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No. 2590 P. 2/7



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Public Health Division
Rockville, MD 20857

April 11, 2008

Beatrice Jones
Civilian Board of Contract Appeals
1800 F Street, NW
Washington, DC 20405

Re: Appeal of the Arctic Slope Native Association, Ltd.; CBCA Nos. 190-ISDA,
CBCA 289-ISDA thru CBCA 297-ISDA

Dear Ms. Jones:

Enclosed please find Appellee's RESPONSE TO APPELLANT'S MOTION THAT
THE BOARD TAKE JUDICIAL NOTICE OF IHS's ADMISSION.

Please contact the undersigned counsel at 301.443.0405 if you have any questions or
perceive any problem.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Dooley", written over a horizontal line.

Sean Dooley
Senior Attorney, Public Health Division
Office of the General Counsel

c.c. Lloyd Benton Miller, Esq.

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THE GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALSARCTIC SLOPE NATIVE ASSOCIATION,
LTD.

Appellant,

v.

INDIAN HEALTH SERVICE; UNITED
STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Appellees.

CBCA 190-ISDA through 297-ISDA
(IBCA 4794-4803-2006)**OBJECTION TO APPELLANT'S MOTION THAT THE BOARD
TAKE JUDICIAL NOTICE OF IHS'S ADMISSION**

The Indian Health Service (IHS), objects to the above-referenced Motion filed by Appellant, Arctic Slope Native Association, Ltd. On April 8, 2008, IHS filed a withdrawal and amended pleading in *Ft. Mojave v. Leavitt*, No. CBCA 547-ISDA, which is the case referenced by Appellant in its Motion.¹

IHS objects for several reasons. First, Appellant's Motion was not filed in accordance with Board Rule 8(a), which requires that "[e]xcept for joint motions by the parties, all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally." No such discussion took place. If

¹ IHS understands that the amended pleading is opposed by *Ft. Mojave*. Such issues are not intended to be within the scope of this objection and we only note it for the Board's benefit.

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Appellant had complied with Rule 8(a), undersigned counsel for IHS in this case could have discussed the matter with his colleague in *Ft. Mojave*, enabling counsel in *Ft. Mojave* to withdraw and amend the prior erroneous pleading in that case and thereby negate the need for Appellant's motion in this appeal. No briefing would have been necessary. Appellant's failure to comply with Rule 8(a) has placed an unnecessary burden on both parties' resources, as well as those of this Tribunal.

IHS also objects because the statement in *Ft. Mojave v. Leavitt* is a legal conclusion and not an admission by IHS. See *Banknote Corp. of America, Inc. v. U.S.*, 365 F.3d 1345, 1355 (Fed. Cir. 2004) (“[T]he Government has not made a factual admission; rather, it has taken a litigation stance on an issue of law—the interpretation of the solicitation.”); *W.V. Realty, Inc. v. Northern Ins. Co.*, 334 F.3d 306, 316 (3d Cir 2003) (“[L]egal conclusions may not be used as evidentiary admissions.”) (citing *Giannone v. U. S. Steel Corp.*, 238 F.2d 544, 548 (3d Cir. 1956)); see also *McDonald v. General Motors Corp.*, 110 F.3d 337, 341 (6th Cir. 1997) (holding that an attorney's legal conclusion could not be taken as a binding admission). Moreover, it is a legal conclusion made in a case where contract support costs (CSC) are not a central issue, and it is inaccurate because it differs from IHS' legal position in cases where CSC is a central issue.

IHS objects because the statement made in the *Ft. Mojave* filing is not subject to judicial notice under Fed. R. Evid. 201, the rule that Appellant relies on for its motion. Rule 201 permits a court to take judicial notice of “adjudicative facts” that are “not subject to reasonable dispute.” Fed. R. Evid. 201(a)-(b). The pleading referenced by Appellant's Motion fails to satisfy either of these requirements. First, adjudicative facts, “are the facts that normally go to the jury in a jury

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case.” Fed. R. Evid. 201(a) note (relying on 2 Administrative Law Treatise 355). IHS’ legal position with regard to CSC does not meet this definition. Second, judicial notice of adjudicative facts is typically limited to “universally known” facts and “requir[es] that the matter be beyond reasonable controversy.” Fed. R. Evid. 201(b) note; see *United States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993) (relying on the requirements of Rule 201(b) in refusing to take judicial notice where “[t]here is no dispute that the NRC Report exists, but there is considerable dispute over the significance of its contents”). Appellant’s assertion that a legal conclusion, sought to be withdrawn in a case where CSC is not a central issue, is an “admission” and that IHS thereby must be held to have somehow endorsed legal arguments made by Appellant in this case, not only may be reasonably disputed, but also is wrong.

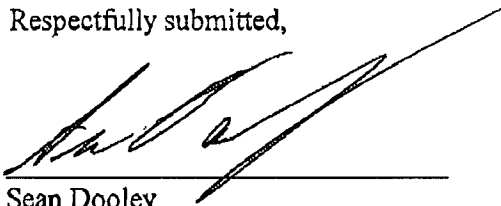
Even if, as Appellant argues, the Board could take judicial notice of the statement, it cannot be offered “for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*; 969 F.2d 1384, 1388 (2d Cir.1992) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir.1991) (citing *United States ex rel. Geisler v. Walters*, 510 F.2d 887, 890 n. 4 (3d Cir.1975))); see also *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 832 (8th Cir. 2003) (holding that the district court did not abuse its discretion in refusing to take judicial notice of documents “offered for the truth of the matters asserted in them”).

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For the reasons stated above, IHS objects to Appellant's Motion, and respectfully requests that this Board deny the Motion and take no notice of the *Ft. Mojave* filing.

Respectfully submitted,



April 11, 2008

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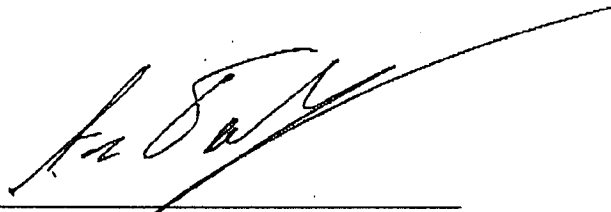
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the enclosed RESPONSE TO APPELLANT'S MOTION THAT THE BOARD TAKE JUDICIAL NOTICE OF IHS's ADMISSION was sent via mail and email this 11th day of April 2008 to:

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No. 2590 P. 1/7



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From: Sean Dooley

Senior Attorney

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Date: January 24, 2008