

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Interior Board of Contract Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

METLAKATLA INDIAN COMMUNITY,)	
)	
Appellant,)	
)	
v.)	IBCA 4767-2006
)	through
)	IBCA 4771-2006
INDIAN HEALTH SERVICE, DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Appellee.)	

**METLAKATLA INDIAN COMMUNITY'S
MOTION FOR SUMMARY JUDGMENT**

Having addressed the government's motion to dismiss the complaint, the Community has concluded that it would be appropriate to move for summary judgment to resolve the IHS's liability for the claims. If this Board agrees that the Community's claims should not be dismissed, then the Community asks that this Board take the final step of issuing a ruling in summary judgment as to IHS's liability for CSC underpayments in FY 1995 through FY 1999.

We do not believe that there can be any disagreement as to the law or material facts supporting liability. There is no question that the IHS received lump-sum appropriations for FYs 1995-1997 and that it failed to pay the Community the entire amount of contract support it agreed the Community was entitled to be paid under the

contracts. Rather it paid some of the funds owed and placed the remaining amounts on the queue and the shortfall list and thereby breached its contracts and violated the ISDEAA. Those breaches, in turn, caused underpayments in FYs 1998 and 1999, in violation of the stable-funding provisions of the Compact and the ISDEAA.

STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Appeals of Gardner Zemke Co.*, No. 3261-62, 96-1 B.C.A. (CCH) ¶ 27,936 at 139,525, 1995 WL 564868 (Sept. 11, 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986)); *Sheinbein v. Dudas*, 465 F.3d 493, 495 (Fed. Cir. 2006). The movant bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). A "material fact" is one that will "affect the outcome of the suit under the governing law." *Id.* at 248.

An appeal from a contracting officer's decision under the Contract Disputes Act is reviewed *de novo*. *Appeal of White & McNeil Excavating, Inc.*, No. 2488, 93-1 B.C.A. (CCH) ¶ 25,286 at 125,961, 1992 WL 181690 (July 24, 1992) (citing 41 U.S.C. § 605(a) and (b)); *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987).

RULE OF CONSTRUCTION

The ISDEAA and the Community's contracts mandate that "[e]ach provision of the [ISDEAA] and each provision of this contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the ... related functions, services, activities, and programs ... from the Federal Government to the Contractor." Appeal File (5)(5) (Art. I § 2 of the Community's FY 1996 Contract); 25 U.S.C. § 450l(c) (§ 1(a)(2) of the Model Contract); Appeal File (10)(11) (Compact, Art. I § 2, providing that Compact be liberally construed to promote tribal autonomy and transfer and redesign of health care PFSAs). This rule of construction applies to both the ISDEAA provisions at issue in this case and to all the terms of the Community's agreements with the IHS.

ARGUMENT

The Community is entitled to judgment under the Supreme Court's holding in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), the Federal Circuit held that for two of the years at issue in this appeal, FYs 1995 and 1996, "there were available appropriations to pay the Appellee its full indirect costs, because there were no statutory caps on funding in the appropriations acts for the relevant fiscal years..." *Id.* at 1079. The Federal Circuit summed up the relevant principles of appropriation law and recognized that in the face of a lump-sum appropriation, the Secretary could reprogram funds to make good on his contractual obligations. The Court of Appeals also rejected the notion that Congress could limit the government's duty through report language. *Id.* at 1086, 1088. This ruling applied to both ongoing and expanded contracts. The Court specifically rejected an argument that the ISD Fund was subject to a cap. *Id.* at 1089. It further found that

Congress had made lump-sum appropriations to the IHS—over \$1.337 billion in FY 1995 and over \$1.375 billion in FY 1996—and that these amounts were available to pay tribal contractors' CSC. *Id.* at 1094. Even at the end of each year, the IHS had unobligated balances of between \$1.2 million and \$6.8 million. *Id.*

This ruling was affirmed by the Supreme Court in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In *Cherokee*, the Supreme Court expressly rejected the notion that a tribe bears the risk of the lack of appropriations or that a tribe "should receive only the portion of the total lump-sum appropriation allocated to it." 543 U.S. at 638. It also rejected IHS's argument that the Secretary has the authority to adjust funding levels based on appropriations. *Id.* at 643-44. Instead, the Court affirmed that tribes are entitled to be paid as promised. *Id.* at 644. This ruling in effect affirmed that the IHS's policies of deferring and avoiding payment of contract support through the queue system and the shortfall list were illegal.

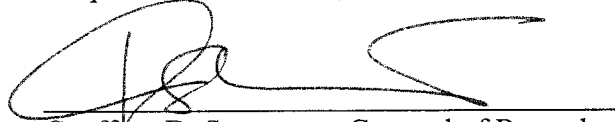
The Community's claim in this case is identical to that presented in *Thompson*. It simply includes three additional fiscal years. The fiscal year 1997 was also a year in which the IHS received a lump-sum appropriation and the reasoning of the *Cherokee Nation* case fully applies—in fact, *Cherokee Nation* involved contracts for FYs 1994 through 1997. 543 U.S. at 635.

As for FYs 1998 and 1999, the Community seeks a judgment that the wrong committed in FYs 1995-1997 carried over into FYs 1998 and 1999 and that the Community would have been paid recurring funding but for that error. We note that the IHS admits that Congress increased appropriations in FY 1998 and 1999. See Answer ¶20.

The facts establishing liability are as clear as the law. The fact that the IHS did not pay the Community its full CSC requirement is well-documented in the queues and shortfall reports that the agency certified to Congress. IHS also admits that the Community claims were placed on the queue, Answer ¶17, and that the agency prepared shortfall reports for FY 1995 through 1999. Answer ¶14. In the face of this documentation, the IHS cannot seriously dispute that it underpaid the Community in violation of the ISDEAA and the contractual agreements.

While the IHS might still dispute the amount of these underpayments, that is an issue to be settled in the ensuing damages phase of this litigation, should the Board grant this motion in whole or in part. This motion goes solely to the question of whether the IHS followed policies similar to those found illegal in *Cherokee Nation*: it refused to pay the entire amount of contract support despite lump-sum appropriations that it could have reprogrammed and instead relegated a portion of the Community's CSC requirement to an IOU found in the queue and shortfall reports. We submit that the Community is entitled to summary judgment on this question. In all years, the Community is entitled to damages to be determined.

Respectfully submitted,



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