

**INTERIOR BOARD OF CONTRACT APPEALS**

|                                          |   |                                       |
|------------------------------------------|---|---------------------------------------|
| CHOCTAW NATION                           | ) |                                       |
| Drawer 1210                              | ) |                                       |
| Durant, Oklahoma 74702-1210              | ) |                                       |
|                                          | ) |                                       |
| Appellant,                               | ) | IBCA Nos. 4847-2006 through 4855-2006 |
| vs.                                      | ) |                                       |
|                                          | ) |                                       |
| MICHAEL O. LEAVITT, SECRETARY,           | ) | ISDA Compact No. 60G950037 (effective |
| U.S. DEPARTMENT OF HEALTH AND            | ) | October 1, 1996, and to the present)  |
| HUMAN SERVICES; CHARLES GRIM,            | ) |                                       |
| DIRECTOR, INDIAN HEALTH                  | ) |                                       |
| SERVICE; UNITED STATES OF                | ) |                                       |
| AMERICA                                  | ) |                                       |
|                                          | ) |                                       |
| Appellees.                               | ) |                                       |
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**COMPLAINT**

The Choctaw Nation, by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, complains and alleges as follows:

**I. INTRODUCTION**

1. This appeal is a follow on case to Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). It involves the failure of the Federal Government, acting through the Secretary of Health and Human Services and the Director of the Indian Health Service (IHS), to recognize properly and to pay in full various “contract support costs” (CSCs) over a period of years associated with the Choctaw Nation’s annual operation of the Choctaw Nation Health Services Authority in Oklahoma, and associated health care programs of the IHS Headquarters and the IHS Oklahoma City Area Office, pursuant to contracts awarded to the Choctaw Nation under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450–458aaa-18.

2. The multiple claims covered by this appeal and this Complaint encompass:
  - (a) the claim that the Secretary, during each of fiscal years 1997 through 2005, unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to the Choctaw Nation; and
  - (b) the claim that the Secretary, during each of fiscal years 1997 through 2005, unlawfully failed to calculate correctly, and thus further underpaid, the indirect administrative CSCs the Secretary was required to pay under the ISDA, as construed in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

## **II. JURISDICTION**

3. The Board has jurisdiction over this appeal pursuant to 25 U.S.C. §§ 450m-1(a) & (d) of Title I of the ISDA; § 303(d) of the Tribal Self-Governance Demonstration Project Act, 25 U.S.C. § 450f note (1999) (repealed) (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 25 U.S.C. § 458aaa-10(a) of Title V of the ISDA (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 41 U.S.C. §§ 605(c)(5), 606 & 607(d) of the Contract Disputes Act; and 43 C.F.R. § 4.100(b).

## **III. PARTIES**

4. The Choctaw Nation is a federally-recognized tribe with its Tribal headquarters located in Durant, Oklahoma. The Choctaw Nation is a “Tribe” as that term is defined by the Indian Self-Determination Act at 25 U.S.C. § 450b(e).

5. Michael O. Leavitt is the Secretary of the Department of Health and Human Services (DHHS) and exercises delegated responsibilities from Congress pursuant to the ISDA and other applicable law. Dr. Charles Grim is the Director of the Indian Health Service (IHS) and exercises authority delegated to him by the Secretary to carry out the Secretary’s

responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “Director,” and “IHS” are used interchangeably.

#### **IV. FACTS AND GENERAL ALLEGATIONS**

6. Since February 1, 1985, the Choctaw Nation has operated various Federal health care programs in Oklahoma pursuant to various contracts between the IHS and the Choctaw Nation. From January 1, 1995 to the present, the Choctaw Nation has operated such programs pursuant to Compact No. 60G950037 with the Indian Health Service, as authorized under Title III of the ISDA. In fiscal year 1996, the Choctaw Nation expanded the scope of its Compact with the Indian Health Service to include certain “Tribal shares” of the Indian Health Service’s Headquarters and Oklahoma City Area Office functions. The tribally-operated federal IHS programs included the Choctaw Nation Healthcare Center hospital in Talihina, Oklahoma, along with satellite clinics at Broken Bow, Hugo, McAlester and Poteau and associated programs, functions, services and activities (hereinafter “Choctaw Nation Health Services”). Each year this compact has been supplemented with an “annual funding agreement.” Collectively the foregoing Compact and annual funding agreements are referred to herein as “contracts.”

7. During the period January 1, 1995 through September 30, 2000, the Compact identified in par. 6 of this Complaint was authorized by Title III of the ISDA, known as the “Tribal Self-Governance Demonstration Project [Act],” as amended, formerly reprinted at 25 U.S.C. § 450f note (1999) (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 734 (2000)). The funding provisions of Title III, section 303(a)(6), incorporated by reference the funding provisions of Title I, requiring that the Secretary shall pay “an amount equal to that which the

[compacting] tribe would have been eligible to receive under contracts or grants under [Title I of the ISDA], including direct program costs and indirect costs,....” Thus, the Secretary’s funding obligations associated with CSCs under the Compact described in par. 6 were at all relevant times through FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

8. Beginning in FY 2001 and continuing to the present, the Self-Governance Compact identified in par. 6 of this Complaint has been authorized by Title V of the ISDA, 25 U.S.C. §§ 458aaa–458aaa-18. The funding provisions of Title V (25 U.S.C. §§ 458aaa-7(c) & (d)) replicate and incorporate the funding provisions of Title I by requiring *inter alia*, in 25 U.S.C. § 458aaa-7(c) that:

[t]he Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under [25 U.S.C. § 450j-1(a)(1)] and amounts for contract support costs specified under [25 U.S.C. §§ 450j-1(a)(2), (3), (5) and (6)].

Thus, the Secretary’s funding obligations associated with contract support costs under the foregoing compact were at all relevant times after FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

9. The provisions of Titles I, III and V of the ISDA governing the determination and payment of CSCs are materially identical.

10. At all relevant times, the provisions of 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA, together controlled the Secretary’s funding obligations under the contracts identified in par. 6 of this Complaint. These are the same provisions that the Supreme Court construed in Cherokee Nation v. Leavitt, 543

U.S. 631 (2005).

11. Title I of the ISDA, 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), requires that the Secretary shall pay to a contracting Tribe “contract support costs” of various categories, and further requires at 25 U.S.C. § 450j-1(g) that “upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)].”

12. The general categories of “contract support costs” (CSCs) to which a contracting Tribe is entitled under the ISDA are:

- (a) “indirect administrative costs, such as special auditing or other financial management costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(ii)) (hereinafter “indirect CSCs”);
- (b) “direct costs, such as workers’ compensation insurance” for certain annually recurring costs attributable directly to the personnel and facilities employed or used to carry out the Federal IHS programs being contracted under the ISDA, Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(i)) (hereinafter “direct CSCs”); and
- (c) non-recurring one-time “start-up costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(5)) (hereinafter “start-up costs”).

The ISDA specifies that these various CSC amounts “shall be added” to an ISDA contract, 25 U.S.C. § 450j-1(a)(2), and further declares that the amounts to be paid “shall include” direct CSCs and indirect CSCs, 25 U.S.C. § 450j-1(a)(3)(A). The ISDA further provides that “[t]he amount of funds required by [25 U.S.C. § 450j-1(a)] \* \* \* (2) shall not be reduced by the Secretary in subsequent years” except in circumstances which the Choctaw Nation alleges are not pertinent here. 25 U.S.C. §§ 450j-1(b) & (b)(2).

13. Since at least 1994, IHS has calculated and paid contract support costs associated

with ISDA contracts and compacts pursuant to a succession of Indian Self-Determination Memoranda and IHS Circulars (collectively “CSC Circulars”). The CSC Circulars explain how contract support cost requirements are to be determined, and how the IHS appropriations are annually allocated to pay those contract support costs requirements to individual Tribal contractors. IHS calculated and paid CSCs associated with the Choctaw Nation’s contracts pursuant to the CSC Circulars.

14. The Secretary’s failure to pay “contract support costs” as specified herein was contrary to the Choctaw Nation’s statutory and contractual rights as articulated by the Supreme Court in Cherokee Nation v. Leavitt, and as further specified, inter alia, in:

- (a) The Choctaw Nation’s compacts and annual funding agreements;
- (b) 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3), 450j-1(a)(5), 450j-1(b), 450j-1(d)(2), 450j-1(g) of Title I of the ISDA, as amended;
- (c) Section 303(a)(6) of former Title III of the ISDA; and
- (d) 25 U.S.C. § 458aaa-7(c) & (d) of Title V of the ISDA.

15. On September 10, 2001, the Pueblo of Zuni filed a class action lawsuit against the Secretary and the United States in the District of New Mexico captioned Pueblo of Zuni v. United States of America, et al., Case No. CV-01-1046 WJ/WPL (D. N.M.) (the Zuni suit). The Zuni suit seeks damages on behalf of all Tribal contractors for the Secretary’s failure during certain years to calculate properly the contract support cost requirements of Tribal contractors (as alleged here in the Second Cause of Action), and further seeks damages for the Secretary’s failure during those same years to pay in full all contract support cost requirements as determined by the Secretary under IHS’s CSC Circulars (as alleged here in the First Cause of Action). On

December 28, 2001 the Zuni suit was stayed pending the outcome of litigation which culminated in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). In March 2005 the stay in the Zuni suit was lifted. As of the filing of this Complaint a Motion for Class Certification is pending and awaiting decision. The Choctaw Nation is a putative member of the class sought to be certified in the Zuni litigation.

16. In 2005 the Choctaw Nation submitted the following contract damages claims to the Secretary involving the Secretary's failure to pay the full amounts of CSCs required by the ISDA and the Choctaw Nation's contracts over a period of years:

- (a) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and
  - (ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 1997 and totaling \$967,923, plus interest (hereinafter **Claims 1 and 2**, respectively);

- (b) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and
  - (ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 1998 and totaling \$926,020, plus interest (hereinafter **Claims 3 and 4**, respectively);

- (c) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 1999 and totaling \$336,162, plus interest (hereinafter **Claims 5 and 6**, respectively);

- (d) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2000 and totaling \$1,299,292, plus interest (hereinafter **Claims 7 and 8**, respectively);

- (e) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir.

1997),

all during fiscal year 2001 and totaling \$200,282, plus interest (hereinafter **Claims 9 and 10**, respectively);

- (f) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2002 and totaling \$1,229,816, plus interest (hereinafter **Claims 11 and 12**, respectively);

- (g) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2003 and totaling \$1,301,060, plus interest (hereinafter **Claims 13 and 14**, respectively);

- (h) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative

CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2004 and totaling \$753,326, plus interest (hereinafter **Claims 15 and 16**, respectively);

- (i) An August 2, 2005 damages claim under ISDA Compact No. 60G950037 involving –
  - (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
  - (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Choctaw Nation was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2005 and totaling \$3,845,152, plus interest (hereinafter **Claims 17 and 18**, respectively).

The total face amount of the claims so submitted was \$10,859,033.

17. By letter dated October 7, 2005, IHS Director Grim advised the Choctaw Nation that Claims 1 through 18 were under review and that a final decision would be issued on or before February 7, 2006.

18. By letter dated February 7, 2006, IHS Director Grim advised the Choctaw Nation that Claims 1 through 18 were still under review and that a final decision would be issued on or before May 7, 2006.

19. By letter dated May 5, 2006, IHS Director Grim advised the Choctaw Nation that Claims 1 through 18 were still under review and that a final decision would be issued on or before June 1, 2006.

20. By letter dated June 1, 2006, IHS Director Grim advised the Choctaw Nation that

Claims 1 through 18 were still under review and that a final decision would be issued on or before June 30, 2006. By letters dated June 30, 2006, IHS Director Grim advised the Choctaw Nation that a final decision had been made on Claims 1 through 18 and that all claims were denied.

21. On the dates specified in par. 16 of this Complaint, the Choctaw Nation timely and properly submitted claims to the appropriate contracting officer for the IHS. Director Grim has rendered a decision on all the claims described in said par. 16, and in each instance the claims were denied.

## **V. CAUSES OF ACTION**

### **FIRST CAUSE OF ACTION**

#### **(General Contract Support Costs – Claims 1, 3, 5, 7, 9, 11, 13, 15, & 17)**

22. The Choctaw Nation realleges the preceding paragraphs of this Complaint as if fully set forth herein.

23. During each of fiscal years 1997 through 2005 the Secretary failed to meet his statutory and contractual obligations to the Choctaw Nation by failing to pay the Choctaw Nation the full direct, indirect administrative, and start-up CSCs the Secretary acknowledged the Choctaw Nation was entitled to receive under the ISDA and the Choctaw Nation's contracts, as reflected (*inter alia*) in the Secretary's CSC Circulars, various annual shortfall reports prepared in connection with the Secretary's recordkeeping and reporting requirements specified in 25 U.S.C. § 450j-1(c), and related "Queue" reports.

24. In addition, beginning in fiscal year 1996, the Secretary placed the Choctaw Nation's contract support cost requirements associated with the "Tribal shares" referred to in par.

6 of this Complaint, on the IHS “Queue” or “Priority List,” identified as File No. 96-41. Further, beginning in fiscal year 1999, the Secretary placed the Choctaw Nation’s contract support cost requirements associated with the contracting of additional IHS functions on the IHS “Queue” or “Priority List,” identified as File No. 99-21. So long as such amounts remained on said lists, and pursuant to IHS policy as reflected in the CSC Circulars in effect at the time, IHS did not pay any of such contract support cost requirements to the Choctaw Nation.

25. The foregoing annual failures to pay are the subject of those portions of the claims described in subparagraphs 16(a) through (i) of this Complaint that are identified as **Claims 1, 3, 5, 7, 9, 11, 13, 15, & 17.**

26. The Secretary’s annual failure to pay to the Choctaw Nation the contract support costs as alleged in this First Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

27. In each year in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to the Choctaw Nation under the rule of Cherokee Nation v. Leavitt, 543 U.S. at 637, 641, and Ferris v. United States, 27 Ct. Cl. 542, 546 (1892).

28. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, the Choctaw Nation’s contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

29. Damages for each breach, as alleged in this First Cause of Action, are measured by the amounts required by law to be paid as CSCs; the reasonably foreseeable damages the Choctaw Nation suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to the Choctaw Nation in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as shall be proven at trial.

**SECOND CAUSE OF ACTION**  
**(Miscalculated Rate Claims – Claims 2, 4, 6, 8, 10, 12, 14, 16, & 18)**

30. The Choctaw Nation realleges the preceding paragraphs of this Complaint as if fully set forth herein.

31. During each of fiscal years 1997 through 2005 the Secretary failed to meet his statutory and contractual obligations to the Choctaw Nation by failing to pay the Choctaw Nation the full amount of indirect administrative CSCs to which the Choctaw Nation was entitled under the ISDA. In this Second Cause of Action the Choctaw Nation alleges that IHS, pursuant to its CSC Circulars, acted unlawfully by using, as a proxy for the determination of such administrative CSCs, the annual "indirect cost rate" assigned to the Choctaw Nation by the U.S. Department of the Interior (DOI), Office of Inspector General or National Business Center. The Choctaw Nation alleges that the "indirect cost rate" annually assigned to the Choctaw Nation was to be used strictly for certain cost-recovery accounting purposes, under guidelines from the Office of Management and Budget (OMB) which caution that such rates are not to be used to determine a

federal agency's funding obligations under contracts or grants. See, e.g., OMB Cir. A-87, 2 C.F.R. § 225.20 ("The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award."). Nonetheless, each year IHS, by policy and practice, required that the amount of the Choctaw Nation's indirect administrative CSCs to be paid under the ISDA and the Choctaw Nation's contracts be determined by application of the Choctaw Nation's most recent "indirect cost rate" assigned to the Choctaw Nation by the DOI. The Choctaw Nation alleges that this practice was contrary to law, as specified in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), in connection with Bureau of Indian Affairs contracts issued under the identical provisions of the ISDA.

32. The foregoing annual failures to pay are the subject of those portions of the claims described in subparagraphs 16(a) through (i) of this Complaint that are identified as **Claims 2, 4, 6, 8, 10, 12, 14, 16, & 18.**

33. The Secretary's annual failure to pay to the Choctaw Nation the correctly calculated indirect administrative CSCs to which the Choctaw Nation was entitled as alleged in this Second Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

34. In each year in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this Second Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to the Choctaw Nation under the rule of Cherokee Nation v. Leavitt, 543 U.S. at 637, 641, and Ferris v. United States, 27 Ct. Cl. at 546.

35. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this Second Cause of Action, the Choctaw Nation's contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

36. Damages for each breach, as alleged in this Second Cause of Action, are measured by the amounts required by law to be paid as indirect administrative CSCs; the reasonably foreseeable damages the Choctaw Nation suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to the Choctaw Nation in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as shall be proven at trial.

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

37. The Choctaw Nation realleges the preceding paragraphs of this Complaint as if fully set forth herein.

38. The Secretary has a duty of good faith and fair dealing in all his contracts.

39. 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 the Choctaw Nation. 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 has possessed superior knowledge regarding IHS’s appropriations, including IHS’s appropriations available to pay CSCs.

40. 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 the Choctaw Nation. 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").

41. The Secretary deprived the Choctaw Nation 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 the Choctaw Nation 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 the Choctaw Nation 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 the Choctaw Nation's contract support cost requirements, or the underpayment of the Choctaw Nation's contract support cost requirements;
- (e) requiring that each year the Choctaw Nation's annual funding agreement state a smaller amount than was required to meet the Choctaw Nation's contract support cost requirements;
- (f) requiring the Choctaw Nation 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 the Choctaw Nation; and
- (h) failing to share with the Choctaw Nation the Secretary's superior knowledge regarding IHS's annual appropriation.

42. The Secretary is liable in damages to the Choctaw Nation for the foregoing

contract breaches, in amounts equal to the amounts alleged in the First and Second Causes of Action in this Complaint.

### **PRAYER FOR RELIEF**

WHEREFORE, the Choctaw Nation prays that this Board grant the following relief:

a. Multiple judgments for damages for the Secretary's breach of each contract in each relevant year, as set forth in this Complaint, including damages measured by the amounts the Secretary failed in each instance to pay (estimated at the time the claims described herein were filed as totaling \$ 10,859,033); damages for the reasonably foreseeable consequences of the Secretary's failure to pay (including the higher amounts of CSCs the Secretary by law would have been required to pay to the Choctaw Nation in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2)) and other applicable law and policy had the Choctaw Nation's contracts and statutory rights not been breached); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such further damages as shall be proven at trial;

b. Interest for one year from the payment due date for each payment the Secretary failed to make under each contract, as provided for under the Prompt Payment Act, 31 U.S.C. §§ 3901-3907;

c. Interest under the Contract Disputes Act, 41 U.S.C. §§ 601-613 from the date of each claim until the date of payment;

d. Costs and attorneys' fees incurred in pursuing this claim, including the appeal before this Board, as provided for under the Equal Access to Justice Act, 5 U.S.C. § 504, 25 U.S.C. § 450m-1(c), and other applicable law; and

- e. Such other monetary and equitable relief as this Board may find to be just.

Respectfully submitted this 4th day of December 2006.

SONOSKY, CHAMBERS, SACHSE,  
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By: /s/ Lloyd B. Miller by DJS \_\_\_\_\_

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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 e-mail and by first class mail, postage prepaid, to the following attorney of record this 4th day of December 2006:

Shara Michalka  
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/s/ Donald J. Simon \_\_\_\_\_  
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