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**U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES****Office of the General Counsel**

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August 10, 2007

Hon. Candida Steel
Administrative Judge
Civilian Board of Contract Appeals
1800 F Street, N.W.
Washington, D.C. 20405

Re: *Forest County Potawatomi Community v. HHS*,
No. CBCA 849-ISDA thru 858-ISDA

Dear Judge Steel:

We enclose for filing an original and one copy of the Department of Health and Human Services' Opposition to Appellant's Motion for Stay and Motion for Leave to File Dispositive Motion in Lieu of an Answer. Please contact the undersigned with any questions or concerns at (312) 886-3605.

Sincerely,

Alan S. Dorn
Acting Chief Counsel, Region V

By:


C/ Douglas Ferguson
Assistant Regional Counsel

cc: Lloyd Benton Miller, Esq.
Donald J. Simon, Esq.
Anne D. Noto, Esq.

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UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

FOREST COUNTY)	
POTAWATOMI COMMUNITY)	
)	
v.)	CBCA 849-ISDA thru
)	858-ISDA
)	
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES)	
)	
Contract Nos.)	
239-95-0005; 239-95-0016;)	
239-96-0011; 239-01-0007;)	
239-02-0007; 239-03-0005)	

**DEPARTMENT OF HEALTH AND HUMAN SERVICES'
OPPOSITION TO APPELLANT'S MOTION FOR STAY AND MOTION
FOR LEAVE TO FILE DISPOSITIVE MOTION IN LIEU OF AN ANSWER**

The Department of Health and Human Services (HHS or Department) hereby opposes the stay requested in Forest County Potawatomi Community's (Forest County or Tribe) Notice of Appeal and Motion for Stay of Proceedings (Notice). Forest County's Notice pertains to decision letters issued by the Indian Health Service (IHS), Bemidji Area Office (BAO) contracting officer denying the Tribe's claims 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 ten-year period. (Notice at 2-3.) Forest County 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 Forest County'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. HHS also requests leave to file a motion to dismiss and/or summary relief with regard to the Tribe's claims for contract years 1994-2000 in lieu of filing an answer to those claims.

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

At the outset, HHS notes that in contravention of Rule 8(a) of the Board's procedures, the Tribe never contacted HHS to discuss its request for a stay. In addition, 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 Forest County 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 (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 (10th 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 Forest County's request for a stay here.¹

The Board also should not accept at face value Forest County'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*),

¹ Forest County 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.

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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 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*, No. CV 01-1046 WJ/WPL, at 17. 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 18 (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 Forest County's unsupported claims of "important common issues" with the CDA appeals filed in *ASNA*, *Metlakatla* and *Coos*. HHS requests that Forest County, at a minimum, be required to file a complaint to which HHS can respond.

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II. Contractor's Releases Signed by Forest County Differentiate this Appeal from Those Filed in *ASNA*, *Metlakatla*, and *Coos*

In addition, one key factual and legal distinction that sets Forest County's appeal apart from any other case that has been fully briefed before the Board is that the Tribe voluntarily executed Contractor's Releases for three of the contracts at issue in this appeal. Those Contractor's Releases state that in consideration for the payments IHS made to the Tribe under the parties' ISDA agreements the Tribe remised and released the United States from "all liabilities, obligations, claims, and demands whatsoever" arising under these agreements. (See Contractor's Releases for All Contracts dated October 20, 1998, August 24, 1999, and August 20, 2001; submitted herewith as Attachment C.) As the Board is aware from its review of the extensive briefs filed in *ASNA*, *Metlakatla*, and *Coos*, the Tribes did not sign releases in these cases.

In signing the Contractor's Releases, Forest County did not except CSC claims from the general release, specifically stating "None" in the area provided on the document to list claims excepted from the releases. *Id.* Accordingly, these Contractor's Releases, which cover seven of the ten contract years at issue in this appeal (contract years 1994-2000), provide an absolute bar to Forest County's claims that it was underpaid for these years. See, e.g., *Abatement Contracting Corp. v. United States*, 58 Fed. Cl. 594, 610 (Fed. Cl. 2003) ("A contractor who executes an unconditional release and fails to exercise his right to reserve claims is barred from maintaining a suit for damages or additional compensation under the contract based on events that occurred prior to execution of the release") (citing *Mingus Constructors, Inc. v. United States*, 812 F.3d 1387, 1391 (Fed. Cir. 1987); *Starflight Boats v. United States*, 48 Fed. Cl. 592, 602 (Fed. Cl. 2001); *Clark Mechanical Contractors, Inc. v. United States*, 5 Ct. Cl. 84, 86 (Ct. Cl. 1984); *J.G. Watts Constr. Co. v. United*

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States, 161 Ct. Cl. 801, 805 (Ct. Cl. 1963)).

The existence of the releases signed by Forest County demonstrates that the majority of the claims at issue here are materially different from those at issue in *ASNA*, *Metlakatla*, and *Coos*. Accordingly, it would *not* be “the most efficient course . . . for the Board to stay this appeal,” and HHS does not agree that the resolution of these other appeals would “manifestly assist the parties here in determining how to proceed,” because none of the other three Tribes signed releases. (*See* Notice at 4.) On the contrary, due to the signed releases, the most efficient course would be to deny Forest County’s request for a stay, require the Tribe to file a complaint, and grant leave to HHS to move for dismissal and/or summary relief as to the claims related to contract years 1994-2000 (the years covered by the releases) while answering the Tribe’s claims with regard to contract years 2001-2003. To avoid Forest County’s concern that there may be “duplication” of briefing if adjudication of the Tribe’s appeal were required to proceed (*see* Notice at 4), the Board could limit the referenced dispositive motion regarding contract years 1994-2000 to the question of whether the releases bar the Tribe’s claims related to these years, while preserving the Department’s rights to raise additional defenses to the claims for these years should the Board rule against the Department on this issue. On August 10, 2007, the undersigned counsel for HHS conferred with one of the attorneys for Forest County, who stated that – since Forest County maintains that these proceedings should be stayed – the Tribe would oppose HHS’s request to file a dispositive motion in lieu of filing an answer regarding contract years 1994-2000.

III. The Requested Stay Would Prejudice HHS.

Significant prejudice to the Department also would result if the Board entered the indefinite stay Forest County 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 memories will continue to fade and an ever increasing number of the employees who were involved in the events at issue in this appeal, many of which occurred over 10 years ago, will leave the agency and become unavailable. Second, because interest on Forest County's claims continues to accrue until the litigation concludes, the amount the Department would have to pay should the Tribe prevail could be significantly increased. See 41 U.S.C. § 611. Third, for as long as the CSC claims of Forest County and other Tribes pending before the Board and district courts 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 Forest County's request for a stay would greatly outweigh any purported "efficiencies" that might be gained thereby, the Board should deny the Tribe's request.²

² 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 D).

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CONCLUSION

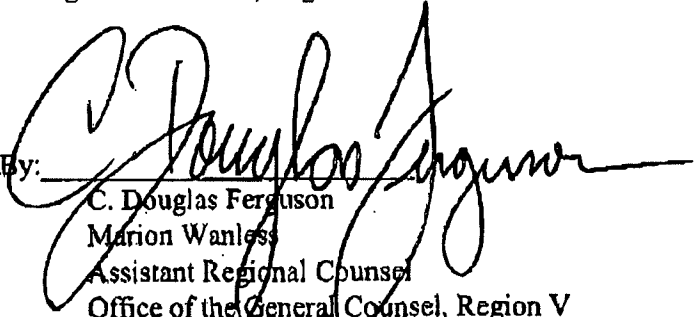
For the above stated reasons, HHS requests that the Board issue an order denying Forest County's request for a stay and requiring the Tribe to file a complaint within 30 days following said order or face dismissal of its Notice with prejudice. Further, in lieu of filing an answer to the Tribe's complaint, the Department requests leave to file a motion to dismiss and/or summary relief 30 days after the complaint is filed that will be limited to the question of whether Forest County's claims for contract years 1994-2000 should be barred by the releases it executed and asks that the Board preserve HHS' right to raise additional defenses for contract years 1994-2000 should the Board rule against HHS on its dispositive motion. As stated above, if the Board approves its request, the Department would file an answer with regard to the remaining contract years.

Respectfully submitted,

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General Counsel

ALAN S. DORN
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By:



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Dated: August 10, 2007

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ATTACHMENT A

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO OF ZUNI, on behalf of itself
and all others similarly situated,

Plaintiff,

v.

Civil No. 01-1046 WJ/WPL

UNITED STATES OF AMERICA;
TOMMY THOMPSON, Secretary of the
United States Department of Health and
Human Services; and
MICHAEL H. TRUJILLO, Director of the
Indian Health Service, United States
Department of Health and Human Services,

Defendants.

**MEMORANDUM OPINION AND ORDER DENYING
CLASS CERTIFICATION AND DENYING MOTION TO CREATE SUB-CLASSES
AND APPOINT COUNSEL FOR SUB-CLASS**

THIS MATTER comes before the Court upon Plaintiff's Motion for Class Certification and Approval of Class Notice, filed June 6, 2006 (Doc. 280) and an Application under Rule 23(g) for Creation of Sub-Classes and for Appointment as Class Counsel for the Rate-Making Claims, filed on July 20, 2006 by Attorneys Michael Gross & J.E. Gallegos (Doc. 297). Having considered the parties' briefs and the applicable law, including counsel's oral arguments at a hearing on this matter, I find that Plaintiff's motion is not well-taken and shall be denied. The denial of Plaintiff's motion renders the motion filed by Mr. Gross and Mr. Gallegos moot, and it shall be denied on that basis.

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BACKGROUND

This case (the "Zuni" case) is a putative class action case filed by Plaintiff Pueblo of Zuni ("Plaintiff") which seeks damages against the United States Government ("Government") for its alleged failure to pay the full contract amounts specified in contracts between Native American Tribes or Pueblos (collectively, "tribes") and the Indian Health Service ("IHS") that were awarded under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq. In the Zuni case, these ISDA contracts provide that Zuni Pueblo members will deliver health care services to other Zuni Pueblo members that would otherwise be provided to members by IHS. Plaintiff seeks damages for the Government's underpayment of contract support costs to tribes for ISDA contracts in fiscal years dating back from 1993 to the present. The Amended Complaint was filed on December 12, 2001 (Doc. 5). It alleges various theories of claims flowing from the Government's alleged breach of contract and violation of the ISDA, and requests both declaratory relief and monetary damages.

A. Statutory Background

The ISDA's stated purpose is to allow tribes to directly operate their own federal programs. Under the ISDA, a tribe and the Secretary of Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. See 25 U.S.C. § 4501(a), (c). The ISDA specifies that the Government must pay a tribe's costs, including administrative expenses. 25 U.S.C. §§ 450j-1(a)(1) and (2). Administrative expenses include: (1) the amount that the agency would have spent for the operation of the program, had

¹Reference to "Government" herein includes the United States Government, along with the named federal agencies, Health and Human Services, and Indian Health Services, as well as the directors of these agencies all of whom are named Defendants.

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the agency itself managed the program, and (2) contract support costs. § 450j-1(a)(1) & (2). The ISDA defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization" acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." § 450j-1(a)(2).

Contract support costs can include indirect administrative costs, such as special auditing or other financial management costs, § 450j-1(a)(3)(A)(ii); direct costs, such as workers' compensation insurance, § 450j-1(a)(3)(A)(i); and certain startup costs, § 450j-1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 635 (2005) ("Leavitt"). Funding of indirect contract support costs is based on a variety of factors, including specific terms of each negotiated ISDA contract, each tribe's annual indirect cost rate, the amount of funding made available by Congress in the annual IHS appropriation and IHS policies and procedures for the calculation and distribution of indirect contract support costs. The Zuni case arises, in part, from a dispute regarding the funding of indirect contract support costs under the individual self-determination contracts.

Prior to 1998, Congress provided IHS with a lump-sum appropriation for the majority of its operations, also providing recommendations on the amount that IHS should expend on contract support costs.² Starting in the fiscal year 1998 appropriation, Congress explicitly limited

² The Government's memorandum brief at 5-6 contains citations to pertinent supporting legislative documents. See, e.g., Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (appropriating a lump-sum appropriation for IHS for fiscal year 1994: "[t]hat not to exceed \$91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated

