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INTERIOR BOARD OF CONTRACT APPEALS

YUKON-KUSKOKWIM HEALTH)	
CORPORATION, INC.)	
P.O. Box 528)	
Bethel, Alaska 99559)	
)	IBCA Nos. _____ through _____
Appellant,)	
vs.)	ISDA Contract No. 243-89-0001
)	(effective through Dec. 31, 1994);
MICHAEL O. LEAVITT, SECRETARY,)	
U.S. DEPARTMENT OF HEALTH AND)	ISDA Compact No. ISG950033-01
HUMAN SERVICES; CHARLES GRIM,)	(effective Jan. 1, 1995 through Sept. 30,
DIRECTOR, INDIAN HEALTH)	1996);
SERVICE; UNITED STATES OF)	
AMERICA)	ISDA Compact No. ISG950033-02
)	(effective Oct. 1, 1996 and to the present)
Appellees.)	

COMPLAINT

Contractor-Appellant, YUKON-KUSKOKWIM HEALTH CORPORATION,
 INC. (YKHC), by and through its attorneys Sonosky, Chambers, Sachse, Miller &
 Munson, LLP, complains and alleges as follows:

I. INTRODUCTION

1. This appeal involves the failure of the Federal Government, acting through the Secretary of Health and Human Services and the Director of the Indian Health Service (IHS), to recognize properly and to pay in full various contract support costs (CSCs) over a period of years associated with YKHC's annual operation of the Federal Government's IHS Yukon-Kuskokwim Delta Service Unit Hospital and associated health care programs (hereinafter YKDSU Hospital), pursuant to contracts awarded to YKHC under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450-458aaa-18.

2. The multiple claims covered by this appeal and this Complaint encompass:
- (a) the claim that the Secretary, during each of fiscal years 1992 through 2004, unlawfully failed to calculate properly YKHC's CSC requirement for "direct" CSCs (and associated indirect administrative CSCs) associated with personnel whom YKHC annually employed in the operation of the IHS YKDSU Hospital;
 - (b) the claim that the Secretary, in fiscal year 1996, unlawfully reduced the CSCs required to be paid YKHC;
 - (c) the claim that the Secretary, during each of fiscal years 1994 through 2000, unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to YKHC; and
 - (d) the claim that the Secretary, during each of fiscal years 1994 through 2000, unlawfully failed to calculate correctly, and thus underpaid, the indirect administrative CSCs the Secretary was required to pay under the ISDA, as construed in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

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II. JURISDICTION

3. The Board has jurisdiction over this appeal pursuant to 25 U.S.C. §§ 450m-1(a) & (d) of Title I of the ISDA; § 303(d) of the Tribal Self-Governance Demonstration Project Act, 25 U.S.C. § 450f note (1999) (repealed) (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 25 U.S.C. § 458aaa-10(a) of Title V of the ISDA (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 41 U.S.C. §§ 605(c)(5), 606 & 607(d) of the Contract Disputes Act; and 43 C.F.R. § 4.100(b).

III. PARTIES

4. YKHC is a non-profit Alaska corporation based in Bethel, Alaska. YKHC is established, controlled and sanctioned by fifty-eight (58) federally recognized Tribes in the Yukon-Kuskokwim Delta, an area of approximately 75,000 square miles situated in extremely remote Southwest Alaska. YKHC is a “tribal organization” as that term is defined by the ISDA at 25 U.S.C. § 450b(l) and used throughout Titles I, III and V of the ISDA.

5. Michael O. Leavitt is the Secretary of the Department of Health and Human Services (DHHS) and exercises delegated responsibilities from Congress pursuant to the ISDA and other applicable law. Dr. Charles Grim is the Director of IHS and exercises authority delegated to him by the Secretary to carry out the Secretary’s responsibilities

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under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms "Secretary," "Director," and "IHS" are used interchangeably.

IV. FACTS AND GENERAL ALLEGATIONS

6. From October 1, 1991 through December 31, 1994 YKHC operated the Federal Government's Yukon-Kuskokwim Delta Service Unit Hospital and associated programs, functions, services and activities under Contract No. 243-89-0001, as authorized under Title I of the ISDA. From January 1, 1995 to the present, YKHC has continued to operate the Federal Government's YKDSU Hospital under the Alaska Tribal Health Compact ("ATHC or Compact"). The specific contracts and compacts at issue in this appeal are as follows:

- (a) ISDA Self-Determination Contract No. 243-89-0001, effective Oct. 1, 1988 through Dec. 31, 1994;
- (b) ISDA Self-Governance Compact (and associated annual funding agreement) No. ISG950033-01, effective Jan. 1, 1995 through Sept. 30, 1996; and
- (c) ISDA Compact No. ISG950033-02 (and associated annual funding agreements) effective Oct. 1, 1996 to the present.

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Collectively the foregoing contracts, compacts and annual funding agreements are referred to herein as “contracts.”

7. The Secretary’s funding obligations associated with CSCs under the contracts identified in subpar. 6(a) of this Complaint were, at all relevant times, controlled by 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

8. Prior to fiscal year (FY) 2001 the two self-governance compacts identified in subpars. 6(b) and (c) of this Complaint were authorized by Title III of the ISDA, known as the “Tribal Self-Governance Demonstration Project [Act],” as amended, formerly reprinted at 25 U.S.C. § 450f note (1999) (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 734 (2000)). The funding provisions of Title III, section 303(a)(6), incorporated by reference the funding provisions of Title I, requiring that the Secretary shall pay “an amount equal to that which the [compacting] tribe would have been eligible to receive under contracts or grants under [Title I of the ISDA], including direct program costs and indirect costs,” Thus, the Secretary’s funding obligations associated with CSCs under the compacts described in this paragraph were at all relevant times prior to FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

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9. Beginning in FY2001 and continuing through FY2004, the self-governance compact identified in subpar. 6(c) of this Complaint (ISDA Compact No. ISG950033-02) has been authorized by Title V of the ISDA, 25 U.S.C. §§ 458aaa–458aaa-18. The funding provisions of Title V (25 U.S.C. §§ 458aaa-7(c) & (d)) replicate and incorporate the funding provisions of Title I by requiring, inter alia, in 25 U.S.C. § 458aaa-7(c) that:

[t]he Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under [25 U.S.C. § 450j-1(a)(1)] and amounts for contract support costs specified under [25 U.S.C. §§ 450j-1(a)(2), (3), (5) and (6)].

Thus, the Secretary's funding obligations associated with CSCs under the foregoing compact were at all relevant times after FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

10. The provisions of Titles I, III and V of the ISDA governing the determination and payment of CSCs are materially identical.

11. At all relevant times, the provisions of 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA controlled the Secretary's funding obligations under the contracts identified in par. 6 of this Complaint. These are the same provisions that the Supreme Court construed in Cherokee Nation v. Leavitt, 543 U.S 631 (2005).

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12. Title I of the ISDA, 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), requires that the Secretary shall pay to a contracting Tribe “contract support costs” of various categories, and further requires at 25 U.S.C. § 450j-1(g) that “upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)].”

13. The general categories of “contract support costs” (CSCs) to which a contracting Tribe or Tribal organization is entitled under the ISDA are:

- (a) “indirect administrative costs, such as special auditing or other financial management costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(ii)) (hereinafter “indirect CSCs”);
- (b) “direct costs, such as workers’ compensation insurance” for certain annually recurring costs attributable directly to the personnel and facilities employed or used to carry out the Federal IHS programs being contracted under the ISDA, Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(i)) (hereinafter “direct CSCs”); and
- (c) non-recurring one-time “startup costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(5)) (hereinafter “start-up costs”).

The ISDA specifies that these various CSC amounts “shall be added” to an ISDA contract, 25 U.S.C. 450j-1(a)(2), and further declares that the amounts to be paid “shall

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include” direct CSCs and indirect CSCs, 25 U.S.C. § 450j-1(a)(3)(A). The ISDA further provides that “[t]he amount of funds required by [25 U.S.C. § 450j-1(a)] * * * (2) shall not be reduced by the Secretary in subsequent years” except in circumstances which YKHC alleges are not pertinent here. 25 U.S.C. §§ 450j-1(b) & (b)(2).

14. The Secretary’s failure to pay “contract support costs” as specified herein was contrary to YKHC’s statutory and contractual rights as articulated by the Supreme Court in Cherokee Nation v. Leavitt, and as further specified, inter alia, in:

- (a) YKHC’s contracts and annual funding agreements;
- (b) 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3), 450j-1(a)(5), 450j-1(b), 450j-1(d)(2), 450j-1(g) of Title I of the ISDA, as amended;
- (c) section 303(a)(6) of former Title III of the ISDA; and
- (d) 25 U.S.C. § 458aaa-7(c) & (d) of Title V of the ISDA.

15. From 1996 through 2005, YKHC submitted the following contract damages claims to the Secretary involving the Secretary’s failure to pay the full amounts of CSCs required by the ISDA and YKHC’s contracts over a period of years:

- (a) A May 23, 1996 damages claim under ISDA Contract No. 243-89-0001, involving IHS’s unlawful failure to pay direct CSCs and associated indirect administrative CSCs in connection with YKHC’s operation of the YKDSU Hospital during fiscal years 1992, 1993, 1994 and 1995, totaling \$4,341,508 (hereinafter **Claim 1**);
- (b) A May 23, 1996 damages claim under ISDA Compact No. ISG950033-01, involving IHS’s unlawful failure to pay direct CSCs and associated indirect

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administrative CSCs in connection with YKHC's operation of the YKDSU Hospital during fiscal year 1995 totaling \$1,472,651 (hereinafter **Claim 2**);

- (c) A June 21, 1996 damages claim under ISDA Compact No. ISG950033-02 involving IHS's unlawful reduction of YKHC's funding amount for indirect administrative CSCs during fiscal year 1996 totaling \$103,680 (hereinafter **Claim 3**);
- (d) A September 4, 1996 damages claim under ISDA Compact No. ISG950033-02 involving IHS's unlawful failure to pay direct CSCs and associated indirect administrative CSCs in connection with YKHC's operation of the YKDSU Hospital during fiscal year 1996 totaling \$2,005,983 (hereinafter **Claim 4**);
- (e) An August 21, 2001 damages claim under ISDA Compact No. ISG950033-02 involving IHS's unlawful failure to pay direct CSCs and associated indirect administrative CSCs in connection with YKHC's operation of the YKDSU Hospital during fiscal year 1997 totaling \$1,956,470 (hereinafter **Claim 5**);
- (f) An August 21, 2001 damages claim under ISDA Compact No. ISG950033-02 involving IHS's unlawful failure to pay direct CSCs and associated indirect administrative CSCs in connection with YKHC's operation of the YKDSU Hospital during fiscal year 1998 totaling \$1,956,470 (hereinafter **Claim 6**); and
- (g) A September 28, 2005 damages claim under ISDA Compact No. ISG950033-02 (hereinafter **Claim 7**) involving:
 - (i) IHS's unlawful failure to pay direct CSCs and associated indirect administrative CSCs in connection with YKHC's operation of the YKDSU Hospital during fiscal years 1999 (\$2,011,532), 2000 (\$2,105,936), 2001 (\$2,074,209), 2002 (\$2,115,694), 2003 (\$2,196,937) and 2004 (\$2,245,269) (collectively totaling \$12,749,577) (hereinafter **Claim 7(a)**);
 - (ii) IHS's unlawful failure to pay additional indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall reports, during fiscal years

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1994 (\$121,704), 1995 (\$587,124), 1996 (\$2,254,943), 1997 (\$2,520,079), 1998 (\$1,651,810), 1999 (\$1,881,141) and 2000 (\$1,633,305) (collectively totaling \$10,650,106) (hereinafter **Claim 7(b)**); and

(iii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that YKHC was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), in fiscal years 1994 (\$576,885), 1995 (\$1,050,594), 1996 (\$2,760,749), 1997 (\$3,068,222), 1998 (\$2,242,416), 1999 (\$2,492,283), and 2000 (\$2,200,209) (collectively totaling \$14,391,358) (hereinafter **Claim 7(c)**).

The total face amount of the claims so submitted was \$49,627,803.

16. On August 20, 1996 IHS Director of Regional Health Development and Acting Self-Governance Coordinator Carol Sudder acknowledged receipt of Claim 3 and stated that "a final decision from the contracting officer in this matter will be completed and communicated in writing to you on or before January 1, 1997."

17. On January 27, 1997, IHS Grants Management Officer and Contracting Officer Kay Carpentier acknowledged receipt of Claims 1 and 2, and subsequently agreed to render a decision on those claims by July 6, 1998.

18. On March 18, 2003, in response to an inquiry from YKHC's counsel, Assistant Regional Counsel, DHHS Office of the General Counsel (OGC), Region X, Kathleen Bradley-Nader confirmed receipt of Claims 1 through 6, reported that the claims were still being reviewed by OGC Region X, and advised that the OGC intended to have those claims processed by the end of fiscal year 2003 (after which, she indicated, draft

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decisions would be forwarded to IHS Headquarters, reviewed by the IHS Leadership Committee, and if approved, forwarded to IHS Director Grim for signature).

19. On May 4, 2005, in response to a subsequent inquiry from YKHC's counsel, Assistant Regional Counsel, DHHS Office of the General Counsel (OGC), Region X, Aaron P. Brown reported that responses to Claims 1 through 6 "are still being drafted and circulated for review" and stated "my best estimate is that they will be finalized this summer."

20. By letter dated November 8, 2005, IHS Director Grim advised YKHC that Claims 1 through 7 were under review and that a final decision would be issued on or before 180 days from November 8, 2005. By letter dated May 5, 2006, IHS Director Grim advised YKHC that Claims 1 through 7 were still under review and that a final decision would be rendered on or before another 180 days from the date of this second letter.

21. To date, no decisions from any contracting officer have ever been rendered on Claims 1 through 7.

22. On the dates specified in paragraph 15 of this Complaint, YKHC timely and properly submitted claims to the appropriate contracting officer for the Indian Health Service (IHS). To date the contracting officers responsible for each of the claims have

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failed to render any decisions on the claims, and in each instance the contracting officers have failed to act on the claims within a reasonable time.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Direct Contract Support Costs (and associated indirect administrative CSCs) – Claims 1, 2, 4, 5, 6 & 7(a))

23. YKHC realleges the preceding paragraphs of this Complaint as if fully set forth herein.

24. During each of fiscal years 1992 through 2004 the Secretary failed to meet his statutory and contractual obligations to YKHC by failing to pay YKHC direct CSCs and associated indirect administrative CSCs in connection with diverse personnel YKHC employed under YKHC's contracts covering the direct operation of the Yukon-Kuskokwim Delta Service Unit Hospital and associated health care programs;

25. The foregoing annual failures to pay are the subject of the claims described in subparagraphs 15(a)(Claim 1), (b)(Claim 2), (d)(Claim 4), (e)(Claim 5), (f)(Claim 6) & (g)(i)(Claim 7(a)) of this Complaint.

26. The Secretary's annual failure to pay to YKHC the contract support costs as alleged in this First Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

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27. In each year in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to YKHC under the rule of Cherokee Nation v. Leavitt, 432 U.S. at 637 & 641, and Ferris v. United States, 27 Ct. Cl. 542, 546 (1892).

28. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, YKHC's contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

29. Damages for each breach, as alleged in this First Cause of Action, are measured by the amounts required by law to be paid as direct CSCs and associated indirect CSCs (estimated at the time the claims described herein were filed as totaling \$24,482,659); the reasonably foreseeable damages YKHC suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to YKHC in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2)) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as shall be proven at trial.

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