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March 12, 2007

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1800 M Street, N.W., 6th Floor
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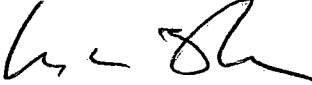
Re: Appeal of the Arctic Slope Native Association, Ltd.;
CBCA 190-ISDA through 297-ISDA (IBCA Nos.
4794-4803/06)

Dear Ms. Jones:

I enclose for filing an original and one copy of the Notice of Additional Authority in Support of Appellant's Motion for Partial Summary Judgment and accompanying Exhibit No. 24. Additionally we are enclosing one extra copy of the Notice of Additional Authority so that it can be conformed and returned to us.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP


Donald J. Simon
Lloyd Benton Miller
Melanie Baca Osborne

cc: Sean Dooley (w/ enclosure)
Judge Steel (w/ enclosure and GAO Report)

Enclosures: Notice of Additional Authority (original plus 2)
Exhibit No. 24

CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)
LTD.,)
)
 Appellant,)
 vs.) CBCA 190-ISDA through 297-ISDA
) (BCA 4794-4803-2006)
MICHAEL O. LEAVITT, SECRETARY)
)
U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, *et al.*,)
)
 Appellees.)
_____)

**NOTICE OF ADDITIONAL AUTHORITY IN SUPPORT OF
APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Appellant Arctic Slope Native Association hereby gives notice of additional authority in connection with the recently concluded hearing held in this matter on February 28, 2007.

1. During the February 28, 2007, hearing, the Board asked what a “declination” decision looks like. Attached hereto as ASNA’s Exhibit No. 24, is a copy of a “declination” letter issued November 29, 1995, by then Area Director James Floyd to the Shoshone-Bannock Tribes. The letter is a part of the public record in the Shoshone-Bannock litigation referenced in ASNA’s opening brief, and is typical of an IHS “declination” letter.

2. During the February 28, 2007 hearing, ASNA counsel Lloyd Miller discussed a recently issued General Accounting Office Report. The Report is as follows: JUDGMENT FUND: TREASURY’S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT (GAO April 2004). The Report is available on the internet at the following site: <http://www.gao.gov/new.items/d04481.pdf>. (A copy accompanies Presiding Judge Steel’s courtesy copy of this filing.) The Report includes a discussion of the low agency

repayment record (covering only “one of every five dollars”), id. at 9, the lack of reimbursement “deadlines,” id. at 10, and the fact “that Treasury has very little authority to enforce reimbursement,” id. at 11. To date neither IHS nor the BIA has ever reimbursed any of the judgments awarded in the Ramah Navajo Chapter, et al. litigation (BIA) nor the Cherokee litigation (IHS), and neither agency has ever requested approval from Congress to reprogram its funds to do so.

3. The CBCA has recently ruled that all decisions from the prior Boards, including the “board[] of contract appeals of the Department[] of ... Interior” “shall be binding as precedent in this Board.” Business Mgt. Research Assocs., Inc. v. GSA, CBCA 464, slip op. at 2 (Jan. 18, 2007) (per curiam). This ruling is directly relevant to all of Appellant’s arguments that rely in whole or in part on prior decisions of the Interior Board of Contract Appeals.

Respectfully submitted this 12th day of March 2007.

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By: 

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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 first class mail to the following parties of record this 12th day of March 2007:

Sean Dooley
Senior Attorney, Public Health Division
Office of the General Counsel
Room 4A-37 Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20857





DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

NOV 29 1995

PORTLAND AREA
INDIAN HEALTH SERVICE
FEDERAL BLDG., ROOM 475
1220 S.W. 3RD AVENUE
PORTLAND, OREGON 97204

Delbert Farmer, Chairman
The Shoshone-Bannock Tribes
Fort Hall Business Council
P. O. Box 306
Fort Hall, Idaho 83203

Re: Partial Declination of the
Shoshone-Bannock Tribes' P.L. 93-638
Proposal Dated October 23, 1995

Dear Chairman Farmer:

This letter is to notify you of the Portland Area Indian Health Service's (PAIHS) final decision regarding the Shoshone-Bannock Tribes' P.L. 93-638 contract proposal dated October 23, 1995.

The Tribes have proposed to contract for the Indian Health Service (IHS) Headquarters and Area Shares related to and supportive of health service delivery programs which are currently operated by the Tribes under their Indian Self-Determination Act (ISDA) Contract with IHS. Those functions, activities, services and programs are identified in the Portland Area Functional Statements for alcohol and substance abuse, community health representatives, maternal and child health, mental health and social services, health education and HIV/AIDS services.

In addition to the foregoing, the Tribes have proposed that funds from the administrative budget of the Fort Hall Service Unit be transferred to them. The Tribes have proposed an amount that they feel is commensurate with the program responsibilities assumed by them when they contracted patient care programs under the ISDA in the past. The Tribes' proposal estimates this amount to be 33.34% of the service unit's administration budget. The Tribes' proposal for administrative funds also asks for 27.936% of the quality assurance (QA) position located at the service unit.

The total amount of funds requested in the Tribes' proposal for the Area and Service Unit, excluding contract support costs¹ is

¹With respect to Contract Support Costs, the Tribes have agreed to inclusion of the following language in the contract:

The Tribe shall be entitled to contract support funds to the full

\$199,634. The total amount of funds requested in the Tribes' proposal for Headquarters, excluding contract support costs is \$66,570.

The Tribes have asked that 100% of the funds identified in their proposal be made available immediately.

Our reasons for declining to award the amount proposed by the Tribes for the Area and Service Unit follow.

A. The contracts proposed by the Tribes are in excess of the applicable funding level for the contract as determined under section 106(a).

In determining the amounts available for contracting under 106(a)(1) the Tribes take the amount budgeted for a particular line², subtracts the Title III residual and the amount awarded to Title III compact tribes from that amount and multiplies that amount by 9.3985% (its share of the Portland Area User Population) to arrive at their Tribal share. In our opinion this methodology overstates the Tribes' 106(a)(1) amount. Pursuant to section 102(a)(2)(D) we decline to contract in the amount proposed by the Tribes.

The 106(a)(1) amount should be computed in the following manner. The amount budgeted by PAIHS for a particular line item should be reduced by: the Title III residual, the amount awarded to Title III Tribes in compacts, the amount retained to provide services to Tribes who contract under Title I of the ISDA, and by the amount retained to avoid adverse impact to non-contracting Tribes. The remainder is the amount available for contracting under Title I. A Tribe's share is arrived at by allocating 70% of the amount available for contracting on the basis of the Tribe's percentage of the Portland Area's active user population. The remaining 30% is divided equally amongst the 31 non-compacting Tribes in the Portland Area. This methodology which was developed in consultation with the Tribes, pursuant to section 105(I)(1) of the ISDA, recognizes that the work performed

extent specified in section 106 (a) (2) of the Act and related provisions. The Tribe's request for contract support funds will be placed on the list maintained under ISDM 92-2 or its successor. An estimate of additional contract support attributable to new and expanded programs, including Area and Headquarters tribal shares shall be separately negotiated with IHS.

²The source document for amounts budgeted to particular lines is, The Portland Area Indian Health Service Draft, "Title I Area Shares Distribution Methodology--Amounts Available Worksheet."

by the Area for a Tribe is not always related to the Tribe's size. It also recognizes that the area has to retain funds to provide services to Tribes that choose to contract under the ISDA and to avoid adversely impacting Tribes who choose not to contract. This methodology has been used to determine the Shoshone-Bannock Tribes' share for those items in the proposal which fall under the Area Administrative Share and Direct Services headings.

The Tribes' have requested administrative support at 15% for both Area Administrative Shares and Direct Services. An administrative support amount is not allowable for Direct Service activities assumed by the Tribes because, staff/program support for administration of direct services activities is provided through the Alcohol (ASAP) and Maternal and Child Health (MCH) line items under Hospitals and Clinics (H&C) and Direct Operations. Both ASAP and MCH receive administrative support at 15%. Pursuant to section 102(a)(2)(D) we decline to contract in the amount proposed by the Tribes.

The 106(a) amount for the Ft. Hall Service Unit administrative shares, related to program responsibilities transferred to the Tribes when the patient care programs were contracted in the past and for QA activities not related to the PHN Program is 0. The patient care programs referred to in the Tribes' proposal were contracted more than 10 years ago. At the time those programs were contracted amounts for program administration were awarded. The current Service Unit administrative staff is part of the staffing package that was determined to be necessary for the administration of the new clinic facility which opened October 9, 1990. This staff has no administrative responsibility for the patient care programs previously contracted, consequently there is no 106(a) amount for services or functions related to the administration of those programs. Likewise, there has been no historical QA activity related to the Tribes' contracted programs, with the exception of the PHN Program which has been contracted by the Tribes. Pursuant to section 102(a)(2)(D) we decline to contract in the amount proposed by the Tribes.

B. Release of 100% of Area Shares will adversely impact other Tribes in the Portland Area.

The Tribe has requested that all negotiated Area Shares be released upon Award of the contract. We decline to do so. Again the lengthy tribal consultation process that began in March of 1995 has resulted in the development of a Portland Area "release plan". The schedule for release of available Area Office shares is January 1, 1996, - 20%; October 1, 1996, - 58%, and the

remaining in FY 1997 and FY 1998. The Portland Area cannot release all funds to the Shoshone-Bannock Tribe or any other Tribe applying for its Area shares in FY 1996. The total amount of Area shares funds currently requested in P.L. 93-638 proposals or identified in Letters of Intent exceeds 2.4 million. Many more proposals are expected after the beginning of the calendar year. The Portland Area cannot reorganize quickly enough in FY 1996 to award each Tribe full Area Office shares.

One of the most important consensus items to come out of the Tribal consultation process was that a release plan is preferable and ultimately more equitable than awarding full amounts on a "first come, first serve basis". If this were the practice, the Shoshone-Bannock Tribes and other Tribes might receive full funding, but at some point there would be no funds available for award to other other Tribes. If first come, first serve were implemented it would precipitate a rush of applications and many Tribes would be adversely affected. The remaining Title I Tribes have expressed, through the consultation process, their desire for a release plan. They have been assured that PAIFS will not employ a first come, first serve approach.

Displayed below is the Tribes' proposal for distribution of tribal shares at the Area and Service Unit level and amounts actually awarded by the Area. The amounts awarded are for the period of performance, November 17, 1995 to September 30, 1996.

Area Administrative Shares

LINE		Proposed	Awarded
17	MHC	8,209	640
18	AIDS	8,786	406
21	PEN	2,011	165
22	H.Ed	660	61
24	ASAP	19,378	1,823
25	CHR	0	0
Nutr.			
41	MH	7,354	680
	ALC.		
43	CDMIS	0	0
51	52 PHN	6,346	417
54	55 H.E.D.	4,256	275
	Dir. Ops.		
71	MCH	580	54
74	MH	1,277	118
75	ASAP	6,876	343

Direct Services

44	45	Youth Treatment	0	0
45	46	Womens Trant.	3,668	2,385
46	47	FAS	5,270	3,694
47	48	Counselor Cert.	9,104	6,382
85	86	High Risk CB.	21,501	15,072

Exhibit 24
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Page -5- SHOSHONE-BANNOCK TRIBES' DECLINATION LETTER

Administrative support @ 15% 15,793' 747'

Service Unit Administration Funds

	33.34% X 196,032	65,357	0
	27.69% X 45,390	<u>12,568</u>	<u>0</u>
Total		\$199,634	\$33,462

Our reasons for declining the amount proposed by the Tribes for Headquarters' (HQ) shares follow.

The Tribes have proposed to take their share of a number of functions/activities which are fully detailed in the Annual Funding Agreement that is being sent to you today under separate cover. Because, with the exception of lines 17, 19, and 43, the Tribes agree with the methodology used by HQ to determine the Tribes' 106(a)(1) amount and the awards where HQ has decided to make an award are for the full amount of the 106(a)(1) amount, we will limit our discussion to lines 17, 19 and 43, and to those lines where HQ makes no award.

The methodology for determining the Tribes' 106(a)(1) amount for lines 17 and 19 was to use the average cost per nurse multiplied by the number of nurses in the 638 contract. This figure is more accurate than the one used in the Tribes proposal. For line 17 the 106(a)(1) amount using this methodology is \$3,380. None of the \$3,380 identified for line 17 is currently available for funding as an award of these funds would adversely affect other tribes and would therefore be in violation of Section 105(I) of the ISDA, and the third declination criterion in Section 102(a)(2)(C). These amounts will not be made available in FY 1996 as they are tied up in fixed costs, and other long term commitments of funds. We therefore decline to contract for \$4,040 the entire amount of the Tribes' proposal.

For line 19 the the 106(a)(1) amount using this methodology is \$1,550. None of the \$1,550 identified for line 19 is currently available for funding as an award of these funds would adversely affect other tribes and would therefore be in violation of Section 105(I) of the ISDA, and the third declination criterion in Section 102(a)(2)(C). These amounts will not be made available in FY 1996 as they are tied up in fixed costs, and other long term commitments of funds. We therefore decline to contract for \$1,860 the entire amount of the Tribes' proposal.

The methodology for determining the Tribes' 106(a)(1) amount for line 43, which relates to HQ West Administration, was to base it on the level of contracting by the Tribes and to award them their

*The Tribes proposed that they receive administrative support for both Area Administrative Shares and Direct Services.

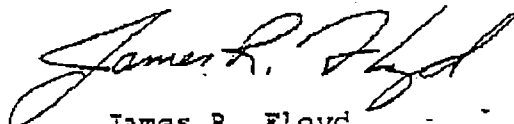
*The Area awarded administrative support for Area Administrative Shares only.

proportionate share of the HQW Administration line. This gives us a figure that is more accurate than the one used in the Tribes proposal. For line 43 the 106(a)(1) amount using this methodology is \$800. None of the \$800 identified for line 43 is currently available for funding as an award of these funds would adversely affect other tribes and would therefore be in violation of Section 105(I) of the ISDA, and the third declination criterion in Section 102(a)(2)(C). These amounts will not be made available in FY 1996 as they are tied up in fixed costs, and other long term commitments of funds. We therefore decline to contract for \$2,045 the entire amount of the Tribes' proposal.

The Tribes have proposed to contract for their 106(a)(1) amount in lines 53 (\$2,534), 81 (\$5,288), 95 (\$5,967), and 171 through 181 (\$8,683). Headquarters declines to award anything in these lines because an award of these funds would adversely affect other tribes and would therefore be in violation of Section 105(I) of the ISDA, and the third declination criterion in Section 102(a)(2)(C). These amounts will not be made available in FY 1996 as they are tied up in fixed costs, and other long term commitments of funds.

You have the right to appeal this declination decision administratively in accordance with the procedures set forth in the Indian Self-Determination Act or, alternatively, you have the right to initiate an action in Federal District Court and proceed directly to such court pursuant to section 110(a) of the Act.

Sincerely,



James R. Floyd
Director
Portland Area Indian Health Service

cc:
Director, Indian Health Service Headquarters
Director, Office of Tribal Affairs Headquarters
Director, Division of Acquisition, PAO
Assistant Regional Counsel, Region X