

INTERIOR BOARD OF CONTRACT APPEALS

801 N. Quincy Street  
Arlington, VA 22203

CONFEDERATED TRIBES OF  
COOS, LOWER UMPQUA AND  
SIUSLAW INDIANS,

Appellant,

IBCA No. \_\_\_\_\_

v.

INDIAN HEALTH SERVICE, Dr. Charles  
W. Grim, Director,

Appellee.

COMPLAINT

This is an appeal by the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (collectively the "Tribe"), a federally recognized Indian tribe that operates public health facilities and provides public health services to its members and other beneficiaries pursuant to contracts with the Indian Health Service ("IHS") under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, 25 U.S.C. § 450 *et seq.* ("ISDEAA").

The Tribe appeals the denial by the IHS of the Tribe's claims for unpaid contract support costs ("CSC") owed to the Tribe under the ISDEAA and Contract Number 248-87-0036 for FY 1995 ("FY 1995 Contract") and Contract Number 248-96-0002 for FY 1996-1998 ("FY 1996-1998 Contract"), as detailed below. The IHS was required to honor its

contractual obligation to pay those costs, which the agency acknowledged to be justified, out of its unrestricted lump-sum appropriations. See *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 1179-80 (2005).

### JURISDICTION

1. The contract in each of the relevant years states that disputes will be resolved in accordance with Section 110 of the ISDEAA. E.g. FY 1996-1998 Contract § (b)(12)(B).

Section 110, in turn, provides that the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, shall apply. 25 U.S.C. § 450m-1(d). Section 110 further provides that "all administrative appeals relating to [ISDEAA] contracts shall be heard by the Interior Board of Contract Appeals." *Id.*

2. On December 29, 2003, The Tribe mailed to Contracting Officer Martha Young (copies to IHS Director Charles W. Grim and Portland Area Director Doni Wilder), a letter requesting a contracting officer's decision on CSC claims for FY 1995 and 1996. A second letter, mailed that same date to the same IHS officials, presented CSC claims for FY 1997. A third letter, dated September 27, 2004, stated a CSC claim for FY 1998. (The letters are attached as Exhibit A.) The IHS has not responded to any of the requests for a decision on these claims. Under the CDA, the agency's failure to respond within 60 days means that the claims are deemed denied. 41 U.S.C. § 605(c)(5). Thus the claims are ripe for appeal under the CDA and Section 110 of the ISDEAA, and this Board has jurisdiction over this appeal.

### STATEMENT OF FACTS

3. During all of the years at issue in this appeal, FYs 1995-1998, the Tribe provided health care services pursuant to the contracts entered into with the Secretary of the

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Department of Health and Human Services ("Secretary") and the IHS under Title I of the ISDEAA.

4. The ISDEAA authorizes the Tribe and other tribes and tribal organizations to assume responsibility to provide programs, functions, services and activities ("PFSAs") that the Secretary would otherwise be obligated to provide. In return, the Secretary must provide the Tribe two types of funding under Section 106(a) of the ISDEAA: (1) "program" funds, i.e. the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1), sometimes called the "Secretarial amount" or the "106(a)(1) amount"; and (2) "contract support costs," the reasonable administrative and overhead costs associated with carrying out the PFSAs, *see id.* § 450j-1(a)(2) and (3).<sup>1</sup> *See also* FY 1996-1998 Contract § (b)(4) (providing that the amount of funding available to the Contractor "shall not be less than the applicable amount determined pursuant to Section 106(a) of the [ISDEAA]").

5. There are three types of CSC: (1) start-up costs, which are one-time costs to plan, prepare for and assume operation of a new or expanded PFSA, *see id.* § 450j-1(a)(5) & (6); (2) indirect costs ("IDC"), costs incurred for a common or joint purpose benefiting more than one PFSA, such as administrative and overhead costs, *see id.* § 450j-1(a)(2); and (3)

<sup>1</sup> Section 106(a)(2) of the ISDEAA mandates as follows:

(2) There shall be added [to the 106(a)(1) amount] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2).

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direct CSC, expenses directly attributable to a certain PFSA but not captured in the IDC pool or the 106(a)(1) amount, such as workers compensation insurance or other expenses the Secretary would not have incurred because, for example, the government is self-insured, see *id.* § 450j-1(a)(3)(A).

6. Direct CSC is "recurring" to both the IHS Area Office and the Tribe, meaning ~~amounts do not need to be re-justified each year.~~ IHS Circular 96-4 §§ 4.A.2.b, 3.D. Indirect CSC (IDC) is recurring to the Area but non-recurring to the Tribe. IDC funds are non-recurring to allow the agency to reduce the amount of IDC funding if the prior-year level would exceed the present year's requirement—for example, if the IDC rate dropped or a program was retroceded (given back) to the IHS.

7. Section 106(b)(2) of the ISDEAA states that the amount of funds required by subsection (a), including CSC, "shall not be reduced by the Secretary in subsequent years except pursuant to —

- (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
- (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
- (C) a tribal authorization;
- (D) a change in the amount of pass-through funds needed under a contract; or
- (E) completion of a contracted project activity or program."

25 U.S.C. 450j-1(b)(2). Section (b)(14)(A) of the FY 1996-1998 Contract incorporates this stable-funding provision and conditions: except as provided in section 105(c)(2), "the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of [the ISDEAA]."<sup>2</sup>

<sup>2</sup> See also IHS Circular 96-4 § 4.A.4.c ("Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section

8. In July of 1994, the Tribe submitted a proposal to the IHS Portland Area Office to assume responsibility for expanded PFSAs, including Western Oregon Service Unit, Area Office and Headquarters shares, with an effective date of October 1, 1994. See Exhibit C at 3-4 (budget request for new and expanded PFSAs approved by Area Director). Consistent with its contracts, the Tribe administered these expanded PFSAs from FY 1995 through FY 1998 (and beyond).

9. Under the IHS policy in effect at the time of the Tribe's proposal in 1994, CSC funding for new and expanded contracts was paid from the Indian Self-Determination ("ISD") Fund. See Indian Self-Determination Memorandum No. 92-2 ("ISDM No. 92-2") § 4.A. The Tribe's ISD funding request, as initially transmitted by the Area Director, included start-up costs of \$71,650 for equipment, direct CSC of \$68,711, and indirect costs of \$46,618, for a total of \$186,979. Exhibit C at 2. The indirect costs were computed by multiplying the direct cost base of \$242,798 (\$174,087 in direct "program" costs, plus \$68,711 in direct CSC, which is part of the recurring base) by the Tribe's FY 1994 negotiated IDC rate of 19.2%. (The Tribe's FY 1995 IDC rate agreement, which provided an IDC rate of 21.6%, was not signed until May 2, 1995, well after the FY 1995 queue request was submitted in July 1994.)

10. Subsequently, the ISD request was amended by hand, striking out the IDC rate of 19.2% and replacing it with 44.8%, so that the IDC amount increased from \$46,618 to \$108,774. Exhibit C at 3. This raised the total ISD request to \$249,135. It is not clear when or by whom this amendment was made, but in any event, the 44.8% rate and the corresponding \$249,135 ISD request were the figures retained on the agency priority list

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106(b) of the [ISDEAA]. Awardee should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater annual need.").

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known as ISD Queue #99-1, published on October 23, 1998.<sup>3</sup> See Exhibit D, line 45, column headed "IDC" (listing IDC requirement of \$108,774, or 44.8% of the sum of the amounts in the columns headed "DCSC" and "106(a)(1) Amount").

11. In its December 29, 2003 letter to the contracting officer, the Tribe claimed \$249,135 for FY 1995 based on the amended request and the figures in ISD Queue #99-1. As set forth in the "Claims" section below, the Tribe now believes that, if the ISD request had been paid in FY 1995, the applicable IDC rate would have been the rate negotiated for that fiscal year, 21.6%, not the 44.8% applied in ISD Queue #99-1. Thus the correct amount of IDC would have been \$52,444 for a total ISD payment of \$192,805.

12. After reviewing the Tribe's ISD Fund request and ensuring that the costs were reasonable, see ISDM No. 92-2 § 4.C.2, the Portland Area Office forwarded the proposal to the Office of Tribal Activities ("OTA") at IHS headquarters on July 26, 1994. Exhibit C at 2 (memorandum with subject line "Request for F. Y. 1994 Indian Self-Determination (ISD) Funds"). By this point, the IHS had agreed that the request accurately reflected the Tribe's CSC need associated with the newly assumed responsibilities; the task for the OTA was simply to determine whether that amount was "available." ISDM No. 92-2 § 4.C.2.

13. By 1994, the amounts the IHS allocated to the ISD Fund from its \$1 billion-plus unrestricted lump-sum appropriation were inadequate to fund all tribal contractors' CSC needs associated with new and expanded contracts. Under agency policy, ISD requests would be funded on a monthly basis until expended. ISDM No. 92-2 § 4.C.1. If all ISD requests pending in a given month could not be funded, "then requests to be funded that month will be selected based on the earliest receipt date." *Id.* § 4.C.4. This first-come, first-

<sup>3</sup> Apparently the 44.8% rate was taken from the Tribe's IDC agreement for FY 1997, which provided for that rate, so the amendment may have been made during that fiscal year.

served system became known as the ISD "queue," in which tribes queued up to receive their ISD requests. For Title I contractors like the Tribe, priority was based on "[t]he date of receipt by the IHS Area office of a Title I contract proposal."<sup>4</sup>

14. The Tribe's 1994 request was apparently misplaced for almost two years before being placed on the queue with a priority date of April 1, 1996. Exhibit C at 1 (Portland Area Office resubmission of ISD request); Exhibit D, line 45 (ISD Queue #99-1 indicating Request Date 04/01/96). In 1999, when the IHS abolished the queue, the Tribe's request was still well back in line and was never paid.

15. On March 1, 2005, the U.S. Supreme Court held that the IHS should have reprogrammed funds from its unrestricted lump-sum appropriation to pay tribal contractors the full CSC due under their contracts. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 1179-80 (2005).

16. In each of the years at issue in these appeals, FYs 1995-1998, the IHS had ample funds available in its unrestricted lump-sum appropriation to fully pay the Tribe's CSC requirement, including CSC funding for new and expanded PFSAs as well as ongoing ones. *See Thompson v. Cherokee Nation*, 334 F.3d 1075, 1093-94 (Fed. Cir. 2003), *aff'd Cherokee Nation v. Leavitt*, *supra* (noting that, by the Secretary's own admission, the IHS had unobligated appropriations totaling \$1,337,042,218 for FY 1995 and \$1,375,245,000 for FY 1996, and even at year's end had "leftover and unexpended appropriations" ranging between \$1.2 and \$6.8 million available to pay tribes' CSC). Instead of doing so, the IHS placed the Tribe's ISD request in the queue, deferring and eventually refusing payment.<sup>5</sup>

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<sup>4</sup> *Id.* § 4.A.4.a.iii.

17. The Appropriations Acts for FY 1995-1998 mention the ISD Fund but do not limit the amount the Secretary could spend to satisfy the IHS's contractual obligations with respect to new and expanded contracts: "of the funds provided [in the IHS lump-sum appropriation], \$7,500,000 shall remain available until expended, for the Indian Self-Determination Fund." Dept of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2528 (1994); see also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) (same).

18. The Federal Circuit has held that the "shall remain available" phrase is a term of art in appropriations law that establishes "carryover authority," indicating that unexpended funds, if any, may be used for the same purpose in the following fiscal year. *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1090 (Fed. Cir. 2003), *aff'd Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005). The phrase does *not* establish a spending cap or limit the ability of the Secretary to spend additional funds on new and expanded contracts if required to do so by his contracts. *Id.* The Supreme Court affirmed this holding. *Cherokee Nation*, 125 S.Ct. at 1181.

19. Thus, the IHS had a duty to provide the funding called for in the contract despite the queue.

20. Had the Tribe's ISD request been paid in FY 1995, when the Tribe assumed the new and expanded programs, the "startup" component of the request would have been paid for that year only. However, the direct CSC associated with the new and expanded programs, \$68,711, would have become part of the Tribe's recurring CSC award each year

thereafter.<sup>6</sup> In addition, both the direct CSC of \$58,711 and the "program" amount computed pursuant to section 106(a)(1), \$174,087, would have become part of the Tribe's recurring "base" for purposes of computing IDC every year.<sup>7</sup> The additional IDC for each year, calculated by multiplying that year's negotiated rate by the additional base of \$242,788, would have been recurring to the Portland Area and available for distribution to the Tribe.<sup>8</sup>

21. Thus the IHS's non-payment of the ISD request in FY 1995 injured the Tribe not only in that fiscal year, but in each subsequent year as well, as detailed in Claim I below.

### CLAIMS

22. Paragraphs 1 through 21 are realleged and incorporated herein.

23. The Tribe's contracts require payment of CSC in accordance with the ISDEAA. FY 1996-1998 Contract § (b)(4) (funding amount "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA]"). The "queue" system, under which the IHS deferred and eventually denied payment of CSC associated with the PFSA's assumed by the Tribe in FY 1995, violates the rule of *Cherokee Nation* that the amounts "available" under section 106(a) to pay tribes the full CSC due under their contracts include the agency's entire unrestricted lump-sum appropriation. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 1179-80 (2005). By failing to pay the applicable amount of CSC determined pursuant to section 106(a), when the agency had available funds to do so, the IHS breached its contract in each fiscal year, 1995-1998.

<sup>6</sup> See IHS Circular No. 96-4 § 4.A.2.b (direct CSC "shall be awarded on a recurring basis").

<sup>7</sup> *Id.* § 4.A.4.a.vii ("Beginning in year 2, direct contract support and section 106(a)(1) funds will be considered part of the recurring base of the award.").

<sup>8</sup> *Id.* § 4.A.4.b.

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Claim I: "Queue" Claim

24. The IHS breached the Tribe's FY 1995 Contract and violated the ISDEAA by failing to pay the full CSC associated with the new and expanded PFSAs assumed by the Tribe in FY 1995. The Tribe claims \$71,650 in start-up costs, \$68,711 in direct CSC, and \$52,444 in IDC (21.6% of the direct program base of \$242,798, comprised of \$174,087 in program costs and \$68,711 in direct CSC), for a total FY 1995 claim of \$192,805.<sup>9</sup>

25. The IHS breached the Tribe's FY 1996 Contract and violated the ISDEAA by failing to pay the full CSC on the recurring base amounts associated with the PFSAs assumed in FY 1995 and operated by the Tribe in FY 1996. The Tribe claims \$68,711 in direct CSC and \$77,453 in IDC (31.9% of the direct program base of \$242,798, comprised of \$174,087 in program costs and \$68,711 in direct CSC), for a total FY 1996 claim of \$146,164.<sup>10</sup>

26. The IHS breached the Tribe's FY 1997 Contract and violated the ISDEAA by failing to pay the full CSC on the recurring base amounts associated with the PFSAs assumed in FY 1995 and operated by the Tribe in FY 1997. The Tribe claims \$68,711 in direct CSC and \$108,774 in IDC (44.8% of the direct program base of \$242,798, comprised of \$174,087

<sup>9</sup> As explained above, the Tribe has reduced its claim from the \$249,135 amount stated in its claim letter—and acknowledged in IHS Queue #99-1—in recognition that IDC for FY 1995 should be calculated at the FY 1995 negotiated rate of 21.6%, not the 44.8% rate reflected in IHS Queue #99-1.

<sup>10</sup> This amount differs from the amount claimed in the Tribe's December 29, 2003 claim letter because in that letter the Tribe claimed IDC on only the direct CSC amount (adjusted for inflation), not on the entire direct cost base, which includes the program amount as well as direct CSC. The Tribe reserves the right to adjust this claimed amount upward if, in the discovery process, the Tribe learns that the program and/or CSC amounts involved would have been eligible for mandatory funding increases in this fiscal year. See IHS Circular No. 96-4 § 4.A.4.a.vii ("Mandatory funding increases [to recurring base] will be provided based on congressional appropriation.").

in program costs and \$68,711 in direct CSC). Thus the Tribe presents a total FY 1997 claim of \$177,485.<sup>11</sup>

27. The IHS breached the Tribe's FY 1998 Contract and violated the ISDEAA by failing to pay the full CSC on the recurring base amounts associated with the PFSA's assumed in FY 1995 and operated by the Tribe in FY 1998. The Tribe claims \$68,711 in direct CSC and \$75,025 in IDC (30.9% of the direct program base of \$242,798, comprised of \$174,087 in program costs and \$68,711 in direct CSC), for a total FY 1998 claim of \$143,736.<sup>12</sup>

**Table 1. Summary of "Queens Claim" for CSC Associated with PFSA's Assumed in FY 1995. (All amounts in dollars except for column E.)**

	A	B	C	D	E	F	G
Year	Startup Costs	Direct CSC	106(a)(1) Amount	Base (B + C)	IDC Rate (%)	IDC (D x E)	Total CSC (A + B + F)
1995	71,650	68,711	174,087	242,798	21.6	52,444	192,805
1996	0	68,711	174,087	242,798	31.9	77,453	146,164
1997	0	68,711	174,087	242,798	44.8	108,774	177,485
1998	0	68,711	174,087	242,798	30.9	75,025	143,736
<b>Total</b>							<b>660,190</b>

<sup>11</sup> This amount differs from the amount claimed in the Tribe's December 29, 2003 claim letter because in that letter the Tribe claimed IDC on only the direct CSC amount (adjusted for inflation), not on the entire direct cost base, which includes the program amount as well as direct CSC. The Tribe reserves the right to adjust this claimed amount upward if, in the discovery process, the Tribe learns that the program and/or CSC amounts involved would have been eligible for mandatory funding increases in this fiscal year. See IHS Circular No. 96-4 § 4.A.4.a.vii ("Mandatory funding increases [to recurring base] will be provided based on congressional appropriation.")

<sup>12</sup> This amount differs from the amount claimed in the Tribe's September 27, 2004 claim letter because in that letter the Tribe claimed IDC on only the direct CSC amount (adjusted for inflation), not on the entire direct cost base, which includes the program amount as well as direct CSC. The Tribe reserves the right to adjust this claimed amount upward if, in the discovery process, the Tribe learns that the program and/or CSC amounts involved would have been eligible for mandatory funding increases in this fiscal year. See IHS Circular No. 96-4 § 4.A.4.a.vii ("Mandatory funding increases [to recurring base] will be provided based on congressional appropriation.")

**Claim II: "Shortfall" Claim**

28. Paragraphs 1 through 27 are realleged and incorporated herein.

29. In addition to the "queue claims," which derive from unpaid CSC associated with the PFSAs assumed in FY 1995, the Tribe asserts "shortfall" claims for unpaid CSC associated with all other PFSAs performed by the Tribe during FY 1997 and 1998. The IHS has acknowledged these underpayments in the CSC "shortfall reports" for FY 1997 and FY 1998. *See Exhibit B.*

30. The IHS shortfall reports are spreadsheets prepared by the IHS in compliance with ISDEAA section 106(c), which requires that the agency submit to Congress an annual report on the implementation of the ISDEAA. 25 U.S.C. § 450j-1(c). The shortfall reports do not include unpaid amounts pending on the queue. *See Exhibit B at 2, column C* (subtracting "Program Amounts on the ISD Queue" from program funding base for purposes of calculating CSC need and shortfall).

31. The Tribe claims \$18,828 in unpaid CSC for ongoing PFSAs other than those assumed in FY 1995, as acknowledged in the IHS CSC shortfall report for FY 1997. *Exhibit B at 1.*

32. The Tribe claims \$11,338 in unpaid CSC for ongoing PFSAs other than those assumed in FY 1995, as acknowledged in the IHS CSC shortfall report for FY 1998. *Exhibit B at 2.*

**PRAYER FOR RELIEF**

The Tribe therefore requests the following relief:

A. That this Board award the Tribe \$690,356 in damages for unpaid CSC, as summarized in the following table:

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Table 2. Total Damages

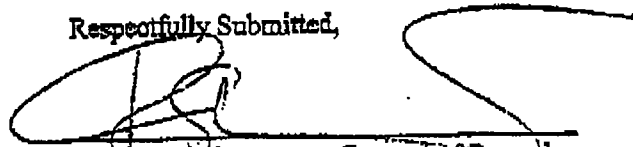
Claim	FY	Amount (\$)
I	1995	192,805
	1996	146,164
	1997	177,485
	1998	143,736
II	1997	18,828
	1998	11,338
Total		690,356

B. That this Board order the payment of interest on these claims pursuant to the CDA, 41 U.S.C. § 611 and the Prompt Payment Act, Chapter 39 of Title 31 United States Code;

C. That this Board award the Tribe its attorney fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 25 U.S.C. § 450m-1; and

D. That this Board award the Tribe such other and further relief as the Board deems appropriate.

Respectfully Submitted,



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Stephen D. Osborne, Counsel  
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