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**INTERIOR BOARD OF CONTRACT APPEALS**

ST. CROIX CHIPPEWA INDIANS OF	)	Docket Nos. IBCA 4810-2006
WISCONSIN	)	IBCA 4811-2006
24663 Angeline Avenue	)	IBCA 4812-2006
Webster, Wisconsin 54893	)	IBCA 4813-2006
	)	IBCA 4814-2006
Appellants,	)	IBCA 4815-2006
vs.	)	IBCA 4816-2006
	)	IBCA 4817-2006
MICHAEL O. LEAVITT, SECRETARY,	)	IBCA 4818-2006
U.S. DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES; CHARLES GRIM,	)	The Honorable Bernard V. Parrette
DIRECTOR, INDIAN HEALTH	)	Administrative Judge
SERVICE; UNITED STATES OF	)	
AMERICA	)	
	)	
Appellees.	)	
	)	

**OPPOSITION TO DEFENDANTS' MOTION TO LIFT STAY**

The St. Croix Chippewa Indians of Wisconsin ("the Tribe") opposes the Government's Motion to Lift Stay. The Tribe will respond separately to the Motion to Dismiss filed contemporaneously therewith, if the Board lifts the stay.

As described in the Tribe's Protective Notice of Appeal and Request for A Stay, there is currently pending before the United States District Court for the District of New Mexico a putative class action entitled Pueblo of Zuni v. United States of America, Case No. CV 01-1046 WJ/WPL, in which a motion for class certification has been filed and fully briefed. The same issues involved in this appeal are presented in the Zuni case. The Tribe is a putative class member in Zuni and wishes to remain a class member if the case is certified as a class.

There is good reason for the Board to exercise its "inherent power to suspend these proceedings." Appeals of Harddrives, Inc., 91-2 BCA ¶ 23769 (IBCA 1991).<sup>1</sup> A decision in Zuni on class certification is imminent. The certification motion was fully briefed in Zuni as of October 10, 2006. The Judge is expected to hold oral argument by January 2007, and issue a decision shortly thereafter. Thus, to the extent interest is accruing on the Tribe's claims, it will not be accruing for long. On the other hand, requiring the Tribe to litigate outside the class will be prohibitively expensive for the Tribe, an unnecessary use of the Board's resources, and contrary to class action principles that favor one lawsuit for a single wrongdoing against numerous victims.<sup>2</sup> This Board is

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<sup>1</sup> See also Landis v. North American Co., 299 U.S. 248, 254 (1936), cited approvingly in Harddrives, *supra* ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); In re Government Business Services Group, LLC, 05-2 BCA ¶ 33059 (AGBCA 2005) ("The Board has the inherent authority to manage its docket and to stay or suspend proceedings in appropriate circumstances.").

<sup>2</sup> "Class-actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrong-doing to merge their claims into a single lawsuit. When used properly, class-actions make the legal system more efficient and help guarantee that injured people receive proper compensation. This is an important principle of justice." [www.whitehouse.gov/news/releases/2005/02/20050218-11.html](http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html) (statement by President Bush in signing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 14). See also Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999) (class actions are intended to address "those recurrent life patterns which call for mass litigation through representative parties") (citation omitted); American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974) (holding that the filing of a class action tolls the statute of limitations for putative class members until a decision is made about certification).

all too familiar with IHS's systemwide policy of underpaying ISDA contractors, be they in Oklahoma, Alaska, or Wisconsin.<sup>3</sup> The Tribe wishes to be part of a class of Tribal contractors that is vindicated for IHS's wrongdoings, much like the class that was certified against the Bureau of Indian Affairs in Ramah Navajo Chapter v. Kempthorne, Case No. 90-957 (D. N.M.) ("Ramah").

In Zuni and elsewhere, the Government has argued that all class members must present timely claims to contracting officers and exhaust administrative remedies prior to being eligible to be in any class that gets certified. While the Tribe disagrees with the Government's position as contrary to class action principles and the class that was certified in Ramah, the Government's argument has left Tribes in a quandary: on the one hand, in Zuni the Government argues Tribes must present timely claims in order to be class members; and on the other hand the Government argues here that Tribes must also appeal the inevitable denials (i.e., exhaust) within certain time limits at which point they have *ipso facto* opted out of any future Zuni class. The Government should not be allowed to argue for mutually inconsistent and incompatible alternatives, particularly in its dealings with Tribes.<sup>4</sup>

It promotes judicial economy for the Board to continue the stay so that the Tribe can participate in the Zuni class if and when that case is certified as a class action. The alternative is

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<sup>3</sup> See Cherokee Nation v. Leavitt, 543 U.S. 631 (2005), aff'g Appeals of Cherokee Nation of Okla., 99-2 BCA ¶ 30462, 1999 WL 440045 (IBCA 1999) and Appeals of Cherokee Nation of Okla., 01-1 BCA ¶ 31349, 2001 WL 283245 (IBCA 2001); See also Appeals of Seldovia Village Tribe, 03-2 BCA ¶ 32400, 2003 WL 22422891 (IBCA 2003); Application for Attorney Fees of Seldovia Village Tribe, 05-2 BCA ¶ 33034, 2005 WL 1805664 (IBCA 2005) (finding IHS lacked substantial justification for failing to pay full contract support costs).

<sup>4</sup> The "undisputed existence of a general trust relationship between the United States and the Indian People," is well established. United States v. Mitchell, 463 U.S. 206, 225 (1983). The Indian Self-Determination Act incorporates the trust responsibility into all contracts with Indian tribes. 25 U.S.C. § 450a(b); 25 U.S.C. § 450(d)(1)-(2); see also 25 C.F.R. § 900.4.

being one of numerous Tribes across the country required to proceed with individual appeals in the Interior Board of Contract Appeals, Court of Federal Claims, or district courts nationwide.<sup>5</sup> Contrary to the Government's argument, judicial economy would not be achieved by requiring the Tribe to maintain its appeal here. First, the defenses asserted in the Motion to Dismiss (limitations and so-called 'releases') have also been raised in the Zuni case and will be resolved there on a class-wide basis if a class is certified. Second, the Government acknowledges that even if the stay were lifted and its Motion to Dismiss granted, three of the Tribe's claims would still have to be litigated here.<sup>6</sup>

For the foregoing reasons, the Tribe opposes the Motion to Lift Stay, and respectfully requests that the Board maintain the stay until after a decision on class certification is made in Zuni.

Respectfully submitted this 23rd day of October 2006.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

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

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AK Bar No. 7906040

William R. Perry  
D.C. Bar No. 255075

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<sup>5</sup> See e.g. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Leavitt, IBCA Nos. 4809-2006, 4821-2006 through 4826-2006 (Protective Notice of Appeal and Request for a Stay filed Aug. 30, 2006; Amended Protective Notice of Appeal and Request for a Stay filed Sept. 15, 2006).

<sup>6</sup> The Government argues that two of the Tribes' nine claims were not submitted to a contracting officer. Mot. to Lift Stay, at 14. Since filing the Protective Notice of Appeal, the Tribe has learned that it appears that no CDA claims were filed by Tribal representatives with respect to 1998 and 2001. For all the reasons stated herein, the Tribe believes that the Board should continue the stay and not address any merits issues at this time. Once the stay is lifted following a decision on certification in Zuni, the Board can dismiss without prejudice the appeal of the 1998 and 2001 claims, if appropriate.


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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 on the 23rd day of October, 2006, to:



Fred R. Garzino  
Assistant Regional Counsel  
United States Department of Health and  
Human Services  
233 North Michigan Avenue, Suite 700  
Chicago, Illinois 60601  
E-mail: fred.garzino@ihs.gov

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Alyson Visconti

October 23, 2006  
**VIA OVERNIGHT MAIL**  
**AND FACSIMILE (703-235-1281)**

Andrea I. Lewis, Recorder  
Interior Board of Contract Appeals  
801 North Quincy Street  
Arlington, Virginia 22203

Re: Appeal of St. Croix Chippewa Indians of Wisconsin  
Docket Nos. IBCA 4810-2006 through IBCA 4818-  
2006

Dear Ms. Lewis:

I enclose for filing (1) an original and two copies of Opposition to Defendants' Motion to Lift Stay, and (2) a diskette containing an electronic version of the Opposition submitted for filing. Additionally, we are enclosing one extra copy of the Opposition and request that you conform it and return the conformed copy to us.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

Lloyd B. Miller  
William R. Perry

Enclosures

cc: Fred Garzino (w/o encls.)