

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

PUEBLO OF ZUNI, on behalf of itself
and all others similarly situated,

Plaintiff,

v.

Case No. CV 01-1046 WJ/WPL

UNITED STATES OF AMERICA; et al.,

Defendants.

**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS
CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE (Dkt. No. 280)**

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**PLAINTIFF’S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS
CERTIFICATION AND FOR APPROVAL OF CLASS NOTICE (Dkt. No. 280)**

Defendants’ Opposition overly complicates a straightforward set of damage claims: Defendants systematically failed to pay Tribal contractors, as a class, the funds to which they were entitled by law and by contract.

The basis for the claims is uncomplicated. Over a period of years Defendants adopted and then implemented several unauthorized policies, called “Circulars.” The Circulars applied to all Tribal contractors. Under the Circulars, Defendants determined each Tribal contractor’s statutory contract support cost (“CSC”) “requirement.” Next, under those same Circulars Defendants limited their available appropriations for CSCs, and as a result they paid insufficient CSC amounts to each contractor – leaving most with shortfalls. Finally, under those same Circulars Defendants meticulously recorded what they had done; they prepared detailed CSC shortfall reports for Congress; and following Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) (“Cherokee III”), they used those

same reports to calculate their exposure to the class. Mem. Op. and Order at 3-5 (Feb. 13, 2006) (Dkt. No. 205) (Lynch, M.J.). Along the way, Defendants’ Circulars also specified the method they would use to calculate CSCs – the very same method struck down in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (“Ramah I”). The class seeks damages for the CSC shortfalls and for the erroneous CSC rate calculation methodology. That is what this case is about, and it comfortably meets Rule 23’s criteria.

Defendants respond by advancing four principal contentions. First, in order to counter the proposition that Cherokee III helps define the class at issue here, Defendants misstate the Supreme Court’s holding and mischaracterize the case as a narrow aberration involving a “few exceptions.” Part A. Second (and in an inappropriate effort to argue the merits), Defendants highlight alleged defenses which (Defendants contend) “if successful” would dispose of various claims and eliminate numerous class members, thus destroying the class. Part B. Third, when turning to Rule 23 Defendants misstate the controlling standards. Part C. Fourth, Defendants question whether commonality and predominance exist, largely focusing on individual damage calculations instead of the only relevant criterion: the Defendants’ potential liability. Parts D-E. All four contentions are unpersuasive.

A. The Defendants’ Revisionist Interpretation of Cherokee III Is Wrong And, in Any Event, Goes to the Merits, Not to Class Certification.

The Supreme Court in Cherokee III in effect defined a class of CSC shortfall claims comprised of Tribal contractors who (just like the two petitioners there) were underpaid their CSCs because IHS incorrectly interpreted the Indian Self-Determination Act (“ISDA”), appropriations law and contract

law – all as reflected in IHS’s Circulars, and all without regard to any particular contract language. The instant case is a direct follow-on to the predominant common course of conduct at issue in Cherokee III.

To avoid the natural consequence of Cherokee III, Defendants deny the Court ever interpreted the ISDA, deny the Court considered IHS’s Circulars, and recharacterize the Court’s holding as but a narrow decision involving highly unusual circumstances. None of these contentions is correct.

1. Despite Defendants’ insistence that the ISDA does not “create ... a duty to pay” (Opp. at 8) (Dkt. No. 306) (hereinafter “Opp. at --”), the Supreme Court’s Cherokee III opinion clearly holds otherwise:

The Act specifies that the Government must pay a tribe’s costs, including administrative expenses. See §§ 450j-1(a)(1) and (2).

543 U.S. at 635 (emphasis added). Indeed, Section 450j-1(a)(2) unambiguously directs that CSCs “shall be added to the amount” to be “provided” under § 450j-1(a)(1). See also § 450j-1(g) (“the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]”). As the Court explained, Congress purposefully placed this duty to pay into the Act:

The Act also reflects a congressional concern with [the] Government’s past failure adequately to reimburse tribes’ indirect administrative costs and a congressional decision to require payment of those costs in the future. See, e.g., § 450j-1(g); see also §§ 450j-1(a), (d)(2).

543 U.S. at 639. Moreover, Congress also specified that all these statutory provisions, along with the balance of the Act, are “incorporated” into every ISDA contract where they are to be “liberally construed” in the contractor’s favor. 25 U.S.C. § 450l(c), secs.1(a)(1) & (2). Given the Supreme Court’s holding, there is no room for Defendants’ argument that this “duty to pay” is not set forth in

the Act, is not carried through into every contract, and is not enforceable in this action.

2. Nor are Defendants correct when they characterize the conduct repudiated in Cherokee III as rare or exceptional, for that conduct is in all material respects identical to the conduct at issue here. Opp. at 3. Here, Defendants insist that “IHS has attempted to fairly and equitably address each contractor’s CSC needs” in light of “insufficient appropriations for CSC,” by “develop[ing] policies [i.e., Circulars] that explain how these [insufficient] appropriations will be distributed.” Id. (emphasis added); see also id. at 17 (same).

This is precisely the same rationale Defendants offered as their defense in Cherokee III. There, Defendants explained that “in anticipation of funding shortfalls for CSCs” “IHS allocated its CSC funds in those years in accordance with [certain] guidelines [citing Circular ISDM 92-2].” Pl. Exh. 49, U.S. Br. at 12, Cherokee III, Nos. 02-1472 & 03-853 (U.S. Sept. 2004). See also id. at 13 (explaining how CSCs were allocated under the Circulars for “new or expanded contracts” [now, Claim 1] and for “ongoing contracts” [now Claim 2]) & 43 n.17 (defending that “IHS had established the queue system” under its Circulars for new or expanded contracts [Claim 2]). Indeed, the Shoshone-Paiute contracts at issue there referred to the Circulars, and the Tenth Circuit decision reversed in Cherokee III relied on those same Circulars.¹ It is thus beyond reasonable debate that the implementation of the Circulars developed by Defendants because they claimed “insufficient appropriations” – the heart of the “actual underlying problem” (Opp. at 3) – is the very same policy (and defense) Defendants relied upon in the Cherokee cases.

¹ Pl. Exh. 50, Joint App. at 120, Cherokee III (U.S. June 18, 2004) (FY1996 AFA, sec. 8(b)); Cherokee Nation v. Thompson, 311 F.3d 1054, 1058 & n.3 (10th Cir. 2002) (Cherokee I).

3. Defendants also seek to marginalize Cherokee III by asserting (incorrectly) that in Cherokee III IHS committed in each contract to a specific amount that was not fully paid (which Defendants now say explains why they lost), whereas when it comes to the class “IHS has ... awarded the amounts that it promised to pay in the contracts.” Opp. at 3. From this alleged factual distinction Defendants insist that Cherokee III only confirms a right to be paid whatever sum is stated in a contract (without regard to the payment required under the ISDA).

Defendants’ factual premise is wrong, and with it the conclusion. It is incontrovertible that some of the Cherokee Nation’s contracts in Cherokee III were fully paid according to their terms – yet the Court still ruled that Cherokee was entitled to the full CSC requirement it was promised in the Act.² That is precisely the same factual situation the Defendants now acknowledge is (“with few exceptions”) predominant for the whole class. Opp. at 3. In short, the issues presented in Cherokee III are identical to the issues presented here. The understatement of CSCs on the face of some contracts did not bar recovery in Cherokee III, and it likewise does not bar recovery here.

The reason for this conclusion is simple: the promise to pay full CSC’s is grounded in the Act, apart from any contract term. The Supreme Court never relied on any contract language and it thus plainly did “invalidate[] IHS’s CSC policies and determined that the Secretary was liable to pay CSC under the ISDA.” Opp. at 2. The Court thus rejected the heart of the Government’s defense and the practices by which IHS generally required that contract amounts be set below the full CSC

² For instance, the Cherokee Nation’s FY1997 funding agreement specified “\$1,441,254” in indirect CSCs, see Pl. Exh. 50, Joint App. at 188, Cherokee III (FY1997 AFA, “Section Six”), a sum that was more than fully paid. Cherokee Nation v. United States, 190 F. Supp. 2d 1248, 1254 (E.D. Okla. 2001) (“IHS paid \$1,656,151”). Ultimately IHS was held liable for an additional “\$2,300,000,” see Consent Judgment, Cherokee Nation v. United States, No. 99-092-S CIV (E.D. Okla. July 24, 2006) (Dkt. No. 190), a much higher amount nowhere specified in the contract.

requirement that the ISDA mandated (and that Defendants recorded in their shortfall reports). It is inconsistent, to say the least, for Defendants now to deny that under Cherokee III ““massive underpayments are owed the putative class”” (Opp. at 3) after candidly advising the Supreme Court that a defeat for the Government would mean “the [IHS] could face liability up to \$100 million,” Pl. Exh. 51, U.S. Pet. for Cert. at 27, Cherokee Nation v. Leavitt, No. 03-853 (U.S. Dec. 11, 2003), and after acknowledging to the Court that “in 1996 and 1997, the overall shortfall in CSC funding, including both new or expanded contracts and ongoing contracts, was approximately \$43 million and \$82 million, respectively.” Pl. Exh. 49, U.S. Br. at 12, Cherokee III.³ As the Court’s decision reflects, it is not a matter of “reopening” contracts to pay additional amounts (Opp. at 4), but of paying and enforcing the CSC requirements as the ISDA intended them to be paid and enforced, without regard to IHS policies designed to undermine the Act’s command.⁴

³ See also Cherokee III, 543 U.S. at 645-646 (referring to an IHS document acknowledging “unpaid” “contract support cost” debts. [Joint App.] at 206-207”); Pl. Exh. 50, Joint App. at 206-209, Cherokee III (“Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls”) (referring on p. 208 to use of unobligated funds to pay “shortfalls in existing contracts” and “the startup and CSC needs of [Tribes] in the ISD Queue”). Plainly the Court was aware of agency-wide CSC “debts” going back several years.

⁴ Similarly, contract language did not matter in the two other cases correctly decided prior to Cherokee III. Both cases have been revisited following Cherokee III and have interpreted Cherokee III to have broad application to all IHS contractors that were underfunded in the mid-1990s. In Appeals of Seldovia Village Tribe, 03-2 BCA ¶ 32400, 2003 WL 22422891 (Int. Bd. Cont. App. Oct. 20, 2003), the Board noted that IHS, relying on the Circulars, refused to add additional CSC funds to the Tribe’s contract. The Board found “no significant differences from Cherokee and that the precedent in Thompson [v. Cherokee Nation], 334 F.3d 1075 (Fed. Cir. 2003) is controlling,” and held IHS liable because of the Act’s mandatory funding provisions. Id. In trying to avoid a subsequent fee award, IHS asserted substantial justification based on the fact that Seldovia’s “contract language differed from that in Cherokee.” Application for Attorney Fees of Seldovia Village Tribe, 05-2 BCA ¶ 33034, 2005 WL 1805664 (Int. Bd. Cont. App. July 26, 2005). The Court noted that “Applicant’s underlying appeal involved essentially the same facts as Cherokee” and “the Government has admitted on numerous occasions that the issues in Seldovia were virtually identical with those in Cherokee ...” Id. (See AT&T Communications, Inc. v. Perry, 296 F.3d 1307, 1311 (Fed. Cir. 2002) (giving “careful consideration to the Board’s legal conclusions in recognition of its considerable experience in construing government contracts”).) In Shoshone-Bannock Tribes v. Leavitt, 408 F. Supp. 2d 1073, 1076-1077 (D. Or. 2005), the court applied Cherokee III where IHS’s failure to pay was due to a “partial declination” to award the required CSC funding, again signifying there was no unpaid “contract” amount. The court noted: “Hundreds of other Tribal contractors were experiencing problems similar to those the Shoshone-Bannock Tribes were experiencing with CSC shortfalls.” Id. at

4. In short, the Supreme Court in Cherokee III effectively defined a class of statutory shortfall claims. Even Defendants concede that “Cherokee Nation eliminated a legal defense, raised by IHS against most of its contractors in the relevant years, that at one time may have made IHS contractors similarly situated.”⁵ Defendants’ new attempt to gloss over this key defense “raised by IHS against most of its contractors,” now resolved against IHS by the Supreme Court, would “undermine [Rule 23(b)(3)’s] goal of efficiency ... because ironically, liability is so clear.” In re Nassau Co. Strip Search Cases, 461 F.3d at 219, 228 (2d Cir. 2006) (discussing Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000)). “The fact that an issue is conceded or otherwise resolved does not mean that it ceases to be an ‘issue’ for the predominance analysis.” In re Nassau, 461 F.3d at 228.

B. The Defendants Improperly Seek to Interject the Merits of Their Defenses Into These Class Certification Proceedings.

Defendants’ next (and recurring) argument is that their many defenses, “if successful” (Opp. at 7), would dispose of various claims and eliminate numerous class members from this suit, thus destroying the class. See id. e.g. at 37-38 (summarizing failure to “present,” res judicata, collateral estoppel, release and waiver defenses).⁶ That contention falls short of the mark, and is simply not the

1078.

⁵ Defs’ Reply to Pl’s Opp. to Defs’ Mot. to Stay Briefing on Class Cert. and to Stay Discovery at 6 (Dkt. No. 39). See also Opp. at 2 (conceding the Court’s determination that IHS had ample “lump sum” appropriations available to pay all CSC requirements in the four years at issue there applies on a class-wide basis).

⁶ Defendants cite Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005), Opp. at 7-8, to support its “failure to state a claim” defense. But Samish actually supports the Pueblo. While it is true for purposes of the Tucker Act, 28 U.S.C. § 1491(a)(1), that the ISDA does not “provide a damage remedy for past program money, or contract support costs never incurred, based on the government’s wrongful refusal to accord recognition in past years,” 419 F.3d at 1367, this necessarily means where there is an underlying contract with a recognized Tribe the ISDA does “confer a private damage remedy” for CSCs. Id.; see infra 11 (discussing actions “arising under contracts authorized by the [ISDA]”). Throughout its opinion the Samish court repeatedly limited its ruling to situations where the claimant never had a contract, id. at 1367 (“damages ... on contracts never created”), because there the Tribe had not yet been federally-recognized. See also id. (“Samish ... never obtained a self-determination contract in the years at issue”).

way class determinations are made. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (a court is not to conduct “a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action”); accord Theissen v. G.E. Capital Corp., 267 F.3d 1095, 1106-1107 (10th Cir. 2001) (citation omitted) (reversing district court where it “effectively made findings regarding these issues under the guise of determining whether plaintiffs were ‘similarly situated’”).

1. Here, the Pueblo has asked the Court to certify a class that is readily identifiable and numerous: all Tribal contractors that were subjected to IHS’s allegedly improper, agency-wide course of conduct through the full class period of underpaying the CSCs required by law (and thus by contract too). The fact that a few potential members of the class ultimately may opt out of the case or may not recover a damage award on some (or even all) of the asserted claims – for example, because they filed suit separately, or independently settled or waived a few claims, or by a fluke were paid their full CSCs – is irrelevant to class certification. As one circuit court observed,

Although a court must examine the relevant facts and both the claims and defenses in determining whether a putative class meets the requirements of Rule 23(b)(3), the fact that a defense ‘may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.’

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 138 (2d Cir. 2001) (certifying despite individual mitigation and damages issues) (quoting Waste Mgmt., 208 F.3d at 296 (certifying despite alleged individual waiver and limitations defenses)). In short, how much any particular Tribe may be owed, or that some defenses “‘may affect different class members differently,’” id., does not affect the predominance of the underlying basis of potential liability common to the entire class: IHS’s

systematic failure, through its Circulars, to follow the law.⁷

2. Moreover, Defendants' assertion that this case cannot be certified because it is fraught with defenses unique to each plaintiff is simply wrong. To the extent the Court may consider defenses for purposes of commonality and predominance, the many defenses that are common to all class members only contribute to a finding of predominance. In re Nassau, 461 F.3d 228-229; Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003); In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166-167 (2d Cir. 1987) (discussing "military contractor" defense).

In this context, it is significant that Defendants raise many of the very same defenses they are raising in other similar pending actions.⁸ For example, in Tunica and elsewhere, as in this case, Defendants argue that Tribal contractors' claims to recover CSCs are barred because the court lacks subject matter jurisdiction for failure to "present" claims under the Contract Disputes Act, 41 U.S.C. §§ 601-613 ("CDA").⁹ Similarly, in Tunica and other litigation, as here, Defendants argue that Tribal

⁷ If, as Defendants' Notice of Supplemental Authority (Dkt. No. 323) reflects, a few of the 334 Tribal contractors elect to proceed with their own cases, and thus opt out by instituting separate litigation, they will simply be excluded from the class. The fact that they choose to take such action, or that once they do their separate cases will follow separate paths, by no logic or rule defeats the propriety of certifying the class for all other claimants.

⁸ Defendants' litany of defenses include: lack of subject matter jurisdiction (including failure to exhaust administrative remedies); limitations and laches; failure to state a claim upon which relief can be granted (including "waiver" and "estoppel"); and "release" of claims – all issues that are common to all members (or in the case of releases, a very large segment) of the class. Opp. at 7-9, 27-32, 37-38. (For a discussion of "releases" see Pl. Class. Mem. at 43 n.60.)

⁹ Compare Opp. at 27-32 and Defs. Memo. in Supp. of Mot. to Dismiss at 20-23, Tunica-Biloxi Tribe of La. v. United States, No. 1:02CV02413 (RBW) (D.D.C. Mar. 31, 2003) ("Tunica") (Dkt. No. 13) (hereinafter "Defs. First Mot. to Dismiss") (both citing SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612 (1990)); see also Pl. Exh. 52, Order at 14, CRIHB v. Shalala, No. C 96-3526-DLJ (N.D. Cal. Mar. 26, 2001) (rejecting presentment defense). Even contractors going to the IBCA confront a uniform jurisdictional defense. See Pl. Exh. 53, Ans. at 2, Arctic Slope Native Assoc., Ltd. v. Leavitt, Nos. 4794-4803 (Int. Bd. Cont. App. Sept. 22, 2006) ("ASNA") ("Seventh" defense) (challenging IBCA jurisdiction over claims "based on a statute"); Pl. Exh. 54, Ans. at 3, Yukon-Kuskowkwim Health Corp., Inc. v. Leavitt, Nos. 4785-2006 through 4791-2006 (Int. Bd. Cont. App. Oct. 10, 2006) ("YKHC") ("Seventh" defense) (same).

contractors fail to state a claim upon which relief can be granted when the contract face amounts are paid,¹⁰ and on similar grounds argue waiver and estoppel.¹¹ Further, Defendants regularly assert laches or limitations to defend against CDA claims.¹² Finally, Defendants regularly assert Ramah I is no longer good law.¹³ Notably, Defendants never explain why, in their apparent view, it would make more sense to litigate these many common defenses, arising under identical statutory and contract language, one by one and over and over for each of 334 Tribal contractors.¹⁴

3. Finally, Defendants are simply wrong in saying that this Court lacks jurisdiction over either the Pueblo's claims or the claims of the class. As Rule 23(c)(1)(C) requires, the Pueblo's Motion specifies the claims for which class treatment is sought, and includes both statutory claims and

¹⁰ Compare Opp. at 7-8 and Defs. Memo. in Supp. of Mot. to Dismiss at 21-28, Tunica (D.D.C. Jan. 13, 2006) (Dkt. No. 82-1) (hereinafter "Defs. Second Mot. to Dismiss") (both citing Samish regarding "failure to state a claim"); see also Pl. Exh. 53, Ans. at 1-2, ASNA ("First," "Second," & "Sixth" defenses); Pl. Exh. 54, Ans. at 2, YKHC ("Third" defense); Pl. Exh. 55, Letter to Tribal Administrator, Akiachak Native Community from HHS at 2 (June 1, 2006) (arguing ISDA does not require payment over amount stated in contract) ("Akiachak"); Pl. Exh. 56, Letter to Chairman, Fort Peck Tribal Executive Board, from HHS at 4 (May 31, 2006) (same) ("Fort Peck").

¹¹ Compare Opp. at 8-9 and Defs. Second Mot. to Dismiss at 28-36, Tunica (Dkt. No. 82-1) (both citing Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443 (Fed. Cir. 1997) among others, for "waiver" and "estoppel").

¹² Compare Opp. at 9 and Defs. First Mot. to Dismiss at 29, Tunica (Dkt. No. 13); Pl. Exh. 57, Ans. at 3, Confederated Tribes of the Grande Ronde Cmty. v. United States, No. 03-2244C (Fed. Cl. Nov. 14, 2005) (Dkt. No. 15) (laches); Pl. Exh. 53, Ans. at 2, ASNA ("Fourth" and "Fifth" defenses) (limitations); Pl. Exh. 54, Ans. at 2-3, YKHC ("Second" defense (laches) and "Sixth" defense (limitations)). Pl. Exh. 55, Akiachak at 2-3 (limitations); Pl. Exh. 56, Fort Peck at 4 & 5 (laches).

¹³ Compare Opp. at 34 n.13 & 43 and Defs. First Mot. to Dismiss at 14, Tunica; see also Fort Peck, Pl. Exh. 56 at 6.

¹⁴ Defendants' reliance on a letter from an attorney in another action to buttress its contention that the laches or limitations defenses raise issues unique to each class member is unpersuasive. Defs' Suppl. Factual Support at 2, Tab B (Dkt. No. 323). Given a sufficient nucleus of common issues (including defenses), the presence elsewhere of individual issues of compliance with the statute of limitations has not prevented certification. In re Linerboard Antitrust Litig., Inc., 305 F.3d 145, 162 (3d Cir. 2002) (quoting Waste Mgmt., 208 F.3d at 296). See also In re Visa, 280 F.3d at 138. Moreover, although the extent to which limitations or laches may apply can sometimes be fact specific, whether the defenses apply here at all is a common question of federal law (involving exhaustion, statutory tolling and equitable tolling) that is identical for all affected class members. Pl. Opp. to Defs. Mtn. to Dismiss in Part at 12-16, 19-20 (Dkt. No. 111).

contract claims. Pl. Class Mem. at 1-2. The Government’s exhaustion argument applies – if it applies at all – only to the contract claims. As for the statutory claims, the plain terms of the ISDA lodge original jurisdiction in this Court to award money damages:

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

25 U.S.C. § 450m-1(a) (emphasis added).¹⁵ Further, this Court has “original jurisdiction” under both 28 U.S.C. § 1331 and § 1362, for this case is indisputably a “civil action[]” arising “under the ... laws ... of the United States.”

Whatever the ultimate outcome of Defendants’ “exhaustion” defense (directed only at CDA claims, and not to the parallel statutory ISDA claims), this Court has ample “jurisdiction” over the Pueblo’s and the class members’ money damages claims, and significantly no district court has ever detected a jurisdictional defect in such claims.¹⁶ As for the remainder of Defendants’ arguments about

¹⁵ Although Defendants assert there is no such thing as a statutory claim (Opp. at 7-8), elsewhere they contend otherwise. See Pl. Exh. 53, Ans. at 2, ASNA (“Seventh” defense); Pl. Exh. 54, Ans. at 3, YKHC (“Seventh” defense).

¹⁶ Pl. Exh. 52, Order at 14, CRIHB (“The Court believes that the claim requirement of the CDA does not apply here, because it is in conflict with, and ultimately trumped by, the explicit grant of jurisdiction of the federal courts to ISDA contractors, pursuant to the 1988 amendments of ISDA. ... [T]he court agrees with plaintiffs that requiring ISDA contractors to go through this process would render Congress’ grant of original jurisdiction in the federal courts a nullity. Consequently, the Court finds that the CDA applies to plaintiff’s claim, but the written claim requirement does not.”) (emphasis added); Cherokee Nation v. United States, 190 F. Supp. 2d 1248, 1255-1256 (E.D. Okla. 2001) (discussing standard of review under independent CDA and ISDA causes of action). See also id. at 1257 (“Section 450m-1(a) of the ISDA grants district courts ‘original jurisdiction’ over ‘civil actions’ with authorization to award money damages. *** This court agrees with the District Court of Oregon that the use of the phrase ‘civil action’ in combination with ‘original jurisdiction’ and the power to award money damages in the ISDA supports de novo review. Shoshone-Bannock [Tribes] of [the] Fort Hall [Reservation v. Shalala], 988 F.Supp. [1306,] at 1315 [(D. Or. 1997)].”).

CDA exhaustion, we respectfully refer the Court to Plaintiff's Opposition to Defendants' Motion to Dismiss at Dkt. No. 111.¹⁷

In sum, the merits of Defendants' diverse defenses, including presentment and tolling, at best go to later membership issues, not to the class certification issues now before the Court. More fundamentally, their very presence in numerous other proceedings only underscores the predominance of the many common defenses raised in this action, further supporting certification under Rule 23.

C. Class Certification is the Favored Course of Action in Complex Litigation.

Defendants selectively quote from *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1987), to suggest that class actions are rare and that the required "rigorous analysis" poses an insurmountable obstacle to certification. *Opp.* at 26 (internal quotations omitted). That is simply not correct, for Defendants choose to omit the Supreme Court's key subsequent sentences: "Class relief

¹⁷As explained there (Dkt. No. 111 at 3, 12-16), Judge Hansen in Ramah correctly held over a decade ago that, so long as the class representative has exhausted its CDA remedy by submitting a claim, absent class members are not required likewise to present CDA claims. *Pl. Exh. 2, Mem. Op.* at 4, Ramah Navajo Chapter v. Lujan, No. 90-0957 (D. N.M. Oct. 1, 1993) (Dkt. No. 95). (Were it otherwise, as a practical matter Rule 23 would be written out of this Court's rules for actions arising under ISDA contracts, an extreme consequence there is no indication Congress ever intended.) In running from this ruling Defendants never explain why during the life of the Ramah case, with so much at stake, the Government never moved to decertify the class for all the reasons the Government now asserts bar class certification here. The truth is, not only did the Government accept the Court's ruling, but the Defendants here – specifically IHS – embraced the ruling by piggy-backing on the settlement release to dispose on a class basis of all miscalculated rate claims assertable against IHS through FY1993. *Pl. Class Mem.* at 6 n.5 (discussing Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091 (D. N.M. 1999) ("Ramah II"). Notwithstanding Defendants' denial (*Opp.* at 54 n.23), the United States, on behalf of IHS by name, was certainly a party to the Ramah II settlement through that release.

In all events, whether absent class members need exhaust their CDA claims (although not their statutory claims) involves issues of class membership, not class certification – and is an issue that may not ultimately matter given the parallel statutory claims. Further, even if the Court later determines that absent class members, too, must individually "present" to recover under the CDA, the record shows that Zuni and other class members have presented 124 CDA claims covering the Cherokee III period (FY1994-1997), see *Pl. Class Mem.* at 56 n.75 (Dkt. No. 281), and 369 claims covering all years. Thus, such a ruling would neither defeat numerosity nor cause the class to be decertified. (As for other class members, the time to "present" CDA claims, if ultimately required, has been tolled. See Dkt. No. 111 at 16-19 (discussing rule of American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974), that filing of a class action tolls the statute of limitations until certification is decided).)

is ‘particularly appropriate’ 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.’” 457 U.S. at 155 (citation omitted). This is so because “‘the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.’” Id. (citation omitted). Thus, in complex litigation that satisfies Rule 23, class actions are the preferred manner of proceeding.¹⁸ See also Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 793-94 (10th Cir. 1970) (quoting Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)); Robinson v. Gillespie, 219 F.R.D. 179, 183 (D. Kan. 2003); Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 435 (D. N.M. 1988); Pl. Class Mem. at 33.

Accordingly (and contrary to Defendants’ view), it would be an abuse of discretion for a court to set the certification bar too high.¹⁹ Indeed, some courts expressly note the stricter standard of review applicable to certification denials than to grants, precisely to protect the policies informing Rule 23. In re Nassau, 461 F.3d at 225. Likewise, courts should not refuse to certify otherwise eligible classes simply out of fears over manageability issues. In re Visa, 280 F.3d at 140 (“failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is

¹⁸ In signing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 14, President Bush noted that “Class-actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrongdoing to merge their claims into a single lawsuit. When used properly, class-actions make the legal system more efficient and help guarantee that injured people receive proper compensation. This is an important principle of justice.” www.whitehouse.gov/news/releases/2005/02/20050218-11.html. See also Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999) (class actions are intended to address “‘those recurrent life patterns which call for mass litigation through representative parties’”) (citation omitted).

¹⁹ Anderson v. City of Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982) (district court abused its discretion in declining to certify class out of erroneous belief named plaintiff lacked standing, and because court improperly assessed the merits of the plaintiff’s claim); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292-293 (2d Cir. 1999) (district court abused its discretion in denying certification by improperly assessing merits of the putative class claims); Abrams v. Communications Workers of Am., 59 F.3d 1373, 1378 (D.C. Cir. 1995) (district court abused its discretion in finding named plaintiffs lacked typicality).

disfavored and ‘should be the exception rather than the rule’”) (citation omitted).

This approach is sensible, for a grant of certification is not the last word, and long after a class is certified a district court retains significant authority to make changes to the class, or even to decertify the class. Pl. Class Mem. at 33 n.48; In re Integra Realty Res., Inc., 354 F.3d 1246, 1261 (10th Cir. 2004); Harrington v. City of Albuquerque, 222 F.R.D. 505, 508-509 (D. N.M. 2004); see also Fed.R.Civ.P. 23(c)(1)(C) (“An order under Rule 23(c)(1) may be altered or amended before final judgment”); 2003 Adv. Comm. Notes (Rule 23(c)(1)(C) authorizes “[d]ecertification” if “warranted after further proceedings”). In other words, granting class certification preserves flexibility for the Court; in contrast, a decision not to certify a class generally means the litigation ends.²⁰

D. Class Claims 1 & 2 (the “Shortfall” Claims) Satisfy Rule 23.²¹

With respect to the “shortfall” claims, Defendants spend relatively little energy questioning

²⁰ Defendants incorrectly invoke United States v. Mendoza, 464 U.S. 154 (1984) as authority for a blanket Government immunity from Rule 23 class actions. Opp. at 61. Mendoza articulates a narrow rule limiting the use of non-mutual offensive collateral estoppel against the Government arising out of separate individual actions; it has nothing to do with Rule 23 class actions. (Indeed, even in the Court of Federal Claims “class actions are not disfavored.” Filosa v. United States, 70 Fed. Cl. 609, 610-611 (2006).) Besides, Mendoza’s policy favoring a diversity of appellate decisions on a given issue has already been assured in the ISDA context by the several appellate decisions that predated and led to Cherokee III, and will continue to be assured by the diverse post-Cherokee III decisions that will arise here, in the Tunica litigation, in the Shoshone-Bannock litigation, and in the pending IBCA cases subject to review in the Federal Circuit, see Pl. Exh. 58 (listing cases).

²¹ In the interest of brevity and the focus of this Motion, we pass over the many areas where Defendants misstate the law or agency practice. One example will suffice. For instance, Defendants seem to assert that a contractor’s unpaid CSC requirement must be determined from after-the-fact audits. Opp. at 48 (explaining CSC shortfall reports were “based on unaudited costs”). But that is not correct, and makes no sense, for one cannot ‘audit’ the expenditure of money one never received. See S. REP. NO. 100-274, at 37 (1987) (rejecting as “an unacceptable argument” agency position that “since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract”). Further, this assertion ignores that CSCs are calculated in full before the year begins; that (at the Tribe’s option) they are paid in a single lump-sum amount at the beginning of the year (§ 450/(c), sec. 1(b)(6)); and that any unspent contract funds remaining at the end of the year remain “available until expended” for health care services. Id. § 450/(c), sec. 1(b)(9)(A); see also 25 U.S.C. § 13a. The notion that CSC requirements are subject to post hoc reductions based upon audits of indirect cost expenditures performed years later (Opp. at 49-50) mixes apples and oranges, is woven out of whole cloth, and appears nowhere in the Act (or even any IHS Circular).

the prospective Class's compliance with Rule 23. We address below the few arguments raised.

Class definition. Defendants' four main objections here are each inapposite. First, Defendants' 'overbreadth' objection (Opp. at 37) merely recycles the "defenses" issue addressed supra at 7-12. Second, Defendants' allegation that 34 of 334 class members may have settled or waived some of their claims (though, from the cited exhibit, not all of their claims), even if later proven, hardly undercuts the proposed class definition. Rather, the Court and the parties easily can ensure that such known absent class member's claims (along with those of others who may opt out of the class) are excluded from any ultimate judgment. Third, Defendants misplace their reliance on Daigle v. Shell Oil Co., 133 F.R.D. 600 (D. Colo. 1990), Opp. at 37, for Daigle involved a proposed class that was defined, not by the defendants' actions but by where plaintiffs lived. 133 F.R.D. at 603 (plaintiffs "arbitrarily have drawn lines on a map ... [but they have] failed to identify any logical reason relating to the defendants' activities ... for drawing the boundaries where they had."). Here, the class is directly tied to Defendants' actions because it covers only Tribes "that have contracted with [IHS] under the [ISDA]." Finally, no amendment of the First Amended Complaint is necessary to encompass the years subsequent to 2001 (although an amendment could readily be requested), for as liberally construed and understood (particularly in the context of the Ramah litigation), the term "the present" includes claims through FY2005.

Rule 23(a). Turning to Rule 23(a)'s four elements, Defendants do not seriously contest "numerosity" under Rule 23(a)(1), Opp. at 39-40, but categorically assert "**There Are No Core Common Questions of Law or Fact**" under Rule 23(a)(2). Id. at 40 (heading; underscoring added). This remarkable assertion is belied a few pages later by Defendants' concession "that some ... 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.” Id. at 46-47. And that is sufficient under Rule 23(a)(2).

Still, Defendants press their categorical “No Core Common Questions” position, not by reference to the merits of the shortfall claim – that is, what are the controlling liability issues and defenses pertinent to that claim – but by reference to ultimate individual damages computations that may be required. Id. at 41 (“what was the amount of CSC that IHS was required to award” and “[d]id IHS award that amount?”).²² Not only is the consideration of individual damages improper on a Rule 23(b)(3) motion (Pl. Class Mem. at 43-44 & n.61), but Defendants’ approach ignores the underlying principle that liability to the class will for each member turn upon resolution of the same core issues – primarily the meaning of Cherokee III, the propriety of Defendants’ continuing reliance on the IHS Circulars after Cherokee III, and controlling appropriations and contract law. Thus, notwithstanding the terms of the contracts, certification is appropriate because this case involves Defendants’ overarching conduct toward the class. Pl. Class Mem. at 52-53; Blackie v. Barrack, 524 F.2d 891, 902-903 (9th Cir. 1975); Mick v. Level Propane Gas, Inc., 203 F.R.D. 324, 331 (S.D. Ohio 2001); Contract Buyers League v. F&F Inv., 48 F.R.D. 7, 11-12 (N.D. Ill. 1969). The fact that, once liability is established, shortfall damages might require individualized determinations is immaterial, as it is

²² On this score Defendants can find no refuge in Busby School of the N. Cheyenne Tribe v. United States, 8 Cl.Ct. 596 (1985) or Zapata v. IBP, Inc., 167 F.R.D. 147 (D. Kan. 1996), Opp. at 47. Busby was decided under a restrictive U.S. Claims Court rule on class actions that no longer exists. See e.g., Filosa, 70 Fed. Cl. at 610-611. And in Zapata the named plaintiffs could not show any similarity between the harm they suffered and the harm suffered by putative class members. (That is, the court first would have had to determine how for all class members each defendant harmed each plaintiff before it could determine liability.) But here, the alleged harm is the same for all class members – underpayments caused by IHS’s implementation of a uniform policy and practice.

in all Rule 23(b)(3) classes. Gold Strike, 436 F.2d at 796 & n.9; In re Visa, 280 F.3d at 138.²³

Defendants next object that all the controlling contracts are materially different, yet they concede that all the contracts at issue are either “a standard government contract” (before 1994), or “a uniform (model) contract” (1994 and later). Opp. at 50. Defendants’ nitpicking over slight variations in the supplemental funding agreements whose terms are trumped by the uniform contracts and by the ISDA (Pl. Class Mem. at 63 & n.82) is unconvincing, as reflected in Plaintiff’s detailed analysis of all the sampled contract documents. Id. at 29-32.²⁴ Again, if, as the Pueblo contends and Cherokee III held, the ISDA requires full funding of a contractor’s CSC requirements, then regardless of any lower amounts inserted into the supplemental funding agreements, Defendants will be liable to the entire class; contract language variations will make no legal difference. That is the core of the Pueblo’s shortfall claim and, whether it is ultimately meritorious or not, the class is entitled to have

²³ As Magistrate Judge Lynch noted, “global CSC [damage] calculations are not relevant to the class certification issues.” Mem. Op. & Order at 15 (Feb. 13, 2006) (Dkt. No. 205); see also id. at 3-4 (“difficulties in quantifying class damages are not relevant to issues of class certification”). Pl. Class Mem. at 44 n.61 (discussing Defendants’ concession) & 53 n.73 (discussing cases). Nonetheless, Plaintiff’s expert Dr. Mather has testified that class shortfall damages can be ascertained with “reasonable accuracy” from IHS’s shortfall reports. Aff. of Dr. David Trigg Mather at ¶11 (Dkt. No. 140). Indeed, the best two answers to the spectre of individualized trials is to recall that (1) every one of the claims raised here on a class basis – the shortfall claim (including “direct” CSC shortfalls) and the miscalculated rate claim – were in Ramah easily resolved on a class basis without any individualized determinations; and (2) Defendants themselves have already calculated class damages for the shortfall claims, again without any so-called “individualized” determinations (Mem. Op. and Order at 3-5 (Dkt. No. 205)). Thus, while damages issues are not relevant, quantification here will not be difficult. (Revealingly, after spending years seeking to influence both Congress and the Judiciary with IHS’s exacting and statutorily-mandated data on annual CSC shortfalls suffered by every Tribal contractor in the country, Defendants now try to run from that data since it threatens to form the basis for their ultimate liability. Opp. at 47-48. Judge Lynch did not find Defendants’ affiant particularly convincing given his conflicting deposition testimony, see Mem. Op. and Order at 6-7 (Dkt. No. 205), and neither should this Court.)

²⁴ Nowhere do Defendants challenge the Pueblo’s Fed. R. Evid. 1006 summary of the sampled contracts’ material terms. Instead, Defendants muddy the picture by adding in every possible extraneous note. On the key issue Defendants press upon the Court, that the contracts are all materially different, Defendants substitute their conclusory statement for any real analysis. Opp. at 50-53.

its day in court on that claim.²⁵

Defendants' objection to the Pueblo's "typicality" is limited to the weak argument that the Pueblo filed representative claims for fiscal years 1993 through 1998, but not later years. But for typicality purposes, the 22 claims the Pueblo filed are more than sufficient to faithfully litigate the claims of the class, particularly considering that in the Ramah litigation Ramah has been litigating a decade's worth of class claims with only one representative claim. Dkt. No. 111 at 3.²⁶

Defendants' conclusory charges of "inadequacy" and "antagonistic" interests are likewise unconvincing. Opp. at 56-58. Defendants incorrectly assert that in this damages action the Pueblo actually seeks instead to force IHS "to reallocate amounts already provided to (and presumably spent by) Tribal contractors" in years past. Opp. at 57. That is simply not what this case is about, and Plaintiff neither alleges nor seeks any such relief. Indeed, the only declaratory and equitable relief subsumed within the Plaintiff's shortfall claim is a declaration that IHS's Circulars are illegal, a declaration that IHS's failure to pay full CSC requirements in both the lump-sum and cap-year periods

²⁵ Defendants' citation to Moore Video Distrib., Inc. v. Quest Entm't, Inc., 823 F. Supp. 1332 (S.D. Miss. 1993), Opp. at 53, merely makes the Pueblo's point. In Moore the court would not certify a class of approximately 70 plaintiffs with distribution agreements because "plaintiffs have not made a prima facie showing that the terms of the contracts were the same or that they were all breached in the same manner or under the same set of circumstances." Id. at 1339. But here the class alleges that the contracts were "all breached in the same manner," that they were breached "under the same set of circumstances," and "that the terms of the contracts were the same." Moore simply does not stand for the proposition that cases involving contract variations are presumptively inappropriate for class certification; to the contrary, classes have been certified where the contracts at issue were substantially similar. See e.g. Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 74 (E.D.N.Y. 2004); Heastie v. Cmty. Bank of Greater Peoria, 125 F.R.D. 669, 675 n.6 (N.D. Ill. 1989). This is only sensible, since a class involving differing contracts ought to be appropriate so long as the "question of basic liability can be readily established by common issues" and only the calculation of damages requires individual examination. Gold Strike, 436 F.2d at 796; In re Visa, 280 F.3d at 138.

²⁶ Defendants incorrectly assert that in Ramah the Government raised no Rule 23 defenses, and thus none were considered by the Court. In fact, the Government opposed certification under Rule 23's commonality, typicality and adequacy grounds, while also challenging the class as insufficiently defined. Pl. Exh. 59, Resp. To Pl.'s Mot. To Certify Class at 1-4, Ramah (Sept. 17, 1991) (Dkt. No. 36). The Court recognized that these grounds were not "Defendants' principal objection." Pl. Exh. 2, Mem. Op. at 2, Ramah (Oct. 1, 1993) (Dkt. No. 95).

was a violation of law, and an injunction against the imposition of IHS's Circulars upon Tribal contractors. These elements of relief only make the claim for class certification stronger, and do not in any manner establish intra-class conflicts.²⁷

Rule 23(b)(3). Finally, Defendants assert in conclusory fashion that common issues will not predominate (Opp. at 59-60), an argument that relies entirely on the remarkable earlier assertion that there are “No Core Common Questions” at all. In truth, the “core problem” of allegedly insufficient appropriations and related overarching common issues predominate heavily. Supra at 2-7.

Defendants also assert that a class action is not a superior vehicle for adjudicating all the claims arising out of the Defendants' alleged misconduct, but one is compelled to ask “superior for whom?” Assuming for the moment that the Government has acted unlawfully in failing to pay hundreds of Tribal contractors – and the analysis must proceed on that assumption in order to assess superiority – a refusal to certify the class is “superior” only for the Government. Moreover, it is superior for the Government only if, as seems to be the Defendants' unstated desire, the alternative to class litigation is not hundreds of individual actions but no actions at all (or no actions beyond those already filed). As the record reflects, a mere 50 of 334 contractors (or 15%) have filed 124 of the 1,336 potential claims (or 9%) arising out of the 1994-1997 Cherokee III period. Pl. Class Mem.

²⁷ Defendants' continuing effort to construct a representational conflict based upon the Judgment Fund statute (31 U.S.C. § 1304) and the CDA, Opp. at 58, is another diversion that has been roundly rejected. Cherokee III, 543 U.S. at 642 (explaining when appropriations are gone the appropriate remedy is damages, payable from the Judgment Fund), affirming Thompson v. Cherokee Nation, 334 F.3d 1075, 1093 (Fed. Cir. 2003) (“Cherokee II”) (discussing Judgment Fund). See also Pl. Class Mem. at 61 & nn.79 & 80. Even if agency reimbursement were to occur there is no way to predict where the reimbursement would come from, such as a supplemental appropriation, funds supporting internal agency functions, or elsewhere. But see Pl. Exh. 19 at 1-2 (“Dear Tribal Leader” letter of April 21, 2005 from IHS Director Grim) (“While the [CDA] provides that agencies are to repay the Judgment Fund, I am committed to maintaining and improving the level of services that the IHS provides to all Tribes. To that end, the IHS will work with the Administration and Congress to ensure that the CSC litigation does not result in any health service reductions.”).

at 56 n.75. Thus, absent a class the Government will escape its liability for 91% of the shortfall claims arising in that period. That may be “superior” for Defendants, but it is not superior for achieving Justice, nor to the victims of the Government’s wrongdoing.²⁸

Similarly, litigating only the 124 separate CDA claims now on file, either in the courts or the contract appeals boards, may be superior for the Government with its mighty resources, but it is not a superior course for either the many judges so burdened, or for the largely impoverished Tribes who one by one will have to face these formidable Defendants. In short, if there is no class, only the Government gains, not the courts and not the victims of the Government’s wrongdoing. As Judge Posner aptly noted, “a class action has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all.” Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). The fact that most claimants have not pursued their claims militates strongly in favor of

²⁸ Defendants use ‘funny math’ to suggest that individual class members have incentive to pursue individual claims, and thus an “interest” in individually controlling their own cases. The math is wrong. See Pl. Class Mem. at 39 n.54. Moreover, a substantial claim on its face does not translate into an “interest” in “controlling” one’s own claim – particularly when the litigant has no resources to litigate its claims (and where, as here, the Government forbids contractors from using contract funds to pursue such claims, see 2 C.F.R. pt. 225, App. B, § 10.b (OMB Cir. A-87); 2 C.F.R. pt. 230, App. B, § 10.g (OMB Cir. A-122); 25 U.S.C. § 450j-1(k)(7)). Defendants are also wrong on the law, for class members will not have a “practical” interest in pursuing separate law suits when “‘the class [has] a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable.’” Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 616 (1997) (quoting 1966 Adv. Comm. Notes to Rule 23(b)(3)). This “cohesion” is certainly present here, as demonstrated by the lack of significant opt-outs during the three times class claims were noticed in the Ramah litigation, even though some contractors eventually recovered six or seven digit payments. See Pl. Exh. 60 (Ramah Orders and related affidavit approving payment amounts (Dkt. Nos. 505, 848 & 853)).

More fundamentally, Rule 23(b)(3)(A)’s ‘individual interest’ rule is intended to protect class members who prefer to litigate separately (something they can readily do by opting out), not to protect Defendants from high-value claims. That after Cherokee III only 12 Tribes have pursued their own claims beyond the contracting officer stage (Pl. Exh. 58), and that 91% of all claims arising during the Cherokee III period have not even been “presented” to a contracting officer, reflects little practical interest in controlling separate litigation. See also Klay v. Humana, 382 F.3d 1241, 1269 (11th Cir. 2004) (focusing on “the relative advantages of a class action over whatever other forms of litigation might be realistically available to the plaintiffs.”) (emphasis added).

class certification, since the failure to vindicate rights cannot be superior to anything.

E. Class Claim 3 (the “Miscalculated Rate” Claim) Satisfies Rule 23.

IHS focuses most of its class opposition to the particulars of the miscalculated rate claim, seeking at every turn to draw the Court into the merits of that claim and its alleged complexities. But the claim is deceptively simple, as reflected in the Tenth Circuit’s opinion in Ramah I.

Although the ISDA does not dictate how administrative CSCs are to be calculated, it does forcefully declare that a contractor will be paid all such CSCs “associated with [its] self-determination contract.” 25 U.S.C. § 450j-1(d)(2). The ISDA does not direct IHS to borrow from the OMB indirect cost rate system to calculate administrative CSCs, yet every IHS Circular commands this method be used. And, as the Tenth Circuit concluded, that method, roundly condemned by Congress in the 1988 Amendments, is faulty. Ramah I, 112 F.3d at 1462-1463. This conclusion is true because (as Defendants admit, Opp. at 22) no matter what type of OMB cost-accounting method a contractor uses, the chosen method will always assign to every grant or contract a theoretical share of indirect costs – even though a particular grant or contract in fact contributes no such costs. By using the OMB method in this manner, IHS’s statutory responsibility actually to pay full administrative CSCs is unlawfully diluted.

That is the law of this Circuit, and that is the law that must inform whether to certify a class claim against IHS that is identical to the Ramah class claim against the BIA. So understood, all the various perambulations dwelled upon by the Defendants (such as fixed-with-carry-forward rates; provisional-final rates; varying direct cost bases; overrecoveries; underrecoveries; and so forth, see Opp. at 44-46), are irrelevant distractions from the matter at hand. They are differences that make

no difference to liability, as became perfectly clear in the Ramah litigation. For this reason, the miscalculated rate claim is just as appropriate for class treatment under Rule 23 as the shortfall claim.

Commonality is present because all Tribal contractors with OMB accounting rates (90% of the class, Pl. Class Mem. at 19), were required to use those rates to calculate their administrative CSCs. Id. 23 n.34 (quoting depositions of Black and Demaray). Unable to contest this admitted common fact, Defendants are reduced to (1) attacking the Pueblo as having a claim whose quantification is colorfully “shrouded in mystery” because the Pueblo could explain its methodology in its deposition (Pl. Exh. 61, Depo. of B. Pinto at 54-62), but could not in discovery locate its original 5-year old damage computations (Opp. at 42-43); and (2) an exegegis on indirect cost methods (complete with pie charts) intended to demonstrate quantification differences and problems (Opp. at 44-46). But these are damages issues that are easily addressed later on, and (as reflected in Pl. Exh. 60 (Ramah Orders and related affidavit)) have already twice been proven in Ramah to be manageable on a class basis. Defendants’ insistence that the Tenth Circuit’s Ramah I decision “is no longer good law” (Opp. at 43), or that the Pueblo’s claim is barred by “waiver” because it (like all other class members) did not appeal IHS’s methodology (Opp. at 8-9), only provides two more predominant issues that support treatment of the claim on a class-wide basis.

Turning to typicality, Defendants assert that the Pueblo “did not sufficiently present [its rate] claims” (Opp. at 55, citing to 7 n.5), but Defendants are wrong that missing damage calculations affect this Court’s jurisdiction. They assert the Pueblo did not have an indirect cost rate after 2003, id., although the representative years and claims all arise in earlier years (and notwithstanding that IHS Circulars permit use of three-year old rates, e.g. Pl. Exh. 8, IHS Cir. 2004-03, at 9). They seek

to malign the Pueblo (Opp. at 55-56) for the internal accounting problems partly caused by the Defendants' historic underfunding of CSCs, and by the National Business Center's compounding adjustments that produced a "death-spiral" for Zuni and many other contractors. Pl. Exh. 62, Bleakman Depo. at 172. How these issues make Zuni atypical in any way that is relevant to the actual claims presented is never explained. In other respects (adequacy, predominance and superiority), Defendants make no additional points focused on the miscalculated rate claims.

F. The Defendants' Critique of Mr. Miller and the Sonosky Firm is Ill-Considered.

Defendants suggest the Court should hesitate to appoint the Pueblo's chosen counsel as class counsel because of the firm's prior representation of the plaintiffs in the class phase of the Cherokee litigation. Opp. at 62. This makes no sense. Once class certification was denied, the plaintiffs in Cherokee I elected to focus their appeal on their own claims, recognizing that a loss on appeal, as they ultimately suffered (before Supreme Court review), would in that manner not bind the class. That was a decision that protected the class, rather than harmed it.²⁹

Equally ill-considered is the suggestion (Opp. at 62-63) that the Court should consider the fact that last year unsuccessful intervenors (now Rule 23(g) "applicants") criticized the Pueblo's counsel in a motion this Court firmly denied. Mem. Op. and Order on Motions Relating to Intervention (Dkt. No. 145) (also denying as moot Plaintiff's motion to strike sealed materials). That unfortunate matter is closed and does not warrant being reopened.³⁰

²⁹ Defendants' discussion of Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001) (Opp. at 32-36), ignores the Pueblo's lengthy analysis of that decision. See Pl. Class. Mem. at 58-64.

³⁰ Rule 23(g) Applicant Michael Gross' Reply Memorandum filed October 10, 2006 (Dkt. No. ____), continues Mr. Gross's pattern of ad hominem attacks against the Pueblo's counsel. Unless the Court invites a response, neither the attacks nor the false statements that accompany them warrant further comment. Suffice it to say, Tunica counsel and

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's Opening Memorandum at Dkt. No. 281, Plaintiff's Motion for Class Certification and for Approval of Class Notice (Dkt. No. 280) should be granted.

Respectfully submitted this 10th day of October 2006.

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the Pueblo's counsel conceive of these cases differently and they have pursued different approaches for litigating them. Mem. Op. and Order on Motions Relating to Intervention at 10 (Dkt. No. 145). Mr. Gross is free to continue pursuing his preferred approach in Tunica, but he has established no basis for his appointment here.

CERTIFICATE OF SERVICE

I hereby certify that I served, or caused to be served by means as set forth below, a true and correct copy of the foregoing to the following attorneys this 10th day of October, 2006:

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