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**BOARD OF CONTRACT APPEALS**

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Attorneys for Contractor/Appellant

**INTERIOR BOARD OF CONTRACT APPEALS**

ST. CROIX CHIPPEWA INDIANS OF WISCONSIN	)	IBCA Nos. _____ through _____
24663 Angeline Avenue	)	
Webster, Wisconsin 54893	)	ISDA Contract No. 239-96-0022
	)	(effective October 1, 1995 through
Appellants,	)	September 30, 1998)
vs.	)	
	)	ISDA Contract No. 239-99-0009
MICHAEL O. LEAVITT, SECRETARY,	)	(effective October 1, 1998 through
U.S. DEPARTMENT OF HEALTH AND	)	September 30, 2001)
HUMAN SERVICES; CHARLES GRIM,	)	
DIRECTOR, INDIAN HEALTH	)	ISDA Contract No. 239-02-0009
SERVICE; UNITED STATES OF	)	(effective October 1, 2001 through
AMERICA	)	September 30, 2004 )
	)	
Appellees.	)	

**PROTECTIVE NOTICE OF APPEAL AND REQUEST FOR A STAY**

The St. Croix Chippewa Indians of Wisconsin ("the Tribe"), by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeals from the denials of U.S. Department of Health & Human Services, Indian Health Service Senior Contracting Officer

Dennis S. Murphy dated May 31, 2006, attached hereto as Exhibits 1 through 6,<sup>1</sup> of multiple 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, 2005 damages claim under ISDA Contract No. 239-96-0022 in the amount of \$29,818.92 for contract year 1996;
- (b) a September 29, 2005 damages claim under ISDA Contract No. 239-96-0022 in the amount of \$32,898.64 for contract year 1997;
- (c) a September 29, 2005 damages claim under ISDA Contract No. 239-96-0022 for contract year 1998;
- (d) a September 29, 2005 damages claim under ISDA Contract No. 239-99-0009 in the amount of \$32,345.16 for contract year 1999;
- (e) a September 29, 2005 damages claim under ISDA Contract No. 239-99-0009 in the amount of \$38,915.41 for contract year 2000;
- (f) a September 29, 2005 damages claim under ISDA Contract No. 239-99-0009 for contract year 2001;
- (g) a September 29, 2005 damages claim under ISDA Contract No. 239-02-0009 (identified in the claim letter as Contract No. 239-99-0009) in the amount of \$16,096.12 for contract year 2002;

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<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).

- (h) a September 29, 2005 damages claim under ISDA Contract No. 239-02-0009 (identified in the claim letter as Contract No. 239-99-0009) in the amount of \$18,332.31 for contract year 2003; and
- (i) a September 29, 2005 damages claim under ISDA Contract No. 239-02-0009 (identified in the claim letter as Contract No. 239-99-0009) in the amount of \$6,074.23 for contract year 2004.

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 same issues involved in this appeal are pending before the United States District Court for the District of New Mexico in a putative class action entitled Pueblo of Zuni v. United States of America, Case No. CV 01-1046 WJ/WPL. A Motion for Class Certification and for Approval of Class Notice (Dkt. No. 280) is pending before the New Mexico District Court. The Tribe is a putative class member in the Zuni case. Thus, the disposition of the Motion for Class Certification affects whether the Tribe will proceed with this appeal. The Tribe files this Notice as a protective Notice of Appeal, preserving the right of the Tribe to proceed in this forum if a class action is not certified in Zuni.

Given the pendency of the class certification motion in the Zuni matter, the most efficient course of action is to stay this litigation.

For the foregoing reasons, Appellant St. Croix Chippewa Indians of Wisconsin respectfully requests that this appeal be docketed and that Appellant's request for a stay be granted.

Respectfully submitted this 1st day of September 2006.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

*/s/ William R. Perry*

By: \_\_\_\_\_

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Attorneys for St. Croix Chippewa Indians of Wisconsin

**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 1st day of September 2006:

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  
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Bemidji, Minnesota 56601

/s/ William R. Perry  
William R. Perry

*Justice*Indian Health Service  
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MAY 31 2006

**By Certified Mail, Return Receipt Requested**David Merrill  
Tribal Chairperson  
St. Croix Tribal Council  
St. Croix Chippewa Indians of Wisconsin  
24663 Angeline Ave.  
Webster, WI 54893**Subject:** Contract No. 239-02-0009  
Contract Disputes Act Claim for Contract Support Costs  
for Contract Year 2004RECEIVED  
EXECUTIVE SECRETARIAT  
INDIAN HEALTH SERVICE  
2006 JUN -6 P 3:00

Dear Mr. Merrill:

The Indian Health Service (IHS) received your claim dated September 29, 2005, for direct and indirect contract support costs (CSC) in the amount of \$6,074.23 for Contract Year 2004 (CY04). By letter dated November 16, 2005, we notified you that we would answer your claim no later than June 1, 2006. Your claim is denied for the following reasons.

**Description of Claims**

Your September 29, 2005 letter identifies claims related to what is identified as Contract No. 239-99-0009. Because that contract number ended in 2001, the IHS assumes that you are instead referring to the contract that governed fiscal years 2002 through 2004. That contract is number 239-02-0009. All of the IHS comments in this letter are based on information pertaining to that contract number for CY04. If you believe this to be in error, please notify this office immediately and provide documentation supporting that contention.

Your September 29, 2005 letter sets forth two claims. The first claim alleges that "IHS failed to pay the full amount of the St. Croix Chippewa Indians of Wisconsin'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 St. Croix Chippewa Indians of Wisconsin."

The second claim alleges that "IHS failed to adjust the indirect cost amount calculated by applying the St. Croix Chippewa Indians of Wisconsin's indirect cost rate to account for the dilution in 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 St. Croix Chippewa Indians of Wisconsin contribute to the St. Croix Chippewa Indians of Wisconsin indirect cost pool at the full rate," and, thus, "violated its contractual and statutory obligations to the St. Croix Chippewa Indians of Wisconsin."

EXHIBIT 6  
Page 1 of 7

Your letter, supported by your certification, alleges that the amount due for CY04 is \$6,074.23, plus interest. However, your letter does not break down this figure between the two claims, does not state how the St. Croix Chippewa Indians of Wisconsin calculated this figure, and does not provide any supporting documentation for this figure.

### Contract Terms at Issue

Contract 239-02-0009, effective October 1, 2001, provides, in part, as follows:

Section (b)(4) Funding Amount: Subject to the availability of appropriations, the [S]ecretary shall make available to the Contractor [the St. Croix Chippewa Indians of Wisconsin] to [sic] total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 405j-1).

Section (b)(5) Limitation of Costs: The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this contract or a specific activity conducted under this contract<sup>1</sup> [sic], the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds [sic] under this contract, the Contractor may suspend performance of the contract until such time additional funds are awarded.

Section (c)(2) Obligations of Contractor, Amount of Funds: The total amount of funds to be paid under this contract pursuant to Section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this contract.

Section (c)(3) Obligations of Contractor, Contracted Programs: Subject to the availability of appropriated funds, the Contractor shall administer the programs, functions, services, and activities identified in this contract and funded through the annual funding agreement

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<sup>1</sup>Section 1 of the Model Agreement, § 106(c) of the ISDA, provides "Limitation of Costs: The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract *would be greater than the amount of funds awarded under the Contract*, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds *awarded* under this contract, the Contractor may suspend performance of the contract until such time additional funds are awarded."

under section (f)(2).

Section (f)(2)(B) Annual Funding Agreement: INCORPORATED BY REFERENCE.  
The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as Attachment 2.

Section 3 of the Annual Funding Agreement (AFA) for CY04 states, "The funding amounts available to the Contractor for the period of this AFA shall be as follows: . . ." It then states that \$49,546 in direct CSC funding and \$163,885 in indirect CSC funding was available to the St. Croix Chippewa Indians of Wisconsin.

Section 6(h) the Annual Funding Agreement (AFA) for CY04 states that "The parties acknowledge that, for the purposes of this annual funding agreement, IHS will calculated [sic] and pay CSC in accordance with §106 of the Indian Self-Determination Act and IHS Circular 2001-05, subject to any statutory requirements imposed by Congress. . . . The Contractor's Current Support Costs (Indirect) will be calculated at the current approved indirect cost rate."

In addition, the informational budget the St. Croix Chippewa Indians of Wisconsin, Attachment A to the AFA for CY04, shows \$163,885 for indirect costs, noting an indirect cost rate of 22.1%.

Modifications 04-18 through 04-19 to the Contract did not change the direct or indirect CSC amounts. Modification 04-20 decreased CSC indirect funding by \$1,267 to a total of \$162, 618. Modifications 04-21 through 04-23 to the Contract did not change the direct or indirect CSC amounts. Modification 04-24 increased CSC indirect funding by \$736 to a total of \$163,354. Modification 04-25 increased CSC direct funding by \$400 to a total of \$49,946. Modifications 04-26 through 04-27 to the Contract did not change the direct or indirect CSC amounts. As a result, the CY04 totals made available and paid to the St. Croix Chippewa Indians of Wisconsin were increased to \$49,946 for CSC direct funding and \$163, 354 for CSC indirect funding.

#### Factual Areas of Agreement and Disagreement

##### A. Claim 1

Most of the allegations set forth in your letter are your characterizations of the rights and duties of the St. Croix Chippewa Indians of Wisconsin and the government under the Indian Self-Determination Act (ISDA). These legal arguments are discussed in the Decision section of this letter.

The IHS disagrees with your allegation that the St. Croix Chippewa Indians of Wisconsin were underpaid \$6,074.23 for CSC for CY04.

The IHS considers the following facts pertinent to its decision on Claim 1:

The St. Croix Chippewa Indians of Wisconsin's informational budget, attached to the AFA,

shows an estimate of \$163,445 for indirect costs. This amount was decreased to \$163,354 through AFA modifications 04-20 and 04-24 as described above.

IHS paid the St. Croix Chippewa Indians of Wisconsin \$49,946 in direct CSC and \$163,354 in indirect CSC in fiscal year 2004. These payments fulfill the contractual obligations specified in Section 3 of the AFA for CY04, as modified.

**B. Claim 2**

The allegations set forth in support of Claim 2 are your characterizations of the parties' rights and duties under the ISDA, not facts. These legal arguments will be discussed in the Decision section of this letter.

As a factual matter, you did not provide IHS with information to support your claim, such as any agreements with other federal agencies. You have provided no evidence that these other federal agencies failed to allow the St. Croix Chippewa Indians of Wisconsin to recover the indirect costs associated with these agreements. Finally, you have provided no evidence that the St. Croix Chippewa Indians of Wisconsin would incur these indirect costs to support the IHS contract alone in the absence of the other federal programs. IHS does not have this information and, therefore, cannot state whether it agrees or disagrees with any factual assertions related to this claim.

The St. Croix Chippewa Indians of Wisconsin's indirect rate agreement with the Department of the Interior Office of the Inspector General dated March 16, 2005, set forth a fixed carryforward indirect rate of 21.74% for fiscal year (FY) 2004. As stated above, the rate noted in the budget was an older, higher rate of 22.1%.

**Decision**

**A. Claim 1**

Claim 1 is denied because IHS has not breached any contractual duty to pay CSC funds beyond those already awarded the St. Croix Chippewa Indians of Wisconsin. Section (c)(2) of Contract No. 239-02-0009 states that the total funds to be paid under the contract would be determined in an AFA. Section 3 of the AFA states that \$49,546 in direct CSC funding and \$163,885 in indirect CSC funding was available for the St. Croix Chippewa Indians of Wisconsin. Modification 04-20 decreased CSC indirect funding by \$1,267 to a total of \$162,618. Modification 04-24 increased CSC indirect funding by \$736 to a total of \$163,354. Modification 04-25 increased CSC direct funding by \$400 to a total of \$49,946. Our records reflect that IHS paid the St. Croix Chippewa Indians of Wisconsin all of the CSC required to be paid under the contract and AFA.

Claim 1 is also denied because, although the ISDA states that tribes are to be paid "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," 25 U.S.C. 450j-1(a)(2), Congress mandated that the "provision of funds [for contract support costs] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). Your contract and Annual Funding Agreement incorporate this express condition by making payment of CSC subject to the availability of appropriations and statutory restrictions imposed by Congress. See, e.g., §§ (b)(4) and (c)(3) of the Contract, and Section 6h. of the CY04 AFA. Beginning in fiscal year 1998, Congress enacted a statutory limit on the amount of the IHS appropriation available for CSC. See PL 105-83, 111 Stat. 1543, 1583 (Fiscal Year 1998 Appropriations Act); PL 105-277, 112 Stat. 2681, 2681-279 (Fiscal Year 1999 Appropriations Act); PL 106-113, 113 Stat. 1501, 1501A-182 (Fiscal Year 2000 Appropriations Act); PL 106-291, 114 Stat. 922, 978-79 (Fiscal Year 2001 Appropriations Act); PL 107-63, 115 Stat. 414, 456 (Fiscal Year 2002 Appropriations Act); PL 108-7, 117 Stat. 11, 261 (Fiscal Year 2003 Appropriations Act); PL 108-108, 117 Stat. 1241, 1293 (Fiscal Year 2004 Appropriations Act).

During CY04, Congress limited the amount of the IHS appropriation that could be used for CSC. This meant that IHS could not use other funds to pay CSC, even though the overall need nationwide for CSC in CY04 far exceeded the capped amount. Therefore, pursuant to IHS policy developed in consultation with tribes and tribal organizations, IHS distributed all of its CSC appropriation to tribes and tribal organizations, including the St. Croix Chippewa Indians of Wisconsin.

Moreover, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organizations." 25 U.S.C. 450j-1(b). To make additional CSC funds available to you would naturally require the reduction of funds associated with the programs serving other tribes. Thus, even if your claim were otherwise valid, no funds are available to pay your claim.

#### **B. Claim 2**

Claim 2 also is denied. As stated above, you have provided no information to support your allegation that you were somehow harmed when IHS used your 2004 indirect cost rate to calculate your need for indirect costs. Instead of paying indirect CSC at the final, approved rate of 21.74%, the IHS paid the Tribe at an older, higher rate of 22.1%. Even if your claim were otherwise valid, IHS has no basis to award your claim. However, as discussed below, your claim is not valid.

Neither your contract nor the ISDA requires IHS to adjust the indirect cost calculation to account for the failure of other federal agencies to allow full indirect cost recovery. The St. Croix Chippewa Indians of Wisconsin never asked IHS to obtain, nor did IHS ever receive, approval from the St. Croix Chippewa Indians of Wisconsin's cognizant agency to adjust the indirect cost rate. Even if the contract permitted IHS to make the rate adjustment the St. Croix Chippewa Indians of Wisconsin now requests, IHS is not the cognizant agency. It is not authorized to adjust rates negotiated under OMB Circular A-87, unless statutorily required.

The ISDA does not require IHS to adjust the indirect cost rate. Instead, IHS is statutorily barred from awarding any costs allocable to other programs. Although 25 U.S.C. 450j-1(d)(1) prohibits using shortfalls in indirect cost funding by other federal, state, or other agencies as the basis for theoretical over-recoveries or other adverse adjustments of any future years' indirect cost rates, it is clear from the legislative history that this provision does not address "rate dilution" of the sort that you appear to be claiming. Instead, this provision addresses the situation where the tribal contractor, unable to collect indirect costs from other federal agencies, incurred fewer indirect costs than had been predicted by the rate. When this "theoretical overrecovery" was carried forward, the result was a lower indirect cost rate. See S. Rep. 100-274 at 32.

Despite the legislative history, the Court of Appeals for the Tenth Circuit held that 25 U.S.C. 450j-1(d)(2) was ambiguous and that the tribal contractor's interpretation that it also prohibited rate dilution was plausible. Ramah Navajo Chapter, Inc. v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997). The court did not rule that the use of OMB Circular A-87 was per se illegal, nor did the court make any ruling with respect to IHS, which was not a party to the case. However, Congress promptly acted to remove any ambiguity in 25 U.S.C. 450j-1(d)(2) and to ensure that the court's decision would not apply to IHS. It amended the ISDA to provide as follows:

Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C.A. §450f et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Pub. L. 105-277, Secretary. 101(e) (1998), codified at 25 U.S.C. 450j-2.

As far as can be determined from your September 29, 2005 letter, you are claiming that your indirect cost pool would not change if other federal programs were added or subtracted from the direct cost base. Even if IHS accepted this factual premise, IHS cannot use its funds to pay indirect costs that are "associated with" any other federal program. This is so even if the other federal program does not allow for the recovery of the full indirect costs associated with it. Any other federal programs in the Band's direct cost base do incur indirect costs that are allocable to them independent of whether their governing statutes permit recovery. For this reason, IHS acted properly when it used the Band's indirect cost rate agreement, calculated under OMB Circular A-87, to calculate the indirect cost need associated with the IHS program.

