

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN**

KEWEENAW BAY INDIAN  
COMMUNITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official  
capacity as Secretary of Health and Human  
Services, YVETTE ROUBIDEAUX, in her  
official capacity as Director of the Indian  
Health Service, and the UNITED STATES  
OF AMERICA,

Defendants.

Case No.: 2:12-cv-00115-RHB

Judge Robert Holmes Bell

**AMENDED COMPLAINT**

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**I. INTRODUCTION**

1. This is a suit for breach of contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (“ISDEAA”) and the Contract Disputes Act, 41 U.S.C. §§ 7101–09 (“CDA”) for money damages against the United States and the Indian Health Service (“IHS”), an agency of the United States Department of Health and Human Services (“DHHS”). Plaintiff, the Keweenaw Bay Indian Community (“the Community”), is a federally recognized Indian tribe that operates public health facilities and provides public health services to its members pursuant to its contract with the United States, the DHHS, and the IHS, under the ISDEAA. The ISDEAA allows the Community to sue for money damages when the DHHS and IHS fail to pay the full amount owed to the Community under an ISDEAA contract – as they have failed to do in this case for the Community’s fiscal years 2004 and 2005. 25 U.S.C.

§ 450m-1(a).

2. Defendants breached their ISDEAA contract with the Community by failing to pay the full contract support costs (“CSC”) owed to the Community according to the ISDEAA and the Community’s ISDEAA contract for its fiscal years 2004 and 2005. Specifically, the IHS underpaid indirect contract support costs (which allow IHS contractors, such as the Community, to pay for administrative and overhead expenses so that they can operate programs at the same level as the relevant department Secretary would have done) as well as direct contract support costs (which allow IHS contractors, such as the Community, to recover costs such as insurance or other expenses). *See* 25 U.S.C. §§ 450j-1(a)(2)–(3).

## **II. JURISDICTION AND VENUE**

3. This case arises under an ISDEAA contract between the United States, DHHS, IHS, and the Community for operation of Indian health programs. This Court has subject matter jurisdiction under the ISDEAA and, as applicable, the CDA. *See* 25 U.S.C. § 450m-1(a); 41 U.S.C. § 7104(b). This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

4. On September 30, 2010, the Community sent (via fax and certified mail) a letter to the Bemdiji Area IHS requesting a contracting officer’s decision on the Community’s CSC claim for the Community’s fiscal year 2004.

5. The IHS contracting officer denied the Community’s fiscal year 2004 claim in a letter dated March 7, 2011, which the Community received on March 21, 2011 (“the 2004 Denial Letter”). Within twelve months of receiving the IHS decision, as required by the CDA, the Community filed this action for review of the decision. *See* 41 U.S.C. § 7104(b). Accordingly, this Court has jurisdiction under the CDA and section 110 of the ISDEAA. *Id.*; 25 U.S.C.

§ 450m-1(a).

6. On September 30, 2011 the Community sent (via fax and Federal Express) a letter to the Bemdiji Area IHS requesting a contracting officer's decision on the Community's CSC claim for the Community's fiscal year 2005.

7. The IHS contracting officer denied the Community's fiscal year 2005 claim in a letter dated March 16, 2012, which the Community received on March 21, 2012 ("the 2005 Denial Letter"). Within twelve months of receiving the IHS decision, as required by the CDA, the Community filed this action for review of the decision. *See* 41 U.S.C. § 7104(b).

Accordingly, this Court has jurisdiction under the CDA and section 110 of the ISDEAA. *Id.*; 25 U.S.C. § 450m-1(a).

### **III. PARTIES**

8. The Keweenaw Bay Indian Community is a federally recognized Indian tribe. The Community occupies and exercises jurisdiction over the L'Anse Indian Reservation, adjacent to Keweenaw Bay, in the Upper Peninsula of Michigan. For many years, the Community has contracted with the United States under the ISDEAA to provide health care services to its members.

9. Defendant the United States of America is a party to the Community's ISDEAA agreement.

10. Defendant Kathleen Sebelius, sued in her official capacity, is the Secretary of Health and Human Services and is charged by law with the responsibility for implementing the ISDEAA with respect to DHHS and IHS.

11. Defendant Yvette Roubideaux, sued in her official capacity, is the Director of the IHS, the agency within the DHHS charged by law with the responsibility for implementing the

ISDEAA and other health laws benefiting Indians.

**IV. THE IHS UNDERPAID THE COMMUNITY'S CSC REQUIREMENTS IN FISCAL YEARS 2004 AND 2005**

12. The ISDEAA authorizes the Community (and other tribes and tribal organizations) to assume responsibility, through entering into an ISDEAA contract, for providing programs, functions, services and activities ("PFSAs"), that the relevant Department Secretary would otherwise be obligated to provide. Accordingly, the Community, along with the United States, the Secretary of DHHS, and the Director of IHS, entered into the Compact of Self Governance and Annual Funding Agreement No. 67G020074 (effective October 1, 2001 through September 30, 2006, as amended for fiscal year 2004 on July 16, 2003, and as amended for fiscal year 2005 on June 28, 2004) ("the Compact and Funding Agreement"), which provided for, among other things, the Community's provision of health services to its members, pursuant to the ISDEAA Title I and V. During the Community's fiscal years 2004 and 2005, the Community provided health care services to eligible individuals under the Compact and Funding Agreement.

13. Under section 106(a) of the ISDEAA, the Secretary must provide the Community with two types of funding: (1) "program" funds – the amount the Secretary of DHHS would have provided for the PFSAs had the IHS retained responsibility for them, see 25 U.S.C. § 450j-1(a)(1); and (2) "contract support costs" ("CSC") – the reasonable administrative and overhead costs associated with providing or carrying out the PFSAs, *see id.* §§ 450j-1(a)(2) and (3). Specifically, the ISDEAA requires that:

There shall be added [to the program funds] 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) 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).

14. There are three types of CSC:

1) Start-up costs: The initial costs for planning, preparing for and assuming operation of a new or expanded PFSA, *see* 25 U.S.C. §§ 450j-1(a)(5)–(6);

2) Indirect costs (“IDC”): The 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”): The expenses directly attributable to a certain PFSA but not captured in either the IDC CSC or the program funds amount, such as insurance or other expenses that the Secretary would not have incurred (the government is self-insured, so it does not incur these costs), *see id.* § 450j-1(a)(3)(A).

Only direct and indirect contract support costs are at issue in this case.

15. The ISDEAA requires that, upon approval of the contract, “the Secretary shall add the full amount of funds to which the contractor is entitled under [section 106(a) of the ISDEAA],” including CSC. 25 U.S.C. § 450j-1(g).

16. Notwithstanding Defendants’ obligation to pay the “full amount” of CSC, in fiscal years 2004 and 2005, the IHS underpaid CSC to the Community — and the IHS’s own reports confirm this underpayment.

17. The IHS is required by law (ISDEAA § 106(c)) to submit to Congress an annual report on the implementation of the ISDEAA, including in relevant part:

(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).

Accordingly, each IHS Area Office issues a “shortfall report” showing the amount by which the IHS underpaid CSC to each tribe for each fiscal year. The shortfall report for fiscal year 2004 shows that IHS underpaid the Community by \$444,368. The shortfall report for fiscal year 2005 shows that IHS underpaid the Community by \$311,744.

A. *The Community’s Fiscal Year 2004 Claim*

18. Even though the IHS’s own shortfall report shows that it owes the Community \$444,368 for CSC in fiscal year 2004, the IHS has denied that its shortfall report can be the basis for a CSC claim. According to the IHS, the shortfall report does not establish an amount owed. Rather, the IHS claims that the shortfall report is a budgeting and estimating tool. Even so, calculating the CSC owed to the Community in fiscal year 2004 according to another IHS-endorsed methodology (as set forth in the IHS Indian Health Manual) similarly confirms a significant underpayment in the amount of \$225,315.53, as discussed in paragraphs 19-22 below, and presented as an alternative theory of damages in this case.

19. The IHS has provided, in its Indian Health Manual, guidelines for the calculation of DCSC by a tribe and has issued a worksheet to be used by the IHS contractors to calculate the DCSC costs. Both the Manual, Exhibit 6-3-H (TN 2007-05 04/06/2007), and the worksheet, show that the costs of fringe benefits, workers’ compensation, state unemployment insurance, and property and liability insurance for the property used for delivery of contracted programs, services, and functions paid by the Community are recoverable as DCSC. These costs are costs for activities that must be carried out by the Community as an IHS contractor to ensure compliance with the Compact and Funding Agreement and prudent management.

20. When the IHS' own methodology for calculation of direct costs is applied, it shows that the IHS underpaid the Community's DCSC by the sum of \$105,462.67 for fiscal year 2004. The Community's records show that it received \$71,769.00 for DCSC, when its recoverable costs of fringe benefits, workers' compensation, unemployment insurance, and property and liability insurance totaled \$177,231.67, resulting in a shortfall calculation of \$105,462.67 for DCSC. This shortfall amount was calculated based upon the IHS's worksheet for DCSC. The worksheet allocates 39.88% of the funding amount for wages and 41.5% of the funding amount for fringes. According to the worksheet, 100% of the costs of workers' compensation, state unemployment contributions, and insurance are recoverable.

21. When the IHS' own methodology for calculation of IDC is applied, the IHS underpaid the Community's IDC by the sum of \$119,852.86 for fiscal year 2004. The underpayment was calculated by totaling the wages and funds associated with running the PFSA's and multiplying by the indirect cost rate for the contract year. The IDC should have been paid in the sum of \$436,228.86, but the IHS paid only \$316,376.00, resulting in a shortfall of \$119,852.86 for the Community's IDC.

22. The total underpayment of CSC (direct and indirect) for the Community's fiscal year 2004, when calculated according to the method set out in the IHS Indian Health Manual, is \$225,315.53. The Community presented this claim in its September 30, 2010 letter to the Bemdiji Area IHS requesting a contracting officer's decision on the Community's CSC claim for fiscal year 2004.

23. There are other methods, apart from those used in compiling the IHS's own shortfall report, or that set forth in the Indian Health Manual, for calculating the CSC shortfall. The most accurate method for calculating CSC is based on the Community's actual experience

and expenditures, as set forth in paragraphs 24-26 below.

24. In fiscal year 2004, the Community's actual recoverable direct costs (fringe benefits, workers' compensation, unemployment insurance, property and liability insurance, worker's compensation insurance, and unemployment insurance) total \$295,125, but the IHS paid only \$71,769 – a DCSC shortfall of \$223,356.

25. To calculate the actual IDC owed, the most accurate method is to total the wages associated with running the Community's PFSA's and to multiply them by the indirect cost rate (issued by Department of the Interior National Business Center) for the contract year. The indirect costs that the IHS should have paid equal \$519,360, but the IHS only paid \$316,376, resulting in an IDC shortfall of \$202,984.

26. Adjusted for the Tribal Share Offset (20% of Tribal Shares - \$19,651), the total CSC owed to the Community for fiscal year 2004 is \$406,689.

27. There is no question that the IHS underpaid the Community's CSC for fiscal year 2004. As described above, the IHS's own shortfall report shows an underpayment of \$444,368, and calculating CSC according to IHS guidelines shows a CSC shortfall of \$225,315.53. Calculating CSC based on the Community's actual expenditures shows a shortfall of \$406,689.

*B. The Community's Fiscal Year 2005 Claim*

28. The IHS's own shortfall report shows that it owes the Community \$311,744 for CSC in fiscal year 2005. But, just as it did for the Community's 2004 claim, the IHS denies that its shortfall report can be the basis for a CSC claim. Even so, calculating the CSC owed to the Community in fiscal year 2005 based on the Community's actual experience and expenditures, as set forth in paragraphs 29-31 below, shows an underpayment of \$575,326.

29. In fiscal year 2005, the Community's actual recoverable direct costs (fringe

benefits, workers' compensation, unemployment insurance, property and liability insurance, worker's compensation insurance, and unemployment insurance) total \$415,873, but the IHS paid only \$71,769 – a DCSC shortfall of \$344,104.

30. To calculate the actual IDC owed, the most accurate method is to total the wages associated with running the Community's PFSA's in fiscal year 2005 and to multiply them by the indirect cost rate (issued by Department of the Interior National Business Center) for the contract year. The indirect costs that the IHS should have paid equal \$560,324, but the IHS only paid \$309,861, resulting in an IDC shortfall of \$250,463.

31. Adjusted for the Tribal Share Offset (20% of Tribal Shares - \$19,241), the total CSC owed for fiscal year 2005 is \$575,326.

*C. The IHS had No Proper Basis for Refusing to Pay the Full Amount of the Community's CSC*

32. Even though underpayment of the Community's CSC claims is established by the IHS's own statements and the Community's calculations, the IHS has refused to pay. Its principal reason (apart from challenges to the method of calculating CSC), as stated in its Denial Letters, is that "Congress also mandated that the 'provision of funds [for contract support costs] is subject to the availability of appropriations'" and that the Community's CSC underpayment claims were therefore "denied because Tribes have no claim to additional CSC in cap years when providing such funding would cause the IHS to exceed the congressional CSC cap."

33. The United States Court of Appeals for the Tenth Circuit recently rejected the IHS's position, holding that a "'subject to the availability of appropriations' clause frees the government of liability only when congressional decisions standing alone—not discretionary agency actions—make funds unavailable for a specific contract." *Ramah Navajo Chapter v. Salazar*, 644 F. 3d 1054, 1073 (10th Cir. 2011), *certiorari granted*, 132 S.Ct. 995 (January 6,

2012). “If an appropriation is legally available to fund a particular contract, then the ‘subject to the availability of appropriations’ condition is satisfied with respect to that contract.” *Id.*, at 1067.

34. On information and belief, the amount of funds appropriated by Congress to pay CSC in fiscal year 2004 was greater than the Community’s CSC requirement – whether the shortfall was \$444,368, \$406,689, or \$225,315.53.

35. On information and belief, the amount of funds appropriated by Congress to pay CSC in fiscal year 2005 was greater than the Community’s CSC requirement – whether the shortfall was \$575,326 or \$311,744.

36. For fiscal years 2004 and 2005, Congress appropriated funds sufficient to pay the full amounts of the Community’s CSC, and Defendants are therefore obligated to pay those amounts to the Community.

## **V. CLAIM FOR RELIEF**

### **Count I**

#### **Breach of Contract and Violation of ISDEAA for Fiscal Year 2004**

37. The allegations in Paragraphs 1-36 are herein incorporated by reference.

38. IHS paid the Community less than its full CSC requirement in fiscal year 2004, as acknowledged in the IHS shortfall report, and by the application of more than one method for calculating CSC. In doing so, the IHS breached its agreements with the Community and violated the ISDEAA’s requirement of full payment from available appropriations.

39. The CSC requirement for the Community’s fiscal year 2004, as calculated according to the methodology in the IHS manual, was \$613,460.53. As calculated according to the Community’s actual experience and expenditures, its CSC requirement for fiscal year 2004

was \$814,485. Based on the Community's records, the IHS paid only \$388,145. Therefore, the Community asserts a claim under the ISDEAA and its Contract for its fiscal year 2004 CSC shortfall of \$444,368 (the amount in the IHS's own shortfall report), and in any event, no less than the Community's calculation of the shortfall (including the Tribal Share Offset) - \$406,689.

## **Count II**

### **Breach of Contract and Violation of ISDEAA for Fiscal Year 2005**

40. The allegations in Paragraphs 1-36 are herein incorporated by reference.

41. IHS paid the Community less than its full CSC requirement in fiscal year 2005, as acknowledged in the IHS shortfall report, and by calculating CSC based on the Community's actual expenditures and experience. In doing so, the IHS breached its agreements with the Community and violated the ISDEAA's requirement of full payment from available appropriations.

42. The CSC requirement for the Community's fiscal year 2005 was \$976,197. Based on the Community's records, the IHS paid only \$381,630. Therefore, the Community asserts a claim under the ISDEAA and its Contract for its fiscal year 2005 CSC shortfall (including Tribal Share Offset) of \$575,326.

## **VI. PRAYER FOR RELIEF**

43. The Community therefore requests the following relief:

A. That this Court award the Community \$444,368, or the amount it determines to be the actual CSC shortfall for the Community's fiscal year 2004, and in any event, no less than \$406,689, in damages for unpaid CSC;

B. That this Court award the Community \$575,326, or the amount it determines to be the actual CSC shortfall for the Community's fiscal year 2005, in damages for unpaid CSC;

C. That this Court order the payment of interest on these claims pursuant to the CDA, 41 U.S.C. § 7109, and the Prompt Payment Act, 31 U.S.C. § 3902;

D. That this Court award the Community 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; and

E. That this Court award the Community such other and further relief as the Court deems appropriate.

DORSEY & WHITNEY LLP

Dated: April 13, 2012

By /s/James K. Nichols  
Skip Durocher (MN Bar No. 208966)  
James K. Nichols (MN Bar No. 0338096)  
50 South 6<sup>th</sup> Street  
Suite 1500  
Minneapolis, MN 55402-1498  
Phone: (612) 340-7855 / (612) 492-6782  
e-mail: [durocher.skip@dorsey.com](mailto:durocher.skip@dorsey.com)  
e-mail: [nichols.james@dorsey.com](mailto:nichols.james@dorsey.com)

John Baker  
Tribal Attorney  
Keweenaw Bay Indian Community  
16429 Beartown Road  
Baraga, MI 49908  
Tel: (906) 353-4107

Counsel for Plaintiff Keweenaw Bay Indian  
Community