

of Health and Human Services Indian Health Service § 12(B)); Exhibit 4 at 8 (Compact of Self-Governance between the Suquamish Tribe and the United States § 12(a)). Section 110, in turn, provides that the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, shall apply. 25 U.S.C. § 450m-1(d). Section 110(d) further provides that all administrative appeals relating to ISDEAA contracts shall be heard by the Interior Board of Contract Appeals, which has been superseded by this Board. *Id.*¹

2. On September 28, 2005, Suquamish faxed and mailed the IHS letters requesting a contracting officer's decision on CSC claims for CY 1997-2004. (The letters for the years at issue in this appeal, CY 1997-1999, are attached as Exhibit 1.) The letter for each year presented two separate CSC claims: (1) a "shortfall" claim alleging that the IHS had failed to pay Suquamish its full CSC need, as required by law, even by the IHS's own calculations; and (2) a "miscalculation" claim alleging that the IHS miscalculated the Tribe's indirect cost (IDC) rate, further exacerbating the CSC shortfall.

In a letter dated January 31, 2007, the IHS contracting officer denied the Tribe's claims for CY 1997.² In letters dated March 16, 2007, Dr. Charles Grim, the IHS Director, denied the Tribe's claims for CYs 1998-2004. The denial letters for the years at issue in this appeal, CY 1997-1999, are attached as Exhibit 2. The Tribe appealed the IHS decisions to this Board within 90 days of receiving them. Therefore this Board has

¹ Section 847 of the National Defense Authorization Act for Fiscal Year 2006 abolished the Interior Board of Contract Appeals—along with every other contract appeals board except for those of the Armed Services, the Postal Service, and the Tennessee Valley Administration— and established in their place the Civilian Board of Contract Appeals (CBCA). Pub. L. No. 109-163 § 847, 119 Stat. 3136, 3394-95 (Jan. 6, 2006). The statute provides that any reference in the laws of the United States to contract appeals boards other than the three listed above "shall be treated as referring to the Civilian Board of Contract Appeals." *Id.* § 847(e).

² In a second, virtually identical, letter dated February 21, 2007, the IHS contracting officer again denied the CY 1997 claim.

jurisdiction over this appeal under the CDA and Section 110 of the ISDEAA. 41 U.S.C. § 606; 25 U.S.C. § 450m-1(d). This appeal involves only the "shortfall" claims for CY 1997-1999, not the shortfall claims for CYs 2000-2004 or any of the miscalculation claims.

STATEMENT OF FACTS

3. During all of the years at issue in this appeal, CYs 1997-1999, Suquamish provided health care services to eligible individuals pursuant to agreements entered into with the Secretary of the Department of Health and Human Services ("Secretary") and the IHS under Title I of the ISDEAA, 25 U.S.C. § 450 *et seq.* (CY 1997) and Title III of the ISDEAA, 25 U.S.C. § 450f note (1994) (CYs 1998 and 1999).

4. The ISDEAA authorizes Suquamish and other tribes and tribal organizations to assume responsibility to provide programs, functions, services and activities ("PFSAs") that the Secretary would otherwise be obligated to provide. In return, the Secretary must provide the Tribe two types of funding under Section 106(a) of the ISDEAA: (1) "program" funds, the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1) (sometimes called the "Secretarial amount" or the "106(a)(1) amount"); and (2) "contract support costs," the reasonable administrative and overhead costs associated with carrying out the PFSAs, *see id.* § 450j-1(a)(2) and (3).³ *See also* Exhibit 3 at 4, CY 1997 Contract

³ Section 106(a)(2) of the ISDEAA mandates as follows:

(2) There shall be added [to the 106(a)(1) amount] 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, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

§ (b)(4) (funding amount "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA]"); 1998 AFA § 6 ("The Tribe shall be entitled to contract support funding ...in accordance with Section 106(a)(2) of the [ISDEAA]...."); CY 1999 AFA § 6 (same).

5. There are three types of CSC: (1) start-up costs, which are one-time costs to plan, prepare for and assume operation of a new or expanded PFSA, *see* 25 U.S.C. § 450j-1(a)(5) & (6); (2) indirect costs ("IDC"), costs incurred for a common or joint purpose benefiting more than one PFSA, such as administrative and overhead costs, *see id.* § 450j-1(a)(2); and (3) direct CSC ("DCSC"), expenses directly attributable to a certain PFSA but not captured in either the IDC pool or the 106(a)(1) amount, such as workers compensation insurance or other expenses the Secretary would not have incurred because, for example, the government is self-insured, *see id.* § 450j-1(a)(3)(A).

6. DCSC are "recurring" to both the IHS Area Office and tribes, meaning amounts do not need to be re-justified by the tribe for each year of the Agreement. IHS Circular 96-04 §§ 4.A(4) (page 9) and 4.A(4)b (page 12), Exhibit 5 at 9 and 12, respectively.

7. IDC are recurring to the Area Offices, *id.* § 4.A(4)b, and, provided they are justified in subsequent years, must be paid to the Tribe at the prior year's level unless that level exceeds 100% of the Tribe's needs. *Id.* § 4.A(4)b and c, Exhibit 5 at 13.

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2). *See also id.* § 450f note (1996) (providing, in Section 303(a)(6) of Title III, that tribes performing Title III agreements must receive "an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act [Public Law 93-638], including direct program costs and indirect costs").

8. Designation of direct and indirect CSC funds as recurring (either to the Tribe or to the Area) is significant because the agency paid recurring funds at the previous year's level (at a minimum) unless that level would exceed 100% of the Tribe's need as required by the Circular. *Id.* § 4.A(4)b and c, Exhibit 5 at 13.

9. These Circular provisions reflect a statutory requirement. Under the ISDEAA, the amount of CSC paid to Suquamish may not be reduced from year to year unless Suquamish's need for CSC in a subsequent year drops or one of five narrow exceptions applies. Section 106(b)(2) of the ISDEAA states that the amount of funds required by subsection (a), including CSC, "shall not be reduced by the Secretary in subsequent years except pursuant to –

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project activity or program[.]"

25 U.S.C. 450j-1(b)(2).

10. The Suquamish agreements incorporate this stable-funding provision and conditions. Exhibit 3 at 10, CY 1997 Contract § (b)14(A) ("the funding for each ... successor annual funding agreement shall only be reduced pursuant to section 106(b) of [the ISDEAA]"); Exhibit 4 at 9, Compact § 15(a) ("The Tribe is hereby assured that future funding of successor Annual Funding Agreements shall only be reduced pursuant to the provisions of Section 106(b) of the [ISDEAA].")

11. IHS Circular 96-04 also incorporates the statutory stable-funding requirement and conditions. The Circular, signed by Michael Trujillo, the Director of the

IHS, was binding on and followed by the agency, and sets out detailed guidance on CSC funding methodology. In relevant part, the Circular provides that, "Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the [ISDEAA]." IHS Circular 96-04 § 4.A(4)c, Exhibit 5 at 13. The Circular does not make this commitment subject to availability; rather it makes clear that an "[a]wardee should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater annual need." *Id.*

12. IHS Circular 96-04 provided the CSC distribution methodology to which the IHS committed itself contractually in Suquamish's AFAs in CY 1998 and CY 1999. *See* CY 1998 AFA § 6 (contract support funding to be provided "in accordance with ... the provisions of Indian Health Service Circular 96-4"); CY 1999 AFA § 6 (same).

13. On March 1, 2005, the U.S. Supreme Court held that the amounts available under section 106(a) to pay tribes the full CSC due under their contracts include the agency's entire unrestricted lump-sum appropriation. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 642-43 (2005). Thus the IHS should have reprogrammed funds to pay tribal contractors the full CSC due under their contracts for fiscal year ("FY") 1994 through FY 1997 when Congress appropriated a lump sum for the IHS without earmarking an amount for CSC.

14. However, the IHS took no such action. Instead the agency vastly underpaid CSC to Suquamish, as documented in the CSC "shortfall reports." The shortfall reports are prepared by the IHS in compliance with ISDEAA section 106(c),

which requires that the agency submit to Congress an annual report on the implementation of the ISDEAA, including:

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted....

25 U.S.C. § 450j-1(c). Each IHS Area Office, including the Portland Area, prepares a shortfall report that shows how much, if at all, each tribe and tribal organization in the Area was underpaid in CSC for the fiscal year. The form of the shortfall report has varied somewhat over the years, but the essential information reflected in the report that is used to calculate the shortfalls has remained the same: the IDC requirement (program base times negotiated IDC rate) plus the DCSC requirement equals the total CSC requirement; the total CSC requirement minus the total CSC paid by the IHS equals the CSC shortfall.

15. According to the shortfall reports, Suquamish suffered significant CSC shortfalls in CYs 1997-1999. *See* Exhibit 6. The shortfalls documented in the reports are summarized in the following table:

Table 1. Shortfall Summary

CY	Total Requirement (\$)	Total Paid (\$)	Shortfall (\$)
1997	541,451 ⁴	435,505 ⁵	105,946
1998	550,471	455,126	95,345 ⁶
1999	655,780	488,097	167,683 ⁷

⁴ Exhibit 3 at 1, column D (DCSC) plus column F (IDC).

⁵ *Id.*, column D plus column E.

⁶ *Id.* at 2, column P ("Total CSC Shortfall") (subtracting column O, "Total CSC Funding Available" from column M, "Total CSC Need").

19. For CY 1997, then, the amount of the claim for underpayment of CSC derives from the agency's own shortfall report: \$105,946.⁸

20. The IHS's failure to pay the proper amount of CSC in CY 1997 hurt Suquamish not only in that year but in subsequent ones. Had the IHS paid the full amount in CY 1997, as it was required to do under the rule of *Cherokee Nation*, the IHS would have been required to pay, and in fact would have paid, at least that same amount in CYs 1998 and 1999 under the stable-funding provisions in section 106(b) of the ISDEAA, Article II, § 12(a) of the Compact, section 4(A) of the AFAs, and IHS Circular 96-04, provided that amount did not exceed Suquamish's total need during those years, which it did not.

20. In FY 1998 and 1999, Congress included language in the appropriations bills providing that total CSC payments by the agency were "not to exceed" a certain specified amount.⁹ Notwithstanding these purported "caps," however, the IHS was contractually bound to pay the Tribe at least its full CY 1997 requirement under the provisions cited above.

22. Appropriations designated for CSC increased in both FY 1998 and FY 1999.¹⁰ As a result, appropriations were not reduced in a way to permit IHS to invoke the

⁷ *Id.* at 3, column S ("Total CSC Shortfall") (subtracting column R, "Total Funding Available for CSC" from column Q, "Total CSC Need").

⁸ The claim amounts may be subject to adjustment to reflect the fact that the Tribe's agreements are for calendar years, while the IHS reports CSC shortfalls based on the federal fiscal year.

⁹ *E.g.*, Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997) (providing that, in FY 1998, "not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts").

¹⁰ *See id.* (appropriating \$168,702,000 for CSC for ongoing contracts in FY 1998, a \$7.98 million increase over CY 1997); P.L. 105-277 (\$203,781,000 in FY 1999, a \$35 million increase).

section 106(b)(2)(A) exception to the stable-funding rule. Nor did any other 106(b) exception apply in those years. The ISDEAA, Suquamish's contracts, and Circular 96-04 make clear that CSC funds "shall not be reduced" from year to year unless one of those five narrow exceptions applies.

23. Based on its conclusion that IHS should have paid it the proper amounts of CSC, Suquamish presented claims for its unpaid CSC in letters to the IHS dated September 28, 2005. *See* Exhibit 1. The IHS denied those claims, *see* Exhibit 2, and the Tribe appealed within 90 days of receiving the denial letters, so this Board has jurisdiction over the appeals. 41 U.S.C. § 606.

CLAIMS

24. In *Cherokee Nation*, the Supreme Court held that the IHS should have reprogrammed funds from its unrestricted lump-sum appropriation to pay tribal contractors the full CSC due under their contracts. The IHS paid Suquamish less than its full CSC requirement in CY 1997, as acknowledged in the IHS shortfall reports. In doing so, the IHS breached its agreements with Suquamish and violated the ISDEAA's requirement of full payment from available appropriations, as affirmed by the Supreme Court in *Cherokee Nation*. The Tribe's claim for the "lump-sum" year CY 1997 is indistinguishable from the claims at issue in *Cherokee Nation*.

25. Had Suquamish been paid properly in the lump-sum year CY 1997, the larger direct and indirect CSC base would have recurred and been paid in subsequent years. The Tribe's claims for CYs 1998 and 1999 are based on the ISDEAA stable-funding requirement under section 106(b), incorporated into the Compact and IHS Circular 96-04. The statute, Compact and circular provide that the agency may not

reduce funding from prior years except in specific narrow circumstances that did not exist in this case.

CY 1997

28. Paragraphs 1 through 27 are realleged and incorporated herein.

29. As indicated in the IHS's own shortfall report, Suquamish's total CSC requirement for ongoing programs in CY 1997 was \$541,451, yet the IHS paid only \$435,505, for a reported shortfall of \$105,946. Exhibit 6 at 1. Therefore, Suquamish asserts a claim under the ISDEAA and section 4 of the CY 1997 AFA for **\$105,946**.

CY 1998

30. Paragraphs 1 through 29 are realleged and incorporated herein.

31. Suquamish's total CSC requirement increased in CY 1998, and none of the section 106(b) exceptions to the stable-funding requirement applied. Had the IHS complied with the rule of *Cherokee Nation* and paid Suquamish the proper amount in CY 1997, \$541,451, the IHS would have been legally obligated to pay at least that much in CY 1998. But in CY 1998, the IHS paid only \$455,126. Exhibit 6 at 2, column O (IHS FY 1998 shortfall report). Therefore, Suquamish asserts a claim under the ISDEAA and section 6 of the CY 1998 AFA for **\$86,325**.

CY 1999

32. Paragraphs 1 through 31 are realleged and incorporated herein.

33. Suquamish's total CSC requirement increased in CY 1999, and none of the section 106(b) exceptions to the stable-funding requirement obtained. Had the IHS complied with the rule of *Cherokee Nation* and paid Suquamish the proper amount in CY 1997, \$541,451, the IHS would have been legally obligated to pay at least that much in

CY 1998 and again in CY 1999. But in CY 1999, the IHS paid only \$488,097. Exhibit 6 at 3, column R (IHS CY 1999 shortfall report). Therefore, Suquamish asserts a claim under the ISDEAA and section 6 of the CY 1999 AFA for **\$53,354**.

PRAYER FOR RELIEF

34. The Tribe therefore requests the following relief:

A. That this Board award Suquamish **\$245,625** in damages for unpaid CSC, as summarized in the following table:

Table 4. Claim Summary

CY	Amount (\$)
1997	105,946
1998	86,325
1999	53,354
Total	245,625

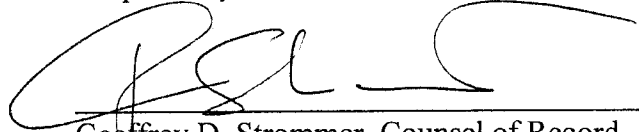
B. That this Board order the payment of interest on these claims pursuant to the CDA, 41 U.S.C. § 611, and the Prompt Payment Act, Chapter 39 of Title 31 United States Code;

C. That this Board award Suquamish its attorney fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 25 U.S.C. § 450m-1(c); and

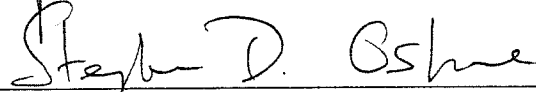
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D. That this Board award Suquamish such other and further relief as the Board deems appropriate.

Respectfully Submitted,



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