost’ clause) provides a valid defense, notwithstanding the Act’s categorical prohibitions against application of those regulations to Tribal contractors, just as Defendants have already asserted in one minor \$65,000 CSC damages case, see Grand Ronde, supra at 56 n.75, Jt. Prelim. Status Rep. at 3 (Dkt. No. 18) (filed Jan. 26, 2006). So, too, Defendants will likely interpose statute of limitations defenses to these older claims. Finally, it cannot be denied that, while the Plaintiff takes the position that the ISDA’s provisions regarding CSCs trump any contract clause the Defendants might rely upon to avoid liability, the Defendants contend otherwise and these older contracts are, as a group, decidedly

different than the more recent contracts. Thus, Plaintiff has proposed carving out the claims involving older contracts as a separate class claim.

For all the reasons already expressed, Class Claim 4 meets Rule 23(a)'s numerosity, commonality, typicality and adequacy components, as well as Rule 23(b)(3)'s predominance and superiority components: (1) hundreds of Tribes had ISDA contracts in those two years; (2) the claims and the Government's defenses are common across all those Tribal contractors; (3) the Pueblo of Zuni's claims are typical of the Class Claim 4 claims, as are the Government's defenses to those claims; (4) both the Pueblo and class counsel will adequately protect the interests of class members covered by Class Claim 4; (5) litigation in one forum of all the 1993 and 1994 claims is far superior to individualized litigation; and (6) the common factual and legal issues underlying the claim (and the common defenses the Government will interpose against the claim) predominate over any individual issues that might arise.

D. The Muskogee District Court in the Cherokee Litigation Erred in its Application of Rule 23 to a Similar Putative Class and its Decision Should Therefore Not Be Followed Here

The Defendants have occasionally pointed to the Muskogee district court's decision in Cherokee, 199 F.R.D. 357, to support its opposition to class certification.⁷⁷ But that reliance is misplaced because the Muskogee court fundamentally erred in its application of Rule 23, an error that is illustrated in two respects by the Supreme Court's subsequent ruling in Cherokee III. The court's errors involve Rule 23's commonality, typicality and predominance elements, and below we discuss

⁷⁷ See e.g. Defs. Opp. to Plf. Counsel's Mot. for Appt. of Interim Class Counsel at 7 (Dkt. No. 163) ("Defendants intend to oppose class certification for the reasons that include those that formed the basis of the Cherokee Court's determination that class certification is inappropriate").

each.⁷⁸

Commonality. Here, the Muskogee court erred by collapsing Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s predominance inquiry. Thus, while the court acknowledged that under Rule 23(a)(2) there need be no more than "a single issue" common to the class, 199 F.R.D. at 363 (citing J.B. ex rel Hart, 186 F.3d at 1288), three paragraphs later the court concluded that individualized issues "predominate[] over questions of law or fact that are common to the class members." Putting aside that this merging of Rule 23's separate elements was clear error, the district court's discussion implicitly acknowledges the existence of at least some "questions of law or fact that are common to the class." Id. at 363. And that should have been – indeed, is – enough to satisfy Rule 23(a)'s commonality requirement. For reasons explained below, the court also separately erred in its analysis of the predominance question.

Typicality. The Muskogee court's analysis of the "typicality" issue was likewise error, this time for two reasons. First, the Court partly based its ruling on mere speculation, made without any elaboration, that "there could be a variety of different legal and remedial theories for each tribe, dependent on its contract terms." 199 F.R.D. at 364. Importantly, the court made no finding on this score. Here, in contrast, the preceding discussion has shown that the key legal claims being asserted by the class, as well as the Government's defenses to those claims, are identical and not dependent on particular contract terms. Moreover (and as discussed earlier in connection with the commonality issue), the parties' sampling reveals that – contrary to the Muskogee court's view of it – the contracts

⁷⁸ The Muskogee court agreed the class was both identifiable and met Rule 23's numerosity requirement, and that class counsel would adequately protect the interests of the class. 199 F.R.D. at 360-62, 365.

generally do not give rise to “different legal and remedial theories.” Indeed, this very point was driven home by the Supreme Court’s treatment in Cherokee III of the very contract clauses the Muskogee court noted were different: the Supreme Court ignored them, and focused instead on the underlying statutory provisions which are common to all contracts.

Second (and in a passage that passingly confuses the BIA with IHS), the Muskogee court predicted there would be antagonism between the class representative and class members because “the Indian Health Services [sic] has a finite budget” and (as the court erroneously stated) “the money to pay these damages must come from the budget of the Indian Health Services [sic].” Cherokee Nation, 199 F.R.D. at 365. That statement, drawn from the court’s assessment of the Contract Disputes Act’s Judgment Fund reimbursement provision, is patently wrong.

As the Supreme Court noted in Cherokee III, government contract law provides that an agency’s decision not to pay a contract “leav[es] the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise.” 543 U.S. at 642. In this connection the Court cited the CDA and “31 U.S.C. § 1304 (Judgment Fund).” Id. at 643. The Judgment Fund statute does not permit or require reimbursement of the Fund by agencies whose unlawful actions give rise to government liability (and thus does not call for reimbursement of judgments awarding statutory damages, such as those sought here under the ISDA). Although the CDA independently does address agency reimbursement responsibilities to the Judgment Fund for damage awards under that Act (41 U.S.C. § 612(c)), it is hornbook government contract law that the CDA’s reimbursement provision is not legally enforceable – which explains why agencies (including IHS) as a rule ignore it. See Pl. Exh. 36, Resp. to Inter. No. 15 (admitting IHS has never reimbursed

Treasury since at least 1993);⁷⁹ see also JUDGMENT FUND: TREASURY'S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT 9 (“[t]he Judgment Fund was reimbursed for fewer than one of every five dollars agencies owed for each of the 3 fiscal years [examined]”) & 11 (“Treasury has very little authority to enforce reimbursement” and the “CDA ... provides no sanctions that would compel agencies to reimburse the Treasury”) (GAO April 2004).⁸⁰

The Muskogee court’s foundational assumption that an award in favor of one Tribe is eventually reimbursed by IHS out of funds serving other Tribes, thereby defeating typicality (and adequacy, too), is thus fundamentally wrong. (Indeed, as Judge Hansen pointedly remarked in Ramah II, ‘robbing Peter to pay Paul’ in this manner would be rank “charlatanism.” Ramah II, 50 F. Supp. 2d at 1095.)

Predominance. Finally, the Muskogee court erred in its predominance analysis by mischaracterizing the nature of the action, and then (as a consequence) elevating the issue of contract clauses over the controlling statutory issues presented.

As the court saw it, the “the primary focus” of the litigation was “the issue of determining entitlement to ‘full’ contract support costs for each tribes [sic] contract for each year in question.”

⁷⁹ The Defendants were asked the following interrogatory: “For each fiscal year from 1993 to the present, identify the nature and amounts repaid by IHS and DHHS to the Treasury Department’s Permanent and Indefinite Judgment Fund” Defendants responded: “There were no such amounts repaid by IHS.” (Likewise, the BIA never reimbursed the Fund, including reimbursement for the Ramah II and Ramah III judgments cited supra at 5 n.4.)

⁸⁰ See also In Matter of The Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation and Liability Act, B-253179, 73 Comp. Gen. 46, 49, 1993 WL 505822, and In Matter of Axelrad, Opinion No. B-251061, B-251061.2, 1993 WL 58276 (Comp. Gen. 1993) (both holding § 612(c) of the CDA is not legally enforceable).

199 F.R.D. at 363. But that is certainly not the primary focus of any of the four class claims asserted here. As to Class Claims 1 and 2 (the “ongoing” and “new or expanded” shortfall claims), the “primary focus” is not on determining each Tribal contractor’s “full” CSC requirement, because IHS has already determined that requirement. Rather the “primary focus” is on IHS’s reliance on its CSC Circulars as a lawful reason not to pay that requirement. As for Class Claim 3 (the miscalculated rate claim), the “primary focus” is similarly on the agency’s insistence on using OMB accounting rates as an absolute proxy for determining indirect administrative CSCs.

The Muskogee court became convinced that the CSC litigation would devolve into “a set of mini-trials,” 199 F.R.D. at 363 (a statement made in a “commonality” section that also merged the predominance and superiority issues). But the best evidence that this will not happen here is this Court’s direct experience in the Ramah litigation, where two sets of multi-million dollar class claims involving some 300 contracts in each of six years were each resolved through a single judgment award (without even one trial), and where the extra-judicial class claims process was then available in each instance to allocate the judgment amount across all class members. Even without a settlement judgment, all indications today are that a single class trial on all class damages will suffice to conclude this case, one way or the other. See discussion supra at 54.

The only other reason suggested by the Muskogee court for finding that individualized issues might predominate was that court’s assumption that the Defendants’ liability turned not on the ISDA itself, but on each Tribe’s contract provisions, together with the Court’s observation that differences in fact existed between the contracts of two different contractors (there, the Cherokee and Shoshone-Paiute contracts). But to this there are several answers.

First – and as the Supreme Court’s Cherokee III decision cogently demonstrates – individual contract clauses are irrelevant when the controlling terms of the Government’s liability are fixed in the ISDA itself. The Supreme Court’s omission of any discussion of either Tribe’s contract – in marked departure from the Muskogee court and the Tenth Circuit – is compelling on this point.⁸¹

Second, it is, again, hornbook government contract law that contract clauses cannot trump a statute, and the Government is therefore barred from invoking a contract clause that would relieve it of a liability established by statute.⁸² In short, the Government’s liability stands or falls on the ISDA and the relevant appropriations Acts, and no clause inserted by the agency into a contract can negate that liability.⁸³

Third, the contract sampling that the parties undertook reveals a stunning similarity across most contracts. Even if the Muskogee court was right that the provisions of the various individual contracts will materially determine liability questions, those contracts are virtually identical in all

⁸¹ Indeed (and contrary to the Muskogee court’s view of it, 199 F.R.D. at 363), it is telling that the Supreme Court required no “examination into the contracts of each plaintiff for each year,” a fact which defeats the central premise of the Muskogee court’s ruling on predominance.

⁸² MAPCO Alaska Petrol. Co. v. United States, 27 Fed. Cl. 405, 416 (1992) (“When a contract clause drafted by the Government is inconsistent with law, whether the [contractor] inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand”) (citations omitted); Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988) (when a contract clause violates the law, “the government can not, by law, benefit from it”); LaBarge Products, Inc., 46 F.3d at 1552 (“if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor’s protection, the contractor is not bound by estoppel, acquiescence, or failure to protest”) (citing Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (Ct. Cl. 1970) and Rough Diamond Co. v. United States, 351 F.2d 636, 639-43 (Ct. Cl. 1965)); California v. United States, 271 F.3d 1377, 1383 (Fed. Cir. 2001) (“Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable, ...”).

⁸³ Of course, it is not necessary (nor perhaps even appropriate) for the Court at this stage to agree with this proposition; it is sufficient for class certification purposes that the class alleges this common theory of recovery. If in the ensuing litigation the Court concludes that a contract clause can trump the ISDA, and that each contract must be separately examined, the Court “retains the ability to monitor the appropriateness of class certification ... and to modify or decertify” the class. In re Integra Realty Res. Inc., 354 F.3d 1246, 1261 (10th Cir. 2004).

material respects. Thus, whether the analysis is done at the level of the statute (as it should be), or at the level of the contracts, the legal questions in common vastly predominate over any individual questions.

In sum, the Muskogee court's assessment of Rule 23 does not withstand scrutiny, and is accordingly entitled to no deference here.

IV. CONCLUSION

The Class meets the requirements of Rules 23(a) and 23(b)(3), defined as

All Indian Tribes and Tribal organizations that have contracted with the Indian Health Service under the Indian Self-Determination Act, 25 U.S.C. §§ 450 - 458aaa-18, at any time from fiscal year 1993 to the present (including FY 2005).

This Court in the Ramah litigation certified a similar class (Pl. Exh. 2, at PL12041):

[A]ll Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

The Ramah class began with the miscalculated rate claim, id. – which was then partially settled with IHS on a class basis (supra at 5 n.4) – and was later expanded to include shortfall claims.⁸⁴ In light of this precedent, the authorities cited herein, the presumption favoring class certification in such circumstances, and the fact that a great wrong done to hundreds of Tribes will go largely unvindicated absent a class, the Pueblo of Zuni respectfully requests that the Court certify the class and approve the form of Notice included as Pl. Exh. 1A.

⁸⁴ Notice of Dist. of Partial Settlement, 65 Fed. Reg. at 4991 (Part VI) (class opt-out notice).

Respectfully submitted this 5th day of June 2006.

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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 **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE** to the following attorneys of record (or their co-counsel) this 5th day of June, 2006:

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