



U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Office of the Chief Counsel, Region V  
233 North Michigan Avenue, Suite 700  
Chicago, Illinois 60601-5502

Telephone: (312) 353-1640  
Facsimile: (312) 886-1718

Writer's Direct Line 312. 886.1713

Our Ref: OGC-V  
BAL07/143

August 8, 2007

Honorable Candida S. Steel  
Civilian Board of Contract Appeals  
1800 F Street, N.W.  
Washington, D.C. 20405

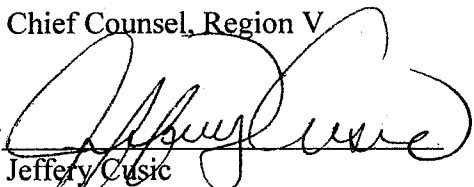
Re: **Fond du Lac Band of Lake Superior Chippewa v. HHS,**  
**CBCA 829-ISDA through 837-ISDA**  
**Compact No. 67G950034**

Dear Judge Steel:

Please find enclosed an original and one copy of the Department of Health and Human Services' *Opposition to Appellants' Motion for Stay* and accompanying attachments for the above-captioned case.

Sincerely,

Donna Morros Weinstein  
Chief Counsel, Region V

By   
Jeffrey Cusic  
Assistant Regional Counsel

cc: Lloyd Benton Miller, Esq.  
Law Offices of Sonosky, Chambers, Sachse, Endreson & Perry  
1425 K Street, NW, Suite 600  
Washington, DC 20005

UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

FOND DU LAC BAND OF LAKE )

SUPERIOR CHIPPEWA )

v. )

DEPARTMENT OF HEALTH )  
AND HUMAN SERVICES )

Compact No: 67G950034 )

CBCA 829-ISDA thru  
837-ISDA

**DEPARTMENT OF HEALTH AND HUMAN SERVICES'  
OPPOSITION TO APPELLANT'S MOTION FOR STAY**

The Department of Health and Human Services (HHS or Department) hereby opposes the stay requested in Fond du Lac Band of Lake Superior Chippewa's (Fond du Lac or Tribe) Notice of Appeal and Motion for Stay of Proceedings (Notice). Fond du Lac's Notice pertains to decisions issued by the Indian Health Service (IHS), Bemidji Area Office (BAO) contracting officer denying the Tribe's claims under the Contract Disputes Act (CDA) that it was underpaid contract support cost (CSC) funds under Indian Self-Determination Education and Assistance Act (ISDA), 25 U.S.C. § 450f *et seq.*, agreements with the IHS over a nine-year period. (Notice at 1-2.) Fond du Lac asks that the appeal be stayed and that it not be required to file a complaint pending the outcome of CSC litigation involving other Tribes. For the reasons that follow, HHS opposes the stay requested in Fond du Lac's Notice and requests that this Tribunal order the Tribe to file a Complaint within 30 days or face dismissal of its Notice with prejudice.

**I. The Tribe Seeks De Facto Class Treatment by the Board that Has Been Denied  
by the Federal Courts.**

First, the Tribe's Notice cites no good basis for the requested stay. Although HHS

acknowledges that the Board has stayed certain Tribal CDA appeals pending the outcome of other litigation, it does not necessarily follow that the Board should agree to enter another stay here. First, as Fond du Lac concedes, even if there once may have been a basis to stay proceedings in anticipation of the decision regarding the motion for class certification in *Pueblo of Zuni v. United States*, No. CV 01-1046 WJ/WPL (D.N.M.), that basis no longer exists because the district court denied class certification on May 22, 2007, *Zuni*, No. CV 01-1046 WJ/WPL, 2007 WL 2120382 (D.N.M. May 22, 2007) (order denying class certification) (submitted herewith as Attachment A), and the Tenth Circuit denied Zuni's petition for interlocutory review, *Pueblo of Zuni v. United States*, No. 07-503 (10<sup>th</sup> Cir. June 25, 2007) (order denying permission for appeal) (submitted herewith as Attachment B). Accordingly, the ongoing *Zuni* litigation provides little, if any, support for granting Fond du Lac's request for a stay here.<sup>1</sup>

The Board also should not accept at face value Fond du Lac's contention that a stay of this proceeding is "the most efficient course" pending resolution of unidentified "crucial common issues" between its CDA appeal and the appeals pending before the Board in *Arctic Slope Native Association, Ltd. v. Leavitt*, CBCA Nos. 190-ISDA and 289-ISDA thru 297-ISDA (*ASNA*), *Metlakatla Indian Community v. IHS*, ISDA Nos. 181-ISDA and 279-ISDA (*Metlakatla*) and *Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians v. IHS*, CBCA Nos. 171-ISDA and 235-ISDA thru 237-ISDA (*Coos*). (Notice at 4.) To accept this premise without even requiring the Tribe to file a complaint would be to assume a commonality among the CDA claims

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<sup>1</sup> Fond du Lac notes that "the district court's decision to deny the motion for class certification can be appealed after the entry of judgment in the district court." (Notice at 3.) However, as it has grown increasingly unlikely that class certification eventually may be granted in the *Zuni* litigation, this overly speculative prospect has lost any persuasiveness it may once have had to support staying CDA appeal proceedings before the Board.

of the Tribes that federal courts have rejected twice, most recently in the *Zuni* litigation and previously in *Cherokee Nation of Oklahoma*, 199 F.R.D. 357 (E.D. Okla. 2001). As the district court ruled in *Zuni*, “individualized issues abound” in the various Tribes’ CDA claims due to the “individualized contracts” at issue. *Zuni*, 2007 WL 2120382, at \*9. The *Zuni* court also cited with approval the decision of the *Cherokee* district court, which held that due to individualized questions of law and fact, “a detailed examination of the contracts of each plaintiff for each year . . . would be required” in order to determine whether IHS should be required to pay additional CSC to the tribes. *Id.* at \*10 (citing *Cherokee*, 199 F.R.D. at 363).

Just as the district courts found that there was insufficient commonality to support class certification in *Cherokee* and *Zuni*, the Board should refuse to stay this proceeding based on Fond du Lac’s unsupported claims of “important common issues” with the CDA appeals filed in *ASNA*, *Metlakatla* and *Coos*. HHS requests that Fond du Lac, at a minimum, be required to file a complaint to which HHS can respond.

## **II. The Requested Stay Would Prejudice HHS.**

Significant prejudice to the Department also would result if the Board entered the indefinite stay Fond du Lac requests based on the faulty premise that “common issues” link all of its claims with those of other Tribes that already have been briefed before the Board, especially if the Board agreed to extend the stay based on any appeals of these decisions. Such an indefinite stay would prejudice HHS in at least three ways. First, a stay would impair the Department’s ability to mount a defense because. The claims here date back to 1995. Memories will continue to fade and an ever increasing number of the employees who were involved in the events at issue in this appeal will leave the agency and become unavailable. Second, because interest on Fond du Lac’s claims

continues to accrue until the litigation concludes, the amount the Department would have to pay should the Tribe prevail on any of its claims could be significantly increased. See 41 U.S.C. § 611.

Third, for as long as the CSC claims of Fond du Lac and other Tribes remain unresolved, they must be reported as contingent liabilities in audited financial statements submitted annually to the Office of Management and Budget and Congress in accordance with 31 U.S.C. § 331(b)(1), 31 U.S.C. § 3515(b), and other authorities. Accordingly, because the prejudice to the Department that would result from granting Fond du Lac's request for a stay would greatly outweigh any purported "efficiencies" that might be gained thereby, the Board should deny the Tribe's request.<sup>2</sup>

### CONCLUSION

For the above stated reasons, HHS requests that the Board issue an order denying Fond du Lac's request for a stay and requiring the Tribe to file a complaint within 30 days following said order or face dismissal of its Notice with prejudice.

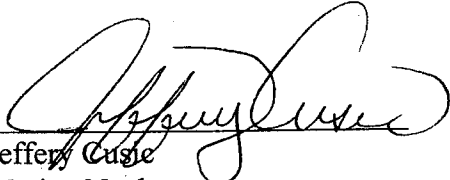
Respectfully submitted,

DANIEL MERON  
General Counsel

ALAN S. DORN  
Acting Chief Counsel, Region V

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<sup>2</sup> The Tribe's Notice also gives the erroneous impression that the Board has stayed all other CDA appeals to await the outcome of the *Zuni* class certification or of the Board's decisions in *ASNA*, *Metlakatla*, and *Coos*. In fact, the Board has entered orders staying proceedings in at least one other case for reasons *other* than to await the outcome of other CSC litigation. In *Lac Courte Oreilles Band of Lake Superior Chippewa v. IHS*, CBCA Nos. 187-ISDA, 224-ISDA, and 225-ISDA (LCO), the Board has stayed proceedings until September 15, 2007, to allow the parties to engage in settlement negotiations and *not* to await the outcome of any other CDA appeal. See *LCO*, CBCA Nos. 187-ISDA, 224-ISDA, and 225-ISDA (CBCA July 10, 2007) (order continuing stay) (submitted herewith as Attachment C).

By   
Jeffery Cusic  
Marian Nealon  
Assistant Regional Counsel  
Office of the General Counsel, Region V  
U.S. Department of Health and Human Services  
233 North Michigan Avenue, Suite 700  
Chicago, Illinois 60601

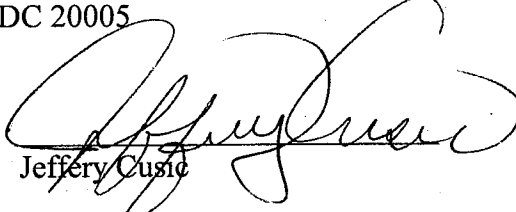
(312) 886-1713  
Counsel for HHS

Dated: August 8, 2007

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on August 8, 2007, I served one copy of the Department of Health and Human Services' Opposition to Appellant's Motion for Stay upon counsel for Appellant via certified mail, return receipt requested:

Lloyd Benton Miller, Esq.  
Law Offices of Sonosky, Chambers, Sachse, Endreson & Perry  
1425 K Street, NW, Suite 600  
Washington, DC 20005

  
Jeffery Cusic