

INTERIOR BOARD OF CONTRACT APPEALS

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| ARCTIC SLOPE NATIVE ASSOCIATION, Ltd. |) | |
| |) | |
| |) | |
| vs. |) | IBCA Nos. 4794 through 4803/06 |
| |) | |
| MICHAEL O. LEAVITT, SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; <i>et al</i> |) | |
| |) | |
| Appellees. |) | |
| |) | |

AMENDMENT TO COMPLAINT

Contractor-Appellant, ARCTIC SLOPE NATIVE ASSOCIATION, LTD. (ASNA), by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby amends its Complaint in this matter to add the following allegations:

* * *

**THIRD CAUSE OF ACTION
(Breach of Good Faith and Fair Dealing - All Claims)**

- 34. ASNA realleges the preceding paragraphs of this Complaint as if fully set forth herein.
- 35. The Secretary has a duty of good faith and fair dealing in all his contracts.
- 36. In entering into the contracts described in this Complaint, the Secretary acted both as a contracting party and as a representative of the United States which owes a trust responsibility to all the federally recognized Tribes including ASNA and the Tribes and Alaska Native people on whose behalf ASNA contracts under the ISDA. 25 U.S.C. § 458aaa-6(g), 42 C.F.R. § 137.2(f) (“The Secretary is prohibited from waiving, modifying, or diminishing in any

way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.”); 25 U.S.C. § 458aaa-14(b), 42 C.F.R. § 137.2(e) (“Nothing in this subchapter shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.”). See also 25 U.S.C. § 450l(c) (sec. 1(d)(1)(B)) (noting the “trust responsibility of the United States to the tribe(s) or individual Indians”); 25 U.S.C. § 450n(2) (noting the “trust responsibility of the United States with respect to Indian people”); 25 U.S.C. § 458aaa-15(a) (applying Section 450(n)(2) to Title V). At all relevant times the Secretary as a government contracting party and trustee has possessed superior knowledge regarding IHS’s appropriations, including IHS’s appropriations available to pay CSCs.

37. Based upon the allegations set forth herein, including in par. 39 of this Complaint, the Secretary had a heightened duty to deal fairly and in good faith with ASNA. This heightened duty is supported by the express terms of the ISDA. 25 U.S.C. § 458aaa-3(a), 42 C.F.R. § 137.3(b) (“The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government’s trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.”); 25 U.S.C. § 458aaa-6(e) and 42 C.F.R. § 137.2(h) (“In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this part in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000.”).

See also 25 U.S.C. §§ 450l(c) (sec. 1(d)(1)(B)) and (sec. 1(d)(2)) (“The Secretary shall act in good faith in upholding [the U.S.’s] trust responsibility [to tribe(s) or individual Indians]” and “the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act”).

38. The Secretary deprived ASNA and its constituent Tribes of the benefits of the contract and the ISDA in a way that was improper and unfair. Thus, the Secretary has breached his duty of good faith and fair dealing, by, among other things:


- (a) failing each year to seek and to secure from Congress additional funds to meet the Secretary’s contract obligations;
- (b) representing to ASNA each year that additional funds were not legally available to pay contract support costs in each of the covered years, when in fact additional funds were available;
- (c) representing to ASNA each year that additional funds were not legally available to pay contract support costs in each of the covered years, when in fact, the Secretary knew that his representation of the law was not accurate;
- (d) failing annually to report to Congress (as directed in the ISDA, 25 U.S.C. § 450j-1(c); 25 U.S.C. § 458aaa-12) regarding the full amount of appropriations needed to meet ASNA’s contract support cost requirements, or the underpayment of the ASNA’s contract support cost requirements;
- (e) requiring that each year ASNA’s annual funding agreement state a smaller amount than was required to meet ASNA’s contract support cost requirements, and failing to add to said agreement ASNA’s full contract support cost requirements;
- (f) requiring ASNA to abide by the IHS CSC Circulars, both in the determination of contract support cost requirements and in the allocation of agency appropriations to pay such requirements;
- (g) failing to negotiate at arm’s length, in a government-to-government relationship with ASNA; and
- (h) failing to share with ASNA the Secretary’s superior knowledge regarding IHS’s annual appropriation.

39. The Secretary is liable in damages to ASNA for the foregoing contract breaches, in amounts equal to the amounts alleged in the First and Second Causes of Action in this Complaint.

* * *

Respectfully submitted this 13th day of December 2006.

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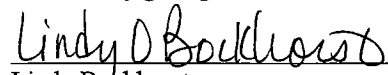
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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by electronic mail, to the following parties of record this 13th day of December 2006:

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