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**UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS**

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FACSIMILE TRANSMISSION - TOTAL PAGES **77**

July 25, 2007

**SUBJECT: Notice of docketing - CBCA 829-ISDA thru 837-ISDA (9 appeals)  
Fond du Lac Band of Lake Superior Chippewa v. HHS  
Compact No. 67G950034**

**TO: Lloyd Benton Miller, Esq. FAX 907-272-8332  
Sonosky, Chambers, Sachse, Endreson & Perry, LLP**

**Donald J. Simon, Esq. FAX 202-682-0249  
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IHS Branch Chief PH 301-443-0406  
Office of the General Counsel**

**Charles Grim, D.D.S., M.H.S.A. FAX 301-443-4794  
Assistant Surgeon General  
Director  
Indian Health Service  
Public Health Service  
Department of Health and Human Services  
801 Thompson Ave. Ste 400  
Rockville, MD 20852**

The rules of procedure are available for downloading on the Board's website: [www.cbca.gsa.gov](http://www.cbca.gsa.gov)

**Clerk's Ofc PH 202-606-8800, FAX 606-0019**

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UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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NOTICE OF DOCKETING

**CBCA 829-ISDA thru 837-ISDA - FOND DU LAC BAND OF LAKE  
SUPERIOR CHIPPEWA v. DEPARTMENT OF HEALTH AND HUMAN  
SERVICES**

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July 25, 2007

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The Board has received your notice of appeal, which has been docketed as **CBCA 829-ISDA thru 837-ISDA**. The appropriate docket number should be referenced in all future correspondence.

CBCA 829-ISDA - Appeal final decision of 4/30/07 - FY 1995, Compact No. 67G950034  
CBCA 830-ISDA - Appeal final decision of 4/30/07 - FY 1996, Compact No. 67G950034  
CBCA 831-ISDA - Appeal final decision of 4/30/07 - FY 1997, Compact No. 67G950034  
CBCA 832-ISDA - Appeal final decision of 4/30/07 - FY 1998, Compact No. 67G950034  
CBCA 833-ISDA - Appeal final decision of 4/30/07 - FY 1999, Compact No. 67G950034  
CBCA 834-ISDA - Appeal final decision of 4/30/07 - FY 2000, Compact No. 67G950034  
CBCA 835-ISDA - Appeal final decision of 4/30/07 - FY 2001, Compact No. 67G950034  
CBCA 836-ISDA - Appeal final decision of 4/30/07 - FY 2002, Compact No. 67G950034  
CBCA 837-ISDA - Appeal final decision of 4/30/07 - FY 2003, Compact No. 67G950034

The rules of procedures governing contract disputes are available for downloading on the Board's website at [www.cbca.gsa.gov](http://www.cbca.gsa.gov). If you do not have internet access, you may request a copy of the rules from the Clerk of the Board at (202) 606-8800 or [beatrice.jones@gsa.gov](mailto:beatrice.jones@gsa.gov). Please note that Rule 54 provides for alternative dispute resolution

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if requested by all parties and approved by the Board. Additional information about the Board's alternative dispute resolution is available on the Board's website.

Enclosed for respondent is a copy of the notice of appeal.

The Clerk's Office is located at 6th floor, 1800 M Street, N.W., Washington, DC 20036. Filings made in person or by courier should be sent to this location. The Board's mailing address is 1800 F Street, N.W., Washington, DC 20405. Filings made via the United States Postal Service should be sent to this address. The Office of the Clerk will receive all papers submitted for filing from 8:00 a.m. to 4:30 p.m. on each day that is not a Saturday, Sunday, or federal holiday. The Board's telephone number is: (202) 606-8800 and its facsimile number is: (202) 606-0019. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire printed submission

**Due to delays in delivery of U.S. Postal Service mail, please transmit responses by overnight delivery or fax.**

This case has been assigned to Board Judge Candida S. Steel, who will initiate proceedings in the case. All future correspondence/inquiries should be directed to Judge Steel's office at (202) 606-8817.

  
BEATRICE JONES  
Clerk of the Board

cc:

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**[government representative until notice of appearance entered]**

Barbara J. Hudson, Esq.

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IHS Branch Chief

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July 24, 2007

By Hand-Delivery

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Beatrice Jones, Clerk  
Civilian Board of Contract Appeals  
1800 M. Street N.W., 6th Floor  
Washington, D.C. 20036

Re: Appeal of Fond du Lac Band of Lake Superior Chippewa

RECEIVED  
2007 JUL 24 P 3:19  
CIVILIAN BOARD OF CONTRACT APPEALS

Dear Ms. Jones:

I enclose for filing an original and one copy of the Fond du Lac Band of Lake Superior Chippewa's Notice of Appeal and Request for a Stay (accompanied by Exhibits 1 through 9). Additionally we are enclosing one extra copy of the documents so that they can be conformed and returned to us.

Sincerely,

*Lloyd Benton Miller*  
Lloyd Benton Miller *by Ann D. ...*

Encls: Notice of Appeal and Request for Stay, Exhibits 1 - 9 (original plus 1)

cc (w/enclosures):

Secretary Michael Leavitt  
Dr. Charles W. Grim  
Barbara Hudson, Esq.  
Dennis S. Murphy

**CIVILIAN BOARD OF CONTRACT APPEALS**

Fond du Lac Band of Lake Superior Chippewa )  
1720 Big Lake Road )  
Cloquet, MN 55720 )

Appellant, )

vs. )

MICHAEL O. LEAVITT, SECRETARY, )  
U.S. DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES; CHARLES GRIM, )  
DIRECTOR, INDIAN HEALTH )  
SERVICE; UNITED STATES OF )  
AMERICA )

Appellees. )

CBCA Nos. 829-ISDA through 837-ISDA

ISDA Compact No. 67G950034

RECEIVED  
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CIVILIAN BOARD OF  
CONTRACT APPEALS

**NOTICE OF APPEAL  
AND MOTION FOR STAY OF PROCEEDINGS**

The Fond du Lac Band of Lake Superior Chippewa ("Tribe") by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeals the denials issued by Charles W. Grim, Director, Indian Health Service (IHS), of the U.S. Department of Health & Human Services, dated April 30, 2007, attached hereto as Exhibits 1 through 9,<sup>1</sup> of damages claims submitted under the Contract Disputes Act (41 U.S.C. §§ 601-612) and the Indian Self-Determination Act (25 U.S.C. §§ 450-458aaa-18) as follows:

- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$177,107.00 for contract year 1995; 829-ISDA

<sup>1</sup> To the extent these damage claims were not the subject of the attached denials, the Tribe appeals from the Contracting Officer's inactions, deemed by operation of law to be denials. 41 U.S.C. § 605(c)(5).

- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$350,079.00 for contract year 1996; 830-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$244,064.00 for contract year 1997; 831-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$254,517.00 for contract year 1998; 832-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$98,362.00 for contract year 1999; 833-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$120,511.00 for contract year 2000; 834-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$113,693.00 for contract year 2001; 835-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$148,693.00 for contract year 2002; 836-ISDA
- (a) a September 29, 2006 damages claim under ISDA Compact No. 67G950034 in the amount of \$151,796.00 for contract year 2003; 837-ISDA

This appeal asserts that the Appellees are liable for money damages due to the non-payment of certain "contract support costs" associated with contracts entered into pursuant to the ISDA between the Indian Health Service and the Tribe.

The claims and issues raised in this appeal are similar to claims in a number of other Tribal appeals now before the Board. Although those cases have not been formally consolidated, the Board has stayed proceedings in those cases. In some cases, the stays were entered pending

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resolution of a motion for class certification in *Pueblo of Zuni v. United States*, CV 01-1046 WJ/WPL (D.N.M), to determine if Appellants would be able to pursue their claims as class members in the *Zuni* case, in lieu of litigating separate appeals before the Board. In other cases, the stays have been entered pending the resolution of issues currently under submission in three cases: *Arctic Slope Native Association, Ltd. v. Leavitt, et al.*, IBCA Nos. 4794-2006 through 4803-2006 ("ASNA"), *Metlakatla Indian Community v. IHS*, CBCA Nos. 181-ISDA, 279-ISDA through 282-ISDA ("Metlakatla"), and *Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians v. IHS*, IBCA Nos. 4724-2005 through 4727-2005 ("Coos").

On May 22, 2007, the district court for the District of New Mexico denied the motion for class certification in the *Zuni* case, and on June 25, 2007 the Court of Appeals for the Tenth Circuit denied a petition under Rule 23(f), Fed.R.Civ.P., for interlocutory review of that decision. As a result, the *Zuni* case will proceed on the merits as a single action, although the district court's decision to deny the motion for class certification can be appealed after the entry of judgment in the district court.

The *ASNA*, *Coos* and *Metlakatla* cases, as lead appeals, each present numerous issues, both procedural and substantive, that are directly relevant to the appeals brought by Appellant here. The *ASNA*, *Coos* and *Metlakatla* cases have each been fully briefed and argued on these important common issues, and are awaiting decision by the Board. The rulings to be made by the Board in these three lead appeals will almost certainly be directly relevant to other CSC appeals currently pending before the Board, including the above-captioned appeal filed by Appellant herein.

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Appellant submits that the most efficient course would be for the Board to stay this appeal on the same basis as the other pending appeals. The imminent resolution of crucial common issues in the lead appeals will manifestly assist the parties here in determining how to proceed, and will avoid duplication of discovery and briefing in these appeals.

For the foregoing reasons, Appellant Fond du Lac Band of Lake Superior Chippewa respectfully requests that this appeal be docketed and that Appellant's request for a stay be granted.

Respectfully submitted this 24<sup>th</sup> day of July 2007.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

By:

  
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Attorneys for Fond du Lac Band of Lake Superior  
Chippewa

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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 certified mail, return receipt requested, to the following parties of record this 24<sup>th</sup> day of July 2007:

Secretary Michael Leavitt  
U.S. Department of Health and  
Human Services  
200 Independence Avenue S.W.  
Washington, D.C., 20201

Dr. Charles W. Grim, Director  
U.S. Department of Health and Human  
Services  
Indian Health Service  
801 Thompson Avenue, Room 440  
Rockville, Maryland 20852

Barbara Hudson, Esq.  
Office of General Counsel  
Public Health Division  
U.S. Department of Health  
and Human Services  
Parklawn Building, Room 4A53  
5600 Fishers Lane  
Rockville, Maryland 20857

Dennis S. Murphy  
Senior Contracting Officer  
Indian Health Service  
522 Minnesota Avenue, N.W., Rm. 119  
Bemidji, Minnesota 56601

  
\_\_\_\_\_  
Anne D. Noto

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service  
Rockville MD 20852

APR 30 2007

**By Certified Mail, Return Receipt Requested**

Ms. Anne D. Noto  
Counsel to the Fond du Lac Band  
of Lake Superior Chippewa  
Law Offices Sonosky, Chambers,  
Sachse, Endreson & Perry, LLP  
1425 K Street, NW, Suite 600  
Washington, DC 20005

**Subject: Contract Disputes Act Claim for Compact No. 67G950034  
Contract Support Costs for Fiscal Year 1995  
Fond du Lac Band of Lake Superior Chippewa**

Dear Ms. Noto:

The Indian Health Service (IHS) received your claim dated September 29, 2006, filed on behalf of the Fond du Lac Band of the Lake Superior Chippewa (Band) for direct and indirect contract support costs (CSC) in the amount of \$177,107 for fiscal year (FY) 1995. By letter dated November 17, 2006, we notified you that we would answer the Band's claim no later than April 30, 2007. Your claim is denied for the following reasons.

**Description of Claims**

Your September 29, 2006, letter sets forth two claims. The first claim alleges that the "IHS failed to pay the full amount of the Tribe's contract support cost requirement calculated pursuant to IHS's policies, by applying an unlawful policy limiting the total amount that would be paid to the Tribe." Your letter states that the, "IHS has reported these amounts in its annual Area contract support cost shortfall reports."

The second claim alleges that in violation of its contractual and statutory obligations to the Band:

IHS failed to include in the calculation of the tribe's indirect administrative contract support cost requirement the full contract support costs associated with the Tribe's contract with IHS. IHS did so by employing the same illegal calculation of the Tribe's indirect cost requirements associated with this contract that was struck down by the Tenth Circuit in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997). Specifically, IHS failed to adjust the indirect cost amount calculated by applying the indirect cost rate to account for the dilution in

829-ISDA

Exhibit 1  
*Fond du Lac Band v. Leavitt*

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Page 2 – Ms. Anne D. Noto

IHS's responsibility to pay indirect contract support costs caused by the erroneous assumption (reflected in applicable OMB circulars concerning indirect cost rates) that all agencies funding the Tribe contribute to the Tribe's indirect cost pool at the full rate.

Your letter, supported by your certification, alleges that the amounts due for FY 1995 are: \$112,380 on your first claim and \$64,727 on your second claim, for a total of \$177,107 on both claims, plus interest. However, your letter does not state how the Band calculated these figures, and does not provide any supporting documentation.

**Contract Terms at Issue**

Compact No. 67G950034, effective September 30, 1994, provides, in part, as follows:

**Article II, Section 2 - Funding Amount:** Subject only to the appropriation of funds by the Congress of the United States and to the adjustments pursuant to Section 106 (b) of Title I of the Act, [Indian Self-Determination and Education Assistance Act (25 U.S.C. 405j-2)], the Secretary or an authorized representative shall provide the total amounts specified in the Band's Annual Funding Agreement.

**Article III, Section 2 - Amount of Funds:** The total amount of funds associated with the consolidation as provided in Section 1 of this Article shall be determined in accordance with Section 303 (a) (6) of Title III and shall be set forth in an Annual Funding Agreement between the Secretary and the Band, which shall be attached hereto and is incorporated in entirety into this Compact.

Section 1 of the Annual Funding Agreement (AFA) for FY 1995, effective September 30, 1994, states:

The total amount of funds associated with the consolidation and redesign of programs, activities, functions and services provided in 1995, pursuant to the Band's Compact of Self-Governance, and which the Secretary and her authorized representative shall make available to the Band as provided in the Compact, shall be determined as provided below.

Section 3 of the AFA provides:

The amount available to the Band pursuant to the Compact and Title III of P.L. 93-638, as amended, is \$4,062,124 plus contract support or indirect costs pursuant to Section 6 of this Agreement, which total is derived from the Indian Health Service budget categories and administrative levels as identified in

Page 3 – Ms. Anne D. Noto

Attachment "A" to this 1997 Annual Funding Agreement, which attachment is incorporated by reference in and made a part of this Annual Funding Agreement.

Section 6 of the AFA states:

A minimum of \$396,000 in indirect contract support costs shall be added to the amount available under the foregoing Section 3. This amount is based upon the Band's indirect cost rate at the time of negotiations. It shall be subsequently adjusted subject to the final determination of the actual rate that is negotiated for 1995 between the Band and the Band's cognizant agency Office of Inspector General. The Band shall be funded from available appropriations for contract support costs purposes at the full rate, calculated as the total amount of direct funds listed in Attachment 'A' times the actual negotiated final rate consistent with the Band's negotiated indirect cost proposal approved by the appropriate federal Office of Inspector General.

Attachment A to the AFA for FY 1995 provided on page 10 that the IHS agreed to pay and the Band agreed to accept \$141,600 in direct CSC and \$396,000 in indirect CSC. (See column entitled "1995 Negot. \$ Share").<sup>2</sup>

On or about March 3, 1995, IHS Headquarters approved the Initial FY 1995 CSC Distribution to the various IHS Areas. As a result, the Band received \$141,600 in direct CSC and \$400,500 in indirect CSC as its Initial FY 1995 CSC distribution.

On or about September 5, 1995, the IHS provided \$1,430 in additional direct CSC funding to the Band as a result of mandatory increases, raising the total of direct CSC funding to \$143,030. On

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<sup>1</sup>In FY 1995, the Band's first year as a Pub. L. 93-638 Title III compact Tribe, the Band also requested an additional \$106,015 in Indian Self-Determination funds ("ISD"). The \$106,015 amount was placed in the queue awaiting payment in FY 1995. The \$106,015 in ISD funding was identified in the AFA for 1996 as additional indirect CSC because it was not paid in FY 1995. This amount remained in the queue for FY 1996. The Band's request for ISD funding in the queue was paid in FY 1997, using the "Alaska Methodology." (The "Alaska Methodology" was a method agreed to by the Agency and the Alaska signees of the Alaska compact to calculate the IDC need identified on the "queue.") The use of the "Alaska Methodology" in FY 1997 resulted in ISD funding being paid to the Band in the higher amount of \$179,337.

<sup>2</sup>As stated in footnote No. 18 to Attachment A to the AFA the \$396,000 in indirect CSC was a tentative funding figure based on the amount of indirect CSC funds provided in 1994. The parties anticipated that the final figure was likely to be higher.