

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NEZ PERCE TRIBE, *et al.*,)
)
Plaintiffs,)
)
v.)
)
)
DIRK KEMPTHORNE,)
SECRETARY OF THE INTERIOR, *et al.*,)
)
Defendants.)
_____)

Case No. 06cv02239-JR

**Electronically Filed on
September 26, 2008**

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION REGARDING NOTICE TO
PUTATIVE CLASS MEMBERS AND PERMISSIVE JOINDER BEFORE CLASS
CERTIFICATION RULING, AND IN OPPOSITION TO DEFENDANTS' RESPONSE**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THIS COURT HAS DISCRETION TO DEFER ITS RULING ON CLASS CERTIFICATION	2
II. DEFERRING THE CLASS RULING HERE FOR A SHORT TIME IS APPROPRIATE AND REASONABLE	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 2, 4, 5

Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1996) (*en banc*),
cert. denied, 525 U.S. 1019 (1998) 3

Bonilla v. Las Vegas Cigar Co., 61 F.Supp.2d 1129 (D. Nev. 1999) 7

Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983) 2

Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002) 5

Deposit Guaranty Nat’l Bank v. Roper, 445 U.S. 326, (1980) 4

Hoffmann-LaRouche, Inc. v. Sperling, 493 U.S. 165 (1989) 6, 7

McNeil v. District of Columbia, 1999 WL 571004 (D.D.C. Aug. 5, 1999) 8

Reed v. State Farm Mut. Auto. Ins. Co., 2008 WL 1777487 (D.Colo. Apr. 16, 2008) 3-4

Rodriguez v. Banco Central, 790 F.2d 172 (1st Cir. 1986) 7

Ross v. Warner, 80 F.R.D. 88 (S.D.N.Y. 1978) 6

Sorenson v. CHT Corp., 2004 WL 442638 (N.D. Ill Mar. 10, 2004) 5

Stanich v. Travelers Indemnity Co., 249 F.R.D. 506 (N.D. Ohio 2008) 7

COURT RULES

Fed. R. Civ. P. 23 *passim*

TREATISES AND LAW REVIEW ARTICLES

Alba Conte & Herbert Newberg, *Newberg on Class Actions* (4th ed.) *passim*

Marjorie A. Silver, *Giving Notice: An Argument for Notification of Putative Plaintiffs in Complex Litigation*, 66 Wash. L. Rev. 775 (1991) 6

INTRODUCTION

On August 8, 2008, Plaintiffs moved this Court for an Order granting leave for Plaintiffs' counsel to send a court-approved Notice to members of the putative class of plaintiffs, and for those members to have a reasonable opportunity – Plaintiffs suggested sixty (60) days -- to permissively join this action before the Court rules on Plaintiffs' pending motion for class action certification. (Dkt. 73); *see also* Dkt. 53 (class certification motion).

On September 9, 2008, the parties filed a Joint Stipulation as to Proposed Notice to the Putative Class along with a Proposed Notice for the Court's approval. (Dkt.76). As stated in the Joint Stipulation, while the parties were able to agree on the form and content of the Proposed Notice, they were unable to agree on the related issue of the impact, if any, of the Notice on the timing of the Court's ruling on class certification. The Joint Stipulation stated the parties' intent to brief this remaining issue.

On September 16, 2008, Defendants filed their Response to Plaintiffs' Motion (Dkt. 78). Defendants oppose Plaintiffs' request that members of the putative class have a reasonable opportunity after Notice is sent and before a ruling on class certification to permissively join this action as plaintiffs. In their opposition, Defendants make two arguments: 1) that such an opportunity amounts to an unauthorized or improper extension of any applicable statute of limitations; and, 2) that the absence of such an opportunity will not prejudice the putative class members. Plaintiffs now reply to these arguments and urge the Court to reject them for the following reasons.

ARGUMENT

I. THIS COURT HAS DISCRETION TO DEFER ITS RULING ON CLASS CERTIFICATION

Defendants correctly state the general rule that the commencement of a class action tolls the running of applicable statutes of limitations until such time as class certification might be denied or the class might be decertified. *See* Defs' Response, at 2; *see also* 1 Alba Conte & Herbert Newberg, Newberg on Class Actions § 1:3 (4th ed.), *citing, inter alia, American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983). Plaintiffs agree with Defendants that at this time there is no direct statute of limitations issue pending before the Court. *See* Defs' Response, at 1 fn.1. However, Defendants certainly have indicated their intentions to raise such limitations issues. *See, e.g.,* Answer to First Amended Complaint, at 30 (Dkt. 28); Defs' Motion to Dismiss, at 38 fn. 23 (Dkt.58) ("In the event that any of Plaintiffs can and do state a cognizable trust accounting claim under the APA after the Court has ruled on this motion, Defendants intend to bring a dispositive motion based on the statute of limitations and any other applicable defenses against that claim at that time.").

Notwithstanding the well-established tolling rule, courts routinely and frequently defer class certification rulings pending certain events such as discovery on class issues, curing class certification requirement deficiencies, decisions on motions to dismiss, merits discovery, and even merits decisions. *See generally* 3 Newberg on Class Actions § 7:16; *accord* § 7:36 (class rulings may be deferred for many different reasons). Class ruling deferrals pending these events may be instigated by motion of a party or by the court *sua sponte*. *Id.* at § 7:16.

Without authority, Defendants argue that such deferrals are unauthorized "by-pass[es] [of]

the limitations period . . . and [improper extensions] of the . . . tolling period through non-action.” Defs’ Response, at 2 (footnote omitted). This argument ignores the overwhelming authority, as shown above, for deferrals. To the extent that these deferrals “continue” limitations period tollings that are started by the filing of class actions, such continuances are well-within with the tolling doctrine itself. *Compare, e.g., Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1380-84 (11th Cir. 1996) (*en banc*), *cert. denied*, 525 U.S. 1019 (1998) (in ADEA action, discussing varying positions on whether, after class certification has been denied, statute of limitations period nevertheless continues to toll due to reconsideration and appeal possibilities).

Deferrals of class rulings likewise of course are consistent with class certification principles as codified in the Federal Rules of Civil Procedure. The present Rule 23 requires courts to make class rulings not at any specified point in the litigation, but only “at an early practicable time.” Fed. R. Civ. P. 23(c)(1)(A). According to the Rules’ Advisory Committee Notes, this language, in effect since 2003, specifically is intended to allow courts time to obtain sufficient information to make certification decisions. *See* 3 Newberg on Class Actions § 7:12. Apart from local rules such as LCvR 23.1(b), specifying a time by which plaintiffs must move for class certification, “there are no formal procedures or timetables leading to an initial class determination.” 3 Newberg on Class Actions § 7:5. Instead, courts have broad discretion to decide when to determine class certification. *Id.* at § 7:6.

Summarizing its understanding of this solid background, one court recently has stated aptly that, “caselaw recognizes that the time frame for determining class certification under Rule 23 must be flexible. . . .” *Reed v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 1777487, at *2 (D.Colo. Apr. 16, 2008).

[A]mple case law establishes that the Court retains discretion to structure the timing of the class certification decision. The rule does not prohibit delaying class certification, even up to the time of judgment on the merits.

[D]elay of the decision may be justified based on the circumstances of a particular case. As such, the discretion in this area remains with the Court.

2008 WL 1777487, at *3 (citations omitted). As Plaintiffs show next, this case presents circumstances warranting deferral of the class ruling until members have had a reasonable opportunity to respond to the Joint Proposed Notice.

II. DEFERRING THE CLASS RULING HERE FOR A SHORT TIME IS APPROPRIATE AND REASONABLE

Class actions are a procedural device. *See generally* 1 Newberg on Class Actions § 1:1. They are one of many procedures such as joinder, interpleader, intervention, and substitution, that address issues of who are proper parties to litigation. *Id.* at § 1.11.

Among proper party procedures, somewhat unique to class actions, of course, is the notion of “absent parties,” also known at the pre-certification stage as “putative class members.” Authorities have noted that the status of putative class members generally is difficult to define. *See, e.g.,* 1 Newberg on Class Actions § 1:4; 5 Newberg on Class Actions § 16:1, *citing, inter alia, Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 343 n.3 (1980) (Stevens, J., concurring).

It nevertheless is clear that putative class members have certain interests and rights. *See generally* 1 Newberg on Class Actions § 1:3; 5 Newberg on Class Actions § 16:1. An important right is their entitlement to the limitations period tolling effectuated by the class action filing. 3 Newberg on Class Actions § 7:29, *citing American Pipe & Const. Co. v. Utah*. Thus, the general rule is that “a class complaint is presumed to state a class action for purposes of tolling the statute of limitations for absent class members, [even] before a class ruling, [and] even if the class is

ultimately denied.” 3 Newberg on Class Actions § 7:28 (footnote omitted).

Defendants’ points, *see* Defs’ Response, at 4, that putative members could or should have filed their own actions, or joined or intervened in this action, thus are irrelevant because putative members are entitled to reasonable reliance on the class action mechanism and the tolling doctrine; they are justified in not taking action regarding their individual claims while a motion for class certification is pending. *See* 1 Newberg on Class Actions § 1:3; 5 Newberg on Class Actions § 16:6 (*citing, inter alia, American Pipe* and discussing that because the filing of a class complaint tolls the statute of limitations for the class, class members may simply await the outcome of the suit; formal intervention is not necessary, and may be of right only if putative class members’ interests are not adequately represented by existing parties).

The rights of putative class members are enforced not just by class counsel and the named representatives, but also by the court. Indeed, “the court is ultimately in charge of protecting the rights of absent class members.” 1 Newberg on Class Actions § 1:3. Thus, when contemplating a denial of class certification, a court has its “own obligation to consider the interests of absent class members” *Sorenson v. CHT Corp.*, 2004 WL 442638, at *12 (N.D. Ill Mar. 10, 2004) (emphasis added). One “thing they may need protection against . . . is the expiration of the statute of limitations on . . . [their] claims without their realizing it.” *Culver v. City of Milwaukee*, 277 F.3d 908, 914-15 (7th Cir. 2002) (discussing situations in addition to those expressly provided for by Rule 23(e) – settlement, dismissal, or compromise – where notice to putative class members is appropriate “if it seems clear that otherwise their interests would be harmed.”).

This is precisely where Rule 23(d)’s catch-all provision for appropriate notice at any stage of a class action, even before class ruling, applies. Fed. R. Civ. P. 23(d)(1)(B)(I); 3 Newberg on

Class Actions § 8:16. Rule 23(d), on which Plaintiffs based their Notice and Joinder Motion, codifies the inherent judicial power, when the circumstances warrant it, to devise and issue appropriate orders necessary to protect all class members, including putative ones. *See* 3 Newberg on Class Actions § 8:15. As one commentator has stated in advocating for notice to putative parties outside the class action context:

In *Hoffman-LaRouche v. Sperling*, the Supreme Court allowed the umpire to notify some sleeping players that the game was underway. It made good sense for the Court to do so. Although due process does not require that persons potentially interested in complex litigation other than Rule 23 class actions receive such notice, notice fosters important public policy interests and is suggested and legitimated by first amendment values. The Article III judge does not overstep constitutional bounds by apprising such persons that litigation they might want to join is proceeding. Not only is such power consistent with the evolving tools of judicial management of litigation, the absence of such power in complex litigation undermines efforts to improve the efficacy, efficiency and accessibility of the judicial system.

Marjorie A. Silver, *Giving Notice: An Argument for Notification of Putative Plaintiffs in Complex Litigation*, 66 Wash. L. Rev. 775, 808 (1991). Along these same lines, Rule 23(d) notice serves as an important management tool and means for bolstering due process. *See* 3 Newberg on Class Actions § 8:15. That is why it often is used to give notice to putative class members and to supervise entities seeking to act on behalf of putative class members, including a party attempting to give them notice of their rights. *See* Plaintiffs' Memorandum In Support of Their Motion regarding Notice to Members of the Putative Class and An Opportunity for the Putative Class Members to Permissively Join this Action Before a Ruling on Class Certification, at 9-10, *citing, inter alia, Ross v. Warner*, 80 F.R.D. 88 (S.D.N.Y. 1978).

Nevertheless, in recognition of the interests of all involved in the present case, Plaintiffs acknowledge that the notice that they seek here needs restrictions including "an end in site," which

is why they proposed a date certain by which the Court will rule on class certification. For example, where courts determine on reconsideration that a class should be decertified “courts have with increasing frequency afforded absent class members, after notice, a fixed reasonable period of time to intervene . . .” 3 Newberg on Class Actions § 7:47. Similarly, in FLSA cases, where courts have discretion to effect notice to unnamed plaintiffs for purposes of class certification, courts control the notice procedure and establish a cutoff date for opting in, which leads to orderly joinder of the parties. *See Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1137 (D. Nev. 1999), *citing, inter alia, Hoffmann-LaRouche, Inc. v. Sperling*, 493 U.S. 165, 170-72 (1989).

Accordingly, Plaintiffs proposed such a cut-off date after a reasonable period of time. Plaintiffs suggested sixty (60) days based on their understanding of other similar time periods during which a response to notice is required or expected. For example, the typical time period in which putative class members must respond to Rule 23(b)(3) notice is 30 to 60 days. *See* 3 Newberg on Class Actions § 8:37; *see also Stanich v. Travelers Indemnity Co.*, 249 F.R.D. 506, 529-30 (N.D. Ohio 2008) (deferring final ruling on class certification and allowing plaintiffs 30 days to identify proper subclass representative, and allowing parties 45 days from date of such identification to conduct discovery on representative’s adequacy).¹

Finally, allowing the putative members a reasonable opportunity to join before a ruling on class certification would not in this case prejudice Defendants. *See Rodriguez v. Banco Central*, 790 F.2d 172, 179-80 (1st Cir. 1986) (fact that court’s deferral of class ruling pending trial of named

¹ Plaintiffs’ 60-day suggestion also takes into account the time needed for tribes, as sovereigns, to respond to the notice. Presumably, Defendants, as sovereign officials, will likewise propose a reasonable time period within which they must respond to any motions for joinder by tribes in these proceedings.

plaintiff's test case results in tolling of statute of limitations for putative class members does not cause defendants irreparable harm because defendants were fully apprised of scope of potential claims by filing of class complaint); *see also McNeil v. District of Columbia*, 1999 WL 571004, at *2 (D.D.C. Aug. 5, 1999) (in FLSA action, where plaintiffs sought to give notice to other similarly situated persons to allow them to join the lawsuit, the court noted the benefits entailed by, not prejudice because of, a "successful judicially supervised effort to locate potential claimants").

CONCLUSION

For the reasons stated above and in Plaintiffs' Memorandum In Support of Their Motion regarding Notice to Members of the Putative Class and An Opportunity for the Putative Class Members to Permissively Join this Action Before a Ruling on Class Certification, Plaintiffs' Motion should be granted.

DATED this 26th day of September, 2008

Respectfully submitted,

/s/ Melody L. McCoy

MELODY L. MCCOY, USDC Bar. No. CO0043
DONALD R. WHARTON
DAVID L. GOVER
DAWN S. BAUM
MARK C. TILDEN
JOHN E. ECHOHAWK
WALTER R. ECHO-HAWK, JR.
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel (303) 447-8760
Fax (303) 443-7776
E-mail mmccoy@narf.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2008, a true and correct copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION REGARDING NOTICE TO PUTATIVE CLASS MEMBERS AND PERMISSIVE JOINDER BEFORE CLASS CERTIFICATION RULING, AND IN OPPOSITION TO DEFENDANTS' RESPONSE, was served by Electronic Case Filing or by regular first class U.S. mail, postage pre-paid, on the following counsel:

E. KENNETH STEGEBY
ANTHONY P. HOANG
KEVIN J. LARSEN
MAUREEN RUDOLPH
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Tel (202) 616-4119
Tel (202) 305-0241
Tel (202) 305-0479
Fax (202) 353-2021

JOHN H. MARTIN
U.S. Department of Justice
Natural Resources Section
1961 Stout St., Eighth Floor
Denver, CO 80294
john.h.martin@usdoj.gov
Tel: (303) 844-1383
Fax (303) 844-1350

Attorneys for Defendants

OF COUNSEL:

PAUL SMYTH
ELISABETH BRANDON
THOMAS BARTMAN
GLADYS I. COHOCARI
SHANI N. WALKER
Office of the Solicitor
U.S. Department of the Interior
Washington, DC 20240

TERESA DAWSON
Office of the Chief Counsel
Financial Management Service
U.S. Department of the Treasury
Washington, DC 20227

/s/ Melody L. McCoy
MELODY L. MCCOY, USDC Bar. No. CO0043
Attorney for Plaintiffs