

**CIVILIAN BOARD OF CONTRACT APPEALS**

|   |   |   |
|---|---|---|
| ARCTIC SLOPE NATIVE ASSOCIATION,<br>LTD.,   | ) |   |
|   | ) |   |
|   | ) |   |
| Appellant,  | ) |   |
|   | ) |   |
| vs.   | ) | CBCA 190-ISDA and 289-ISDA<br>through 297-ISDA<br>(IBCA 4794-4803-2006) |
|   | ) |   |
| MICHAEL O. LEAVITT, SECRETARY<br>U.S. DEPARTMENT OF HEALTH AND<br>HUMAN SERVICES, <i>et al.</i> , | ) |   |
|   | ) |   |
|   | ) |   |
| Respondents.  | ) |   |
|   | ) |   |
| <hr style="border: 0.5px solid black;"/>  |   |   |

**APPELLANT’S REPLY TO NOTICE OF SUPPLEMENTAL AUTHORITY**

The cases cited in IHS’s latest Notice of Supplemental Authority add nothing to the matter at hand, and do not stand for the propositions for which they are offered.

*Southern Ute Indian Tribe v. Michael O. Leavitt, et al.*, No. 05-988 WJ/LAM (D.N.M. Oct. 18, 2007)(Doc. 66) concerned the propriety of certain language IHS sought to include in an ISDA annual funding agreement for fiscal year 2008 (language which as described, though never quoted, is unlike anything in ASNA’s 1996-2001 funding agreements at issue here). The Court’s opinion followed an earlier opinion rejecting as unlawful IHS’s attempt in fiscal year 2005 to decline to award any contract in response to a Tribe’s refusal to accept restrictive contract support cost payment language. *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp.2d 1245 (D.N.M. 2007).

In the dictum that IHS cites, Judge Johnson obliquely expresses skepticism about the effect of certain appropriations Act language on the government’s liability. But when Judge Johnson directly addresses the issue head-on, he is far more circumspect:

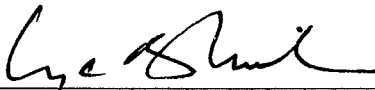
The United States Supreme Court's decision in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) suggests, as this Court has noted, that "the Government's obligation to pay CSC may be different when there are no unrestricted funds available to pay them."

*Southern Ute*, Mem. Op. at 8, n.7 (emphasis added) (quoting Judge Johnson's earlier opinion, *Southern Ute*, 497 F. Supp. at 1256. ). That is hardly a holding on the matter.

IHS's reliance on *Greenlee Construction, Inc. v. GSA*, CBCA 416 (March 6, 2007) also misses the mark. The ASNA appeal involves a tolling question. *Greenlee* does not. As ASNA's briefing has demonstrated, simply labeling a limitations provision as "jurisdictional" does not answer the tolling issue presented here, much as IHS might prefer otherwise.

Respectfully submitted this 10<sup>th</sup> day of November 2007.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

By: 

Lloyd B. Miller  
D.C. Bar No. 317131  
AK Bar No. 7906040

Peter G. Ashman, Of Counsel  
AK Bar No. 8306018

900 West Fifth Avenue, Suite 700  
Anchorage, Alaska 99501-2029  
Telephone: 907-258-6377  
Facsimile: 907-272-8332

SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY, LLP

Donald J. Simon  
D.C. Bar No. 256388

Arthur Lazarus, Jr.  
D.C. Bar No. 7682

1425 K Street, N.W., Suite 600  
Washington, D.C. 20005  
Telephone: 202-682-0240  
Facsimile: 202-682-0249

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 and first class mail to the following parties of record this 13 day of November 2007:

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

  
Lindy O Bockhorst