

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

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 WJ/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE AND TO MOTION BY
MICHAEL P. GROSS FOR CREATION OF SUB-CLASSES AND FOR APPOINTMENT
AS CLASS COUNSEL**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

FACTUAL AND PROCEDURAL BACKGROUND 4

I. THE CLAIMS OF THE PUEBLO OF ZUNI 4

II. THE DEFENSES OF THE INDIAN HEALTH SERVICE. 6

III. PLAINTIFF’S MOTION FOR CLASS CERTIFICATION AND THE GROSS APPLICATION FOR APPOINTMENT AS CLASS COUNSEL OF A SUB-CLASS. . 9

STATUTORY BACKGROUND 11

ARGUMENT 26

I. NO CLASS MAY BE CERTIFIED FOR MONETARY RELIEF UNLESS EACH AND EVERY MEMBER OF THE CLASS HAS SATISFIED THE JURISDICTIONAL PREREQUISITES OF THE CONTRACT DISPUTES ACT 27

II. A DISTRICT COURT HAS ALREADY DENIED A MOTION BY COUNSEL FOR CERTIFICATION OF THIS CLASS 32

III. PLAINTIFF HAS NOT DEMONSTRATED NUMEROSITY, COMMONALITY, TYPICALITY, OR ADEQUACY AS IS REQUIRED BY RULE 23(A) IN ORDER FOR A CLASS TO BE CERTIFIED 36

A. The Proposed Class Definition and the Proposed Claims Are Overbroad 36

B. The Proposed Class Does Not Satisfy the Numerosity Requirement 39

C. There are No Core Common Questions of Law and Fact 40

1. The individualized nature of the claims asserted 41

2. The individualized nature of the defenses asserted 49

3.	The existence of contracts with different terms defeats commonality . . .	50
D.	Plaintiff’s Claims Are Not Typical of Those of Other Contractors	54
E.	Plaintiff Would Not Be An Inadequate Class Representative Because Its Claims For Additional CSC Are Antagonistic to Other Contractors’ Claims	56
IV.	PLAINTIFF HAS NOT DEMONSTRATED PREDOMINANCE AND SUPERIORITY REQUIRED BY RULE 23(B) IN ORDER FOR A CLASS TO BE CERTIFIED	59
A.	Individualized Questions Predominate Over Common Ones	59
B.	A Class Action Is Not Superior to Individual Litigation	60
V.	THE COURT DOES NOT NEED TO APPOINT CLASS COUNSEL	
	CONCLUSION	62
	LIST OF EXHIBITS	

TABLE OF AUTHORITIES

CASES

Alabama v. Shalala, 124 F. Supp. 2d 1250 (M.D. Ala. 2000) 20

Albertson’s, Inc. v. The Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974) 58

Allen v. Wright, 468 U.S. 737 (1984) 55

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997) 41, 54, 56

Avocados Plus Inc. v. Veneman, 370 F.3d 1243 (D.C. Cir. 2004) 35

Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t, 194 F.3d 1374 (Fed. Cir. 1999) 57

Beta Sys. Inc. v. United States, 838 F.2d 1179 (Fed. Cir. 1988) 9

Bishop v. New York City Dep’t of Hous. Preservation & Dev.,
141 F.R.D. 229 (S.D.N.Y. 1992) 31

Blain v. United States, 552 F.2d 289 (9th Cir. 1977) 30

Booth v. Churner, 532 U.S. 731 (2001) 35

Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991) 29

Boughton v. Cotter Corp., 65 F.3d 823 (10th Cir. 1995) 60

Busby Sch. of N. Cheyenne Tribe v. United States, 8 Cl. Ct. 596 (1985) 47

Caidin v. United States, 564 F.2d 284 (9th Cir. 1977) 30

Califano v. Yamasaki, 442 U.S. 682 (1979) 26, 27

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 61

Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) 2, 3, 51

Cherokee Nation v. Thompson, 311 F.3d 1054 (10th Cir. 2002) 17

Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001) passim

Chris Berg, Inc. v. United States, 426 F.2d 314 (1970)	9
Cizek v. United States, 953 F.2d 1232 (10th Cir. 1992)	30
Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474 (10th Cir. 1996)	52
Colo. Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354 (D. Colo. 1999) ..	36, 36, 60
Commonwealth of Pa. v. Nat’l Ass’n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975)	30
Computer Prods. Int’l, Inc. v. United States, 26 Cl. Ct. 518 (1992)	29
Daigle v. Shell Oil Co., 133 F.R.D. 600 (D. Colo. 1990)	36, 37, 39
Davoll v. Webb, 160 F.R.D. 142 (D. Colo. 1995)	26, 36
Demontiney v. United States, 255 F.3d 801 (9th Cir. 2001)	27
Dep’t of Soc. Serv. v. Sullivan, 904 F.2d 710, 1990 WL 81840 (9th Cir. June 18, 1990)	20
Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989)	8
E. Walters & Co., Inc. v. United States, 576 F.2d 362 (Cl. Ct. 1978)	8
Edgington v. R.G. Dickinson & Co., 139 F.R.D. 183 (D. Kan. 1991)	31, 54, 56
Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968)	59
Flink/Vulcan v. United States, 63 Fed. Cl. 292 (2004)	8
Founding Church of Scientology v. Director, 459 F. Supp. 748 (D.D.C. 1978)	30
Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982)	26, 27, 41, 54, 56
Gollehon Farming v. United States, 17 F. Supp. 2d 1145 (D. Mont. 1998)	30
Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)	54
Gregory Lumber Co. v. United States, 229 Ct. Cl. 762 (1982)	29
Hall v. Beals, 396 U.S. 45 (1969)	7

Hardin v. Harshbarger, 814 F. Supp. 703 (N.D. Ill. 1993)	31
Harrington v. City of Albuquerque, 222 F.R.D. 505 (D.N.M. 2004)	36, 62
Hartford Accident & Indem. Co. v. United States, 130 Cl. Ct. 490 (1955)	8
Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409 (2003)	9
Hoskin v. United States, No. 00-1713, 2001 WL 175237 (E.D. La. Feb. 20, 2001)	30
In re Indian Tribes Contract Support Costs Litig., 383 F. Supp 2d 1380 (J.P.M.L. 2005) ..	33, 63
In re Agent Orange Prod. Liability Litig., 818 F.2d 194 (2d Cir. 1987)	30
J.B. ex rel. Hart v. Valdez, 186 F.3d 1280 (10th Cir. 1999)	26, 27, 37, 39, 41
J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc., 628 F.2d 994 (7th Cir. 1980)	31
James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996)	28
K.L. by Dixon v. Valdez, 167 F.R.D. 688 (D.N.M. 1996)	37
Kantor v. Kahn, 463 F. Supp. 1160 (S.D.N.Y. 1979)	30
Kendall v. Watkins, 998 F.2d 848 (10th Cir. 1993)	30
Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994)	28
Krueger v. United States, 26 Cl. Ct. 841 (1992)	29
Lincoln v. Vigil, 508 U.S. 182 (1993)	12
Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135 (1973)	8
Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977)	30
Luria v. Civil Aeronautics Bd., 473 F. Supp. 242 (S.D.N.Y. 1979)	30
Made in the U.S.A. Found. v. United States, 51 Fed. Cl. 252 (2001).	29
Maine v. Shalala, 81 F. Supp. 2d 91 (D. Me. 1999)	20

MAPCO Alaska Petroleum Inc. v. United States, 27 Fed. Cl. 405 (1992)	9
McCarthy v. Madigan, 503 U.S. 140 (1992)	35
McGraw v. Prudential Ins. Co., 137 F.3d 1253 (10th Cir. 1998)	34
McNeil v. United States, 508 U.S. 106 (1993)	35
Mendenhall v. United States, 20 Cl. Ct. 78 (1990)	28
Mexican Intermodal Equip., S.A. de C.V. v. United States, 61 Fed. Cl. 55 (2004)	8
Meyers v. S.W. Bell Tel. Co., 181 F.R.D. 499 (W.D. Okla. 1997)	60
Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed. Cir. 1987)	9
Moore Video Distribs., Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332 (S.D. Miss. 1993)	53
Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698 (5th Cir. 1994)	31
Norton v. The City of Marietta, 432 F.3d 1145 (10th Cir. 2005)	38
O'Shea v. Littleton, 414 U.S. 488 (1974)	7
Penn v. San Juan Hosp., Inc., 528 F.2d 1181 (10th Cir. 1975)	54
Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp., 183 F.R.D. 687 (D. Colo. 1998)	41
Ramah Navajo Chapter v. Lujan, No. 90-957 (D.N.M. 1993)	34, 34
Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996)	57
Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997)	34, 45, 50
Reed v. Bowen, 849 F.2d 1307 (10th Cir. 1988)	26
Reliance Ins. Co. v. United States, 931 F.2d 863 (Fed. Cir. 1991)	28
Renda Marine Inc. v. United States, 71 Fed. Cl. 782 (2006)	28, 29

Reservation Ranch v. United States, 39 Fed. Cl. 696 (1997)	9
Rex v. Owens ex rel. State of Okla., 585 F.2d 432 (10th Cir. 1978)	26, 39
RTC v. Fed. Sav. & Loan Ins. Corp., 25 F.3d 1493 (10th Cir. 1994)	52
Samish v. United States, 419 F.3d 1355 (Fed. Cir. 2005)	8, 50
Seaboard Lumber Co. v. United States, 903 F.2d 1560 (Fed. Cir. 1990)	8
Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000)	35
Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306 (D. Or. 1997)	14
Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (E.D. Pa. 1977)	54
SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612 (1990)	28
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)	27
Thoen v. United States, 765 F.2d 1110 (Fed. Cir. 1985)	28, 29
Tradesman Int'l Inc. v. U.S. Postal Serv., 234 F. Supp. 2d 1191 (D. Kan. 2002)	29
Tunica-Biloxi Tribe v. United States, No. 02-2413 (D.D.C. 2004)	27, 28, 33
Union Pac. R.R. Co. v. United States, 847 F.2d 1567 (Fed. Cir. 1988)	8
United States v. Kubrick, 444 U.S. 111 (1979)	30
United States v. Mendoza, 464 U.S. 154 (1984)	28, 61
United States v. Int'l Fidelity Ins. Co., 1998 WL 892299 (10th Cir. Dec. 23, 1998)	28
United States v. Black Hawk Masonic Temple Ass'n, Inc., 798 F. Supp. 646 (D. Colo. 1992)	29
United States v. Mitchell, 445 U.S. 535 (1980)	28
United States v. Sherwood, 312 U.S. 584 (1941)	28
Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968)	54

Weaver v. United States, 98 F.3d 518 (10th Cir. 1996)	28
Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443 (Fed. Cir. 1997)	8
Zapata v. IBP, Inc., 167 F.R.D. 147 (D. Kan. 1996)	47

STATUTES

25 U.S.C. § 13	12
25 U.S.C. § 450	11
25 U.S.C. § 450a	11
25 U.S.C. § 450b	11, 16
25 U.S.C. § 450f	8, 11, 12, 13, 14, 18
25 U.S.C. § 450j	8, 16, 18
25 U.S.C. § 450j-1	8, 14, 15, 16, 18, 42, 48, 58
25 U.S.C. § 450j-2	8, 34, 43
25 U.S.C. § 450j-3	34, 43
25 U.S.C. § 450l	8, 14, 15
25 U.S.C. § 450m-1	8, 13, 14, 27, 28
28 U.S.C. § 1295	28
28 U.S.C. § 2401	30
28 U.S.C. § 2675	30
31 U.S.C. § 1301	20
41 U.S.C. § 605	1, 14, 28, 29
41 U.S.C. § 606	29

41 U.S.C. § 609	29, 40
41 U.S.C. § 612	58
42 U.S.C. § 1601	12
42 U.S.C. § 2001	12
<u>Dep't of the Interior & Related Agencies Appropriations Act,</u> Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997)	17, 57
<u>Omnibus Consol. & Emergency Supplemental Appropriations Act, 1999,</u> Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79 (1998)	57
<u>Consol. Appropriations Act, 2000,</u> Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82 (1999)	57
<u>Dep't of the Interior & Related Agencies Appropriations Act, 2001,</u> Pub. L. No. 106-291, 114 Stat. 922, 978-79 (2000)	57

CODE OF FEDERAL REGULATIONS

2 C.F.R. Pt. 220	19
2 C.F.R. Pt. 225	19, 20, 21, 23, 24, 25
2 C.F.R. Pt. 230	19
25 C.F.R. § 900	12, 13, 14, 15, 18
43 C.F.R. § 4.1	25
45 C.F.R. Pt. 16	25

INTRODUCTION

In seeking nationwide class certification, Plaintiff urges the Court to adopt a “one-size fits all” approach to hundreds of individual Tribal contracts and compacts with differing terms. This case is not appropriate for class treatment because the core issue the Court will have to decide necessarily turns on facts that differ significantly for each and every putative class member. The issue of what amount, if any, the Indian Health Service (“IHS”) was required to pay to each Tribal contractor for contract support costs (“CSC”) in any particular year requires an analysis of the terms and conditions of that contractor’s individual contract, the contractor’s attempts to pursue its claims administratively, the governing law and congressional appropriation limits in effect in the particular year, and the method by which the contractor’s costs were determined. The elements of Federal Rule of Civil Procedure 23 (commonality, typicality, adequacy of representation, and predominance of common questions of law and fact) therefore cannot be satisfied. Another federal district court reached this very conclusion previously in a well-reasoned decision in Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001), and this Court should take the same approach.

But before the Court even reaches the requirements of Rule 23, the Court must take notice of the limits of its jurisdiction and decline to certify a class that includes IHS contractors that have not satisfied the jurisdictional prerequisites required in this type of action. Congress limited this Court’s jurisdiction over claims for monetary relief under the Indian Self-Determination and Education Assistance Act (“ISDA”) to those claims that have been properly presented under the Contract Disputes Act (“CDA”), 41 U.S.C. § 605(a). For these reasons, the Pueblo of Zuni’s Motion and Memorandum for Class Certification and For Approval of Class Notice (hereinafter “Class Motion” or “Class Mem.”) should be denied. The Application for Appointment as Class Counsel,

filed by Michael P. Gross, should also be denied.

Aside from Plaintiff's failure to demonstrate jurisdiction and compliance with Rule 23's requirements, the Class Motion contains many erroneous arguments about the ISDA and IHS that relate to the Supreme Court's recent decision in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). Plaintiff argues that the Supreme Court invalidated IHS's CSC policies and determined that the Secretary was liable to pay CSC under the ISDA. Plaintiff thus argues that this decision may be applied in the same manner to all IHS contractors in a class action lawsuit. But contrary to Plaintiff's argument, the Supreme Court reached neither of these conclusions.

In Cherokee, the Court held that ISDA contracts are like any other procurement contracts in which the government is bound by its promises. See 543 U.S. 631, 643 (2005). The Court then had to assess the sole defense raised by the Secretary in defense of Plaintiff's breach claims, namely, that the Secretary did not have sufficient appropriations to pay the contract amounts already promised. See id. at 641-42. Given these circumstances, the Court held that (1) when the Secretary promised a specific amount in an ISDA contract for indirect CSC, and (2) when lump sum appropriations were legally available for that purpose (as the Court found them to be in years before 1998), the Secretary could not defend against a breach of contract claim by arguing that he had insufficient appropriations. See id. at 642.

The Supreme Court did not conclude that the ISDA itself required the payment of any CSC. The Court only adjudicated the specific contract claims of the two contractors, Cherokee Nation and the Shoshone-Paiute Tribes of the Duck Valley Reservation, that were before it. See id. Because the contracts of Zuni are different from those at issue in the Supreme Court, IHS's liability in this

case is far from a foregone conclusion. While it may be undisputed that IHS has been unable to award all contractors the full amount of CSC that they have requested, IHS has, with few exceptions such as Cherokee and Shoshone-Paiute's contracts, awarded the amounts that it promised to pay in the contracts. IHS vigorously disputes that "massive underpayments are owed to the putative class."

The Supreme Court also did not invalidate IHS's "circular-based" policies. The Cherokee Court reviewed whether the two ISDA agreements before it were binding contracts. See 543 U.S. at 643. In any event, IHS policies are not what Plaintiff seeks to challenge here. Zuni's claims are decidedly for monetary relief arising out of its contracts. Zuni's claims do not arise out of an agency-wide policy--in fact, there is no agency CSC policy from which money damages could flow. It is the actual ISDA agreements that provide a means to obtain contract funding such as CSC, and the CDA that provides a means by which a Tribal contractor can seek monetary relief for breach of these contracts.

Any actual underlying problem is, at bottom, not a statutory or contractual violation but a case of insufficient appropriations for CSC. In the face of this reality, IHS has attempted to fairly and equitably address each contractor's CSC needs, as well as to balance its responsibility to serve Indians that receive health care services directly from IHS. In order to provide necessary guidance on the distribution of insufficient appropriations, IHS and Tribal contractors have worked together to develop policies that explain how these appropriations will be distributed. IHS has made transparent the amount of CSC funding that is available to each contractor for each year and thus has not created any expectation of, much less entitlement to, additional CSC. Those Tribal contractors that were displeased with the amount of CSC funding IHS made available refused to agree to the

amounts or allocation method and sought court review. Many other contractors accepted the reality of limited funding and chose to operate their ISDA programs recognizing that they would not get all of the funds they wanted.

There is no legal precedent for what Plaintiff seeks to require here: the reopening of contracts that have long since been performed, with the Court mandating retroactive increases in CSC funding that were never part of the original negotiation. This is particularly unprecedented as the ISDA provides a means by which a Tribal contractor can challenge the terms offered by IHS before execution. See 25 U.S.C. § 450f(a)(2). Putting aside the extraordinary nature of the relief sought in this case, the individualized nature of the various claims and defenses demonstrates there is simply no fair, equitable, and efficient way to adjudicate them on a class-wide basis.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE CLAIMS OF THE PUEBLO OF ZUNI.

Since before fiscal year 1993, Zuni has had multiple ISDA contracts with the Secretary of HHS through the Albuquerque Area Office of IHS. (Am. Compl. ¶¶ 4, 48.) On April 16, 2001, Zuni notified IHS contracting officer Diego Lujan of twenty-two contract disputes related to its contracts in effect during fiscal years 1993-1998.¹ The legal theory underlying Zuni's claims was that IHS allegedly had failed to pay the full amount of Zuni's indirect CSC calculated under Zuni's indirect cost rate. Zuni sought a total of \$324,213.36 in additional funding. See CDA claim (Ex. A, B).

On September 28, 2001, Zuni amended seven of its claims pending before Mr. Lujan to

¹ An example of one of Zuni's claim letters is attached as Exhibit A, and a summary prepared by Zuni of all of the April 16, 2001 claims is attached as Exhibit B. All twenty-two of the claim letters are attached as Exhibit A to Defendants' Motion to Dismiss (docketed as #59).

include a new legal theory of recovery for additional indirect CSC, which it described as:

“[Employing] the same illegal calculation of the Pueblo’s indirect cost requirements associated with this contract that was struck down by the Tenth Circuit in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). Specifically, IHS failed to adjust the indirect cost rate issued by the Department of the Interior Office of Inspector General to account for the dilution in IHS’s responsibility for indirect costs under the ISDA caused by the OIG’s erroneous assumption in its rate that all agencies funding the Pueblo contribute to the Pueblo’s indirect cost pool at the full OIG-determined rate. By failing to adjust the OIG rate to calculate IHS’s full responsibility to pay indirect costs under the ISDA, IHS violated its contractual and statutory obligations to the Pueblo of Zuni.

See CDA Claim (Ex. C).² The revised total amount claimed by Zuni was \$339,933.44.

Zuni thereafter brought this lawsuit. In the Complaint, Plaintiff seeks money damages (not specific performance or CSC payments) from IHS based on alleged violations of the ISDA itself and breach of its ISDA contracts. (Am. Compl. ¶¶ 1, 42.) Plaintiff sets forth six causes of action:³

- (1) IHS violated the ISDA by using an improper methodology to calculate Zuni’s indirect CSC,
- (2) IHS breached Zuni’s contracts by using an improper methodology to calculate Zuni’s indirect CSC,
- (3) IHS violated the ISDA by underpaying Zuni’s CSC for its ongoing contracts, as calculated by IHS,
- (4) IHS breached Zuni’s contracts by underpaying Zuni’s CSC for its ongoing contracts, as calculated by IHS,
- (5) IHS violated the ISDA by underpaying Zuni’s CSC for its new and expanded contracts, as calculated by IHS,

² An example of one of Zuni’s claim letters is attached as Exhibit C, and a summary prepared by Zuni of its September 28, 2001 claims is attached as Exhibit D. All of the claim letters are attached as Exhibit C to Defendants’ Motion to Dismiss (docketed as #59).

³ The Complaint has a seventh cause of action for declaratory judgment. (Am. Compl. ¶¶ 88-92), but as Plaintiff did not raise it as an issue for certification, it is not pertinent to this discussion.

- (6) IHS breached Zuni's contracts by underpaying Zuni's CSC for its new and expanded contracts, as calculated by IHS.

(Am. Compl. ¶¶ 66-87.) The First Amended Complaint further explains that “[t]he period covered . . . is federal fiscal years 1993 to the present.” (Am. Compl. ¶ 1.) As the First Amended Complaint was dated and signed on December 12, 2001, “to the present” is 2001.

II. THE DEFENSES OF THE INDIAN HEALTH SERVICE.

On May 23, 2005, Defendants filed a Motion to Dismiss in Part the First Amended Complaint For Lack of Subject Matter Jurisdiction (docketed as #59). In their Motion, Defendants moved to dismiss all of the claims in the First Amended Complaint that were not first presented (raised) by Zuni to an IHS contracting officer (“CO”), as required by the Contract Disputes Act (“CDA”). See 41 U.S.C. § 605(a). Defendants explained that Zuni must have fulfilled the CDA’s presentment requirement with respect to each claim before the Court, and that the failure to satisfy this requirement renders the Court without subject matter jurisdiction to review claims for monetary relief against the government.

Plaintiff opposed the Motion (docketed as #111) and responded by raising a host of excuses for why it had not properly presented all of the claims asserted in the First Amended Complaint, e.g., that CDA presentment would be futile and that the pendency of another putative class action (Cherokee, in the Eastern District of Oklahoma) tolled the applicable statute of limitations for presenting any additional claims that it might have.⁴

⁴ In its Opposition filed in August 2005, Plaintiff alleged that if it wanted to present a claim related to fiscal year 1999 funding, it had until September 30, 2005, in which to do so. September 30, 2005, has now come and gone, and Zuni has not presented a claim for this year. It may be because Zuni cannot make out a good faith claim for relief due to serious CSC over-recoveries from IHS in years after 1998. See Moberly Decl. ¶¶ 63-65 (Ex. E); Demaray Decl. ¶ 60 (Ex. F).

Defendants' Motion, if successful, would dispose of (1) Zuni's claims related to fiscal years other than 1993-1998, (2) Zuni's claims of under-calculation of its indirect CSC for fiscal years 1996-1998, (3) Zuni's claims for additional direct CSC for all years, and (4) Zuni's claims for indirect CSC for new and expanded contracts for all years.⁵ Once dismissed, none of these claims could be certified for class consideration. A party may not represent a class on a claim for which the party lacks standing or cannot otherwise make out an injury-in-fact. See O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Hall v. Beals, 396 U.S. 45, 48-49 (1969).

Defendants also filed an Answer. The operative Answer, filed on May 8, 2006, described a number of their defenses (docketed as #252). In addition to the Court's lack of subject matter jurisdiction over some of the claims, additional defenses include:

(1) Failure to State a Claim Upon Which Relief May Be Granted. This defense pertains to the claim by Zuni that the ISDA requires the payment of a sum certain above and beyond what is found in its ISDA contracts. Plaintiff has failed to state a claim because the ISDA does not require that IHS pay a sum certain for CSC or that IHS calculate CSC under a particular methodology. See,

⁵ The Complaint alleges that IHS failed to award sufficient direct CSC, but Zuni did not present such claims under the CDA and does not discuss the basis for liability of these amounts in the Class Motion. In fact, Zuni's designated representatives testified that Zuni does not have a claim for additional direct CSC. See Gasper Dep. at 79:11-24 (Ex. G); Quintero Dep. at 92:12-25 (Ex. H); Pinto Dep. at 54:4-7 (Ex. I). See Defendants' Rule 30(b)(6) Notice & Ltr. with Zuni Designations (Ex. J). With respect to the rate adjustment claim, Defendants also queried these representatives about the adjustments that Zuni made to its indirect cost rates for purposes of its CDA claims, and none could explain the methodology by which the rates had been or should be adjusted. See Gasper Dep. at 68:24-69:25 (Ex. G); Quintero Dep. at 83:14-88:3 (Ex. H); Pinto Dep. at 55:17-56:4 (Ex. I). The parties thereafter entered into a Stipulation by which Zuni admitted that it had no information or documents in its possession, custody or control that would explain the method by which it adjusted its indirect cost rates and sought \$15,720.26 in additional costs from IHS. See Stipulation (Ex. K.) Given these facts, the Court lacks jurisdiction over all of Zuni's claims related to the rate methodology and direct CSC.

e.g., Samish v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005). It mandates only that there be a negotiation between IHS and Zuni and that Zuni either (a) agree with IHS on the amount of CSC and memorialize it in a contract or (b) disagree with IHS on the amount of CSC and file a lawsuit challenging this amount in court. See 25 U.S.C. §§ 450f(a), 450j(c), 450j-1(a), 450j-1(b), 450j-2, 450l, 450m-1. In other words, the duty that the ISDA creates is a duty to contract, not a duty to pay. See Samish, 419 F.3d at 1367. Because Zuni never disputed the amount made available by IHS before execution of its contracts and AFAs, it is limited to seeking the amounts for which it contracted if for some reason it believes that IHS has failed to pay these amounts.

(2) Waiver and Estoppel. Plaintiff's waiver of any additional rights to CSC was waived when: (1) Zuni failed in each year to challenge the funding levels and funding methodology (the use of an indirect cost rate) proposed for its agreements pursuant to the procedures available to it under the ISDA, (2) Zuni executed the relevant agreements year after year, (3) Zuni performed under the agreements, and (3) Zuni accepted funding from IHS under its agreements. The Secretary, as a party to these agreements, relied upon the enforceability of their terms, and acted to his detriment in distributing the appropriations for other purposes related to the health care needs of Indians. Under these circumstances, the law of waiver and estoppel preclude any claims that Plaintiff might raise for additional funding.⁶ See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997).

⁶ See also Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990); Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 641 (Fed. Cir. 1989); Union Pac. R.R. Co. v. United States, 847 F.2d 1567, 1570 (Fed. Cir. 1988); E. Walters & Co., Inc. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978); Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135, 148 (1973); Hartford Accident & Indem. Co. v. United States, 130 Cl. Ct. 490, 567 (1955); Mexican Intermodal Equip., S.A. de C.V. v. United States, 61 Fed. Cl. 55, 70 (2004); Flink/Vulcan v. United States, 63 Fed. Cl. 292, 307-08 (2004), aff'd on other grounds, No. 05-5048, 2006 WL 222995 (Fed. Cir. Jan. 12, 2006); Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 417 (2003), rev'd on

Zuni further waived any claims for an adjustment to its indirect cost rate by accepting its indirect cost rates without dispute or appeal. See Declaration of Deborah A. Moberly ¶ 47 (Ex. E).

(3) Release. This defense pertains to five releases signed by Zuni releasing the government from any claims related to five of its contracts for which it seeks relief before this Court. See Zuni Releases (Ex. L). Release is generally a bar to a claim for further relief. See Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1395 (Fed. Cir. 1987).

Defendants also may assert additional defenses based on the ISDA, statutes of limitation, laches, and Article III's requirement of a live case-or-controversy. (Am. Answer ¶¶ 1-2.)

III. PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND THE GROSS APPLICATION FOR APPOINTMENT AS CLASS COUNSEL OF A SUB-CLASS.

On April 21, 2006, the Magistrate Judge ordered limited class certification discovery, which was completed on December 13, 2006 (Orders docketed as ##52, 155). On June 5, 2006, the Pueblo of Zuni filed a motion for class certification and for approval of a class notice (hereinafter referred to as "Class Motion" or "Class Mem." and docketed as #281). In this Motion, Plaintiff seeks to certify a class of contractors defined as:

other grounds sub nom., Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); Reservation Ranch v. United States, 39 Fed. Cl. 696, 712 (1997), aff'd on other grounds, 217 F.3d 850 (Fed. Cir. Sept. 9, 1999) (unpublished mem.). Anticipating this defense, Plaintiff cites to a few cases that it represents demonstrate that waiver does not apply. (Class Mem. at 63 & n.82.) But the instances where courts have declined to apply waiver and estoppel are few and distinguishable, either because the contractor carefully protected its rights before the contract was executed or shortly thereafter or because there was egregious behavior on the part of the government. See Hermes, 58 Fed. Cl. at 409, 412-13 (explaining that waiver was not applied in Beta Sys. Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988), Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (1970), and MAPCO Alaska Petroleum Inc. v. United States, 27 Fed. Cl. 405, 416 (1992), overruled on other grounds by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005), because the contractors in those cases actually complained about the alleged invalidity of the contracts at the contract formation, or, at the very least, at any early stage in the history of the conflict).

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 (2005).

(Class Mem. at 1.) Plaintiff then seeks certification on 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.

(Class Mem. at 1-2.)

On July 17, 2006, another group of attorneys headed by Michael P. Gross, Esq. filed a paper in this case titled "Application under Rule 23(g) for Creation of Sub-Classes and For Appointment of Class Counsel for the Rate-Making Claims" (hereinafter "Gross Application" and docketed as #297). The Application sought certification of a separate sub-class defined as:

All class members contracting or compacting with the United States for health programs administered by the Secretary of Health and Human Services under the Indian Self-Determination and Education Assistance Act of 1970, 25 U.S.C. § 450 *et seq.*, as amended, whose indirect contract support costs are determined by application of the indirect cost rate system or its rules and principles set forth in OMB Circular A-87, OMB Circular A-122, and derivative circulars or policy statements of the Indian Health Service.

Gross Application at 1. The Gross Application was filed notwithstanding the fact that this Court previously denied a Motion to Intervene by Mr. Gross on behalf of two putative class members, the Ramah Navajo School Board (“RNSB”) and the Tunica-Biloxi Tribe, see Order Denying Motion to Intervene (docketed as #145), and notwithstanding the fact that RNSB and Tunica have pursued their own putative class action complaint in the District of Columbia, see Gross Application at 1.

Defendants oppose certification of the class proposed by Zuni and of the sub-class proposed by Mr. Gross as set forth below. As no class is appropriate, there is no need to appoint class counsel, and thus Mr. Gross’s “Application” should likewise be denied.

STATUTORY BACKGROUND

The Indian Self-Determination and Education Assistance Act. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDA”), a statute that was designed to foster Indian self-government by permitting the transfer of certain federal programs to Tribal governments and other Tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs both the Secretary of the Department of Health and Human Services (“HHS”) and the Secretary of the Department of the Interior (“DOI”), upon the request of an Indian Tribe, to enter into “self-determination contracts.” See id. § 450f(a)(1); id. § 450b(i) (defining “Secretary”). A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by IHS or DOI] to Indian Tribes and their members pursuant to Federal law.” Id. § 450b(j).

At issue in this lawsuit are Zuni’s self-determination contracts with the Indian Health Service (“IHS”). IHS provides health care services to American Indians and Alaska Natives throughout the

United States, either directly under the Snyder Act and the Indian Health Care Improvement Act, see 25 U.S.C. § 13; 42 U.S.C. §§ 1601, 2001(a), or by providing funding and support to Tribes and Tribal organizations under ISDA contracts. See Lincoln v. Vigil, 508 U.S. 182, 185 (1993); see also Declaration of Ronald B. Demaray ¶ 4 (Ex. F).

ISDA Contract Formation. Under the ISDA, if a Tribe or Tribal organization wishes to take over the planning, conduct, or administration of programs or services that are otherwise provided by IHS, it may submit a request to the Secretary in the form of a self-determination contract proposal. See 25 U.S.C. § 450f(a)(2). The proposal must contain, inter alia, the amount of funding requested for the contract. See 25 C.F.R. § 900.8(h). The Secretary thereafter has 90 days either to (1) approve the proposal and proposed funding levels and award the contract, or (2) issue a written notification declining all or part of the proposal for one of five justifications found in § 450f(a)(2). See 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. The Secretary is directed to approve all severable portions of a proposal. See 25 U.S.C. § 450f(a)(4). If the Secretary does not take action on a contract proposal within 90 days, the proposal is deemed approved. See 25 C.F.R. § 900.18.

Declination of Contract Proposals. The Secretary may decline a contract proposal on one of five statutory bases. See 25 U.S.C. § 450f(a)(2); see also 25 C.F.R. § 900.22 (reciting statutory bases). Notably, one of those bases is “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)” 25 U.S.C. § 450f(a)(2)(D). In issuing a contract “declination,” the Secretary must “state any objections in writing[,]” “provide assistance to the Tribal organization to overcome the stated objections,” and provide the Tribal organization with an administrative appeals process. See id. § 450f(b); 25 C.F.R.

§ 900.31. The Tribe or Tribal organization may, however, “exercise the option to initiate an action in [federal district court] and proceed directly to such court pursuant to [§ 450m-1(a)].” Id.

Administrative Review Process. A Tribe or Tribal organization that receives notification of a declination may appeal the decision through an administrative appeals process. See id. The statute requires that the Secretary make provisions to have a “hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate[.]” Id. This administrative process is set forth in 25 C.F.R. §§ 900.150-900.176. It includes an opportunity for an informal conference or for a more formal appeal. See 25 C.F.R. §§ 900.150-900.176.

Direct Review by a Federal Court. A Tribe or Tribal organization that receives notification of a declination also may seek direct review in federal court pursuant to 25 U.S.C. § 450m-1(a). See 25 U.S.C. § 450f(b). Section 450m-1(a) gives federal courts the power to review a Secretary’s declination decision for its compliance with the ISDA and, if the decision is in error, to require the Secretary “to reverse a declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract.” Id. § 450m-1(a). The conclusion of a declination action is either an order affirming the decision of the Secretary or an order compelling the Secretary to enter into a contract. As a result, an ISDA contract is formed if either (1) the parties are in agreement about the terms of the contract and the Secretary awards the contract, or (2) a reviewing court orders the Secretary to award the contract under the terms sought by the contractor.

The ISDA Contract. An ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1994, annual funding agreements (“AFAs”).

See 25 U.S.C. § 450l (providing for a model contract); id. § 450l(c)(e)(2) (providing for written modifications to the contract); id. §§ 450l(c)(b)(4), (c)(f)(2) (providing for an AFA). The funding levels for an ISDA contract are generally described in an AFA.

Although many self-determination contracts remain in effect for more than one year, Tribal contractors must submit AFA proposals each year, which are then subject to individualized negotiations between the Secretary and the contractor. See 25 U.S.C. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. The ISDA does not contain specific formulas or funding amounts, but it requires that, with a few exceptions such as a reduction in appropriations, the funding level for existing contracts shall not be less than in previous years. See 25 U.S.C. § 450j-1(b)(2); see also 25 C.F.R. § 900.32. If the parties are unable to agree on the appropriate funding level, the parties follow the same disputes procedures outlined above. See 25 U.S.C. § 450f(b); 25 C.F.R. § 900.32.

In the years relevant to this lawsuit, IHS and Zuni were always able to agree on the terms of Zuni's ISDA contracts, as evidenced by the execution of numerous contracts and AFAs. IHS has never had to "decline" one of Zuni's proposed contracts or AFAs. In contrast, other contractors have utilized the declination process to challenge proposed contract terms and conditions. See, e.g., Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1310-12 (D. Or. 1997).

Contract Disputes. Once the parties execute (sign) an ISDA contract and an AFA, all disputes arising under it are subject to the Contract Disputes Act ("CDA"). See 25 U.S.C. §§ 450m-1(a), (d). The CDA, found at 41 U.S.C. §§ 601 et seq., requires, inter alia, that before a claim may be brought in federal court, it must first be timely presented to a contracting officer at the relevant agency. See 41 U.S.C. § 605(a); 25 C.F.R. §§ 900.215-900.230. Many Tribal contractors have

utilized the CDA procedures over the years. See Demaray Decl. ¶ 53 (Ex. F).

An ISDA contractor has non-judicial, post-execution avenues of relief as well: if the contractor believes that funding offered by IHS is insufficient, it may suspend performance under the contract or may, after notice, give the program back to IHS. See 25 U.S.C. §§ 450l(c)(b)(5), 450j(e); 25 C.F.R. §§ 900.240 et seq.

Funding of an ISDA Contract. Funding under an ISDA contract includes two components—the Secretarial amount and contract support costs (“CSC”). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of health services. See 25 U.S.C. § 450j-1(a)(1) (the “amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs”). Because some of the costs of operating IHS’s federal programs, however, are attributable to programs of federal agencies other than IHS, the Secretarial amount does not necessarily cover all of the administrative or operating expenses of a particular program. See id. § 450j-1(a)(2). Thus, a self-determination contract generally also includes CSC funding for some of these administrative costs. See id.

The ISDA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See id. Moreover, the ISDA provides that funding for CSC “shall not duplicate any funding provided [in the Secretarial amount].” Id. § 450j-1(a)(3)(A). Further, the ISDA directs that IHS’s ISDA appropriations “may be expended only for costs directly attributable to [ISDA contracts or grants] and no funds . . . shall be available for any [CSC] associated with [any non-IHS contracts or grants].” Finally, IHS’s payment of CSC, like all funding under the ISDA, is subject

to the availability of appropriations. See id. § 450j-1(b); id. § 450j(c).

CSC can be further broken down into three categories. See id. § 450j-1(a)(3)(A). First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance. See id. § 450j-1(a)(3)(A)(i); id. § 450b(c). Second, in the initial year of a contract, CSC may include "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis." Id. § 450j-1(a)(5). Finally, there are indirect CSC, the subject of this lawsuit, which are administrative costs that are shared by several different programs or services. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f).

An example of an indirect cost is the salary of a payroll clerk. See Moberly Decl. ¶ 9 (Ex. E); Declaration of Wallace Chan ¶ 11 (Ex. N). An organization may hire a payroll clerk to issue paychecks for staff that work on four different contracts and grants ("programs") run by the organization. See id. The payroll clerk "benefits" the four programs by ensuring that staff for each program gets paid, and thus his salary is not easily attributable to just one of the programs. See id. It also might be inefficient and time-consuming to have the clerk keep track of the amount of time he works on each of the four programs because the work he performs is not easily segregable. See id. The salary of the payroll clerk--incurred by an organization for a common or joint purpose benefitting more than one program and difficult to directly allocate to the programs served--is a quintessential indirect cost. See id.

Insufficient Appropriations and IHS's Policy Response. Since before 1995, Congress has provided funding each fiscal year to IHS for, among other things, self-determination contracts and the associated CSC. In fiscal years before 1998, Congress did not limit the amount of funding for

CSC directly in the appropriations acts. See Cherokee Nation v. Thompson, 311 F.3d 1054, 1058-59 (10th Cir. 2002), rev'd, 543 U.S. 631 (2005). At that time, IHS allocated funds for CSC on the basis of recommendations in congressional committee reports accompanying the IHS appropriations. See id. Starting in 1998, however, Congress “capped” the amount of funds available for the payment of CSC, and this capped amount has since been the basis for CSC allocations by IHS. See, e.g., Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997) (Ex. M).

With the possible exception of 1994, IHS’s total allocations for CSC have been insufficient to fund the total amount requested by all Tribal contractors for CSC in each year since at least 1993. See Demaray Decl. ¶ 16 (Ex. F). Thus, IHS has had to develop policies for how the annual appropriation for CSC should be allocated among Tribal contractors. See id. ¶ 19. These policies, developed with full Tribal participation through the Joint IHS/Tribal CSC Workgroup, have been memorialized in a series of guidance memoranda or Circulars.⁷ See id. IHS Memoranda and Circulars are not binding on Tribal Contractors, but set forth the guidelines that IHS officials follow for ISDA contracting and the funding of CSC requests. See id.

While the ISDA defines indirect CSC and provides that indirect CSC shall be added to the

⁷ Indian Self-Determination Memorandum 92-2, which was adopted in 1992 and remained in effect until April 1, 1996 (Class Mem., Ex. 4); IHS CSC Circular No. 96-04, which was adopted in 1996 and remained in effect until 2000 (Class Mem., Ex. 5); IHS CSC Circular No. 2000-01, which was adopted in January 2000 and was applicable to 2000 and 2001 ISDA awards (Class Mem., Ex. 6); and IHS CSC Circular No. 2001-05, which was signed in 2001 but was applicable to fiscal year 2002, 2003, and 2004 ISDA awards (Class Mem., Ex. 7). In September 2004, a new Circular was published, IHS CSC Circular No. 2004-03, which was applicable to 2005 and 2006 ISDA awards and remains in effect today (Class Mem., Ex. 8). In 1999, pursuant to congressional direction, a separate policy was developed for the allocation of the 1999 appropriation. See Demaray Decl. ¶ 21. Additional information about IHS’s policies can be found in Mr. Demaray’s declaration.

contract pursuant to an AFA, it does not specify or mandate how the parties will ascertain the actual amount of indirect CSC. Instead, the ISDA requires that Tribal contractors and IHS negotiate and agree upon the specific amount of CSC or the specific formula for determining indirect CSC. See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B), 450j-1(b), 450j(c); 25 C.F.R. §§ 900.12, 900.8(h). The parties' negotiated agreement is then memorialized in the ISDA contract.

As a starting place for negotiating indirect CSC, contractors may either use an indirect cost rate for the calculation of indirect CSC (discussed in more detail below) or may negotiate what are called "indirect-type costs" directly with IHS. See Demaray Decl. ¶ 25 (Ex. F). Additionally, IHS has implemented pilot projects for the payment of CSC that allow contractors to negotiate unique CSC funding terms. See id. This has resulted in IHS awarding CSC to its contractors under several different methodologies and guidelines over the years. See id.

Zuni has always submitted to IHS an indirect cost rate as the starting point for calculating indirect CSC. Thus, each of Zuni's ISDA AFAs specify that Zuni's indirect CSC funding will be based on its indirect cost rate for that year.⁸ See Excerpts from Zuni Contracts (Ex. O.) Because Zuni now seeks to challenge the methodology by which its indirect cost rates were determined as well as the use of those rates, the methods for calculating indirect cost rates are most relevant here.

⁸ See Excerpts from Zuni's Contracts (Ex. O), Term Nos. 4-7, 11-13, 17-22, 26-29, 33, 35, 37 ("The amount of Indirect cost funding will be based upon the Contractor's Indirect Cost Agreement which is current for this period of performance.") & Term Nos. 9, 15 ("Indirect costs during the period of this contract shall be reimbursed at rates established by agreement between the Contractor and the Department of Interior, Office of Inspector General. No deviation from the established rate will be made without approval of the office of Inspector General, as evidenced by a formal rate negotiation agreement."). In addition, the contracts and AFAs either limit the total award under the contract to a sum certain or specify the specific amount of indirect CSC that will be awarded. See id. Terms 1, 3-8, 10-14, 16-23, 25-30, 32-37.

Indirect Cost Rates. Indirect cost rates are not issued by IHS, but by a government contractor's "cognizant agency." They are the result of a negotiation that is independent from contracting under the ISDA. See Moberly Decl. ¶ 4 (Ex. E); Chan Decl. ¶ 7 (Ex. N). The cognizant agency for Tribal governments is DOI. See Moberly Decl. ¶ 41; Chan Decl. ¶ 3. For other Tribal organizations, the cognizant agency is generally the agency that awards the largest amount of Federal funds to the particular Tribal contractor. See Moberly Decl. ¶ 42; Chan Decl. ¶ 3. DOI is Zuni's cognizant agency. See Moberly Decl. ¶ 43. Since January 3, 2003, the component within DOI responsible for rate negotiation has been the National Business Center ("NBC"). See id. ¶ 3. Prior to that time, this function was handled by DOI's Office of the Inspector General ("OIG"). See id. Other Tribal non-profit organizations negotiate indirect cost rates with the Division of Cost Allocation ("DCA"), a component of HHS. See Moberly Decl. ¶ 42; Chan Decl. ¶ 3.

The negotiation between a government contractor and its cognizant agency is guided by general cost principles, found in Circulars published by the Office of Management and Budget ("OMB"). The three OMB Circulars, OMB A-21, 2 C.F.R. Pt. 220 (for educational organizations); OMB A-87, 2 C.F.R. Pt. 225 (for State, Local, and Tribal governments), and OMB A-122, 2 C.F.R. Pt. 230 (for nonprofit organizations), provide guidance on the reasonableness, allowability, and allocability of indirect costs. See id. They aim to equitably allocate indirect costs to programs (federal, state, private, and/or Tribal) that benefit from shared administrative costs (like the payroll clerk). See id. Although the Circulars provide guidance for different types of organizations, the principles in all three are the same: the indirect cost (e.g., the salary of the payroll clerk) must be equitably allocated among the four programs that are benefitted by the costs (e.g., the programs

served by the payroll clerk). Zuni's indirect cost rates were negotiated under OMB Circular A-87; other Tribal contractors have negotiated indirect cost rates under OMB A-122 and OMB A-21.

The determination of how to allocate indirect costs to each of the programs benefitted is critical because if one of the programs is a federal program funded through congressional appropriations, over-charging that program may violate the terms of the underlying appropriations. Federal law provides that appropriations shall be applied only to the objects for which they were made except as otherwise provided for by law. See 31 U.S.C. § 1301(a) (the stated purpose, time, and amount of any appropriation governs); see also Dep't of Soc. Serv. v. Sullivan, 904 F.2d 710, 1990 WL 81840, at *3 (9th Cir. June 18, 1990) (unpublished mem.) (explaining that when California received program funds from HHS and USDA and used shared administrative services to run the programs, California could not charge costs to HHS that were allocable to USDA without violating 31 U.S.C. § 1301(a)); Alabama v. Shalala, 124 F. Supp. 2d 1250, 1269 (M.D. Ala. 2000) ("A general principle of federal appropriations law provides that federal funds may be used only for authorized purposes."); Maine v. Shalala, 81 F. Supp. 2d 91, 98 (D. Me. 1999) (explaining that cost shifting is not permitted under federal law). In recognition of 31 U.S.C. § 1301(a), the OMB Circulars prohibit "cost-shifting." See, e.g., 2 C.F.R. Pt. 225, App. A, § F.3.b ("Amounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation.").

The Circulars have flexible methodologies for organizations, such as State, Local or Tribal Governments, to allocate their indirect costs to all programs that benefit from those costs. See Moberly Decl. ¶ 7; Chan Decl. ¶ 13. These methodologies provide a means to determine the

maximum amount of indirect costs that can be charged to a federal award, unless more or less is permitted by law. See Moberly Decl. ¶ 4; Chan Decl. ¶ 12. Application of the general methodologies in the Circulars to a government contractor’s unique circumstances yields an indirect cost rate or rates which can then be used as permitted to determine indirect CSC for any of the contractor’s contracts or grants. See Moberly Decl. ¶ 13; Chan Decl. ¶ 14.

In general, an indirect cost rate is the ratio of the total amount of reasonable and allowable indirect costs (called an “indirect cost pool”) to total program funding that benefits from those indirect costs (called a “direct cost base”). See 2 C.F.R. Pt. 225, App. E, § B.3; Moberly Decl. ¶ 14; Chan Decl. ¶ 15. The ratio yields an indirect cost rate (indirect cost pool / direct cost base). See id.

Here is an example for a Sample Contractor (“Contractor A”):

Indirect Costs	
Administrative Assistant	\$40,000
Human Resources Director	\$68,000
Payroll Clerk	\$20,000
Grants and Contracts Officer	\$28,000
Procurement Officer	\$38,000
Rent	\$40,000
Security Guards	\$48,000
Office Supplies	\$18,000
Total Indirect Costs	\$300,000
Direct Cost Base	
Bureau of Indian Affairs (BIA)	\$700,000
Indian Health Services (IHS) Clinic	\$500,000
EPA Program	\$200,000
School Lunch Program (USDA)	\$100,000
State Program	\$500,000
Tribal Program	\$1,000,000
Total Direct Cost Base	\$3,000,000

The calculation for Contractor A, based on the figures above, is \$300,000 (indirect cost pool) over \$3,000,000 (direct cost base) = .1 or 10% (indirect cost rate). See Moberly Decl. ¶¶ 18-20.

Once the rate is generated, it may be applied to the portion of the base associated with each program to determine the maximum amount of costs that can be equitably allocated to the program. For example, to determine the maximum amount of indirect costs that could be charged to the BIA programs, one would multiply the rate (10%) by the BIA portion of the base (\$700,000), to get \$70,000. The formula, however, is for allocating costs, and the Circulars specify that there is no right to or expectation of actual recovery of those costs created by the rate methodology. See 2

C.F.R. § 225.20; Moberly Decl. ¶¶ 51-52; Chan Decl. ¶ 38. The amount actually recoverable from any government agency is determined by reference to the law and contractual requirements of the underlying contract or grant.⁹ See id.

The Circulars also provide for different types of rates, depending on the needs of the organization and what would be most equitable for that organization. See Moberly Decl. ¶ 21; Chan Decl. ¶ 21. One type of rate is the “fixed” rate, often called a “fixed-with-carry-forward” rate, which is a rate that is based both on an estimate of the costs expected to be incurred for the applicable period and on a subsequent adjustment (called a carry-forward) that takes into account the difference between the estimated costs and the actual costs from an earlier period. See 2 C.F.R. Pt. 225, App. E, § 6; Moberly Decl. ¶¶ 22-27; Chan Decl. ¶ 24. The purpose of the carry-forward is to account for the difference between a contractor’s actual costs and recoveries from an earlier period and what the contractor was allocated based on its estimates. See id. For example, Contractor A’s 2006 negotiation would involve estimated 2006 indirect costs and an estimated direct cost base with a carry-forward adjustment based on actual 2004 indirect costs. See Moberly Decl. ¶¶ 22-24. The 2004 carry-forward increases or decreases the 2006 estimated indirect costs to reflect any under-recovery or over-recovery of indirect costs from the earlier year. See id.

Another type of rate available to contractors requires negotiating two indirect cost rates for each year. See 2 C.F.R. Pt. 225, App. E, § B.7, B.8; Moberly Decl. ¶ 29; Chan Decl. ¶ 22. They are

⁹ Even within the simplified (single rate) method, there are variations depending on the organization. For example, if allocating costs over the total funding amounts will not be equitable, the contractor can utilize a different base, *i.e.*, salaries and fringe. See 2 C.F.R. Pt. 225, App. E, § B.4; Moberly Decl. ¶ 16; Chan Decl. ¶ 18. Contractors may opt to use one of three bases: total salaries and wages with or without fringe benefits or total modified direct costs less capital expenditures and pass-through. See id.

called provisional/final rates. See id. First, a provisional (temporary) indirect cost rate is generated using estimates of the contractor's expected or historical costs. See id. A final rate is generated after actual costs for that period are known, usually within six months after the end of the period covered by the rate. See id. Under a provisional/final rate, over and under-recoveries are handled by the funding agency and are not considered in the rate calculation.¹⁰ See id. Over the time period relevant to the First Amended Complaint, Zuni used a fixed-with-carry-forward rate in some years and a provisional/final rate in other years. See Moberly Decl. ¶ 43,

The Circulars also allow contractors to negotiate more than one indirect cost rate (called either the multiple allocation base method or "special" rates). See 2 C.F.R. Pt. 225, App. E, § C.3, C.4; Moberly Decl. ¶¶ 33-34; Chan Decl. ¶ 31. Multiple rates are available to government contractors when indirect costs benefit the contractor's programs in varying degrees. See id. An example might be when some of the programs in the contractor's base benefit from the indirect costs to a greater degree than the other programs. See id. The purpose of allowing contractors to have multiple rates is to allocate indirect costs to programs relative to the benefits received by those programs. See id.

Negotiating Indirect Cost Rates. A contractor that wishes to obtain an indirect cost rate (or rates) must submit a proposal to its cognizant agency. See id. App. E, § D.1.a. The proposal "must be developed (and, when required, submitted) within six months after the close of the [contractor's] fiscal year, unless an exception is approved by the cognizant Federal agency." Id. App. E, § D.1.d.

¹⁰ A third type of rate is called a predetermined rate and it is generally available only to certain organizations. See Moberly Decl. ¶ 32; Chan Decl. ¶ 26. Predetermined rates may be issued for a period of two to four years where historical cost experience has been stable, but are generally not used when the contractor's direct cost base contains payments pursuant to federal contracts. See id.

The Circulars set forth the proposal requirements. See id. App. E, § D.2. Once the contractor has submitted an indirect cost rate proposal, the cognizant agency will review, negotiate, and ultimately approve an indirect cost rate or rates. See id. App. E, § E.1. A rate agreement is then signed by the contractor and a representative of the cognizant agency. See id. App. E, § E.3. Once the agreement is signed, the rate or rates are available to all federal agencies for their use as agreed to under any particular contract or grant agreement. See id.

Dispute Processes. OMB also provides for a dispute resolution process in the event that there is a disagreement between the government contractor and the cognizant agency in negotiating a rate. “If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency and the [contractor], the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.” Id. App. E, § F.4. The appeals procedure for DOI is found at 43 C.F.R. §§ 4.1 et seq. The appeals procedure for HHS (DCA) is found at 45 C.F.R. Part 16. See Chan Decl. ¶ 41. Zuni has never pursued claims through DOI’s appeals process (Moberly Decl. ¶ 47), has accepted its rate agreements over the years, see Attachment B to Moberly Decl., and has submitted them to IHS for use in its ISDA contracts, see supra n.8.

The use of indirect cost rates. A cognizant agency, such as NBC, is not involved with the funding of contracts or grants. See Moberly Decl. ¶¶ 51-52; Chan Decl. ¶ 35. A funding agency (such as IHS, BIA, or USDA) may or may not use an indirect cost rate as the basis for the actual reimbursement for or award of indirect costs. See 2 C.F.R. § 225.20.

As described above, the process by which many Tribal contractors are awarded CSC by IHS is the result of two separate negotiations: one negotiation with a cognizant agency to develop an

indirect cost rate that all parties agree fairly and equitably allocates costs and a second negotiation with IHS to determine the amount of CSC needed and available in order to run the programs under contract. Although general statutory and regulatory mandates govern these two negotiations, a Tribal contractor's structure, the type and size of its programs under contract, and its particular needs result in very different final agreements. These unique agreements are the basis for Zuni's challenge here, but provide the primary reason why this case cannot proceed as a class action.

ARGUMENT

“The class-action device was designed as ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)). Thus, a class action may not be certified unless the trial court is satisfied, after “rigorous analysis,” that the prerequisites of Rule 23(a) have been met and that the action falls within one of the three categories of Rule 23(b). See Gen. Tel., 457 U.S. at 161; J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287-88 (10th Cir. 1999) (citing Gen Tel.); Cherokee, 199 F.R.D. at 360.

The movant has “a strict burden” of showing that the class should be certified and that the requirements of Rule 23 are met.” Rex v. Owens ex rel. State of Okla., 585 F.2d 432, 435 (10th Cir. 1978); Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir. 1988); Cherokee, 199 F.R.D. at 360. The movant must provide direct support for each requirement in Rule 23. See Davoll v. Webb, 160 F.R.D. 142, 143 (D. Colo. 1995). Conclusory averments or mere parroting of the elements of Rule 23 have been consistently rejected by the courts. See, e.g., Gen. Tel., 457 U.S. at 161; J.B., 186 F.3d at 1290 n.7. The failure to satisfy any one of the elements of Rule 23 precludes class certification.

See Gen. Tel., 457 U.S. at 161. Finally, even if the requirements of Rule 23 have been satisfied with the necessary proof, the decision of whether to certify a class is firmly committed to the trial court's discretion. See Califano, 442 U.S. at 703; J.B., 186 F.3d at 1287; Cherokee, 199 F.R.D. at 360.

Each of these elements will be discussed in turn. There are, however, several threshold matters that preclude or militate against class certification that will be discussed first, one of which goes to the Court's subject matter jurisdiction. The Supreme Court has unequivocally stated that a court's jurisdiction is a threshold inquiry that should be resolved before proceeding with other aspects of a case. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); see also J.B., 186 F.3d at 1285 (explaining that courts are required to consider jurisdictional issues before considering whether certification is appropriate).

I. NO CLASS MAY BE CERTIFIED FOR MONETARY RELIEF UNLESS EACH AND EVERY MEMBER OF THE CLASS HAS SATISFIED THE JURISDICTIONAL PREREQUISITES OF THE CONTRACT DISPUTES ACT.

This lawsuit is brought under the ISDA for money damages. (Am. Compl. ¶¶ 1-2.) The ISDA directs that, for all claims by contractors against the government for monetary relief, the Contract Disputes Act ("CDA") applies. See 25 U.S.C. §§ 450m-1(a), (d). The ISDA thus conditions its waiver of sovereign immunity for monetary claims against the government on the application of the CDA. See id.; see also Demontiney v. United States, 255 F.3d 801, 806 (9th Cir. 2001) (explaining limited waiver of sovereign immunity found in the ISDA); Tunica-Biloxi Tribe v. United States, No. 02-2413, slip op. at 8-10 (D.D.C. 2004) (recognizing that CDA presentment under the ISDA is a condition on the Court's jurisdiction) (Ex. P). Thus, the terms and conditions of the CDA act as limitations on a court's subject matter jurisdiction.

A party seeking to sue the United States bears the burden of demonstrating that a specific statutory provision waives the government's sovereign immunity from suit. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); United States v. Sherwood, 312 U.S. 584, 586-87 (1941); see also Weaver v. United States, 98 F.3d 518, 520 (10th Cir. 1996). The United States, as sovereign, is immune from suit unless it consents to be sued, the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit, and a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. See United States v. Mitchell, 445 U.S. 535, 538 (1980).

There are three jurisdictional prerequisites in the CDA most relevant to this Class Motion. First, the CDA requires that before any contract claim may be brought in federal court, it must be presented to a contracting officer ("CO"). See 41 U.S.C. § 605(a) ("All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision."). This presentment requirement is mandatory; the failure to present a claim in a timely manner bars a reviewing court from asserting jurisdiction over that claim. See James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 614 (1990); Mendenhall v. United States, 20 Cl. Ct. 78, 82 (1990); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985); Renda Marine Inc. v. United States, 71 Fed. Cl. 782, 789 (2006); Tunica-Biloxi, slip op. at 10; see also United States v. Int'l Fidelity Ins. Co., No. 98-3051, 1998 WL 892299, at *1-2 (10th Cir. Dec. 23, 1998) (unpublished decision) (explaining the statutory requirements of the CDA); Tradesman Int'l Inc. v. U.S. Postal Serv., 234 F. Supp. 2d

1191, 1197 (D. Kan. 2002) (same); United States v. Black Hawk Masonic Temple Ass'n, Inc., 798 F. Supp. 646, 649 (D. Colo. 1992) (same).¹¹

In addition, there are two strict statutes of limitation in the CDA. First, for contracts entered into on or after October 1, 1995, the CDA has an administrative statute of limitation that requires claims to be presented to a government CO within six years of accrual. See 41 U.S.C. § 605(a). Second, the CDA has a one-year statute of limitations within which contractors are required to bring adversely decided CDA claims in federal court. See id. §§ 606. The one year period begins to run after the CO issues a decision or the claim is deemed denied. See id.

A court may not excuse a contractor's failure to timely present a CDA claim (to either a CO or the federal district court) because Congress has limited the Court's jurisdiction over CDA claims to those claims that meet the presentment requirement. See Computer Prods. Int'l, Inc. v. United States, 26 Cl. Ct. 518, 525 (1992); Krueger v. United States, 26 Cl. Ct. 841, 844 (1992); Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); Thoen, 765 F.2d at 1116; Gregory Lumber Co. v. United States, 229 Ct. Cl. 762 (1982); Renda Marine, 71 Fed. Cl. at 792; Made in the U.S.A. Found. v. United States, 51 Fed. Cl. 252, 255-56 (2001). The CDA contains no exceptions to these requirements for class actions. In other words, these requirements apply to each and every putative class member that seeks to recover money from the United States. Therefore, any ISDA contractor that has not timely presented a claim may not be a part of (must less the class

¹¹ The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret and apply the CDA almost exclusively, see 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein. It is only by virtue of 25 U.S.C. § 450m-1(a) that Plaintiff can bring these CDA claims in this Court or any federal district court, where there exists very little case law on the CDA.

representative in) a federal court class action; the Court lacks jurisdiction over these claims and cannot certify a class that includes contractors and claims over which it lacks jurisdiction.

Federal courts have often discussed the propriety of class actions in the context of another mandatory presentment scheme, that of the Federal Torts Claims Act (“FTCA”). Like the CDA, the FTCA’s mandatory presentment requirement limits the exercise of federal court jurisdiction. See 28 U.S.C. §§ 2401(b), 2675(a); United States v. Kubrick, 444 U.S. 111, 117-18 (1979); Kendall v. Watkins, 998 F.2d 848, 852 (10th Cir. 1993); Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992). Based on this statutory presentment requirement, courts have uniformly held that each and every member of a putative FTCA class action must present an individual claim for relief to the relevant agency; the failure to do so requires dismissal or denial of the motion for class certification. See In re Agent Orange Prod. Liability Litig., 818 F.2d 194, 198 (2d Cir. 1987); Caidin v. United States, 564 F.2d 284, 286-87 (9th Cir. 1977); Blain v. United States, 552 F.2d 289, 291 (9th Cir. 1977); Lunsford v. United States, 570 F.2d 221, 224-27 (8th Cir. 1977); Commonwealth of Pa. v. Nat’l Ass’n of Flood Insurers, 520 F.2d 11, 24 (3d Cir. 1975), overruled on other grounds, 659 F.2d 306 (3d Cir. 1981); Hoskin v. United States, No. 00-1713, 2001 WL 175237 (E.D. La. Feb. 20, 2001); Gollehon Farming v. United States, 17 F. Supp. 2d 1145, 1160-61 (D. Mont. 1998), aff’d on other grounds, 207 F.3d 1373, 1382 n.2 (Fed. Cir. 2000), rev’d, Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005); Luria v. Civil Aeronautics Bd., 473 F. Supp. 242, 244-45 (S.D.N.Y. 1979); Kantor v. Kahn, 463 F. Supp. 1160, 1162-64 (S.D.N.Y. 1979); Founding Church of Scientology v. Director, 459 F. Supp. 748, 754 (D.D.C. 1978).

As the presentment of a timely claim to an IHS CO is a prerequisite to this Court’s

jurisdiction over that claim, each individual putative class member that Zuni seeks to represent must have presented the claim raised here before initiation of the lawsuit in order to invoke the Court's jurisdiction. Plaintiff has not so pled, and in fact admits that this is not the case. (Class Mem. at n.75.) Therefore, the Class Motion must be denied.

Even were the Court to consider modifying the class definition to read "All Indian Tribes and Tribal organizations that have contracted with the Indian Health Service . . . and have timely presented to an IHS CO the claims that are the subject of this lawsuit under the CDA," the task before the Court would still be enormous. The Court would need to review the circumstances surrounding each contractor's presented claim to determine: (1) whether the contractor presented the same type of claims for each of the years involved in this lawsuit, and, if yes, (2) whether each claim was timely presented to a contracting officer and timely submitted to this Court.¹² For example, one putative class member presented claims related to its CSC funding for fiscal years 1996-2001 on three legal theories. See CDA Claim Ltr. of Tunica-Biloxi Tribe (Ex. Q). Another putative class member presented claims related to its CSC funding for fiscal year 1995-1996 on two legal theories. See CDA Claim Ltr. of RNSB (Ex. R). The individualized nature of this review to

¹² Defendants expect that the parties will dispute the timeliness of CDA claims under the applicable statute of limitations as well as the doctrine of laches. The assertion of a statute of limitations (or laches) as a defense to claims necessarily raises individual, rather than common, questions. See *J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 998-99 (7th Cir. 1980); *Hardin v. Harshbarger*, 814 F. Supp. 703, 708 (N.D. Ill. 1993); *Bishop v. New York City Dep't of Hous. Preservation & Dev.*, 141 F.R.D. 229, 238 (S.D.N.Y. 1992); see also *Edgington v. R.G. Dickinson & Co.*, 139 F.R.D. 183, 194 (D. Kan. 1991) ("When the representatives are subject to unique defenses that predictably will become a major focus of litigation then class certification should be denied."). Moreover, "[p]utative class members whose grievances are barred by the statute of limitations . . . cannot be counted toward computation of the class." *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 716 (5th Cir. 1994).

determine the Court's jurisdiction directs that a class action here, even under a modified class definition, would be inappropriate and extremely inefficient.

II. A DISTRICT COURT HAS ALREADY DENIED A MOTION BY COUNSEL FOR CERTIFICATION OF THIS CLASS.

In 1999, Lloyd Miller and his firm, Sonosky, Chambers, Sachse, Endreson and Perry, brought a class action complaint against IHS in the Eastern District of Oklahoma on behalf of the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservations. See Cherokee Nation v. United States, 199 F.R.D. 357, 358 (E.D. Okla. 2001). The class definition that Mr. Miller sought in Cherokee was:

“All Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts or annual funding agreements authorized by the Indian Self-Determination Act, 25 U.S.C. § 450 et seq., that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present.”

Id. at 360. The district court permitted discovery into the class issues. On November 1, 2000, the court held a hearing on the plaintiffs' motion for class certification, at which time both parties introduced evidence. Both parties thereafter submitted additional briefing.

On September 9, 2001, the court denied the motion for class certification. The court determined that the Rule 23 elements of common questions of law and fact, typicality, adequacy of representation, and predominance had not been not satisfied. See id. at 363-66. More specifically, the court found that an adjudication of the case would require that the court review each ISDA contractor's contract and would cause the litigation to devolve into a series of “mini-trials that would defeat the judicial efficiency which a class action is designed to promote.” Id. at 363. The court recognized that each contract is the subject of an individual negotiation between IHS and the

contractor and that “there could be a variety of different legal and remedial theories for each Tribe, dependent on its contractual terms.” Id. at 364. The court also recognized that because any damages would come from the agency’s budget, which was necessarily finite, the class representatives’ interests were (or at the very least could be) antagonistic to those of the putative class members. See id. at 365-66.

The court’s sound reasoning in Cherokee is extremely persuasive in demonstrating why the virtually identical class should not be certified here. Cherokee remains the only case in which a court has considered the propriety of a class of all IHS contractors under Rule 23 and it correctly concluded that the elements were not satisfied. Similar conclusion have been reached in other contexts. First, the Judicial Panel on Multi-District Litigation considered the question of transfer and consolidation of this case with another ISDA CDA putative class action, Tunica-Biloxi v. United States, No. 02-2413 (D.D.C.), and concluded that there were no “remaining, unresolved common questions of fact and law [that were] sufficiently complex and/or numerous to justify Section 1407 transfer[.]” In re Indian Tribes Contract Support Costs Litig., 383 F. Supp 2d 1380, 1380 (J.P.M.L. 2005). In addition, this Court, in denying a Motion to Intervene by Tunica-Biloxi and RNSB in this case last October, explained that while the claims of Tunica-Biloxi, RNSB, and Zuni were similar, each “involves contracts with different tribes and therefore different terms and conditions with their respective contracts[, and t]he resulting complexity involved in different contractual agreements balances out any consideration of potential judicial economy.” Order Denying Mot. to Intervene at 7-8 (docketed as #145).

As Plaintiff and Applicant for Class Counsel Gross point out, however, in 1993, a judge in

this District certified a class of Tribal contractors in a lawsuit against the Department of the Interior's Bureau of Indian Affairs ("BIA"). See Ramah Navajo Chapter v. Lujan, No. 90-957 (D.N.M. 1993) ("RNC") (Class Mem. at Ex. 2). This action, filed in 1990, continues to this day, thus illustrating that the class action device has proven cumbersome and inefficient in the context of these claims.

More important, a review of the Order granting class certification demonstrates an error by the Court in concluding that CDA administrative presentment could be excused for putative class members on the basis of futility, notwithstanding the fact that the Court held that the CDA's requirements were jurisdictional.¹³ See id. at 4. As explained above, the waiver of sovereign immunity for monetary relief under the ISDA has been expressly limited by Congress and the failure of a claimant to satisfy the CDA's presentment requirements deprives a reviewing court of jurisdiction over that claim. The CDA is thus distinguishable from a statute where exhaustion through an administrative process is prudential and based on public policy considerations alone. See McGraw v. Prudential Ins. Co., 137 F.3d 1253, 1263 (10th Cir. 1998); Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004). When exhaustion is non-mandatory, a court

¹³ Notably, after the RNC court certified the BIA class, the district court ruled for BIA on the merits (Ex. S). The plaintiffs then took an appeal, but the defendants, having won on the merits, did not cross-appeal the certification decision. Concluding that the ISDA was ambiguous, see RNC, 112 F.3d 1455, 1461-62 (10th Cir. 1997), the Tenth Circuit reversed the decision of the district court, and by then, it was too late for the defendants to appeal the certification decision. DOI and the Class thereafter entered into settlement negotiations that resulted in a settlement under which BIA paid out a significant amount of money in exchange for, inter alia, a release of claims against all federal agencies. The Class, however, reserved certain claims against IHS. (Class Mem., Ex. 3 at 4). As IHS was not a party to the suit nor was it involved in the settlement negotiations with the RNC Class, there is absolutely no accuracy to Zuni's statement that IHS "agreed to litigate older miscalculated claims on a class basis." (Class Mem. at 57.) Congress then amended the ISDA to clarify any ambiguity that the Tenth Circuit had found, see 25 U.S.C. §§ 450j-2, j-3, and re-affirmed the district court's interpretation of the ISDA.

may excuse exhaustion on the grounds of “futility.” See id. But when exhaustion is mandatory, as in the CDA, futility is not an exception. See id. The court in RNC, in finding that “futility” was an exception to the CDA’s jurisdictional prerequisite, erred.

Indeed, since this Court’s ruling in 1993, the Supreme Court has issued a decision in the Medicare context on this very point. In Shalala v. Illinois Council on Long Term Care, Inc., the Supreme Court strictly construed a statutory exhaustion requirement and refused to excuse the plaintiffs’ from exhaustion, notwithstanding that the plaintiffs sought only to make a prospective, non-monetary challenge to agency regulations on broad constitutional and statutory grounds. See 529 U.S. 1, 15 (2000); see also Booth v. Churner, 532 U.S. 731, 741 & n.6 (2001) (refusing to excuse the failure to exhaust when exhaustion requirement was statutory); McNeil v. United States, 508 U.S. 106, 111 (1993) (declining to excuse a violation of the specific statutory administrative exhaustion process by stating, inter alia, “[w]e are not free to rewrite the statutory text.”); McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required.”). The cases interpreting the CDA strictly and without exception demonstrate that presentment under the CDA is a mandatory requirement which cannot be waived.

Finally, the more recent denial of class certification by the Cherokee court specifically distinguished the RNC Class decision by explaining that “the United States did not oppose class certification on any of the grounds set forth in Rule 23 [thus] the court in RNC never had the opportunity to evaluate the proposed motion for class certification pursuant to Rule 23(a) qualifications.” 199 F.R.D. at 366 n.1. The Cherokee court accordingly found “the decision in [RNC] of little assistance in the case at bar.” Id. This Court should reach the same conclusion about

the RNC Order. In contrast, the Cherokee decision, directly on point and well reasoned, should be accorded great weight on the issue of class certification presented here.

III. PLAINTIFF HAS NOT DEMONSTRATED NUMEROSITY, COMMONALITY, TYPICALITY, OR ADEQUACY AS IS REQUIRED BY RULE 23(A) IN ORDER FOR A CLASS TO BE CERTIFIED.

Rule 23(a) provides:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (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.

Fed. R. Civ. P. 23(a).

A. The Proposed Class Definition and the Proposed Claims Are Overbroad.

As a threshold matter, a class for which certification is sought must meet a standard that is implicit in Rule 23: there must exist an identifiable class. See Harrington v. City of Albuquerque, 222 F.R.D. 505, 509 (D.N.M. 2004); Cherokee, 199 F.R.D. at 360; Colo. Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 356 (D. Colo. 1999); Daigle v. Shell Oil Co., 133 F.R.D. 600, 602 (D. Colo. 1990). To ensure that a class is neither amorphous nor imprecise, a class should generally be defined by the actions of the defendant. See Daigle, 133 F.R.D. at 602. Moreover, “the requirement that there be a class is not satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” Davoll, 160 F.R.D. at 144; see also Colo. Cross-Disability, 184 F.R.D. at 357.

Here, Plaintiff seeks to define the class 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 [2005].” (Class Mem. at 1.) There are many problems with this overly broad and ill-defined class.

First, the proposed definition is overbroad because it includes contractors over which this Court lacks jurisdiction, as described above, because they have not presented an administrative claim under the CDA, let alone one for each claim and each year related to this case. It also does not identify the class by reference to the activities of IHS or to the common injuries of the named plaintiff and proposed class members; it merely defines the class by reference to the status of the plaintiffs (e.g., all IHS contractors). The court in Daigle rejected a similarly defined class by explaining that the proposed class could contain individuals who did not allege that they had any injury caused by the defendants. See 133 F.R.D. at 604; see also J.B., 186 F.3d at 1290 (rejecting class definition that included individuals who had no claim); K.L. by Dixon v. Valdez, 167 F.R.D. 688, 691 (D.N.M. 1996) (same). Plaintiff admits as much. See, e.g., Class Mem. at 36 (conceding that Plaintiff does not know if all IHS contractors could even bring a claim for additional CSC); Deposition of William Ron Allen at 84:21-85:20 (Ex. T) (stating that the Jamestown S’Kallam Tribe received from IHS all of the CSC it requested); Demaray Decl. ¶ 61 (Ex. F) (explaining that some contractors had no reported CSC shortfall).

In addition, the proposed definition includes at least 34 IHS contractors (out of approximately 330) that have already disputed, litigated, settled, or waived claims related to CSC in other forums. See Ex. U for a list of contractors that have previously filed suit against IHS related to CSC; see also Class Mem. at 5 n.5 for a partial list of cases filed against IHS related to CSC. Under the doctrines

of res judicata, collateral estoppel, and pursuant to release and waiver terms of settlement agreements, these contractors would be barred from joining this putative class. See United States v. Mendoza, 464 U.S. 154, 158-59 (1984) (describing the doctrines of res judicata and collateral estoppel as a bar to issue and claim relitigation).

It would be a massive undertaking for the Court and the parties to attempt to determine the extent and scope of the bars of res judicata, collateral estoppel, and the waiver and release terms resulting from settlements. For example, the Cherokee Nation has already litigated its claims related to CSC for 1994-1997 in two separate lawsuits, later combined before the Supreme Court. See Cherokee Nation Complaints (Ex. V). Res judicata would bar Cherokee from joining this class, but it is possible that Cherokee would dispute this issue. The Court would need to resolve the specific and individualized issue of res judicata by reference to the operative facts at issue in Cherokee's original complaints as well as those in Zuni's First Amended Complaint. The parties may take different positions with respect to the extent of preclusion, and thus the scope and extent of preclusion as to each of these contractors would have to be analyzed individually, rendering the class vehicle inefficient and the class definition over-inclusive.

The actual claims that Plaintiff seeks to have certified also present problems. For example, Proposed Class Claims One, Two, and Three all include claims from fiscal years 1995 to 2005. (Class Mem. at 1-2.) The First Amended Complaint, however, raises claims only for fiscal years 1993 to 2001. Therefore, years after 2001 are not even before the Court and cannot be certified.¹⁴

Applicant Gross's proposed class definition runs even further afield. It fails to include any

¹⁴ Plaintiff cannot amend its complaint via a class certification brief. See, e.g., Norton v. The City of Marietta, 432 F.3d 1145, 1151-52 (10th Cir. 2005).

fiscal year parameter and thus is an entirely inappropriate definition for certification of contract claims for monetary relief. His definition also does not mirror the claims in the First Amended Complaint or the Class Motion (e.g., he discusses a claim involving the use of fixed-with-carry-forward rates on pages 8-10 of the Application), and it appears that he and the contractors that he represents have a different theory of relief (i.e., a theory that, if successful, would require NBC and DCA to adjust the indirect cost rate methodology, see Application at 8) than that asserted by Zuni, which seeks to require IHS to adjust the actual rates themselves, see Proposed Class Claim Three. As a stranger to this litigation, Mr. Gross cannot seek to certify a class including new claims or claims for years that are not even part of this lawsuit.

B. The Proposed Class Does Not Satisfy the Numerosity Requirement.

Rule 23(a)(1) requires that a proposed class be so numerous that joinder of all members in one lawsuit would be impractical. See J.B., 186 F.3d at 1288; Rex, 585 F.2d at 435; Cherokee, 199 F.R.D. at 361; Daigle, 133 F.R.D. at 602; Colo. Cross-Disability, 184 F.R.D. at 357. Generally, courts consider a number of factors when determining whether numerosity is satisfied, including class size, geographic diversity of the class, the relative ease or difficulty in identifying members of a class for joinder, the financial resources of class members, and the ability of class members to institute individual lawsuits. See Cherokee, 199 F.R.D. at 361; Colo. Cross-Disability, 184 F.R.D. at 357.

Accepting, for purposes of this discussion, Plaintiff's proposed class definition of "all IHS contractors that contracted with IHS between 1993 and 2001," Defendants do not dispute the size of the class as defined by Plaintiff (as of 2005, there were 335 contractors contracting with IHS, see

Demaray Decl. ¶ 8 (Ex. F)), or the geographic diversity of IHS contractors. However, the actual size and composition of the class as so defined would fluctuate depending on which year was at issue because the number of Tribe and Tribal organizations with ISDA contracts (and the number of the contracts themselves) has changed and grown over the years. See id. More important, due to the over-inclusiveness of the class definition as discussed supra, Plaintiff provides no proof on the actual number of IHS contractors that could take part in this lawsuit (e.g., those that have timely presented the same claims at issue in this suit, etc.).

Moreover, if Plaintiff actually seeks hundreds of millions of dollars in this lawsuit, see Class Mem. at 18 (reciting that IHS owes contractors \$74.3 million dollars in 2005 alone), then each putative class member would have an average potential recover in excess of \$1,000,000, which is sufficient incentive to pursue the claim individually. While Defendants contest liability and assert that, as a general matter, IHS fulfilled its contractual promises, Plaintiff's "pie in the sky prayer for relief" renders incredible any assertion by Plaintiff that a contractor would not pursue an individual claim. As such, each and every Tribal contractor that believes it has a claim against IHS has a sufficient incentive to institute its own lawsuit, as many have done.¹⁵ (Ex. U, V.) Plaintiff has failed to satisfy its burden on the numerosity factor.

C. There are No Core Common Questions of Law and Fact.

The second prerequisite in 23(a) is that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a). When a claim is common to some, but not all, of the class

¹⁵ Since Plaintiff filed its Motion, additional contractors have presented CDA claims to IHS COs, and others have sought further review in the Interior Board of Contract Appeals. See 41 U.S.C. § 609.

members, the commonality requirement is not satisfied. See J.B., 186 F.3d at 1298 n.4; Cherokee, 199 F.R.D. at 363. Courts look at whether there was a common course of conduct that affects the entire class and question whether the claims arise out of the same operative facts based on the same legal theories. See Queen Uno Ltd. P’ship v. Coeur D’Alene Mines Corp., 183 F.R.D. 687, 691 (D. Colo. 1998). This factor is satisfied when the “issues involved are common to the class as a whole” and when they “turn on questions of law applicable in the same manner to each member of the class.” Gen. Tel., 457 U.S. at 155. The commonality prerequisite “is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609, 623-24 (1997). While the commonality requirement requires one issue common to the class, in order to certify a Rule 23(b)(3) class, as sought here, common questions must predominate over individual ones. See J.B., 186 F.3d at 1288; Queen Uno, 183 F.R.D. at 691. Predominance is discussed separately below, but is based on the claims and defenses here.

1. The individualized nature of the claims asserted.

In this case, the Court will decide the core issue of liability by reference to two questions: (1) For each year, what was the amount of CSC that IHS was required to award to Zuni (and, if a class is certified, every other IHS ISDA contractor)?, and (2) Did IHS award that amount? To answer these two questions, the Court and the parties will need to conduct an individualized review of each contractor’s circumstances, the terms of their contracts, the amounts of CSC IHS awarded to them, and many other factors. The evidence used to resolve the issues of IHS liability, if any, will not overlap among the contractors. There is no core issue of law or fact common to each

contractor's claim.

For example, Zuni claimed that the Secretary had a duty to pay it \$980,730.62 under the ISDA and its contracts for fiscal years 1993-1998. (Ex. B, D.) It alleges that the Secretary paid only \$637,138. See id. Thus, it alleges that the Secretary violated the ISDA and Zuni's contracts by failing to pay \$343,592.62.¹⁶ See id. The primary provision of the ISDA on which Zuni relies provides:

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, but which--(A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

25 U.S.C. § 450j-1(a)(2). From this provision, Zuni argues that Congress set the amount of CSC to which Zuni is entitled, but never explains how to ascertain that amount beyond stating that the provision requires "the full amount of funding defined by [this provision]" and that the Court need not determine the full amount required to be paid for each contractor because IHS has already made this determination. (Class Mem. at 41, 62.)

Zuni's claim for a rate adjustment is similarly shrouded in mystery. When asked during

¹⁶ Curiously and without explanation, the First Amended Complaint and Class Motion recite \$664,129 as the amount of Zuni's claim. (Am. Compl. ¶ 50; Class Mem. at 25.)

discovery about the adjustment that Zuni used for purposes of its CDA claims, Zuni conceded that it did not know. See supra n.5. In the Class Motion, Zuni relies on Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), as support for its argument that the ISDA requires IHS to adjust or recalculate indirect cost rates. (Class Mem. at 26.) In 1998, however, Congress clarified what the Tenth Circuit perceived to be an ambiguity in the ISDA and thus the decision is no longer good law. See 25 U.S.C. §§ 450j-2, j-3.¹⁷

Zuni's claim appears to be that, despite Zuni's negotiation and agreement to a specified amount of CSC which is set forth in its contract, (Ex. O), IHS must take Zuni's indirect cost rate (that Zuni negotiated with DOI) and adjust it upward because, according to Zuni, its indirect cost pool is fixed and because some non-IHS programs in its direct cost base do not award or reimburse Zuni for its rate-based share of Zuni's total indirect costs. The upward adjustment to which Zuni is claiming entitlement would involve removing these programs from Zuni's direct cost base (the denominator) and re-calculating the rate without changing the indirect cost pool (numerator). Then, Zuni alleges that the new, adjusted rate should be applied against the IHS program base to determine

¹⁷ Zuni also points to a report prepared by Tribal Consultant James Sizemore. Without going into depth about the serious flaws in Mr. Sizemore's report, it is sufficient to say that the "sample Tribal organization" that he uses in his report bears no resemblance to Zuni. For example, the sample Tribal organization has 54% of its direct cost base comprised of IHS programs and 21% of its base comprised of BIA programs. (Class Mem., Ex. 32 at 12.) In recent years, Zuni has had approximately 10-15% of its base comprised of IHS programs and approximately 10-20% of its base comprised of BIA programs. See Attachment B to Moberly Decl. (Ex. E). Moreover, while it is highly unlikely that the indirect costs of the sample contractor are fixed and thus would not change if it no longer administered its non-ISDA programs, it is entirely incredible to urge that Zuni's indirect costs are fixed and also would not change if Zuni no longer administered its non-ISDA programs, which comprise more than 50% of its programs. Mr. Sizemore conceded as much when he testified that indirect costs would be reduced if a contractor no longer administered a large portion of its base. See Sizemore Dep. at 150:2-151:14 (Ex. W).

an amount of indirect costs that the Secretary must pay. If IHS did not pay this amount, Zuni alleges that IHS has violated the ISDA, breached its contracts with Zuni, and is liable for damages. The analysis and “facts” that Zuni employs to demonstrate its own purported entitlement, even if accepted, could not be applied to any other Tribal contractor other than Zuni itself, much less to a nationwide class. This is because:

(1) Not all IHS contractors even have indirect cost rates. See Demaray Decl. ¶¶ 25-33 (Ex. F). Some contractors negotiate directly with IHS for indirect-type costs (approximately 44 in 2001). See id. ¶ 29; see also Allen Dep. at 84:21-85:20 (Ex. T). Some contractors secure indirect CSC funding via other methods. See Demaray Decl. ¶¶ 30-31. And finally, a few contractors do not incur indirect costs at all. See id. ¶ 32. Plaintiff does not dispute this. (Class Mem. at 43 n.60.) Therefore, whether and to what extent the ISDA requires a rate adjustment is not an issue common to the class.

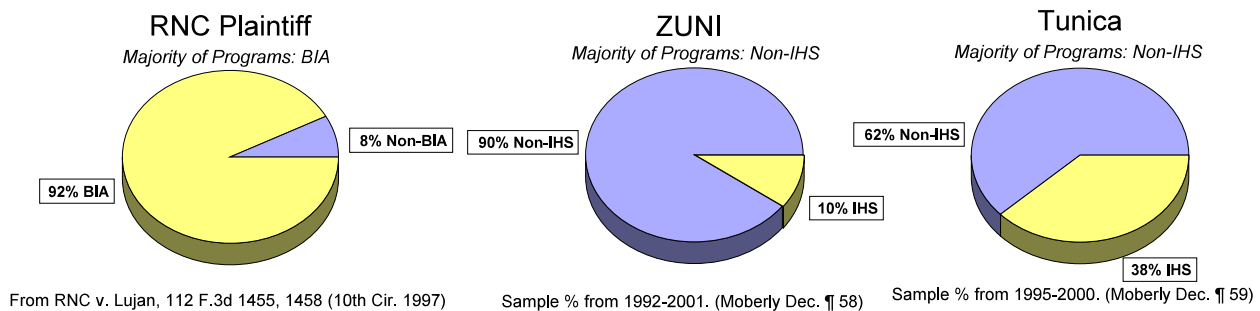
(2) Of those contractors that have indirect cost rates, the methodologies used for the negotiation of those rates vary greatly. Some IHS contractors negotiate with NBC and others negotiate with DCA for indirect cost rates. See Moberly Decl. ¶¶ 41-42 (Ex. E); Chan Decl. ¶ 3 (Ex. N). IHS contractors categorize costs in different manners, e.g., some contractors consider a particular cost to be a direct cost and others consider the same cost to be an indirect cost. See Moberly Decl. ¶ 12; Chan Decl. ¶ 19; Demaray Decl. ¶ 14. The contractors use different types of direct cost bases. See Moberly Decl. ¶ 16; Chan Decl. ¶ 18. Contractors negotiate for different types of rates (fixed-with-carry-forward, provisional/final, and predetermined), which take into account over and under-recoveries in different manners. See Moberly Decl. ¶¶ 21-32; Chan Decl. ¶¶ 21-30;

Demaray Decl. ¶ 28. Some contractors have more than one rate, which impacts the programs that are in the direct cost base. See Moberly Decl. ¶¶ 33-39 & Attachment A; Chan Decl. ¶¶ 31-33 & Attachment A. In particular, for those contractors that have special rates for their IHS programs, e.g., Chugamuit and the Alamo Navajo School Board, there are no other programs in their direct cost base that could be removed pursuant to Zuni's proposed rate adjustment. Many contractors do not have indirect costs rates for recent years (e.g., Zuni's most recent indirect cost rate is for 2003), and, as such, rate adjustments cannot be made to rates that do not yet exist. See Moberly Decl. ¶¶ 43, 48. Because the rate methodologies vary to such a large degree, how a rate adjustment would be made is not an issue that is common to the class.¹⁸

(3) Assuming, arguendo, that the rationale of RNC was still good law, whether a contractor's indirect cost pool is fixed is an individualized determination subject to expert testimony and related to, inter alia, the nature of the contractor's programs and the proportion of the total amount of the Tribe's base that consists of IHS programs. See, e.g., RNC, 112 F.3d at 1461-62 (explaining that because RNC had 92% of its direct cost base comprised of BIA programs, the costs required to support just the BIA programs were not much different from the costs required to support 100% of its programs, i.e., the costs were largely fixed). Contractors have different proportions of IHS and BIA as well as other programs in their base, and no contractor has as many IHS programs in their base as the plaintiff in RNC had of BIA programs. See Moberly Decl. ¶ 57. Only 4% of

¹⁸ Many of the witnesses that Plaintiff indicated had relevant information for purposes of class certification testified to the differences in the rate methodologies used by IHS contractors as well as to the differences in the IHS contractors' overall organizational structures and financial situations. See Dunn Dep. at 7:19-17:19, 82:11-21 (Ex. X); Bleakman Dep. at 113:21-114:10, 134:1-14 (Ex. Y); Sizemore Dep. at 79:10-80:15, 258:5-283:6 (Ex. W).

NBC contractors negotiating for a single rate had more than 50% of their base comprised of IHS programs. See id. By way of demonstration, these three charts compare the breakdown of Zuni’s base with two other contractors’ bases.



Whether any particular contractor can demonstrate that its costs are fixed requires an individualized factual determination the outcome of which will not have any relevance to any other putative class member, much less all of them.

(4) Similarly, whether a contractor contracts for programs or grants that do not pay indirect costs and to what degree any indirect costs are paid are individualized factual determinations that must be made by reference to a contractor’s audited financial statements or other similarly sufficient evidence. See Moberly Decl. ¶ 69; Chan Decl. ¶ 40. Many contractors, however, do not have current audited financial statements. See Moberly Decl. ¶ 49. Therefore, it would be impossible to make these types of assessments for all IHS contractors. To what degree each contractor has recovered from the agencies that fund the programs in its direct cost base is not an issue common to the class.

Defendants do not contest that some, although certainly not all, of the issues described on

pages 41 and 42 of the Class Motion will need to be resolved by any court in determining how much CSC, if any, IHS was required to pay any particular contractor. But virtually every contract case involves some issues that overlap with other contract cases. If the contracts and circumstances leading up to the signing of the contract and the parties' post-contract actions differ in ways that are legally significant (as they do here) or, if, as in this case, the relevant law changed over the time period covered by all of the different contracts, a determination as to one contract will do little to resolve the parties' rights under another contract. The legal and factual issues that must be resolved to determine whether IHS is liable to one contractor for any particular year far outweigh the issues shared by a class of contractors for many years, and the ultimate resolution of even the "common" issues regarding liability will differ from one contract to the next.

Although the individualized nature of the liability claim is never discussed, Zuni readily admits that "once class liability is established, each class member's ultimate recovery will depend on each contractor's particular circumstances." (Class Mem. at 43.) Thus, if Zuni were to prevail on behalf of a class, the issues related to damages are not common to the class. See Busby Sch. of N. Cheyenne Tribe v. United States, 8 Cl. Ct. 596, 603 (1985) (declining to certify a class of third party ISDA contract beneficiaries because of the individualized proof necessary to establish damages); Zapata v. IBP, Inc., 167 F.R.D. 147, 166 (D. Kan. 1996) (same).

As a basis for its claims, it appears that Plaintiff is relying on various draft or final reports prepared by IHS for Congress that provide rough estimates of CSC requests by contractors. (Class Mem. at nn.21, 22, 51.) Defendants do not know to what extent Plaintiff is suggesting that these draft or final reports have any legal significance in this case, but in the event that Plaintiff would so

argue, it would be hard-pressed to point to any basis for that conclusion. These various spreadsheets were created at the request of Congress because Congress was aware that it had not appropriated sufficient funds for IHS to award the full amount of CSC requested by Tribal contractors. See 25 U.S.C. § 450j-1(c).

In these spreadsheets, IHS has sought to estimate the amount of CSC that each contractor believed was needed to run its ISDA programs and the amount that IHS was able to award for CSC, the difference being called a “shortfall.” See Demaray Decl. ¶ 56 (Ex. F). In almost all instances, the amount of CSC “need” that IHS reported was based on unaudited costs, often contained outdated or preliminary indirect cost rates, had numerous errors discovered after the fact, and other non-final estimated amounts. See id. ¶¶ 55-59. For years before 1998, IHS considers the shortfall data to be particularly unreliable, non-standardized, and incomplete.¹⁹ See id. ¶ 58. Under no circumstances were these budgetary documents meant to reflect an amount of CSC that IHS promised to award. See id. ¶ 17. Finally, any claim that Plaintiff might make about the shortfall data is entirely undercut by its own actions. Notably, Zuni did not submit shortfall data as the basis for its CDA claims to the IHS CO and did not assert that the shortfall report had any significance to its claims. (Ex. A, C.)

¹⁹ Attached to the Class Motion is a report by David Mather. Dr. Mather is a Tribal consultant who has never worked for IHS. See Mather Dep. at 60:9-19 (Ex. Z). Dr. Mather has primarily worked with IHS Tribal Contractors in the Alaska Area and thus lacks familiarity with the majority of IHS Tribal Contractors. See id. at 28:9-46:12. More important, he was uncertain when asked about the different sources of shortfall data and had difficulty deciding which sources of shortfall data he believed were the most reliable, notwithstanding the fact that he has made the broad and unsupported statement that “CSC shortfall reports” reflect the amount of funding that IHS is required by statute to award to contractors. See id. at 111:7-116:5, 117:12-22.

2. The individualized nature of the defenses asserted.

For each claim described above, Defendants would raise various defenses. IHS's primary defense is that the amount of CSC owed to any particular contractor is determined by reference to the terms and conditions of that contractor's ISDA contracts. For example, IHS would show that Zuni agreed in its annual funding agreements ("AFAs") to use its indirect cost rates, without adjustment, as the basis for calculating indirect CSC. See Ex. O; see also supra n.8. IHS would argue that Zuni is bound by the terms of those agreements. Similarly, IHS would show that Zuni agreed to the specific funding amounts set forth in the agreements and cannot alter those amounts retroactively. IHS would then introduce individualized proof that the Secretary did, in fact, pay the specified amounts.²⁰ IHS would also present five contract releases signed by Zuni releasing IHS from all liability under five of its contracts. See Zuni Releases (Ex. L). Such defenses would dispose of Zuni's claims in full. As Plaintiff explains, some IHS contractors executed releases and others did not. (Class Mot. at n.60 & Ex. 39 ¶¶ 9-10.) In addition, some signed releases for some of their contracts and not others.

If the Court were to reach the merits of Zuni's rate adjustment theory, IHS would need to review the specific programs in Zuni's base to determine whether and to what extent Zuni's non-IHS programs do not pay their rate-based share of indirect costs. In addition, IHS would want to present expert (economic) testimony on whether Zuni's indirect cost pool is fixed. IHS would also review whether Zuni actually expended any funds for IHS programs that were not recovered and, if not,

²⁰ Bryceson Pinto, Zuni's Tribal Administrator and designee, testified that Zuni and IHS negotiated CSC amounts, that Zuni agreed to those amounts, and that IHS paid those amounts. See Pinto Dep. at 100:10-102:1 (Ex. I.)

argue that Zuni had no injury and thus lacked standing to sue.²¹ Finally, IHS would urge that any claim for an adjustment of either the indirect cost rate to which Zuni previously consented or of the amounts of CSC specified in its AFAs, was waived by Zuni. See supra n.8.

These defenses are individualized and would need to be resolved before the Court could find IHS liable for a violation of the statute in any particular year and under any particular contract. The resolution of each of these questions would involve individualized proof specific to Zuni. Regardless of whether Zuni prevailed or failed on its claims, the analysis and result would not be determinative of whether IHS was liable to any other Tribal contractor.

The individualized nature of the claims of each putative class member, the individualized nature of the defenses that would be asserted by IHS, and the separate, discrete and unrelated determinations that will have to be made with respect to each instance of an alleged violation illustrate the absence of common issues in this case. The necessity for such individual and discrete inquiries makes these claims inappropriate for class action treatment.

3. The existence of contracts with different terms defeats commonality.

Prior to 1994, IHS generally utilized a standard government contract format for memorializing the results of the individual negotiations between Tribal contractors and IHS. See Demaray Decl. ¶ 37. The specific amounts and additional funding terms agreed to between IHS and the contractor would then be incorporated into this format. See id. Starting in 1994, Congress amended the ISDA to include the terms of a uniform (model) contract but directed that additional

²¹ All courts to consider the issue have concluded that the ISDA does not permit Tribal contractors to secure a windfall, *i.e.*, recovery of funds never incurred. See Samish, 419 F.3d at 1367; RNC, 112 F.3d at 1464. This principle was echoed by Plaintiff's witnesses. See, e.g., Dunn Dep. at 144:22-23 (Ex. X); Sizemore Dep. at 237:3-238:5 (Ex. W).

terms and the annual funding agreement (“AFA”) must be negotiated by the parties to the contract. See id. The terms of the model contract were incorporated into ISDA contracts as the contracts came up for re-negotiation over the next few years. See id. IHS and its contractors generally execute ISDA contracts and compacts for more than one year, but annually negotiate AFAs. See id. ¶ 38. With the exception of the mandatory model contract provisions of the ISDA, additional terms of ISDA contracts and AFAs can vary widely in terms and conditions. See id. Because it is the AFA that generally sets forth the terms of the parties’ agreement with respect to CSC funding, it is necessary to review each AFA to understand the agreement. See id. Even among Zuni’s contracts and AFAs at issue in this case (Ex. O), there are differences in the terms and conditions.

As explained above, the Court would need to review each contractor’s contract in order to assess whether the Secretary had breached that contract.²² Because of this necessity, the parties conducted a sampling of IHS contracts for specific years in order to have sufficient evidence by which to determine how similar or dissimilar the contracts actually are. See Stipulation (docketed as #254.) At Exhibit AA, Defendants have provided the Court with excerpts of these contracts.

Exhibit AA reveals that many AFAs state a dollar figure for recurring costs (including CSC). See Demaray Decl. ¶ 39. Zuni’s fiscal year 1996 AFA specifically recites that IHS will award to Zuni \$16,460 for direct CSC and \$5,670 for indirect CSC. See id.; see also Ex. O. Before 1999, a

²² Zuni’s desire to avoid analyzing the terms and conditions of each contract is in conflict with the position that Cherokee Nation and the Shoshone-Paiute Tribes, represented by the same attorneys that are representing Zuni here, recently pressed successfully before the Supreme Court: that an ISDA contract is a binding promise between two parties akin to a government procurement contract. See Cherokee, 543 U.S. at 639-43. Now that this principle is the law, Plaintiff has decided that the contracts themselves are of no concern or significance, and that Zuni’s contractual promises are meaningless (“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.”). (Class Mem. at 3.)

number of AFAs also included clauses in which the Tribal contractor specifically agreed to forego immediate payment of CSC and have its request for CSC placed on a queue in accordance with IHS Memoranda or Circulars. See Demaray Decl. ¶ 40. Several AFAs set forth a dollar figure for CSC that IHS promised to pay but also included clauses providing that the Tribal contractor does not waive the right to seek any additional CSC to which it believed it was entitled under the ISDA. See id. ¶ 41. Tribal contractors participating in the CSC pilot project have terms that are specific to their circumstances. See id. ¶ 42. Similarly, Tribal contractors that negotiate indirect-type costs directly with IHS have contract terms that are specific to their circumstances. See id. ¶ 46. Other AFAs incorporate the IHS Circulars as the basis of the agreement. See id. ¶¶ 44-45.

A cursory review of the contract excerpts, which do not purport to be all of the applicable terms in any one contract, demonstrates the vast differences among the different contracts which cannot be taken into account in a class action. It can no longer be claimed that the funding terms of the contracts are identical. The contracts incorporate different terms and different sets of terms, all of which would require a comprehensive and careful analysis. See, e.g., RTC v. Fed. Sav. & Loan Ins. Corp., 25 F.3d 1493, 1499 (10th Cir. 1994) (quoting from the Restatement for the proposition that a contract is interpreted as a whole); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474, 480-81 (10th Cir. 1996) (when in conflict, specific terms govern over general terms). Even Plaintiff avoids commenting on the specific funding provisions in the contracts and limits its discussion to the general and non-specific terms that are found in many of the contracts, as though no other terms were relevant. (Class Mem. at 27-32.)

The dissimilarities among the contracts, between years, contractors, and IHS Area Offices,

is no surprise. IHS has twelve Area Offices throughout the country and a headquarters office in Rockville, Maryland. See Demaray Decl. ¶ 11. Each of the twelve Area Offices has primary responsibility for negotiating, awarding, and administering all ISDA contracts that are in its jurisdiction. See id. IHS does not unilaterally award ISDA contracts, but negotiates contract terms and conditions with each contractor on a government-to-government basis. See id. ¶ 35. IHS approaches each contract negotiation as a unique event and the product of the negotiation is unique to the particular contractor and its circumstances. See id. ¶¶ 34-35. Often, contractors are represented at contract negotiations by consultants or even attorneys who are instrumental in negotiating on behalf of the contractor. See id. ¶ 35. Language regarding CSC in these AFAs can and does differ substantially as a result of these individual negotiations and can vary from one year to the next even for the same contractor. See id. ¶ 38.

Courts have generally held that cases involving different contracts are not appropriate for class certification. See Moore Video Distribs., Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332, 1339 (S.D. Miss. 1993) (explaining that claims of breach of individually negotiated contracts with different terms at different times by a corporate defendants would pose a situation requiring individualized proof that was inappropriate for class certification). In fact, Plaintiff cites no case wherein contract claims were certified. The majority of the cases cited by Plaintiff involve very different Rule 23(b)(2) classes for claims involving injunctive and declaratory relief. Usually in Rule 23(b)(2) cases, there is a specific statute, regulation, or policy that is challenged and which is or will be applied to all putative class members. Invalidation of that particular law, regulation or policy will

automatically provide relief to the entire class.²³ Here, by contrast, the Court will be confronted with many uncommon questions of law and fact and will have to make exhaustive evaluations of each contractor's individual claim. Certification of a class in this action will not advance the efficiency and economy of litigation, which is a principal purpose of a class action. See Gen. Tel., 457 U.S. at 159; Gottlieb v. Wiles, 11 F.3d 1004, 1007 (10th Cir. 1993).

D. Plaintiff's Claims Are Not Typical of Those of Other Contractors.

Rule 23(a)(3) requires that the named plaintiff's claims be typical of the putative class's claims. See Cherokee, 199 F.R.D. at 364; Edgington v. R.G. Dickinson & Co., 139 F.R.D. 183, 189 (D. Kan. 1991). Specifically, "the class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Gen. Tel., 457 U.S. at 156 (internal citation and quotation marks omitted). The issues of typicality, commonality, and adequacy of representation often tend to merge together. See Amchem, 521 U.S. at 626 n.20; Gen. Tel., 457 U.S. at 157 n.13; Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1189 (10th Cir. 1975); Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480, 484 (E.D. Pa. 1977); Ward v. Luttrell, 292 F. Supp. 165, 166-68 (E.D. La. 1968). Thus, as Defendants have already established that there is insufficient commonality among the claims of the contractors, Zuni's claims (and the defenses IHS would assert against Zuni) are not typical of any other contractor's claims. There are some additional, non-typical aspects of Zuni's claims.

²³ Plaintiff makes a weak claim that because IHS has recently attempted to develop some standardized contract language, there is a common question of fact. (Class Mem. at 14.) The Tribal contractor involved in the one example raised by Plaintiff of standardized language being offered by IHS brought suit to challenge the inclusion of that language. See Class Mem. at n.15 (citing Southern Ute Indian Tribe v. Leavitt, No. 05-988 (D.N.M.)).

First, Zuni has not presented any CDA claims for additional CSC for years after 1998. It may be because Zuni cannot make out any type of claim for those years due to large CSC over-recoveries from IHS. See Moberly Decl. ¶¶ 63-65 (Ex. E); Demaray Decl. ¶ 60 (Ex. F); see also Pinto Dep. at 119:11-131:9 (Ex. I) (agreeing that it appeared from the indirect cost rate agreements that Zuni had, for 1997-2001, recovered more indirect costs from IHS than it had incurred in the administration of its IHS programs). If it is presumed to be true that Tribal contractors never recover sufficient CSC from IHS and from other agencies, as Zuni claims, Zuni is not a typical representative of the class it purports to represent. Similarly, Zuni did not sufficiently present claims related to the indirect cost rate methodology or direct CSC. See supra n.5.

Second, Zuni does not have an indirect cost rate for any year after 2003, Moberly Decl. ¶ 43, and has generally been one or two years behind on their indirect cost rate proposals, see Gasper Dep. at 23:1-25 (Ex. G). For 2004 and 2005, any adjustment to its rates is unripe as there is no agency record and no agency action to review. See Allen v. Wright, 468 U.S. 737, 750 (1984).

Third, in 1993-1996, Zuni's independent auditor's report cited Zuni for serious problems with its indirect cost accounting, including that: (a) Zuni's untimeliness caused it to recover less total indirect costs than it otherwise might have recovered, and (b) Zuni's use of an out of date indirect cost rate resulted in over- and under-recoveries of indirect costs from various individual federal agencies. See Moberly Decl. ¶ 50. As part of the audit, an independent auditor must review the contractor's compliance with specific requirements applicable to major federal assistance programs, such as the allowability of costs incurred and allocation of the costs to various programs, and issue a report with findings and recommendations. See id. ¶ 49. Of the Tribal contractors with

which NBC negotiates, many receive a clean opinion in their audit with no identified material weaknesses, while other contractors' audits contain many negative findings related to their administration of government programs. See id. But Zuni has had more negative audit findings, at least for 1993, than other Tribal contractors. See Bleakman Dep. at 131:1-7 (Ex. Y). Because there is no "typical" claim for additional CSC and because Zuni's own claims are not typical of any other contractor's, Plaintiff cannot satisfy the typicality requirement.

E. Plaintiff Would Not Be An Inadequate Class Representative Because Its Claims For Additional CSC Are Antagonistic to Other Contractors' Claims.

Rule 23(a)(4) requires the class representatives be in a position to protect fairly and adequately the interests of the class. See Cherokee, 199 F.R.D. at 365-66; Edgington, 139 F.R.D. at 190. A court should review whether the representative's claims are sufficiently interrelated and not antagonistic with the class's claims to ensure fair and adequate representation. See Gen. Tel., 457 U.S. at 157 n.13; In Re Am. Med. Sys., Inc., 75 F.3d at 1083; Edgington, 139 F.R.D. at 190. The relevant considerations include whether the putative class representative is itself a qualified and appropriate representative of the class, and whether any conflict exists between it and the class. See Amchem, 521 U.S. at 625; Queen Uno, 183 F.R.D. at 694.

As explained above, commonality, typicality, and adequacy of representation have several common features. For example, if Plaintiff does not have a typical claim or if there is a lack of commonality among the claims of the putative class members, then it is easy to see how there might be conflict in a class or how the named plaintiff might not be in a position to protect the rights of the other members. For example, putative class members that, unlike Zuni, did not agree to a specific funding amount in their AFAs, did not sign releases, did pursue claims administratively, and that are

able to demonstrate actual under-recoveries, might not want Zuni to represent them. Therefore, all of the factors described above related to typicality and commonality also address the inadequacy of Zuni to protect the interests of the class.

An important additional factor that makes all of the class members, including Zuni, have interests adverse to each other is that starting in 1998, Congress capped the funds that could be obligated for CSC in each year. See, e.g., Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997) (Ex. M); Omnibus Consol. & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79 (1998) (Ex. BB); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82 (1999) (Ex. CC); Dep't of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79 (2000) (Ex. DD); see also Declaration of Thomas Thompson ¶ 4 (Ex. EE). IHS may not expend funds for CSC beyond the amount of the cap. See Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999). IHS has already expended its CSC appropriations for 1998-2001. See Thompson Decl. ¶¶ 7-14.

IHS firmly believes that it cannot be required to reallocate amounts already provided to (and presumably spent by) Tribal contractors in those years and the Court lacks authority to require IHS to pay monies in excess of what Congress provided for CSC. If Zuni were to successfully argue that CSC must be re-distributed based on a methodology different from the one IHS used during the capped years, any such redistribution would set the putative class members against each other. An award to one contractor would necessarily result in a decrease of funding for other contractors. The

interests of any putative class member that would get a lesser share of the appropriation would be antagonistic to the interests of putative class members that would get a greater share. In this situation, a class should not be certified. See Albertson's, Inc. v. The Amalgamated Sugar Co., 503 F.2d 459, 463-64 (10th Cir. 1974). This requirement must be stringently applied because “members of the class are bound unless they affirmatively exercise their option to be excluded, even though they may not be actually aware of the proceeding.” Id.

Plaintiff argues that the Judgment Fund is available to pay damages in this case. (Class Mem. at 74.) Aside from the bar imposed by the CSC cap, if IHS were to incur a judgment here, it would be required to repay the judgment from its future appropriations, thus reducing the amounts available for CSC to contractors in future years. See 41 U.S.C. § 612(c). The Judgment Fund, available to pay judgments in CDA cases, specifically requires that funds awarded under the CDA be reimbursed by the agency that incurred the judgment.²⁴ See id. Thus, IHS's other programs, all of which are for the benefit of Indians, will be harmed. See 25 U.S.C. § 450j-1(b) (making all funds under the ISDA subject to the availability of appropriations and directing that the Secretary is not required to reduce funding for programs serving one Tribe to make funds available to another Tribe). There is simply no way around the fact that “success” in this case will inure to the benefit of some of the putative class members and to the detriment of others. This reality militates against a class and the adequacy

²⁴ Plaintiff wrongly suggests that the Judgment Fund does not require the reimbursement of monetary relief under the ISDA. (Class Mem. at 60.) The ISDA specifically incorporates the CDA for all claims for monetary relief. Thus, any money paid out in this lawsuit would need to be paid back under § 612(c). Whether and to what extent any particular agency repays the Judgment Fund as is required under § 612(c) is an inter-agency dispute not appropriate for judicial resolution. The law, however, is perfectly clear that reimbursement is required, and this Court cannot assume that the law will be circumvented in order to avoid a conflict of interest among putative class members.

of Zuni's class representation.

IV. PLAINTIFF HAS NOT DEMONSTRATED PREDOMINANCE AND SUPERIORITY REQUIRED BY RULE 23(B) IN ORDER FOR A CLASS TO BE CERTIFIED.

In this case, Plaintiff has sought to certify a Rule 23(b)(3) class. Rule 23(b)(3) reads:

[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (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;
- (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). There are two essential elements in a Rule 23(b)(3) inquiry. First, the movant must demonstrate not only that some common questions of law or fact exist in the class under Rule 23(a), but that these questions predominate over individual questions in the case. See Esplin v. Hirschi, 402 F.2d 94, 98 (10th Cir. 1968); Cherokee, 199 F.R.D. at 363. Second, the movant must demonstrate that the proposed class action is the superior method of handling the claims of the class members. See id. Plaintiff cannot make either showing here.

A. Individualized Questions Predominate Over Common Ones.

As discussed above, resolution of the claims and defenses at issue in this case must necessarily involve individualized determinations for each contractor. These individual issues would not merely predominate over any alleged class issues, but rather, would overwhelm them. Adjudicating these individualized claims would cause this proposed class action to “degenerate in practice into multiple lawsuits separately tried.” Fed. R. Civ. P. 23(b)(3) adv. committee's note

(1966); see also Cherokee, 199 F.R.D. at 363 (certification that result in set of “mini-trials” should be denied). As a consequence, certification under Rule 23(b)(3) should be denied. See Boughton v. Cotter Corp., 65 F.3d 823, 827-28 (10th Cir. 1995); Meyers v. S.W. Bell Tel. Co., 181 F.R.D. 499, 506 (W.D. Okla. 1997).

B. A Class Action Is Not Superior to Individual Litigation.

As the Rule directs, there are several considerations relevant to the question of whether a class action is superior to actions brought by individual plaintiffs. IHS has already provided evidence on the first and second factors, e.g., the interest of members of the class in individually controlling the prosecution or defense of separate actions and the nature and extent of litigation already pending. Over the years, there has been a great deal of litigation on CSC against IHS. See Ex. U, V; see also Class Mem. at 5 n.5. Because there are other actions currently pending, it is apparent that other members have the ability and willingness to bring their own actions. Cf. Colo. Cross-Disability, 184 F.R.D. at 362 (no other actions were pending). Moreover, the amount that Plaintiff claims is at stake in this suit undercuts any argument that individual contractors lack incentive or ability to pursue individual claims.²⁵ See supra Part I.A.

The third consideration, the desirability or undesirability of concentrating the litigation of the claims in this forum, also weighs against class certification. First, individual courts would not be

²⁵ Plaintiff’s allegation that hundreds of claims “covered” by the Supreme Court’s decision will go unvindicated if there is no class action is entirely unsupported. To the extent that any other contractor is similarly situated to the Cherokee Nation and the Shoshone-Paiute Tribes (e.g., cases in which IHS did not pay the contractor the amount specified in the contract at a time when appropriations were not capped and where the contractor had fulfilled the jurisdictional prerequisites of the CDA), IHS would pay those contractors. Contractors that are not similarly situated are not entitled to relief under that decision.

adjudicating the same issues over and over again; rather, they would be analyzing each contractor's individual claims for additional CSC. In addition, it is important in cases involving the government for the law to develop and not be frozen by virtue of having a class action where all legal issues are adjudicated in one circuit. See Mendoza, 464 U.S. at 160 (explaining that the law benefits from having multiple courts of appeals rule on an issue before it comes to the Supreme Court). At best, each individual contractor will adjudicate its individual claims and IHS's individualized defenses. At worst, there will be different interpretations of the governing law in different districts. However, that is generally how litigation proceeds. Different courts may reach different conclusions on essentially the same issue. If differing Courts of Appeals reach different conclusions, the Supreme Court may resolve the issue.

Management difficulties posed by the adjudication of this case as a class action--the fourth factor--would undermine the objective of judicial efficiency that underlies the treatment of cases as class actions. The number of purely individual questions in this matter precludes such economies. See Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) ("The greater the number of individual issues, the less likely superiority can be established"). In fact, it is hard for IHS to understand how this case would be administered. Would IHS necessarily be able to prevail against the entire class if it prevailed against Zuni's alone? Are all other contractors willing to have their claims determined based on the contracts and circumstances of Zuni (which released its claims against IHS)? If not, there is no efficiency to be gained by class-wide treatment. All of these factors demonstrate that the proposed class action is not superior to individual lawsuits for the "fair and efficient" adjudication of the matters in controversy.

V. THE COURT DOES NOT NEED TO APPOINT CLASS COUNSEL.

Prior to 2003, the adequacy of class counsel was considered as part of the Rule 23(a)(4) requirements. In 2003, Rule 23 was amended and Rule 23(g) now governs the appointment of class counsel. Under Rule 23(g)(1)(B), courts must determine whether the prospective attorney will “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). To make this assessment, the Rule sets out several considerations. Fed. R. Civ. P. 23(g)(1)(C). Class counsel need only be appointed if a class is certified. See Harrington, 222 F.R.D. at 515.

Defendants do not dispute that Mr. Miller and his firm (“Sonosky”) are competent counsel, but raise a few issues related to their representation that may be of some concern to the Court. The first is that Sonosky unsuccessfully litigated the propriety of certification of the same class sought here in Eastern District of Oklahoma in 2001. But instead of appealing the denial of class certification, the same attorneys filed this lawsuit and now attempt collaterally to challenge Judge Seay’s ruling. See Cherokee, 199 F.R.D. at 364. Counsel’s strategic decision to avoid a direct challenge to a decision they (apparently) believed to be erroneous has resulted in a large use of resources of the courts and IHS in having to twice oppose a motion for class certification that involves extensive discovery and briefing.

Second, Sonosky’s adequacy already has been challenged by putative class members. Specifically, as part of their Motion to Intervene, Tunica-Biloxi and RNSB questioned whether Sonosky had done sufficient work in “identifying or investigating potential claims” and whether they had sacrificed certain claims for others. (Mem. in Support of Mot. to Intervene at 6-9; docketed as #55; Reply in Support of Mot. to Intervene at 6-10; docketed as #80.) In support of these allegations,

Tunica and RNSB filed evidence, under seal and ex parte. Although Defendants have not seen this evidence and, as such, cannot ascertain whether and to what extent it actually addresses Sonosky's adequacy, the fact of this assertion by other putative class members is notable.

Mr. Gross's application for appointment of class counsel is a separate matter. He does not represent a party in this litigation, he has belatedly sought to amend the complaint through a third-party filing, and he has already caused Plaintiff, IHS, and the Court to expend time and resources addressing his meritless procedural maneuvers. Mr. Gross has twice sought to involve himself and his clients in this litigation. First, he filed a motion to consolidate Tunica (a case originally filed in this district and then moved by Mr. Gross to the District of Columbia) with this case under 28 U.S.C. § 1407, the multidistrict litigation statute. After briefing and oral argument, the Judicial Panel on Multi-District Litigation denied the motion in its entirety. See In re Indian Tribes Contract Support Costs Litig., 383 F. Supp 2d 1380, 1380 (J.P.M.L. 2005). Next, Mr. Gross filed a motion to intervene in this case on behalf of his clients, Tunica and RNSB, a motion opposed by Zuni and Defendants and one which this Court denied in a written opinion (docketed as #145). In the wake of these rulings, Mr. Gross went forward with his litigation in the District of Columbia. In that case, IHS has filed a motion to dismiss and a motion for summary judgment, and has responded to a partial motion for summary judgment. IHS has also responded to onerous discovery requests, and its officials have been and will be subjected to extended depositions. In the midst of all of this, Mr. Gross has again moved to interject himself in this litigation inappropriately. His Application, a blatant third attempt at forum-shopping, should be summarily denied.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification and For Approval of Class Notice should be denied. Similarly, the Application by Michael P. Gross, Esq., for Appointment as Class Counsel for a Sub-Class should be denied.

Respectfully submitted,

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Dated: August 31, 2006

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LIST OF EXHIBITS

EXHIBIT

- A Zuni CDA Claim Letter (Example)
- B Zuni CDA Summary (April 2001 Claims)
- C Zuni CDA Claim Letter (Example)
- D Zuni CDA Summary (September 2001 Claims)
- E Declaration of Deborah A. Moberly
- F Declaration of Ronald B. Demaray
- G Deposition of Suzanne Gasper (Excerpts)
- H Deposition of Jeannette Quintero (Excerpts)
- I Deposition of Bryceson Pinto (Excerpts)
- J Defendants' Rule 30(b)(6) Deposition Notice & Letter with Zuni Designations
- K Stipulation by the Parties re: CDA Claims
- L Zuni Releases
- M Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997)
- N Declaration of Wallace Chan
- O Zuni's Contracts (Excerpts)
- P Tunica-Biloxi Tribe v. United States, No. 02-2413 (D.D.C. 2004)
- Q Tunica-Biloxi Tribe CDA Claim Letter
- R Ramah Navajo School Board CDA Claim Letter
- S Ramah Navajo Chapter v. Lujan, No. 90-957 (D.N.M. 1993)
- T Deposition of William Ron Allen (Excerpts)

U	List of Contractors that have Previously Filed Suit Against IHS Related to CSC
V	Cherokee Nation Complaints
W	Deposition of James Sizemore (Excerpts)
X	Deposition of Tasha Dunn (Excerpts)
Y	Deposition of Bruce Bleakman (Excerpts)
Z	Deposition of David Mather (Excerpts)
AA	CSC Terms from Sample Contracts (Excerpts)
BB	<u>Omnibus Consolidated & Emergency Supplemental Appropriations Act, 1999</u> , Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79 (1998)
CC	<u>Consolidated Appropriations Act, 2000</u> , Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82 (1999)
DD	<u>Dep't of the Interior & Related Agencies Appropriations Act, 2001</u> , Pub. L. No. 106-291, 114 Stat. 922, 978-79 (2000)
EE	Declaration of Thomas Thompson

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, I sent, via electronic mail, a copy of Defendants' Opposition to Plaintiff's Motion for Class Certification and for Approval of Class Notice and to Motion by Michael P. Gross for Creation of Sub-Classes and for Appointment as Class Counsel, with Exhibits, addressed to:

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