

simply join in the Zuni class action. The CDA does not allow a claimant to ignore its initial election. 41 U.S.C. § 609(a)(1). Second, St. Croix assumes, without basis, that it properly invoked the jurisdiction of this Tribunal.

The CDA is the controlling statute in these matters, yet St. Croix's Opposition completely ignores the CDA's legal imperatives. The CDA does not allow St. Croix's election of the IBCA forum to be treated as a mere placeholder. Rather, the CDA requires that St. Croix make an "either-or" choice of forum. This is known as the Election Doctrine. Nat'l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1541-42 (Fed. Cir. 1988). "Under the Election Doctrine, the binding election of forums is an 'either-or' alternative, and, as such, does not provide a contractor with dual avenues for contesting a contracting officer's adverse decision." Id. Thus, pursuant to the Election Doctrine, the contractor's election of a forum pursuant the CDA is irrevocable. Mark Smith Construction Co. v. United States, 10 Cl.Ct. 540, 542 (1986); Schickler, TMD U.S.A., Inc. v. United States, 54 Fed. Cl. 264, 269 (2002).

Nor would the IBCA save any judicial resources by doing as St. Croix proposes, i.e., simply waiting until an unknown future date when the Zuni court determines whether or not to certify a class action. The CDA requires the IBCA to rule regardless of the outcome of Zuni. Under the provisions of the CDA and the Election Doctrine, if St. Croix properly invoked the jurisdiction of this Tribunal, it cannot have its appeal heard in any district court. Motion at 5-8. If, on the other hand, it failed to properly invoke jurisdiction because it did not file its appeal timely or its "placeholder" appeal was ineffective, then it may file its appeals in district court or in the Federal Claims Court. Motion at 6-7. In either event, the IBCA must decide whether or not it has jurisdiction over the nine docketed matters presented to it by St. Croix regardless of any action taken by the Zuni court. Given the statutory requirements of the CDA, waiting for the

Zuni court to act does not relieve this Tribunal of the need to rule on Appellees' Motion.

As discussed at length in Appellees' brief, the IBCA must determine whether or not St. Croix timely filed these nine cases within the 90-day period required by the CDA. The CDA states, "Within 90 days from the date of receipt of a contracting officer's decision under section 605 . . . , the contractor may appeal such decision to an agency board of contract appeals . . . ," in this case the Interior Board of Contract Appeals ("IBCA"). 41 U.S.C. § 606. Because it is jurisdictional, the 90 day time limit, unlike some of the IBCA's rules, cannot be relaxed or modified in the interests of justice, or otherwise. J.C. Equipment Corp., IBCA 2885-89, 1991 WL 629480 (1991). Appellees have presented documents establishing that St. Croix did not comply with the 90-day limit required by the CDA. St. Croix has presented no information or argument seeking to counter the existing evidence. The IBCA should determine that based on the evidence, St. Croix did not timely file the nine docketed appeals and the IBCA does not have jurisdiction over them.

Alternatively, if the IBCA determines that St. Croix's nine appeals were timely filed, then the Board must next decide whether the materials filed by St. Croix are adequate enough to confer jurisdiction on the IBCA. St. Croix's "Protective Notice of Appeal" is insufficient to perfect an appeal before this Board because St. Croix did not unequivocally state its intent to proceed before this Board within the 90 days mandated by the CDA. "The mere filing of a document, which is not a 'proceeding' on the merits, is not a viable election pursuant to the statute." Nat'l Neighbors, 839 F.2d at 1543.

If it is determined that the IBCA has jurisdiction over the matters St. Croix seeks to appeal, the actions of any other judicial body, such as the Zuni court, have no effect upon St. Croix. If this Tribunal determines that it does not have jurisdiction over these nine docketed

matters,² then St. Croix is at liberty to bring these matters in the federal courts if it complies with 41 U.S.C. § 609 regarding judicial review.

Regardless of the IBCA's final determination regarding its jurisdiction over these matters, nothing is gained by waiting until the Zuni court acts on the pending class certification motion. The Zuni court's action on the pending motion for class certification does not affect St. Croix's jurisdictional status before the IBCA. The passage of time by waiting for the Zuni court to act does not alter the fact that under the CDA St. Croix has attempted to exercise its choice of forum and the IBCA must rule on whether it has or does not have jurisdiction over these appeals.³

St. Croix asserts that will be "prohibitively expensive" for it to litigate outside of the Zuni action. Opposition at 2. But St. Croix ignores the fact that it is not being forced to proceed before the IBCA. Rather, it has chosen to place itself in this position by electing to file with the IBCA instead of a federal district court or the Federal Claims Court. Based on St. Croix's freely made election, it cannot now claim it would be unfair to litigate its appeals before this Tribunal, beginning with a determination of whether it has jurisdiction, because of the expense involved.

Appellees reassert their position that continuance of this Stay will prejudice them regardless of its length. Motion at 12-13. St. Croix asserts, without more, that a decision on class certification in Zuni will occur shortly after January, 2007. Opposition at 2. But this is a belief, not a fact. The fact is that the Zuni matter has been proceeding for five years. Only the judge in Zuni can determine when a class is or is not certified. Final resolution of the matter of

² In its Opposition, St. Croix admits that it did not file claims for contract years 1998 and 2001. Opposition at 4, footnote 6.

³ Because St. Croix has failed to respond to any of the legal arguments presented in Appellees' Motion, and because it offers no defense as to why it should not be held accountable for filing with this Board outside of the allowed statutory 90-day period mandated by the CDA, this Tribunal lacks subject matter jurisdiction over those appeals and the appeals must be dismissed.

class certification in Zuni remains unknown.

In the meantime, the prejudice against Appellees continues to accrue along with the interest charge that is mandated by the CDA. Under the provisions of the CDA, “[i]nterest on amounts found due to contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof.” 41 U.S.C. § 611; Motion at 13. St. Croix cannot be the arbiter of what is a long or short Stay if it is not exposed to the very real adverse consequences of a Stay coupled with a possible adverse decision by this Tribunal.

Additionally, as stated in Appellees’ Motion, memories will continue to deteriorate while a Stay is in place and people may become unavailable as witnesses. The Stay only serves to delay justice, and inflicts known prejudicial costs on the Appellees. These matters should be decided on the merits, not on the basis of who is prejudiced the least in presenting its case.

For all of these reasons, Appellees request that the Stay be lifted and that this Tribunal order St. Croix to file its Complaints within 30 days following the lifting of the Stay. Thereafter, a briefing schedule can be set for Appellees’ dispositive motions in at least six of the nine pending appeals.

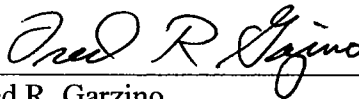
For lack of jurisdiction, St. Croix is free to pursue its claims elsewhere. Otherwise, St. Croix has elected this forum and must proceed here.

Dated: November 8, 2006

Respectfully submitted,

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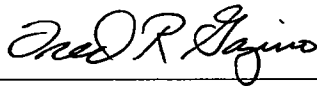
CERTIFICATE OF SERVICE

I, Fred R. Garzino, an attorney, certify that I have caused a copy of the attached document, "Appellees' Reply to St. Croix's Response to 'Appellees' Motion to Lift Stay and to Dismiss 'Protective Notice of Appeal,'" to be served via Federal Express overnight mail, upon the following persons:

Honorable Bernard V. Parrette, Judge
Interior Board of Contract Appeals
801 North Quincy Street, Suite 300
Arlington, VA 22203

Lloyd Benton Miller, Esq.
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This 8th day of November, 2006.



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U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES

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November 8, 2006

Honorable Bernard V. Parrette, Judge
Interior Board of Contract Appeals
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Arlington, VA 22203

RE: **St. Croix Chippewa Indians of Wisconsin v. Michael O. Leavitt, Secretary, Health and Human Services; Charles Grimm, Director, Indian Health Service; United States Of America**, Docket Nos. IBCA 4810-2006, IBCA 4811-2006, IBCA 4812-2006, IBCA 4813-2006, IBCA 4814-2006, IBCA 4815-2006, IBCA 4816-2006, IBCA 4817-2006, IBCA 4818-2006.

Dear Judge Parrette:

Enclosed for filing is the original and two copies, and a computer disc in WordPerfect, of "Appellees' Reply to St. Croix's Response to 'Appellees' Motion to Lift Stay and to Dismiss 'Protective Notice of Appeal.'"

Appellees respectfully request that the additional copy of the brief be date stamped by the Recorder and returned to Appellees' counsel in the self-addressed, postage-paid envelope provided.

The undersigned certifies that on November 8, 2006 he sent a copy of that motion and this letter to Appellant's counsel, at the address listed on the attached Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

Donna Morros Weinstein
Chief Counsel, Region V

By

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Encl.