

I. (a) PLAINTIFFS St. Croix Chippewa Indians of Wisconsin	DEFENDANTS Kathleen Sebelius, Secretary of the U.S. Dep't of Health & Human Services Yvette Roubideaux, Director of the U.S. Indian Health Service
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>Burnett</u> (EXCEPT IN U.S. PLAINTIFF CASES)	COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) William R. Perry, Lloyd Benton Miller, Anne D. Noto Sonosky, Chambers, Sachse, Endreson & Perry LLP 1425 K Street, NW, Suite 600 Washington, DC 20005 Tel: (202) 682-0240	ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <u>FOR DIVERSITY CASES ONLY!</u>																								
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="radio"/> 1 U.S. Government Plaintiff </div> <div style="width: 45%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <input checked="" type="radio"/> 2 U.S. Government Defendant </div> <div style="width: 45%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III) </div> </div>	<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%;"></th> <th style="width: 10%; text-align: center;">PTF</th> <th style="width: 10%; text-align: center;">DFT</th> <th style="width: 40%;"></th> <th style="width: 10%; text-align: center;">PTF</th> <th style="width: 10%; text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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<input type="radio"/> E. General Civil (Other)	OR	<input type="radio"/> F. Pro Se General Civil
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<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)
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<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) <i>*(If pro se, select this deck)*</i>	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) <i>*(If pro se, select this deck)*</i>	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input checked="" type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input checked="" type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
☒ 1 Original Proceeding
 ☐ 2 Remand from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify)
 ☐ 6 Multi-district Litigation
 ☐ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 41 U.S.C. § 2101 et. seq. Breach of contract and statute - underpayment of contract support costs to Indian tribe

VII. REQUESTED IN COMPLAINT

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐

DEMAND \$ 908,511
 JURY DEMAND:

Check YES only if demanded in complaint
 YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY

(See instruction)

YES ☐ NO ☒

If yes, please complete related case form

DATE: 4/3/2013

SIGNATURE OF ATTORNEY OF RECORD /s/ Anne D. Noto

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ST. CROIX CHIPPEWA INDIANS
OF WISCONSIN,
24663 Angeline Avenue
Burnett County, Webster, WI 54893

Plaintiff,

vs.

KATHLEEN SEBELIUS,
Secretary of the U.S. Dep't of Health
and Human Services,
200 Independence Avenue, S.W.
Washington, D.C. 20201

And

YVETTE ROUBIDEAUX,
Director of the U.S. Indian Health Service;
801 Thompson Avenue, TMP 450
Rockville, MD 20852,

Defendants.

Case No.: _____

COMPLAINT

The St. Croix Chippewa Indians of Wisconsin ("Tribe") complains and alleges as follows:

I. INTRODUCTION

1. This case involves the failure of the federal government, acting through the Secretary of Health and Human Services ("HHS" or "Secretary") and the Director of the Indian Health Service ("IHS"), to pay in full various "contract support costs" ("CSCs") to which the St. Croix Chippewa Indians of Wisconsin was entitled by operation of law and by contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), 25

U.S.C. §§ 450-458aaa-18. This case seeks to apply to the Tribe, the rulings in Cherokee Tribe v. Leavitt, 543 U.S. 631 (2005), Salazar v. Ramah Navajo Chapter, 567 U.S. ___, 132 S. Ct. 2181 (2012), and Arctic Slope Native Ass'n, Ltd. v. Sebelius, No. 11-83, 2012 WL 2368663 (U.S. June 25, 2012), on remand Arctic Slope Native Ass'n, Ltd. v. Sebelius, No. 2010-1013, 2012 WL 3599217 (Fed. Cir. Aug 22, 2012) ("Arctic Slope II").

2. The Secretary failed to pay the Tribe's full contract support cost requirements based upon the assertion that appropriated funds were not legally available to make such payments in full. In Ramah Navajo and Arctic Slope II, the Supreme Court and the Federal Circuit, respectively, rejected assertions by the Secretary of the Interior and the Secretary of HHS in connection with identical underpayments made to other contracting Tribes. Both courts held the Secretaries' failure to pay was unlawful and a breach of contract.

3. The claims covered by this Complaint assert that, each year from Fiscal Year ("FY") 2005 through FY 2010, the Secretary failed to pay in full the CSCs which the Secretary acknowledged were due and owing to the Tribe under the Tribe's contracts. The Tribe seeks as damages the unpaid funds and the associated lost third-party collections which, under each year's contract, the Tribe would have collected had each year's unpaid CSCs been fully paid.

4. The Tribe also claims that the Secretary improperly failed to make adjustments to the indirect cost rates employed by the Secretary to calculate the Tribe's indirect contract support cost requirement, and that such adjustments were necessary in order to lawfully calculate the full indirect costs associated with carrying out the Secretary's contracted programs. The Tribe seeks damages for the Secretary's actions in these respects as well.

II. JURISDICTION

5. This court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1362, 28 U.S.C. § 1491(a); 28 U.S.C. § 1525; 25 U.S.C. §§ 450m-1(a), (d) of the ISDA and 41 U.S.C. §§ 7103-7107 of the Contract Disputes Act.

III. PARTIES

6. The St. Croix Chippewa Indians of Wisconsin is a federally-recognized Indian Tribe with its tribal headquarters in Webster, Wisconsin. The St. Croix Chippewa Indians of Wisconsin is a “Tribe” as that term is defined by the Indian Self-Determination Act, 25 U.S.C. § 450b(e).

7. Kathleen Sebelius is the Secretary of the Department of Health and Human Services. Secretary Sebelius exercises delegated responsibilities from Congress pursuant to the ISDA and other applicable law. Dr. Yvette Roubideaux is the Director of the Indian Health Service. Director Roubideaux exercises authority delegated to her by the Secretary to carry out the Secretary’s responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “HHS,” “Director” and “IHS” are used interchangeably.

IV. FACTS AND GENERAL ALLEGATIONS

8. Under ISDA, Indian tribes are authorized to administer programs and provide services that would otherwise be undertaken by the federal government. By contract, a tribe agrees to provide such services and the federal government agrees to provide funds to cover both direct program requirements, and “contract support costs.” The Tribe and the IHS entered various ISDA contracts covering Fiscal Years 2005-2010, under which the Tribe promised to

provide various health care programs and services, and IHS promised to provide funding as required in ISDA and in the contracts.

9. ISDA requires that the Secretary shall pay to a contracting Tribe “contract support costs” of various categories, 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), 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)].”)].” Interest earned on such funds is to be retained by the Tribe to provide additional health care. 25 U.S.C. § 458aaa-7(h).

10. The general categories of “contract support costs” to which a contracting Tribe is entitled under the ISDA are:

- (a) “indirect administrative costs, such as special auditing or other financial management costs,” Cherokee Tribe, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(ii));
- (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 Tribe, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(i)); and
- (c) non-recurring one-time “start-up costs,” Cherokee Tribe, 543 U.S. at 635 (citing § 450j-1(a)(5)).

The ISDA specifies that all CSC amounts “shall be added” to an ISDA contract, 25 U.S.C. § 450j-1(a)(2). 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 were not present here (such as completion of a contracted project). 25 U.S.C. § 450j-1(b)(2).

11. During each of fiscal years 2005-2010, IHS has calculated and paid contract support costs associated with ISDA contracts and compacts pursuant to a succession of Indian

Self-Determination Memoranda, IHS Circulars, and (for several years) the IHS Manual (collectively “IHS Manual”). The IHS Manual explains how CSC requirements are to be determined. IHS calculated the contract support cost requirement associated with the Tribe’s contracts pursuant to the IHS Manual.

12. Pursuant to the IHS Manual, IHS “determine[s]” a contractor’s “contract support cost requirement” prior to contract award. IHM § 6-3.1.E.5. IHS does this by calculating the contractor’s indirect contract support costs and direct contract support costs; by reviewing those costs against the Secretarial amount to eliminate any duplicative costs; and by then setting the net amount as the contractor’s “contract support cost requirement.” This becomes the amount which IHS is obligated to pay under the contract.

13. Indirect contract support costs are the bulk of these costs. The IHS Manual instructs how indirect contract support cost requirements will be determined in any given year. The Tribe’s indirect contract support cost requirements were determined pursuant to the IHS Manual in connection with the Tribe’s FY 2005 through FY 2010 contracts.

14. With respect to such costs, the Manual instructs IHS to determine the contractor’s contract support cost requirement “by applying the negotiated [indirect cost] rate(s) to the appropriate direct cost base.” IHM § 6-3.2.E.1. In so doing, IHS uses the contractor’s most recent indirect cost rate so long as it is not “more than three years old.” Id. IHS multiplies the contractor’s most recent indirect cost rate against the direct cost base paid under the contract (i.e., the Secretarial amount less appropriate exclusions) to calculate the amount due for indirect contract support costs. The direct cost base includes all direct contract support costs. See IHM § 3.4.E.1 (“The DCSC, along with other Section 106(a)(1) funds, will be considered part of the recurring base of the award.”); IHM § 6-3.3.A.3 (“[CSC] funding is based on the total amount

associated with the PFSA [Programs, Functions, Services and Activities] awarded from the date of assumption through the end of the FA [Funding Agreement] performance period, not to exceed 12 months.”) The product of these calculations is the contractor’s indirect contract support cost requirement. This is the process IHS used to calculate the Tribe’s indirect contract support cost requirement in each of Fiscal Years 2005 through 2010.

15. The IHS Manual instructs how direct contract support cost requirements will be determined in any given year. The Tribe’s direct contract support cost requirements were determined pursuant to the IHS Manual in connection with the Tribe’s FY 2005 through FY 2010 contracts.

16. The IHS Manual instructs that direct contract support costs are negotiated according to detailed guidelines set forth in the Manual and an Appendix. IHM § 6-3.2.D; IHM Exhibit 6-3-H. Once negotiated, direct contract support costs are paid on a “recurring” basis (IHM §§ 6-3.2.D, 6-3.2.D.2), meaning they “do not require annual rejustification to the Secretary.” IHM § 6-3.1.E.12. See also IHM § 6-3.3.B.2 (“As stated in paragraph 6-3.2D, DCSC funding is provided on a recurring basis”); IHM § 6-3.4.E.1 (“The amount of the DCSC is provided to the awardee on a recurring basis and will not be reduced, but the amount may be renegotiated annually at the option of the awardee.”). Once negotiated, direct contract support costs are increased “by the amount needed to increase prior year DCSC funding by the National OMB nonmedical inflation rate.” IHM § 6-3.3.B.2.

17. The IHS Manual provides a final step in connection with the determination of a Tribe’s contract support cost requirement, concerning duplicative costs. In this last step, all costs are reviewed for duplication to verify that the determined contract support costs do not duplicate contract funds being paid to a contracting Tribe as part of the Secretarial amount. IHM § 6-

3.2.B. At the conclusion of this process, “[t]his **adjusted CSC requirement is the Section 106(a)(2) amount that the awardee is eligible to receive**, subject to available appropriations.” Id. (emphasis added). This “adjusted CSC requirement” is the contract price for the contract support costs to be paid by IHS to a contracting Tribe.

18. The Tribe’s contracts under ISDA required that the Tribe be paid no less than the full amount of the Tribe’s contract support cost requirement as determined under the IHS Manual.

19. During each of the years FY 2005 through FY 2010, the Secretary failed to pay the full amount of the Tribe’s contract support cost requirement. The Secretary’s failure was contrary to the Tribe’s statutory and contractual rights as set forth by the Supreme Court in Cherokee Tribe and Ramah, and as further specified in the Tribe’s contracts with IHS and in the ISDA. See 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).

20. On September 20, 2011, the Tribe presented contract damages claims to the Secretary involving the Secretary’s failure to pay the full amount of CSCs required by the ISDA and the Tribe’s contracts over a period of years, including:

A claim under ISDA Contract No. 239-10-0007, and other contracts, involving –

- (i) IHS’s unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS’s annual CSC shortfall and related “Queue” reports, and
- (ii) IHS’s unlawful failure to properly calculate the indirect administrative CSCs that the Tribe was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),
- (iii) IHS’s liability for lost third-party collections caused by the underpayment of contract support costs.

all during fiscal years 2005 through 2010 totaling \$908,511, plus interest;

21. By six letters dated April 4, 2012, William F. Fisher, IHS Senior Contracting Officer, Bemidji Area advised the Tribe all claims were denied. The letter stated, *inter alia*, that the Tribe had appeal rights, including the right to “bring an action in . . . the United States District Court within 12 months of the date you receive this notice.”

22. The unpaid portion of the Tribe’s contract support cost requirement, as calculated by IHS and excluding the miscalculated rate claim and the claim over lost third-party collections, was set forth annually in the IHS Bemidji Area Office portion of the Tribal IHS CSC Shortfall Reports which IHS prepared for Congress after the close of each fiscal year (“the Shortfall Reports”).

23. The amounts set forth in the annual Shortfall Reports are the minimum additional amounts IHS would have paid the Tribe had IHS each year fully paid all of the Tribe’s contract support cost requirements.

24. The Shortfall Reports were prepared by IHS to comply with a statutory directive to report to Congress on the amount of any “deficiency” (or “shortfall,” see IHM § 6-3.5.B.2) in the payment of contract support costs as measured by the agency’s statutory and contractual obligations. 25 U.S.C. § 450j-1(c)(2).

25. The Shortfall Reports state the minimum additional contract support cost amounts which IHS would have paid the Tribe “had the contract[s] been performed, that is, had there been no breach.” RESTATEMENT (SECOND) OF CONTRACTS, §344, comment a. The Shortfall Reports constitute binding party admissions by the Secretary regarding the minimum additional contract support cost amounts owed by the Secretary to the Tribe. The IHS is estopped and barred from denying the accuracy, admissibility and completeness of the Shortfall Reports.

V. CAUSES OF ACTION

**FIRST CAUSE OF ACTION
(Failure to Pay Required Contract Support Costs)**

26. The Tribe incorporates all previous allegations of fact and law into this Cause of Action.

27. During each of years FY 2005 through FY 2010, the Secretary failed to meet her statutory and contractual obligations to the Tribe by failing to pay the Tribe's full contract support cost requirement regarding the Tribe's ISDA contracts.

28. The Secretary's annual failure to pay the Tribe the full CSC requirement constitutes for each year a separate breach of statutory and contractual rights.

29. The government is liable to the Tribe for the unpaid amount of the Tribe's full contract support cost requirements, together with accrued interest, attorneys' fees and costs, as prayed below.

**SECOND CAUSE OF ACTION
(Expectancy Damages)**

30. The Tribe incorporates all previous allegations of fact and law into this Cause of Action.

31. Damages for each breach of the Secretary's contracts with the Tribe are measured by the amounts required to place the Tribe in the position it would have been in had there not been a breach.

32. The Secretary was required to annually pay the Tribe a single lump sum payment representing the Tribe's full contract amount, as determined each year pursuant to the IHS Manual. With those funds, the Tribe provides health care services and bills the cost of those services to Medicare, Medicaid and private insurers, as required by the Tribe's contract with IHS

and applicable law (“third-party collections” or “program revenue”). The Tribe is required by its contract and applicable law to bill responsible third parties (such as Medicare, Medicaid and private insurers) for such services. This billing function is a contracted function which IHS transferred to the Tribe when the Tribe contracted to operate the programs subject to the contracts. The activity of billing Medicare, Medicaid and private insurers for health services provided under the contract is an integral and foreseeable part of each year’s contract.

33. Additional contract payments to the Tribe result in increased third-party collections. The Tribe’s contracts and applicable law mandate that program revenues be spent on additional health care benefiting the Tribe’s members and other eligible patients. Because the Secretary underpaid the Tribe’s contracts, the Tribe provided fewer services and suffered damages in an amount equal to the third-party revenues that would have been collected by the Tribe under the contract had full payment occurred.

34. The government is liable to the Tribe in damages for the amounts required to place the Tribe back in the position it would have been in had there been no breach of the Secretary’s duty to pay the Tribe’s contract support costs in full, including not only the unpaid contract support costs but also the associated third-party collections, together with accrued interest, attorneys’ fees and costs, as specifically prayed below.

**THIRD CAUSE OF ACTION
(Miscalculated Rate Claim)**

35. The Tribe incorporates all previous allegations of fact and law into this Cause of Action.

36. During each of fiscal years 2005 through 2010, the Secretary failed to meet her statutory and contractual obligations to the Tribe by failing to pay the Tribe the full amount of

indirect administrative CSCs to which the Tribe was entitled under the ISDA. IHS, pursuant to its CSC Circulars, acted unlawfully by using, as an automatic proxy for the determination of such administrative CSCs, the unadjusted annual “indirect cost rate” assigned to the Tribe by the National Business Center. The “indirect cost rate” annually assigned to the Tribe was to be used strictly for certain cost-recovery accounting purposes, and the applicable Office of Management and Budget (OMB) guidelines caution that such rates are not to be used to determine a federal agency’s funding obligations under contracts or grants. See, e.g., OMB Cir. A-87, 2 C.F.R. § 225.20 (“The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award.”). Nonetheless, each year IHS, by policy and practice, required that the amount of the Tribe’s indirect administrative CSCs to be paid under the ISDA and the contracts be determined by application of the Tribe’s most recent “indirect cost rate” assigned to the Tribe by the DOI. The Tribe alleges that this practice was contrary to law, as specified in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

37. The Secretary’s reliance on the unadjusted “indirect cost rate” disadvantaged the Tribe in various respects including:

- (a) the indirect cost rate relied upon by IHS calculated the IHS’s responsibility for indirect costs based upon the incorrect assumption that all agencies contributing to the Tribe’s direct cost base would contribute in full proportional amounts to the indirect cost pool, when in fact some such agencies did not so contribute to the pool. The impact of this assumption was to reduce the calculation of the Tribe’s indirect costs as compared to the costs actually associated with operating the Tribe’s contracts with IHS;
- (b) the indirect cost rate that IHS applied to the Tribe adjusted twice, instead of once, adverse carryforward adjustments from prior years (an error which, had it not occurred, would have produced a higher indirect cost rate); and
- (c) the indirect cost rate that IHS applied to the Tribe failed to adjust the carryforward computations that are a part of the indirect cost computations, so that shortfalls in

IHS indirect cost payments that were caused by the alleged insufficiency in IHS appropriations were not carried forward to future year rate computations (where such adjustments would have produced a higher indirect cost rate had they been carried forward).

38. The government is liable to the Tribe for the amounts the Secretary would have paid had the Secretary not failed to adjust the indirect cost rates she chose to use for calculating the Tribe's indirect contract support cost requirement associated with carrying out the Secretary's programs under contract, together with accrued interest, attorneys' fees and costs.

VI. PRAYER FOR RELIEF

WHEREFORE, the St. Croix Chippewa Indians of Wisconsin prays for the following relief:

- a. A judgment for damages for the Secretary's breach of each ISDA contract in each relevant year, for failure to pay contract support costs and related damages, as set forth in more detail in this Complaint;
- b. Interest for one year from the payment due date for each payment the Secretary failed to make under each contract, as provided for under the Prompt Payment Act, 31 U.S.C. §§ 3901-3907;
- c. Interest under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, from the date of each claim until the date of payment upon entry of final judgment;
- d. Costs and attorneys' fees incurred in pursuing this claim as provided for under the Equal Access to Justice Act, 5 U.S.C. § 504, 25 U.S.C. § 450m-1(c), and other applicable law; and
- e. Such other monetary, declaratory and equitable relief as this court may find to be just.

Respectfully submitted this 3rd day of April 2013.

SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP

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