

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

SENECA NATION OF INDIANS,)
a federally recognized Indian tribe,)
90 Ohi:yo' Way)
Salamanca, N.Y. 14779)

Plaintiff,)

v.)

Civil Action No. _____

UNITED STATES DEPARTMENT)
OF HEALTH AND HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, D.C. 20201,)

and)

KATHLEEN SEBELIUS, in her official capacity)
as Secretary,)
United States Department of Health and Human)
Services)
200 Independence Avenue, S.W.)
Washington, D.C. 20201,)

Defendants.)

COMPLAINT FOR DECLARATORY RELIEF AND MONEY DAMAGES

Plaintiff Seneca Nation of Indians ("Nation"), by and through undersigned counsel, brings this Complaint for Declaratory Relief and Money Damages against Defendants UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ("Department") and KATHLEEN SEBELIUS, in her official capacity as Secretary ("Secretary") of the Department.

In support thereof, the Nation states as follows:

I. PARTIES

1. The Nation is a federally recognized Indian tribal government, organized and governed pursuant to a constitution originally made and adopted in convention assembled on December 4, 1848, and as amended from time to time in accordance with its provisions, with the elected Seneca Nation Tribal Council serving as the governing body of the Nation and with its headquarters located on the Nation's Allegany Territory at 90 Ohi:yo' Way, Salamanca, NY 14779 and on the Nation's Cattaraugus Territory at 12837 Route 438, Irving, NY 14081.

2. The Department is an executive department within the U.S. federal government whose constituent agencies and programs include the Indian Health Service ("IHS"), with the headquarters of the Department located at 200 Independence Avenue, SW, Washington, DC 20201.

3. Ms. Kathleen Sebelius is the Secretary of the Department and has overall responsibility for administering the Department as well as overseeing its constituent agencies and programs, including the IHS, and managing certain Indian affairs and appropriations within the IHS, including contracting on behalf of the United States with Indian tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act, P.L. 93-638 as codified at 25 U.S.C. §§ 450 *et seq.* (the "ISDEAA") to carry out Indian health service programs, with her office located within the headquarters of the Department at 200 Independence Avenue, SW, Washington, DC 20201.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this is a civil action arising under the Constitution, laws, or treaties of the United States, and pursuant to 25 U.S.C. § 450m-1(a) in that this is a civil action or claim against the Secretary.

5. Venue in the District of Columbia is proper under 28 U.S.C. § 1391(b) and (e) because the Defendants in this matter are an officer and agency of the United States and a substantial part of the events giving rise to the claims asserted herein occurred in this district.

III. FACTS

A. **The Nation's Proposed Self-Determination Contract Amendments, Deemed Approvals, and the Defendants' Breaches**

6. Ms. Martha Ketcher is the Acting Area Director ("Acting Area Director") of the IHS Nashville Area Office ("IHS Nashville Office") and has overall responsibility for administering the IHS Nashville Office, including such responsibilities as may have been delegated to her by the Secretary regarding contracting with Indian tribes and tribal organizations under the ISDEAA to carry out Indian health service programs.

7. By letter from Nation President Robert Odawi Porter to the Acting Area Director, dated April 29, 2011 and received May 2, 2011 (the "April 29 Letter"), and pursuant to the ISDEAA, the Nation proposed an amendment to increase funding under its Fiscal Year ("FY") 2010 Agreement by \$3,774,392, plus interest. The April 29 Letter is incorporated herein by reference and a copy is attached hereto as Exhibit A.

8. In the April 29 Letter, the Nation requested that its FY 2010 Agreement amendment proposal be treated as a FY 2010 Agreement amendment by IHS pursuant to 25 C.F.R Part 900, Subpart D. April 29 Letter at p. 2, Exhibit A.

9. In the April 29 Letter, the Nation proposed the same amendment to its FY 2011 Agreement to increase funding by \$3,774,392, plus interest. April 29 Letter at p. 3, Exhibit A.

10. In the April 29 Letter, the Nation requested that its FY 2011 Agreement amendment proposal be treated as a FY 2011 Agreement amendment by IHS pursuant to 25 C.F.R. Part 900, Subpart D. April 29 Letter at p. 3, Exhibit A.

11. Section 102(a)(2) of the ISDEAA, codified at 25 U.S.C. § 450f(a)(2), and the implementing regulations at 25 C.F.R. §§ 900.14 – 900.19 require that any tribal proposal to amend an existing contract must, as a matter of law, be deemed approved by the Secretary if it is not lawfully declined within ninety (90) days of its receipt or within an extension of that period granted by written consent of the Indian tribe or tribal organization proposing the amendment.

12. Pursuant to 25 C.F.R. § 900.18, the Secretary is required to award a deemed-approved amendment to an existing self-determination contract and add to the contract the full amount of funds pursuant to Section 106(a) of the ISDEAA, as codified at 25 U.S.C. § 450j-1(a).

13. The April 29 Letter was received by the IHS Nashville Office on May 2, 2011. Return Receipt attached to the April 29 Letter, Exhibit A.

14. The Nation has not consented to any extension of the ninety (90) day period. Affidavit of Robert Odawi Porter ("Porter Affidavit") at ¶ 14, incorporated herein by reference and a copy is attached hereto as Exhibit B.

15. The ninety (90) day period expired on August 3, 2011. Porter Affidavit at ¶ 15, Exhibit B.

16. During the ninety (90) day period, neither the Secretary nor any other officer of the Department provided a response to the Nation's proposed amendment to its FY 2010 Agreement. Porter Affidavit at ¶ 16, Exhibit B.

17. During the ninety (90) day period, neither the Secretary nor any other officer of the Department provided a response to the Nation's proposed amendment to its FY 2011 Agreement. Porter Affidavit at ¶ 17, Exhibit B.

18. To date, neither the Secretary nor any other officer of the Department has awarded the Nation's proposed and deemed-approved amendment to its FY 2010 Agreement. Porter Affidavit at ¶ 18, Exhibit B.

19. To date, neither the Secretary nor any other officer of the Department has awarded the Nation's proposed and deemed-approved amendment to its FY 2011 Agreement. Porter Affidavit at ¶ 19, Exhibit B.

20. To date, neither the Secretary nor any other officer of the Department has added the full amount of funds from the Nation's proposed and deemed-approved amendment to its FY 2010 Agreement. Porter Affidavit at ¶ 20, Exhibit B.

21. To date, neither the Secretary nor any other officer of the Department has added the full amount of funds from the Nation's proposed and deemed-approved amendment to its FY 2011 Agreement. Porter Affidavit at ¶ 21, Exhibit B.

B. Background to the Nation's Self-Determination Contract and Proposed Amendments

22. Pursuant to Title I of the ISDEAA, codified at 25 U.S.C. §§ 450f-450n, the Nation and the Secretary entered into the Self Determination Contract Model Agreement entitled "Contract Between the Secretary of the Department of Health & Human Services and the Seneca Nation of Indians", Contract No. 285-00-0002, dated January 1, 2000 (the "Self-Determination Contract"). The Self-Determination Contract, including the cover Notice of Self Determination Contract Model Agreement ("Model Agreement Notice") and the Annual Funding Agreement for Fiscal Year 2010, is incorporated herein by reference and attached hereto as Exhibit C.

23. The provisions of the ISDEAA and Self-Determination Contract are to be liberally construed for the benefit of the Nation to transfer the funding and related functions, services, activities and programs (or portions thereof) specified in the Self-Determination Contract that are otherwise contractible under Section 102(a) of the ISDEAA, codified at 25 U.S.C. § 450f(a), including all related administrative functions, from the Federal Government to the Nation as contractor. Article I, Section 2 of the Self-Determination Contract, Exhibit C.

24. The Self-Determination Contract is to be administered by the IHS Nashville Office. Section 5 of the Model Agreement Notice, Exhibit C.

25. The Program Title for the Self-Determination Contract is "Operation of Comprehensive Health Delivery System for Seneca Nation of Indians". Section 7 of the Model Agreement Notice, Exhibit C.

26. By agreement of the parties, the Self-Determination Contract became effective on January 1, 2000 and by its terms, pursuant to Section 105(c)(1) of the ISDEAA, codified at 25 U.S.C. § 450j(c)(1), has an indefinite term. Article II, Sections 1 and 2 of the Self-Determination Contract, Exhibit C.

27. By its terms, the Self-Determination Contract requires the Nation and the Secretary to negotiate successive Annual Funding Agreements, or "AFAs", each of which is incorporated into the Self-Determination Contract. Article II, Section 14(A) and Article VII, Section 2(B) of the Self-Determination Contract, Exhibit C.

28. A negotiated AFA contains "terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment" and "such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those

supported by financial resources other than those provided by the Secretary), to which the parties agree." Article VII, Section 2(A) of the Self-Determination Contract, Exhibit C.

29. The total amount of funds to be paid under the Self-Determination Contract, pursuant to Section 106(a) of the Act, as codified at 25 U.S.C. § 450j-1(a), must be determined in the AFA. Article III, Section 2 of the Self-Determination Contract, Exhibit C.

30. For Fiscal Year ("FY") 2010, the Self-Determination Contract incorporates the AFA dated October 1, 2009 ("FY 2010 AFA") and Modification No. 71 to the Contract Model Agreement/Annual Funding Agreement ("Modification No. 71"). The Self-Determination Contract, the FY 2010 AFA, and Modification No. 71 are collectively referred to herein as the "FY 2010 Agreement," incorporated herein by reference and copies are attached hereto as Exhibit C.

31. The FY 2010 Agreement provides funding for the programs, functions, services and activities, or portions thereof, that the Nation is to perform or administer on a fiscal year period from October 1, 2009 through September 30, 2010. Current Changes section, Modification No. 71 at p. 2, Exhibit C.

32. For FY 2011, the Self-Determination Contract incorporates the FY 2010 Agreement by virtue of Modification No. 82 to the Contract Model Agreement/Annual Funding Agreement ("Modification No. 82"), which extends the FY 2010 Annual Funding Agreement through September 30, 2011 and makes certain other changes. The FY 2010 Agreement and Modification No. 82 are collectively referred to herein as the "FY 2011 Agreement." Modification No. 82 is incorporated herein by reference and a copy is attached hereto as Exhibit D.

33. In its April 29 Letter, the Nation asked IHS to immediately correct an IHS undercount of more than 12,150 patient visits for FY 2010, and to make a correspondingly proportional adjustment to its FY 2010 Active User Population total from 4,122 to 6,156 (an addition of 2,034 patients). April 29 Letter at p. 2, Exhibit A.

34. The average per patient cost of Nation health care funded by the IHS is \$1,855.65, based on a prior IHS determination of per patient funding allocation when IHS calculated its proposed withdrawal of \$380,000 from the Nation's Self-Determination Contract base funding in response to the Nation's proposed removal of 205 individuals from eligibility for service in fall 2010 ($\$380,000 / 205 \text{ individuals} = \$1,855.65$). Porter Affidavit at ¶ 8, Exhibit B.

35. In its April 29 Letter, the Nation proposed an amendment to its FY 2010 Agreement in the amount of \$3,774,392, plus interest, based on the calculated average per patient cost of \$1,855.65 multiplied by the 2,034 patients not counted by IHS. April 29 Letter at p. 2, Exhibit A.

36. Because the FY 2010 Agreement was extended through the FY 2011 Agreement, the Nation also proposed in its April 29 Letter an amendment to its FY 2011 Agreement identical to its FY 2010 amendment in the amount of an additional \$3,774,392, plus interest. April 29 Letter at p. 2, Exhibit A.

C. Contract Disputes Act Claims and Denials

37. The Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, recodified at 41 U.S.C. §§ 7101 *et seq.*, and the implementing regulations thereto (collectively, the "CDA"), are made applicable to self-determination contracts, including the FY 2010 Agreement and FY 2011 Agreement, by 25 U.S.C. §§ 450m-1(d).

38. Ralph Ketcher, Jr., is the Chief Contracting Officer ("Chief Contracting Officer") for the IHS Nashville Office and has those responsibilities as may have been delegated to him by the Secretary regarding contracting with Indian tribes and tribal organizations under the ISDEAA to carry out Indian health service programs, including those related to negotiating, implementing, and serving as contracting officer for Title I Self-Determination Act Contracts entered into pursuant to 25 U.S.C. § 450f.

39. Ralph Ketcher, Jr. is the contracting officer in this case, pursuant to the CDA at 41 U.S.C. § 7101(6).

40. The Nation's legal counsel Philip Baker-Shenk, Holland & Knight LLP, on behalf of and as authorized by the Nation, submitted a letter to the Chief Contracting Officer dated November 30, 2011 and received on December 5, 2011 ("CDA Claims Letter"), tendering the Nation's certified claims to the IHS Nashville Office pursuant to the CDA. The CDA Claims Letter is incorporated herein by reference and a copy is attached hereto as Exhibit E.

41. The CDA Claims Letter demanded an immediate cure and full and appropriate relief from the material breaches by the IHS of (1) the Nation's FY 2010 Agreement, by the IHS failure to pay, as of August 3, 2011, \$3,774,392, plus interest, to the Nation for the deemed-approved contract amendment that increased the amount of funding provided under Modification No. 71 of the FY 2010 Agreement, and (2) the Nation's FY 2011 Agreement, by the IHS failure to pay, as of August 3, 2011, \$3,774,392, plus interest, to the Nation for the deemed-approved contract amendment that increased the amount of funding provided under Modification No. 82 of the FY 2011 Agreement. CDA Claims Letter, Exhibit E.

42. Pursuant to 41 U.S.C. § 7103(b), the Nation's CDA claims for more than \$100,000 were lawfully certified. CDA Claims Letter, Exhibit E.

43. Pursuant to 41 U.S.C. § 7103(a)(4)(A), the Nation's claims as a contractor against the Federal Government were timely submitted.

44. Pursuant to 41 U.S.C. § 7103(f)(2) and 25 C.F.R. § 900.223, the CDA requires that a contracting officer, within sixty (60) days of receiving a submitted certified claim for more than \$100,000, either issue a decision or notify the contractor of the time within which a decision will be issued.

45. After two intermediate letters dated December 21, 2011 extending the time within which a decision would be made (see copies of letters attached hereto as Exhibits F and G), the Chief Contracting Officer sent two letters to Nation President Robert Odawi Porter dated April 5, 2012 and received April 10, 2012, one pertaining to FY 2010 and one to FY 2011, denying the Nation's CDA claim for FY 2010 (the "FY 2010 Claim Denial Letter") and for FY 2011 (the "FY 2011 Claim Denial Letter"), respectively. The FY 2010 Claim Denial Letter is incorporated herein by reference and a copy is attached hereto as Exhibit H. The FY 2011 Claim Denial Letter is incorporated herein by reference and a copy is attached hereto as Exhibit I.

46. Based on the decision letter dated April 5 with a receipt date by the Nation of April 10, 2012, this judicial appeal is timely filed. 41 U.S.C. § 7104(b)(1) and (3); 25 U.S.C. §§ 450f(b)(3) and 450m-1(a); 25 C.F.R. § 900.222(e).

47. This action appeals the contracting officer's decision *de novo*. 41 U.S.C. § 7104(b)(4); 25 U.S.C. § 450m-1; *Cherokee Nation of Oklahoma v. U.S.*, 190 F.Supp.2d 1248, 1258 (E.D. Okla. 2001), *rev. on other grds. by Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1317-1318 (D. Or. 1997).

48. Under the Equal Access to Justice Act, the prevailing party in a direct action appealing a contracting officer's decision may seek costs as well as reasonable fees and expenses, including attorneys' fees. 25 U.S.C. § 450m-1(c) and 25 C.F.R. § 900.216(c) (making the Equal Access to Justice Act applicable to self-determination contracts); 5 U.S.C. § 504; 28 U.S.C. § 2412; 43 CFR Part 13 (for DHHS adversarial proceedings).

COUNT I

DECLARATORY JUDGMENT

49. Plaintiff reasserts and incorporates by reference the allegations contained in paragraphs 1-48 as though fully set forth herein.

50. The Nation's proposed amendments to its FY 2010 Agreement and FY 2011 Agreement as contained in the April 29 Letter were, as a matter of law, to be deemed approved upon the expiration of the Defendants' ninety (90) day review period, without lawful declination, on August 3, 2011.

51. Plaintiff is entitled to a declaration that each of the April 29 Letter proposed amendments to its FY 2010 Agreement and FY 2011 Agreement are deemed approved as of August 3, 2011.

52. WHEREFORE, Plaintiff requests that the Court enter judgment in its favor against Defendants declaring that each of the April 29 Letter proposed amendments to the Nation's FY 2010 Agreement and FY 2011 Agreement are deemed approved as of August 3, 2011.

COUNT II

**FY 2010 AGREEMENT BREACH OF CONTRACT CLAIM,
25 U.S.C. § 450m-1; 41 U.S.C. § 7101 et seq.**

53. Plaintiff reasserts and incorporates by reference the allegations contained in paragraphs 1-52 as though fully set forth herein.

54. The Defendants were obliged as of August 3, 2011, by the deemed approval of the April 29 Letter proposed amendment to the Nation's FY 2010 Agreement, to award the amendment and add to the FY 2010 Agreement the full amount of funds proposed in the amendment, but the Defendants failed to do so and thereby breached the FY 2010 Agreement.

55. As to the FY 2010 Agreement, Plaintiff is entitled to an award of money damages in the amount of \$3,774,392, plus interest on this award pursuant to 41 U.S.C. § 7109 as well as costs and reasonable fees and expenses, including attorneys fees, pursuant to authority both equitable in nature and that provided under the Equal Access to Justice Act, 28 U.S.C. § 2412.

56. WHEREFORE, Plaintiff requests that the Court enter judgment in its favor against Defendants granting an award of money damages in the amount of \$3,774,392, or such other amount as the Plaintiff proves at trial, together with interest, costs, and fees, including attorneys fees.

COUNT III

**FY 2011 AGREEMENT BREACH OF CONTRACT CLAIM,
25 U.S.C. § 450m-1; 41 U.S.C. § 7101 et seq.**

57. Plaintiff reasserts and incorporates by reference the allegations contained in paragraphs 1-56 as though fully set forth herein.

58. The Defendants were obliged as of August 3, 2011, by the deemed approval of the April 29 Letter proposed amendment to the Nation's FY 2011 Agreement, to award the

amendment and add to the FY 2011 Agreement the full amount of funds proposed in the amendment, but the Defendants failed to do so and thereby breached the FY 2011 Agreement.

59. As to the FY 2011 Agreement, Plaintiff is entitled to an award of money damages in the amount of \$3,774,392, plus interest on this award pursuant to 41 U.S.C. § 7109 as well as costs and reasonable fees and expenses, including attorneys fees, pursuant to authority both equitable in nature and that provided under the Equal Access to Justice Act, 28 U.S.C. § 2412.

60. WHEREFORE, Plaintiff requests that the Court enter judgment in its favor against Defendants granting an award of money damages in the amount of \$3,774,392, or such other amount as Plaintiff proves at trial, together with interest, costs, and fees, including attorneys fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- a. Grant Plaintiff the relief requested in this Complaint;
- b. Grant Plaintiff its reasonable attorneys fees incurred in preparing and bringing this action pursuant to the Indian Self-Determination and Education and Assistance Act of 1975, as amended, and the Equal Access to Justice Act; and
- c. Grant Plaintiff such other and further relief as the Court deems just and equitable.

Dated this 10th day of September, 2012.

Respectfully submitted,

HOLLAND & KNIGHT LLP

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