



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Chitina Traditional Village Council v. Juneau Area Director, Bureau of Indian Affairs

Docket No. IBIA 97-49-A (06/06/1997)

Related Indian Self-Determination Act case:

Interior Board of Indian Appeals decision, 31 IBIA 100



United States Department of the Interior

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June 6, 1997

CHITINA TRADITIONAL VILLAGE	:	Docket No. IBIA 97-49-A
COUNCIL,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
JUNEAU AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	

RECOMMENDED DECISION

Appearances: Joe P. Josephson., Esq., Anchorage, Alaska, for Appellant

Roger Hudson, Esq., Anchorage, Alaska, for Appellee

Before: Administrative Law Judge Sweitzer

On November 25, 1996, Appellant Chitina Traditional Village Council (Chitina) filed with the Interior Board of Indian Appeals (Board) an appeal of an October 21, 1996, decision issued by the Juneau Area Director (Area Director), Bureau of Indian Affairs (BIA), declining to enter into a fiscal year (FY) 1997 contract with Chitina regarding five proposed programs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450-450n (1994).¹ Those proposed programs are: forest fire training and equipment, forest fire management, forest management (allotment forestry), agriculture, and contract support.² The matter was then assigned to me for hearing.

¹ All further citations to the United States Code are to the 1994 edition.

² Only the first four programs, forest fire training and equipment, forest fire management, forest management (allotment forestry), and agriculture, are at issue. In its Notice of Appeal, Chitina makes reference to only "four contract proposals" and "four proposed contracts." Chitina has not challenged the Area Director's declination of the proposal for contract support.

Hearing was held on March 5, 6, and 7, 1997, in Anchorage, Alaska. On May 7, 1997, the parties filed their final posthearing briefs and the matter is now ripe for recommended decision. Having carefully reviewed all evidence and briefs, and for the reasons set forth below, I conclude that the Area Director's decision should be vacated and the matter should be remanded to the Area Director for further consideration.

Statement of Facts

In 1988, Federal legislation was passed authorizing the Tribal Self-Governance Demonstration Project (Tr. 21). Under this project, Indian tribes were offered the opportunity to take over many of the functions and activities (and associated funding) of the Federal Government pursuant to negotiated agreements (Tr. 21). Three consortiums of tribes initially participated in the project in Alaska (Tr. 104, 121-22). They negotiated funding from the BIA based upon formulas for proportional distribution of available funds whereby, for example, funds for forestry programs were distributed based upon acreage figures (Tr. 104-08, 121-22, 128-31, 141).

On October 25, 1994, additional Federal legislation was enacted terminating the Demonstration Project and establishing a permanent Tribal Self-Governance Program for transferring control of Federal programs, services, functions, and activities to tribal governments via compacts with the Federal Government. See Pub. L. No. 103-413, 108 Stat 4272 (1994), codified at 25 U.S.C. §§ 458aa-458hh. As follows, that legislation required development of a formula to, determine each tribe's share of the funding available for each of the transferable programs, services, functions, and activities.

Within 90 days after October 25, 1994, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs for inclusion in the Self-Governance compacts.

25 U.S.C. § 458ee(d).

This legislation provided the driving force for the BIA's implementation of a national "tribal shares process" by which it hoped to develop the necessary funding formulas (Tr. 35, 40, 117-18). The Deputy Commissioner of Indian Affairs directed each of the BIA's area offices to identify all of its functions and activities, to differentiate core (residual) functions that were inherently Federal responsibilities which could not be transferred to tribal governments, and to estimate the costs of each of the functions or activities (Tr.. 23-24 35- 36).

The funding associated with the residual functions would not be available to the tribes (Tr. 24, 26, 92). Non-residual function funding would be identified as available to the tribes pursuant to either a self-determination contract or a self-governance compact (Ex. 47; Tr. 129).

By February 27, 1995, the Juneau Area Office had prepared a document known as the "Blue Book" listing its functions, their costs, and whether they were transferable to the tribes (Ex. 44; Tr. 26, 30). The Blue Book was provided to all Alaskan tribes for comment regarding identification of residual functions, funds available for nonresidual functions, and formulas for determining tribal shares for nonresidual functions (Tr. 30-31, 94-96). The tribes were invited to meetings to discuss these matters (Tr. 30-31, 94-96). Chitina was invited to a meeting in Anchorage, Alaska, which took place in May of 1995 (Tr. 95-96).

During the same time period, the Juneau Area Office also discussed these matters in negotiations with consortiums of tribes seeking compacts under the permanent Tribal Self-Governance Program (Tr. 31-32, 121-22). Chitina representatives were asked to and did leave these negotiations because Chitina was not a participant in any of the consortiums (Tr. 636-37).

Thereafter, the Deputy Commissioner's Office created a Federal team to review the efforts of the area offices and to standardize the identification of residual functions and activities (Tr. 36). By January of 1996 the team had developed a list of residual functions (Ex. 45). The Juneau Area Office then invited all tribes to a meeting to determine the resources needed to perform each residual function and the formulas for determining the funds available to each tribe as its tribal share for each nonresidual function (Tr. 101-02). The attending tribes and the BIA reached agreement regarding the formulas to be used, but they could not fully agree on the resources needed by the BIA to perform the residual functions (Tr. 102-03).

In March 1996, the Juneau Area Office issued to all tribes in Alaska a document known as the "Yellow Book" containing the list of residual functions developed by the Federal team with associated estimated cost data for the Juneau Area (Ex. 48; Tr. 39, 41-42, 56). The book also contains the basis of the tribal share formula for each program (Ex. 48). For instance, regarding agriculture, the book lists "Population/Tribe" under the category "Formulae/Remarks." (Ex. 48) This means that the formula for agriculture requires 50 percent of the available funds to be divided equally amongst the tribes and the remaining 50 percent to be divided in proportion to the population of each tribe (Tr. 52-53, 65-68).

The Yellow Book also includes estimates for each program of the funds available to the tribes without a compact under the Tribal Self-Governance Program (non-compacting tribes) (Tr. 125-27). The available funding for the tribes with compacts (compacting tribes) is not addressed because that funding is separately identified and transferred to the Office of Self-Governance for distribution (Tr. 593).

However, with respect to each program, the BIA has applied the same tribal share formula in determining funding for both compacting and non-compacting tribes (Tr. 34, 121-128-31, 140-41). The formulas used to determine tribal shares under the Demonstration Project were later used to determine tribal shares for purposes of funding distribution either pursuant to self-governance compacts or self-determination contracts (Tr. 34, 121-22, 128-31, 140-41). Consequently, the tribal shares of each tribe, including Chitina, have been determined on the same basis, regardless of whether the tribe is a compacting tribe (Tr. 73, 122, 129, 140-41, 336).

Equity is the underlying principle of the tribal share process (Tr. 118). The BIA is seeking to treat all tribes fairly and equally by determining each tribe's tribal share for a particular program using the same tribal share formula (Tr. 33, 71, 118, 154-55). Prior to enactment of the 1994 legislation, self-determination contract funding was left to the discretion of the Area Director (118-21, 154-55). That discretion has now been replaced by adherence to the tribal share formulas (Tr. 120-21).

Under the tribal share process, if a tribe does not compact or contract for its tribal share for a particular program, the funding remains with the BIA to enable it to provide the programmatic services directly to the tribe or to the Native allotment owners in its service area, and to ensure that funding will be available to the tribe should it choose to contract or compact in the future (Tr. 37-38, 82-83, 100 267, 269, 303, 335-36). In general, the BIA cannot give a particular tribe more than its tribal share or, in effect, the BIA would be taking money from other non-compacting tribes to pay the particular tribe and jeopardizing the BIA's financial ability to provide trust services to the other non-compacting tribes or Native allotment owners in their service areas (Tr. 37-38, 223-24, 678).

In the Yellow Book, the Area Director asked for comments, and meetings were held in the Spring of 1996 to inform the tribes on how to interpret the book (Tr. 43, 56, 96-98; Ex. 48). After a tribal work group recommended that the Yellow Book be made more user friendly, twenty-four tribal representatives were selected to assist in improving the Yellow Book (Tr. 57-58, 86-90; Ex. 51). The representatives have met with the BIA several times and the tribal share process is still ongoing (Tr. 60, 74, 87).

Nevertheless, in September of 1996, the Acting-Deputy Commissioner of Indian Affairs directed that "FY 1997 tribal shares will continue to be negotiated in accordance with the FY 1996 tribal shares guidance with some modifications." (Ex. 51) Consequently, an interim determination of each tribe's tribal shares was made for FY 1997 based upon estimated budget figures (Tr. 58; Exs. 6, 7).

On August 30, 1996, Chitina applied for a self-determination contract for FY 1997 covering a wide variety of programs, including the programs at issue (Ex. 1; Tr. 168-70). The Area Director awarded a contract to Chitina funding many of these programs at the

proposed level of Chitina's corresponding tribal priority allocation (TPA) ³ (Exs. 56, 57; Tr. 183-84).

For each of the programs at issue, the Area Director declined to fund them because the amount of funds proposed by Chitina was in excess of the available funding level (Ex. 58). "Adequate protection of trust resources is not assured" was cited as a second reason for declining each program, except agriculture (Ex. 58).

The Area Director used the estimated FY 1997 tribal share figures along with estimated TPA figures for FY 1997 ⁴ in determining to decline Chitina's self-determination contract proposals at issue (Exs. 41, 58; Tr. 58-59, 74-75). The applicable funding level for each of the programs at issue was determined to be its tribal share plus its TPA, if any (Tr. 72-73). In so determining the applicable funding level, the Area Director treated Chitina no differently than any other tribe (Tr. 72-73).

For FY 1997, Chitina's estimated TPA and estimated tribal share are \$912 and \$1,218, respectively, for the allotment forestry program (Tr. 170-71, 239-45, 284-86; Exs. 13, 41). The Juneau Area's allotment forestry program is comprised of the following subprograms: timber sales management, forest inventory, forest protection (including timber trespass investigations), and forest management (Tr. 224-25, 239-45, 313-14, 570-71; Ex. 13). Chitina's estimated tribal share for each of these subprograms is \$577, \$162, \$172, and \$307, respectively (Ex. 13). Chitina's tribal share of \$1,218 allotment forestry is the total of its estimated tribal shares for these various subprograms (Ex. 13; Tr. 239-45, 284-86, 313-14).

The tribal share formulas for allotment forestry are based primarily upon comparisons of Native allotment acreage within a tribe's service area to Native allotment acreage within the entire State of Alaska (approximately 1,100,000 acres) (Tr. 227, 243-45, 570-71). This follows from the fact that the lands in Alaska for which the Juneau Area Office has trust responsibilities are nearly exclusively Native allotment owned by individuals; no tribe in Alaska, with the exception of Metlakatla, owns trust land (Tr. 241, 321-22, 400-01). The Juneau Area Office's various forest management subprograms are provided to fulfill its trust responsibilities with respect to the individual Native allotments (Tr. 237-38, 241, 321-22, 400-01).

For each of these subprograms, no witness could identify the basis of the tribal share formula used for FY 1997 (see, e.g., Tr. 240-42, 297, 418). The formula for forest management appears to be based upon the ratio of forested acres within the Native allotments located in the tribe's service area to the forested acres within all Native allotments in the State

³ A TPA is that portion of the Congressional appropriation for an Indian affairs program specifically appropriated and identified to a single tribe (Tr. 48, 201).

⁴ Estimated figures were used because, among other reasons, the BIA's FY 1997 budget was still pending at the time the declination letter was issued (Ex. 7).

of Alaska (Ex. 48). Mr. Tony Urvina, the Juneau Area Natural Resource Manager, testified that the most liberal method, *i.e.*, the most favorable method to Chitina, of determining its share of allotment forestry funds would be to use a formula based upon the percentage of Native allotment acreage located within Chitina's service area (Tr. 297).

Mr. Urvina did testify as to the formulas he had developed in the past, but was not sure if they were being used (Tr. 220-21, 240-42, 295-96). The basis of the formula for timber sales management had been two ratios: (1) the commercial forested acreage within the Native allotments located in the tribe's service area divided by the commercial forested acreage within all the Native allotments located in the State of Alaska and (2) the volume of commercial timber sales from Native allotments located in the tribe's service area divided by the volume of commercial timber sales from all the Native allotments located in the State of Alaska (Tr. 240-41, 297). However, Mr. Urvina did not know the amount of commercial forested acreage on Native allotments within Chitina's service area (Tr. 330). The formula for forest inventory had been based upon the ratio of Native allotment acreage within the tribe's service area to Native allotment acreage within the State of Alaska (Tr. 240-41). For forest protection, the formula had been based upon either the ratio of forested acres within the Native allotments located in the tribes's service area to the forested acres in all Native allotments in the State of Alaska or the ratio of Native allotment acreage within the tribe's service area to Native allotment acreage within the State of Alaska (Tr. 240-41, 295).

While no BIA witness knew the precise acreage figures used to calculate Chitina's tribal shares (*see* Tr. 242, 330, 418, 667), they were aware of the total BIA funds available to non-compacting tribes and Chitina's approximate percentage of the non-compacting tribes' Native allotment acreage. Because of a service boundary dispute, the estimates of the Native allotment acreage within Chitina's service area varied from approximately 3,000 to 8,000 acres (Tr. 272-73, 319-20, 419, 544, 568-69). Chitina's service area thus contains no more than 2 percent of the approximately 447,000 acres of Native allotments in the State of Alaska which are not serviced under a Tribal Self Governance compact (Tr. 298, 319-20, 602-03).

Chitina's proposed funding level for the allotment forestry program is \$56,124 (Ex. 1). This amount is 19 percent of the \$289,604 in forestry funding available for distribution to non-compacting tribes in FY 1997 (*see* Tr. 61-63, 228-34; Exs 40, 42). Chitina thus seeks an amount which greatly exceeds the sum of its estimated tribal share of \$1,218 and its TPA of \$912.00 and which, in percentage terms, is far larger than its 2 percent share of the total Native allotment acreage in the non-compacting tribes' service areas (Tr. 223-24, 319, 604; Ex. 8).

In the declination letter, the Area Director compared the proposal of \$56,124 for allotment forestry with Chitina's estimated tribal share (\$1,218) of the forest management budget and concluded that "[f]unding of your proposal at the level requested would negatively impact non-contracting tribes by reducing the Area Forest Management budget and leave

insufficient funding available for direct service delivery and assistance to other contractors.” At the hearing, BIA witnesses elaborated that if Chitina's proposal was fully funded at \$56,124, there would be insufficient funding for the BIA support staff necessary to provide the programmatic services directly to the other non-compacting tribes (Tr. 195, 309-10).

Excluding funding of Chitina's proposal, Mr. Urvina expects to have no money left in the BIA's forestry account by the end of FY 1997 (Tr. 309-10). Out of the \$289,604 in tribal share funding plus the BIA's residual funding of \$61,000 for forestry, the BIA must fund a full-time forester position costing approximately \$122,000, plus Mr. Urvina's position costing in excess of \$82,794, and one-half of a secretarial position (Tr. 228-29, 309-10). He may also be required to distribute some of the monies to certain consortiums - including \$29,000 to Maniilaq - which have applied for funding under the permanent Tribal Self-Governance Program (Tr. 309-10, 324-31, 336-38, 467-68; Ex. 25).

With respect to Chitina's \$198,448 proposal for forest fire management (Ex. 1), the Area Director observed in the declination letter that the proposal exceeded not only Chitina's estimated tribal share of \$3,273, but also the Juneau Area Office's entire estimated budget of \$167,000 for forest fire management (Ex. 58).⁵ The evidence confirms his observations (Tr. 192-94, 255-57, 357-58, 397, 400, 604). He opined that funding of the proposal “at the level requested would negatively impact non-contracting tribes by reducing the Area Forest Fire Management budget and leave insufficient funding available for direct service delivery and assistance to other contractors.” (Ex. 58)

At the hearing, BIA personnel elaborated that if the Juneau Area Office entire forest fire management budget were used to fund Chitina's proposal, the Office would not be able to retain the employees necessary to provide forest fire management for the Native allotments in the service areas of the other non-compacting tribes (Tr. 193-94, 605-07). Like its forestry trust responsibilities, the Office's trust responsibilities for forest fire management are owed to the individual allotment owners (Tr. 322).

Not surprisingly, the tribal share formula for forest fire management is based upon the ratio of Native allotment acreage within the tribe's service area to all Native allotment acreage in the State of Alaska, although no witness could identify the precise formula (Tr. 239, 395, 420, 422, 425-26, 697). Mr. Nate Shourds, the Acting-Area Forester, testified as to the reasonableness of this formula basis, explaining that the time devoted to identifying allotments and their resources which require fire protection is proportional to the amount of allotment acreage (Tr. 421). Again, Chitina's proposal (for more than 100 percent of the available funding for non-compacting tribes) far exceeds its 2 percent share of the Native allotment acreage for non-compacting tribes and its estimated tribal share (of \$3,273) (Tr. 189, 223-24).

⁵ The actual FY 1997 budget was later set at \$166,000 (Ex. 25; Tr. 393).

Chitina also proposed funding of \$32,533 for forest fire training and equipment, consisting of a \$15,000 proposal for equipment (a 15-passenger van) and a \$17,533 proposal for wages to be paid to a Fire Operations Supervisor and the Tazlina Hotshot fire crew during their attendance at a training session (Ex. 1). That crew is certified as a Type I Emergency Fire Fighter (EFF) crew by the State of Alaska (Tr. 524, 528, 535, 542-43). As previously mentioned, Chitina's tribal share for forest fire management is only \$3,273, an amount nowhere near the proposed funding of \$32,533 (Tr. 189).

In the declination letter, the Area Director detailed the reasons why this proposal could not be funded:

The Bureau of Indian Affairs is not a suppression * * * agency in Alaska and therefore does not provide wildland fire suppression services in Alaska. The Bureau of Land Management (BLM) Alaska Fire Service (AFS) is the Department of the Interior (DOI) Agency responsible for fire suppression in the State of Alaska. The BLM provides the resources (equipment and crews) necessary to protect DOI lands and natural resources (including Native allotments).

The BLM has entered into a Cooperative Fire Protection Agreement with the State of Alaska [Department of Forestry (DOF)] for the protection area in which Chitina * * * and the [Tazlina Hotshot crew] originate and reside. Therefore, the State is responsible for providing the suppression services (equipment and crews) necessary to protect DOI lands and natural resources.

The [Tazlina Hotshot] crew has [operated] over the past number of years and is currently operating as a State of Alaska [DOF] Type I [EFF] crew. The Bureau provides funding to the State of Alaska DOF for training of non-compact and non-contract Tribal EFF crew members.

Fire training requested in your proposal is provided as needed through the Alaska Interagency Fire Community.⁶ The State of Alaska [DOF] is the administrative agency responsible for nominating the [Tazlina Hotshot] crew to the training required to meet the State DOF Type I EFF Crew minimum standards. * * *

⁶ The term "Alaska Interagency Fire Community" may be a misnomer for the Alaska Wildland Fire Coordinating Group (discussed below), which is a recent consolidation of the Alaska Multi-agency Coordinating Group and the Alaska Interagency Fire Management Council (see Ex. 17).

The State DOF as the crews administrative agency should also provide the crew with the equipment required to function as a State of Alaska [DOF] Type I Crew.
* * *

The majority of the proposed budget is to provide training and equipment for the crew to meet the State DOF Type I EFF standards. * * * As a State DOF Type I crew, it is the State of Alaska DOF responsibility to provide the training and equipment needed for the crew to meet their (State) requirements and is not a responsibility of the Bureau of Indian Affairs.

The Bureau's trust responsibility is to the Native allotted resources and any funding used has to assure adequate protection of trust resources on Native allotments. The Juneau Area Forest Fire Management program funds are used to provide Fire management services on Native Allotments and coordinate with the Interagency community to provide a safe fire management program in Alaska. Juneau Area Fire Management funds are also used to support the equipment needs of the Area Forestry staff.

Capitalized equipment needs for other than the Forest Fire Management Programs (crew transportation) need to be submitted by the tribes to the Area as a Subsidiary Proposal. The Area will prioritize and consolidate the Subsidiary proposals and submit them to the National Interagency Fire Center (NIFC). The National cutoff date for receipt of Area consolidated subsidiary proposals is June 30th annually. Any proposals received after that date are considered in the next funding cycle. To receive 1997 Subsidiary funding [Chitina] would have had to submit a 1997 proposal by June 30, 1996.

(Ex. 58). The evidence confirms the accuracy of this detailed reasoning.

The BIA is a fire protection, not a fire suppression, agency in the State of Alaska (Tr. 215, 253, 286, 290, 292, 312, 380, 409-10, 415, 439, 546, 586). While the BIA's mission statement and manual contemplate its performance of fire suppression services, the fire suppression provisions do not apply to the BIA's activities in the State of Alaska (Tr. 355-57, 408-10; Exs. 15, 25). Similarly, although a Memorandum from the Acting-Deputy to the Assistant Secretary of Indian Affairs provides that the BIA will train and equip Type I EFF crews, that memorandum does not apply to the BIA in Alaska (Tr. 375-78). Rather, Secretary of Interior Order No. 3077, March 17, 1982, confirms that the BLM maintains the DOI's fire suppression organization in Alaska and that BLM will provide fire suppression for Native allotments in Alaska (Exs. 25, 26).

Thus, the BLM is DOI's fire suppression agency in Alaska (Tr. 253, 379-80, 409-10, 437-39; Exs. 14, 25). Consequently, proposals for self-determination contracts for fire

suppression activities should be submitted to the BLM and not the BIA (Tr. 318, 323-24; see also 61 Fed. Reg. 32482, 32486 (June 24, 1996) (a proposal should be submitted to the agency with jurisdiction over the program to be contracted, i.e., the BIA, BLM, etc.)).

In the aforementioned Secretarial Order, the Secretary acknowledges that the "recognized economic and operational benefits in the area of non-duplication of suppression systems, consistency in State and Native relationships, and Statewide total mobility will be realized through the continuation of this structure [under which BLM is responsible for all DOI fire suppression]." (Ex. 26) The Order also provides that the BLM may enter into cooperative agreements with the State of Alaska or other fire suppression organizations, "[w]hen economically and operationally beneficial for protection of Departmental and Native lands." (Ex. 26)

The BLM has entered into such a cooperative agreement with the State of Alaska DOF (Ex. 22). The cooperative agreement is consistent with the Departmental policy that "whenever efficiencies can be maximized and/or costs minimized, the Interior Agencies enter into cooperative agreements with state and local governments. Under these arrangements, protection responsibilities are exchanged and scarce resources are shared." (Ex. 19)

Under that agreement, the DOF is responsible for fire suppression on both State and Federal lands in the southern portion of Alaska, including Chitina's service area, and the BLM is responsible for fire suppression on both State and Federal lands in the northern portion of Alaska (Tr. 377-87, 477; Exs. 122, 25). Recognizing that State and Federal lands, including Native allotments, are intermingled and that fire in one jurisdiction presents a threat to lands in the other, the agreement specifically provides that "[a] coordinated interagency wildland fire suppression program can avoid unnecessary duplication of suppression resources and is the most cost-effective operational approach to providing protection services." (Ex. 22; see also Tr. 380, 448-49).⁷

Therefore, either the BLM or the DOF is responsible for hiring, providing, and mobilizing the fire suppression services (including fire crews and their equipment) necessary to protect Native allotments in the State of Alaska (Ex. 25; Tr. 377-87, 448, 596-97). These agencies provide the necessary training for fire crews which may be used throughout the State, as needed, on both State and Federal land (Ex. 25; Tr. 377-87). The BIA does not hire fire crews or provide their training because it is not a suppression agency in Alaska and therefore has no need itself for fire crews (Tr. 367-68, 438, 448-52; Ex. 25).

⁷ The benefits of interagency cooperation and cost sharing in fire suppression and management is recognized in various other Departmental documentation (see Exs. 14, 15, 27).

The BIA's role in fire management in the State of Alaska is to identify for the suppression agencies the location of Native allotments, the resources thereon that may need protection from fire, and the level of protection to be afforded (Tr. 250-51, 439-40, 470-71, 589). The BIA serves as the intermediary between the allotment owners and the suppression agencies both with regard to fire events and fire planning (Tr. 251-52, 439-40). The fire planning includes participation in interagency committees to develop and revise management guidelines for EFF crews, to prioritize crew training needs, and to provide training to crews and agency personnel in the most cost-effective manner (Tr. 353-55, 439-40, 588).

In keeping with Departmental policy and the fact that a coordinated interagency wildland fire suppression program is the most cost-effective operational approach to providing fire protection services, the BIA does work with the BLM, the DOF, and the other members of the Alaska Wildland Fire Coordinating Group (AWFCG) to determine what fire suppression resources are needed in Alaska and to ensure that those resources are available by, for example, providing necessary training to EFF crews (Tr. 362-64, 367-68; 411, 440, 448-49; Exs. 17, 22). The AWFCG's objectives include the promotion of "effective and efficient wildland fire management utilizing coordinated planning and sharing of resources." (Ex. 17) Consistent with this objective, the Juneau Area Office pays its fair share of the costs of interagency projects, such as training courses for fire crews (Tr. 440-41, 448-52).

Thus, the Office has earmarked up to \$25,000 of its fire management budget each year to be paid to the DOF for training (Tr. 378-79, 583-84; Ex. 25). However, if the Office were to fund both Chitina's \$198,448 forest fire management proposal and its \$32,533 forest fire training and equipment proposal, its \$166,000 FY 1997 budget for fire management for non-compacting tribes would be totally dissipated and the Office would not be able to fulfill its trust responsibilities to the Native allotments within the other non-compacting tribes' service areas (Tr. 400-01).

Funding for capitalized equipment (including vehicles) for fire crews in Alaska is provided on a discretionary basis through subsidiary funding from the NIFC (Tr. 262-64, 376-77, 402-04, 452-453, 628-29; Ex. 25). BLM maintains and operates the NIFC in cooperation with other DOI Bureaus, the U.S. Forest Service, and the National Weather Service (Ex. 19; Tr. 428). The NIFC manages, among other things, the National fire training development center and the National fire cache for supplies, equipment and radios (Ex. 19). Each request for equipment from a field unit, tribe, or other entity to a BIA area office is prioritized and then forwarded to the NIFC for funding (Tr. 403, 452-53). The NIFC, in turn, prioritizes the requests from all of the area offices and then funds the highest priority requests until it runs out of funds (Tr. 376-77, 401-04). No tribe is entitled to subsidiary funding and many requests are not funded (Tr. 403-04).

The total core DOI cost of the NIFC operations is included in the BLM portion of the fire management appropriation (Ex. 19). Participating agencies from outside the DOI

reimburse the BLM for their share of the NIFC base operation costs (Ex. 19). Further, all DOI fire management funds are first appropriated to the BLM for allocation to the other DOI Bureaus (Tr. 316-17, 395-96, 435; Ex. 19).

For the agriculture program, the tribal share formula, as previously mentioned, is the sum of the following two calculations: (1) 50 percent of the available funding multiplied by the ratio of the Indian population within Chitina's service area to the entire Alaskan Indian population (according to the 1990 census) and (2) 50 percent of the available funding multiplied by the ratio of one to the number of Alaskan tribes (Tr. 52-53, 245-46, 299). Chitina acknowledges that it is "small," consisting of only 212 members as of March 7, 1995 (Ex. 52). There are 226 or 227 Alaskan tribes and approximately 100 of them are non-compacting tribes (Tr. 72, 257, 298, 593-94). The Juneau Area Office's FY 1997 agriculture budget is \$64,780 (Tr. 247-48; Ex. 40). After its residual funding of \$61,000 is subtracted, \$3,780 remains available to all the non-compacting tribes (Tr. 247-48; Ex. 40). Out of the \$3,780 in available funding, Chitina's tribal share was estimated at \$83 (Tr. 247-48; Exs. 40, 58). The amount of \$1,800 was also available to Chitina as its TPA (Ex. 58).

Chitina requested \$20,902 in funding for agriculture, an amount greatly in excess of the sum of its tribal share and TPA (Exs. 1, 58; Tr. 246-49). The declination letter reiterates these facts and concludes that "[f]unding of [Chitina's] proposal at the level requested would negatively impact non-contracting tribes by reducing the Area Agriculture [budget] and leave insufficient funding available for direct service delivery and assistance to other contractors."

In FY 1995, the BIA did provide funding for Chitina self-determination contract proposals regarding comparable forest fire training and equipment, forest fire management, and agricultural programs (Tr. 148, 152-53, 156-58; Exs. 52, 53, 54). However, Chitina's FY 1995 self-determination contract did not cover those programs; rather, they were funded pursuant to discretionary, one-time grants (Tr. 146, 148, 152-53, 156-58, 207, 217; Exs. 52, 53, 54). The one time grant for agriculture was for \$8,500 (Tr. 151). The larger one-time grant for forest fire training and equipment and forest fire management was made because the BIA had failed to decline the contract proposals in a timely manner and issued a grant to settle the matter (Tr. 153, 217-18, 641-42).

Under a similar scenario, the BIA provided nearly \$100,000 in funding for those programs in FY 1996, as it neglected to timely decline to fund the agriculture and forest fire management (including the forest fire training and equipment) proposals (Tr. 160-65, 167, 395-97, 608, 641-42, 689; Ex. 55). The \$100,000 in funding was provided by the NIFC from subsidiary funding, as the Juneau Area Office did not have sufficient funds available (Tr. 163-64, 611, 699-702).

As a result, numerous other tribes did not receive subsidiary funding for projects to protect trust resources that would otherwise have been funded in FY 1996 (Tr. 699-702).

Further, it would be futile to ask the NIFC for similar funding in FY 1997 because Steve Haglund, the BIA Director of the NIFC, indicated to the Juneau Area Office that the subsidiary funding is there to serve trust lands and meet commitments to other tribes through the subsidiary funding process (Tr. 699-702). Similarly, both the BIA's Central Office and the BLM were contacted by the Juneau Area Office and they indicated that no funds were available for FY 1997 other than the tribal share funds (Tr. 199-200, 215-16). In fact, Congress cut the BIA's Central office funding to residual levels and prohibited Central Office funds from being used for self-determination contract funding in FY 1997 (Tr. 37, 54; Pub. L. No. 104-208, 110 Stat. 3009).

Furthermore, the FY 1996 contract did not cover the allotment forestry program (Tr. 542). The proposal for FY 1997 included the allotment forester position as a new position (Tr. 665-66).

During the negotiations regarding the proposals for FY 1995 and FY 1996 and in correspondence, Chitina's representatives were informed of the amount of their estimated tribal shares, the nature of the tribal share process, and the fact that self-determination contract funding would no longer be distributed on a discretionary basis, but rather, it would be limited to their tribal share plus any tribal priority allocation (Tr. 147, 154, 166, 211-12, 652, 686-90; Exs. 44, 46, 48, 50, 52, 59, 60). They also discussed the tribal share formulas and the bases for some of the formulas, such as population or acreage figures (Tr. 694). In response, Chitina claimed that the tribal share process was unfair and that the formulas were skewed in favor of the compacting tribes (Tr. 166, 212, 687).

However, the actual tribal share formulas and much of the associated data were not disclosed to Chitina's representatives (Tr. 508, 532-33, 637-38, 667). The BIA did provide them with maps and lists of the Native allotments within Chitina's service area (Tr. 545, 550-51, 568-69). In the spring of 1996, the BIA also supplied them with estimated acreage and forested acreage figures for the allotments within the service area (Tr. 571-72). Chitina had some concerns about a dispute over its service area boundaries which it conveyed to the BIA, but the BIA never responded (Tr. 668-69; Ex. F).

Discussion

Chitina's grounds for appeal are numerous (see pages 2 and 3 of its Notice of Appeal). Additionally, in its posthearing briefs, Chitina has reformulated many of the grounds. Except to the extent the contentions of errors of fact or law have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law, are immaterial, or are beyond the scope of this proceeding.

I.

The Declination Decision Should Be Vacated

One of Chitina's allegations is that it has never been informed of its precise tribal shares or the precise tribal share formulas, calculations, and supporting data. This allegation was proven true at the hearing.

In the case of Shoshone-Paiute Tribes v. Phoenix Area Director, 18 IBIA 423 (1990), the Board held that a formula for distribution of funds for self-determination contractual purposes should be made available to the affected tribes for comment and discussion, together with supporting data, prior to the time for negotiation of the contracts for the fiscal year to which the formula applies. Id. at 429-30. Because the BIA failed to do so in that case, the Board vacated the decision of an Area Director concerning distribution of self-determination contract funds. Id. at 430.

In the present case, it may be argued that the BIA met its duty to make available the tribal share formulas during the early 1996 meeting to which Chitina was invited but apparently did not attend. Also, it did provide some estimates of allotment acreage figures, but there is no indication that these particular figures were intended for use or were used in the calculations. The evidence shows that the BIA failed to make available for comment and discussion, at a minimum, the supporting data upon which it relied to calculate Chitina's tribal shares.

Further, the Area Director has conceded at page 3 of Appellee's Opening Post-Hearing Brief that Chitina's tribal shares have not been precisely and conclusively determined. Consequently, the Area Director's decision (declination letter) should be vacated and the matter should be remanded so that the precise tribal share figures, formulas, calculations, and supporting data may be made available to Chitina for comment and discussion.

II.

General Observations Regarding the Issue of Whether the Contract Proposal Should Be Approved

The question remains whether the decision should be reversed, rather than vacated, and a contract awarded to Chitina for each of the proposals at issue. Governing law provides that the Secretary of the Interior "may only decline to approve a self-determination contract proposal for one of five specific reasons." 25 C.F.R. § 900.22. The Secretary must approve a contract proposal and award the contract within 90 days after receipt of the proposal unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one or

more of the five specific reasons for declination exist, together with a detailed explanation of the reason for the declination and, within 20 days, any documents relied on in making the decision. See 25 C.F.R. § 900.29; 25 U.S.C. § 450f(a)(1).

In the present case, the Secretary's delegate, the Area Director, cited two of those reasons for declining the proposals relating to forest fire training and equipment, forest fire management, and forest management (allotment forestry). Those two reasons, which track the language found at 25 U.S.C. § 450f(a)(1)(B) (see also 25 C.F.R. § 900.22(b)) and 25 U.S.C. § 450f(a)(1)(D) (see also 25 C.F.R. § 900.22(d)), respectively, are (1) adequate protection of trust resources is not assured, and (2) the amount of funds proposed is in excess of the applicable funding level for the contract, as determined under 25 U.S.C. § 450j-l(a). The Area Director rejected the agricultural proposal on the second ground only.

With respect to each proposal at issue, Chitina alleges that the proposal should be deemed accepted by operation of law because it was not declined effectively within the statutory 90-day period. It argues that the declination letter is ineffective or a nullity for two reasons: (1) it is facially deficient in that it does not contain the specific findings and detailed explanations required by 25 C.F.R. § 900.29, and (2) the Area Director has not clearly demonstrated the validity of the cited grounds for declination.

While the merits of Chitina's arguments with respect to each proposal are discussed separately below, certain general observations can be made. First, "the Secretary has the burden of proof * * * to establish by clearly demonstrating the validity of the grounds for declining the contract proposal[s]." 25 C.F.R. 900.163; see also 25 U.S.C. § 450(e)(1).

Second, a contract for the proposals shall not be awarded to Chitina based upon its various arguments that the BIA failed to afford Chitina due process of law and disregarded applicable regulations or other authorities. In general, Chitina fails to adequately explain how the alleged improper conduct or unfairness of the BIA amounts to a denial of its due process rights. Further, it cites no precedent to support a finding that a denial occurred or that any such denial mandates approval of the contract proposals.

Third, many of the arguments are couched not only in terms of alleged due process violations, but also as grounds for approving the contract proposals irrespective of whether a due process violation occurred. Most are specifically addressed below, and none of them constitutes a ground for approving the contract proposals.

Fourth, the argument that the declination letter is facially deficient under 25 C.F.R. § 900.29 because it does not set forth or explain the tribal share formulas, calculations, and associated data cannot be sustained. The declination letter specifically informs Chitina that "funding is allocated based on a tribal shares methodology. This is the * * * basis for the allocation of funds for the P.L. 93-638 contract proposals for non-TPA funds." (Ex. 58) It

also identifies the estimated tribal share and the vastly higher proposed funding for each proposal. It then informs Chitina that "[f]unding of your proposal at the level requested would negatively impact non-contracting tribes by reducing the * * * budget and leave insufficient funding available for direct service delivery and assistance to other contractors." No more detailed explanation is required to make a clear demonstration that the amount of funds proposed is in excess of the applicable funding level for the contract.

The purpose of the tribal share process is to achieve a fair distribution of available funds among the tribes so as to assure that no tribe is favored at the expense of another and to avoid jeopardizing the BIA's financial ability to carry out its trust responsibilities. Relevant statutory provisions are supportive of this purpose. See 25 U.S.C. §§ 450j-1(b), 458ff(b). Section 450j-1(b) provides in pertinent part: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." Section 458ff(b) provides: "Nothing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments." If a tribal share estimate is reasonable, then a contract award of a substantially greater amount defeats the purpose of the tribal share process and these statutory provisions.

The function of the hearing in this matter was to test the accuracy or validity of the Area Director's clear demonstration of declination grounds by, among other things, examining the reasonableness of the tribal share estimates, including their underlying formulas, calculations, and associated data. While more detail in the declination letter might have been preferable, the absence thereof does not render the declination letter a nullity or require the contract to be awarded under 25 C.F.R. § 900.29 or its statutory authority, 25 U.S.C. § 450f.

Admittedly, it is a close question as to whether the Area Director should have provided the bases for its tribal share estimates, *i.e.*, the formulas, calculations, and data, to make the clear demonstration required under 25 C.F.R. 900.29 and 25 U.S.C. § 450f. Assuming, *arguendo*, that he was required to do so, the question remains whether the remedy for failing is to approve the contract proposals. The wording of 25 U.S.C. § 450f appears unforgiving in this regard, requiring approval if the clear demonstration is not made in the written declination notification.

However, approval in this case clearly would be unjust, favor Chitina at the expense of other non-compacting tribes, and jeopardize and/or eliminate the protection afforded to the trust resources on Native allotments within the service areas of the other non-compacting tribes. Upon approval of each proposal, Chitina would receive funding far greater than its fair share

of the available funding as estimated under the tribal share process, unlawfully reducing the funding which is available to protect all Native allotment trust resources and which other tribes are eligible to receive under section 450f.

This result would be contrary to the statutory policy provisions found at 25 U.S.C. §§ 450j-1(b), 458ff(b). By their own terms, those provisions take precedence over any other provision to the contrary, including section 450f. Assuming, arguendo, that the declination letter is deficient, these policy provisions, under the circumstances, override the apparent dictate of section 450f to approve the contract proposals.

Fifth, a related argument of Chitina is also unsustainable. Chitina argues that the Area Director has not clearly demonstrated the validity of the grounds for declination at the hearing because he has not precisely identified the tribal share formulas, calculations, or associated data used to estimate Chitina's tribal shares. The factual premise of Chitina's argument is certainly correct. However, the conclusion does not follow from the premise because each of Chitina's funding proposals greatly exceeds any reasonable estimate of its tribal share.

Sixth, Chitina argues that the forest fire management, forest fire training and equipment, and agriculture programs were funded under its multi-year, FY 1996 self-determination contract, and therefore that the FY 1997 funding proposals for these programs may not be declined because they are proposals for continuation of funding under a multi-year contract. See 25 C.F.R. §§ 900.12, 900.32, 900.33.

Chitina's argument is based upon the fact that its FY 1996 funding is set forth in a modification to its FY 1996 self-determination contract (Ex. 55). Mr. Raymond James Shinn, Natural Resource Director for Chitina, testified that he felt that the FY 1997 contract proposals were a continuation of the FY 1996 contract modification (Tr. 525). Mr. Jeffrey William Doty, the Chitina Village Administrator, also expected the FY 1997 contract proposals to be funded as a continuation of the FY 1996 contract modification because it was a "term contract." (Tr. 665)

However, the clear weight of all the evidence shows that the FY 1996 funding for these programs was a one-time settlement that does not implicate the prohibition against declination associated with multi-year contracts. In reviewing the FY 1996 contract, it is important to note that it covers numerous programs in addition to the agriculture and fire-related programs (Ex. 55; Tr. 690). Ms. Peggy Akagi, the BIA Contracting Officer who negotiated with Mr. Shinn and Mr. Doty regarding the FY 1996 funding, testified that the language "term contract" did not apply to the funding for agriculture and fire management (including fire training and equipment). (Tr. 691-92). She insisted that Chitina's representatives were repeatedly told during the negotiations that the FY 1996 funding for

agriculture and fire management was a one-time settlement resolving the Juneau Area Office's dilemma of having to fund proposals which it intended but failed to decline in a timely manner (Tr. 166, 693).

Her testimony is supported both by Mr. Shinn's testimony and the actual funding documentation. Mr. Shinn acknowledged that he was informed by the BIA both at the negotiation table and in writing that the FY 1996 funding was one-time special funding (Tr. 542, 551). Most importantly, both the modification transmittal letters and the modification itself clearly indicate that the funding for the agriculture and fire management programs is provided as a one-time settlement (Exs. 39, 55; Tr. 167, 208-09).

Seventh, one of Chitina's arguments is that the BIA inappropriately relied upon the tribal share process before promulgating regulations governing the process. It apparently contends, among other things, that it was improperly denied the opportunity to participate in a rule-making regarding the tribal share process. The BIA has acknowledged that a draft version of such regulations was due to be published on approximately May 1, 1997. However, the authorizing legislation, 25 U.S.C. § 458gg, specifically provides that "[t]he lack of promulgated regulations shall not limit the effect of this part," which mandates development of the tribal share formulas to determine shares for inclusion in self-governance compacts. See 25 U.S.C. § 458ee(d). Furthermore, the legislative history states, "Since the lack of regulations shall not limit the effect of this Title, it is intended that negotiations and implementation may proceed under this Title well before final regulations are issued." S. Rep. No. 103-374, 103rd Cong., 2nd Sess., as 12 (1994) (emphasis added). Consequently, it was not improper for the BIA to proceed, prior to issuance of the regulations, with implementation of the tribal share process.

While the tribal share process was mandated for the permanent Tribal Self-Governance Program, and not for the self-determination contract program, see 25 U.S.C. § 458ee(d), it is reasonable for the BIA to apply it to the self-determination contract program as well. In so doing, it is establishing a uniform basis for distributing funds for two programs with identical, or near identical, purposes.

Eighth, Chitina cites an April 29, 1994, Presidential Memorandum, 59 Fed. Reg. 22951, for the proposition that it was entitled to give input into the development of the tribal share formulas and their application in determining Chitina's tribal shares. It then alleges that the BIA failed to invite Chitina to give that input. Citing 25 U.S.C. § 450f, it also reiterates the argument that it was entitled to be informed in the declination letter of the tribal share formulas, calculations, and supporting data. However, it fails to explain how this allegation and argument, if true, amount to a violation of due process or dictate granting the desired remedy of approving the contract proposals.

In fact, Chitina was invited to at least one meeting (in early 1996) to discuss the development of the tribal share formulas.⁸ More importantly, the Presidential Memorandum specifically states that it "is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Chitina's allegation simply does not justify granting the remedy it seeks.

Even if the failure to include in the declination letter the formulas, calculations, and supporting data underlying the tribal share estimates amounts to a due process violation, the appropriate remedy would be to order the Area Director to provide the information or to vacate the decision and remand the matter for further consideration. See Quileute Tribe v. Portland Area Director, 23 IBIA 20 (1992) (where an Area Director failed to adequately specify the reasons for a decision in violation of the basic precept of the American administrative law system that a person has a due process right to be informed of the reasons for a government agency's decision affecting it, the Board initially ordered the Area Director to provide the appellant with the information to adequately explain the reasons behind the decision and, after the Area Director failed to do so, vacated the decision and referred the matter for further consideration); see also Kaw Nation v. Anadarko Area Director, 24 IBIA 2 (1993) (Area Director's decision vacated and the matter remanded for further consideration because neither the decision nor the administrative record contained an explanation for the decision).

Ninth, Chiiina is not correct in its argument that the BIA has failed to show that it met its obligation under 25 U.S.C. § 450j-1(a). Subsection 450j-1(a) provides:

The amount of funds provided under the terms of the self-determination contracts entered into pursuant to this subchapter shall not be less than the * * * Secretary would have otherwise provided for operation of the programs or portions thereof for the period covered the contract, without regard to the

⁸ The testimony of Mr. Lesley A. Sutherland, Chitina's Fire Management Specialist Training Officer, is not to the contrary. He testified that he was asked to leave a meeting where the consortiums of tribes were negotiating compacts and that he was never invited to any other meeting "in regards to any negotiations of compacting tribes in the BIA over tribal shares or compact terms." (Tr. 636-37) His testimony does not address the more general question of whether any other Chitina representative was invited to a meeting regarding negotiations over tribal share formulas. His testimony is also ambiguous as to whether he is referring to meetings devoted to the compact negotiations (from which non-compacting tribes might reasonably be excluded) or to both those meetings and the meeting(s) regarding the separate and more general tribal share process to which all tribes were invited

organizational level within the Department of the Interior * * * at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

Chitina's argument is based upon the fact that the Juneau Area Office does not limit the direct provision of programmatic services to a level consistent with a tribe's tribal share (Tr. 304-07, 321-22, 331-35). Rather, it provides direct services (to the individual allotment owners in the tribe's service area) on a prioritized basis that may (or may not) lead to a service level requiring funding in excess of a tribe's tribal share (Tr. 304-07, 321-22, 331-35). Chitina therefore argues that its contract proposals should be funded to the limit of the Secretary's program budget without regard to any tribal share formulation.

Chitina's interpretation of 25 U.S.C. § 450j-1(a) fails to account for the countervailing effect of 25 U.S.C. § 450j-1(b), which provides: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." As noted by the Board, "[t]he language of [this subsection] indicates that the Secretary is vested with some degree of discretion to balance the funding requirements of tribes which share a common appropriation."

Because decisions allocating funds among tribes are based on the exercise of discretion, this office does not substitute its judgment for that of the BIA, but rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of that discretion and that the discretionary decision was reasonable. See Ponca Tribe of Oklahoma v. Acting Anadarko Area Director, 22 IBIA 199, 203 (1992); see also Kaw Nation, 24 IBIA at 30. In the instant case, the BIA reasonably determined at the national level, and consistent with Congressional policy, to allocate not only self-governance compact funds, but also self-determination contract funds, using the tribal share process to ensure that the funds are distributed equitably, regardless of whether a tribe seeks self-determination through a compact or a contract, and that sufficient funds are retained to carry out inherently Federal responsibilities.

It was also reasonable to determine nationally that if a tribe does not compact or contract for its tribal share, the funding remains with the BIA to enable it to provide the programmatic services directly to the tribe or individual allotment owners. The Board itself has acknowledged that the "BIA's residual funding needs would be greater where only one of five tribes contracts than wher- four out of five contract. Yet, there are undoubtedly certain minimum staffing levels that must be maintained as long as there are any non-contracting tribes." Id. at 29.

Although this acknowledgement does not refer to "residual funding" in the sense of funding for inherently Federal responsibilities, the need for which would still exist in the absence of non-contracting tribes, and although it fails to account for such responsibilities, it nevertheless supports the premise of the BIA's retention of funding where a tribe does not compact or contract. That premise is that each tribe or individual allotment owner has a need or potential need for services which must be fairly funded, either through compacting, contracting, or direct servicing.

The retention of funds serves the additional purpose of ensuring that funds are available if a non-compacting tribe decides to compact. As the Board has observed, the BIA must be mindful of 25 U.S.C. § 450j-1(b)(2), which provides that self-determination contract funding shall not be reduced in subsequent years. Kaw Nation, 24 IBIA at 30 n.14. If Chitina is granted more than its fair share (tribal share) of funding, that funding cannot be reduced and reallocated in subsequent years to meet the legitimate demands of other non-compacting tribes which may seek to contract. "If BIA cannot correct a problem in the future, it must seek to avoid creating the problem in the first instance." Id.

As the Board has noted, "[t]he division of program funds, in cases where some tribes contract and others do not, is undoubtedly difficult in the best of circumstances." Kaw Nation, 24 IBIA at 29. The BIA has acted reasonably, giving proper consideration to all legal prerequisites to the exercise of its discretion, by implementing the tribal share process to handle the difficult division of program funds.

Tenth, Chitina also contends that the Secretary failed to comply with 25 U.S.C. § 450f(b)(2) and 5 C.F.R. § 900.30, which require the provision of technical assistance to overcome the stated objections to the contract proposals. However, the Secretary's delegate, the Area Director, did offer to provide technical assistance in the letter of declination. There is no evidence that Chitina responded to this offer. The Secretary cannot provide technical assistance without the contract applicant's cooperation and involvement.

Chitina nevertheless argues that the offer of future assistance does not suffice because the Secretary should have provided the assistance prior to declination. This argument is contrary to the plain meaning of the cited statute and regulation, which contemplate that the Secretary will state his objections in writing (the declination letter) and then assist the applicant to overcome them. In sum, no violation of that statute or regulation occurred.

Finally, Chitina alleges various other BIA violations of statutory or regulatory provisions on pages 14 through 16 of the Second Brief of Appellant. For each alleged violation, either the BIA did not actually commit a violation, or the remedy for the violation is not to approve the contract and thus grant a windfall to Chitina at the expense of the other non-contracting tribes and individual allotment owners in their service areas.

III.

The Forest Fire Management Proposal

A.

Is the Declination Letter Sufficient?

Regarding the forest fire management proposal, the Area Director cited two of the five specific reasons for declination, including that the amount of funds proposed is in excess of the applicable funding level for the contract, as determined under 25 U.S.C. § 450j-1(a). The Area Director then clearly demonstrated that the proposed funding was excessive, and thus complied with 25 C.F.R. § 900.29.

Specifically, he found that the proposed funding of \$198,448 exceeded not only Chitina's estimated tribal share of \$3,273, but also the Juneau Area's entire estimated FY 1997 budget of \$167,000. This is a clear demonstration of the excessiveness of the proposed funding that requires no further explanation.

These stated facts also clearly demonstrate that adequate protection of trust resources is not assured. If the entire budget were expended to fund Chitina's proposal, there would be no funding left to support the various fire management functions, such as coordinating with the fire suppression agencies, which assure adequate protection of the trust resources.

B.

**Did the Area Director Clearly Demonstrate
the Validity of the Grounds for Declining the Proposal?**

At the hearing, the Area Director clearly established the validity of declining the forest fire management proposal on the ground that the proposed funding was in excess of the applicable funding level. Chitina has proposed funding of \$198,448, an amount far greater than any reasonable estimate of the applicable funding level, estimated tribal share for forest fire management.

At most, Chitina's service area contains two percent of the total Native allotment acreage located within the service areas of the non-compacting tribes. The BIA's total FY 1997 fire management budget for the non-compacting tribes is \$166,000. Two percent of this budget is \$3,320, a reasonable high estimate of Chitina's tribal share which is only slightly higher than the tribal share estimate of \$3,273 made by the Juneau Area Office.

The facts also clearly show that adequate protection of the trust resources within the service areas of all the non-compacting Alaskan tribes is not assured. If the Juneau Area Office's entire fire management budget were used to fund Chitina's proposal, the Office would not be able to retain the employees necessary to provide fire management for the Native allotments in the service areas of the other non-compacting tribes.

IV.

The Forest Fire Training and Equipment Proposal

A.

Is the Declination Letter Sufficient?

Regarding the forest fire training and equipment proposal, the Area Director cited two of the five specific reasons for declination: (1) that the amount of funds proposed is in excess of the applicable funding level for the contract, as determined under 25 U.S.C.A. § 450j-1(a), and (2) that adequate protection of trust resources is not assured. The Area Director then provided a detailed explanation clearly demonstrating that the proposed funding was excessive and that adequate protection of trust resources is not assured. He thus complied with 25 C.F.R. § 900.29.

His explanation, in summary, was (1) that the proposal for capitalized equipment (the passenger van) should have been submitted by June 30th as a proposal for subsidiary funding, which the Area Office would then forward to the NIFC for consideration, (2) that the responsibility for providing equipment and training to fire crews for protection of the area in which Chitina is located lies not with the BIA or the BLM but with the State of Alaska DOF, in coordination with the interagency community, and (3) that forest fire management funds are used to assure adequate protection of the trust resources on Native allotments by providing fire management services directly to Native allotments and a safe fire management program through coordination with the interagency community. He distinguished the training proposed by Chitina as being a service which the BIA does not provide directly because it is not a suppression agency in Alaska. Such training is funded only indirectly by allocations to the DOF, which provides the training or nominates crews for training through the interagency community.

He did concede that Chitina might use its tribal share under the forest fire management program to provide the training itself or to fund training through the DOF. The declination letter notes, however, that Chitina's tribal share for forest fire management is only \$3,273, whereas Chitina's proposal is for \$32,533, which includes \$17,533 for training.

These facts clearly demonstrate that the amount of proposed funding is in excess of the applicable funding level for a self-determination contract. That level is zero for the capitalized equipment portion of the proposal and only an estimated \$3,273 for the training portion.

They also clearly demonstrate that adequate protection of trust resources is not assured. Chitina proposed to expend a substantial sum of money not for the provision of direct services to the Native allotments, and not for a coordinated effort to maintain or improve the established interagency fire management program, but rather, for a maverick course of action not sanctioned by those with responsibility for efficiently allocating the pooled resources of the interagency community. The implication is that the proposed use of the funds is not directly protective of the trust resources and is likely to be either or both an inefficient use of funds or duplicative of interagency efforts to assure an adequate supply of trained fire crews and equipment.

B.

**Did the Area Director Clearly Demonstrate
the Validity of the Grounds for Declining the Proposal?**

The Area Director clearly proved the validity of declining the forest fire training and equipment proposal on the ground that the proposed was in excess of the applicable funding level. Chitina has proposed funding of \$17,533 for training, an amount far in excess of the previously mentioned, reasonable high estimate of its tribal share (applicable funding level), which is \$3,320.

With regard to the proposed funding for equipment (\$15,000), the facts clearly establish that any such funding is to be provided by the NIFC through the subsidiary proposal program and not through a self-determination contract. Consequently, the applicable funding level is zero and the proposed funding is far in excess of this amount.

Chitina contends, however, that the Juneau Area Office should have sought funding for Chitina's forest fire training and equipment and forest fire management proposals from any and all Departmental sources, such as the NIFC, because the fire suppression responsibility ultimately falls upon the Secretary and not merely with the BIA or some other portion of the Department. In support thereof, Chitina notes that the Juneau Area Office sought and obtained \$100,0,00 in fire management funding from the NIFC for Chitina in FY 1996. Again, Chitina gives short shrift to the effect of 25 U.S.C. § 450j-1(b).

"Even though the ISDA speaks of a Tribe's "entitlement" to certain funds, the Secretary cannot be forced to take money from a program serving a Tribe in order to make up for [another program's] appropriations shortfall." Ramah Navajo School Board, Inc.

v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996). Subsection 450j-1(b) "mean[s] precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve [particular funding] purposes in order to meet his responsibility to allocate [funding for other purposes]." Id.

The evidence is uncontroverted that the NIFC provides funding for capitalized equipment, including the passenger van sought by Chitina, through the subsidiary funding program, and not through self-determination contract funding. The fact that the Secretary chose to fund Chitina's FY 1996 proposal from subsidiary funding does not place an affirmative obligation on the Secretary to do so in the future. The FY 1996 funding was specifically identified as a one-time settlement payment. Any post-FY 1996 proposal of Chitina will be funded only if it is timely submitted for subsidiary funding and is rated sufficiently high on the priority list. Many other tribes receive funding through the subsidiary funding program based upon a prioritization system and the Secretary cannot be forced to take money from this program to make up for the self-determination contract funding shortfall perceived by Chitina.

The same rationale would likely apply to taking money from some other Departmental program to fund training or equipment. Furthermore, if Chitina's proposal is not funded, the Secretary would not otherwise provide for the operation of the proposed program because the DOF, in cooperation with the interagency community, and not the Department individually, provides the training and equipment to ensure an adequate supply of crews and equipment in Chitina's area (as more fully discussed below). Thus., it is questionable whether the Department is required to make the Juneau Area Office's fire management budget available to fund any portion of Chitina's proposal.

In any event, the Area Director has determined to make that budget available to Chitina to the extent of its tribal share, the applicable funding level, and this is the only funding shown to be available to Chitina for self-determination contract funding in fire management (including fire training and equipment). The reasonable high estimate of Chitina's tribal share is far lower than the proposed funding amount.

The Area Director also clearly showed the validity of declining the proposal because adequate protection of the trust resources was not assured. He proved that the equipment proposal could only be funded under the subsidiary proposal process by which the interagency group, the NIFC, prioritizes and funds proposals from throughout the United States. He also established that the State of Alaska DOF is responsible for fire suppression on both State and Federal (including Native allotments) lands in the southern portion of Alaska where Chitina's service area is located. The DOF is thus responsible, in coordination with the interagency community, for providing equipment and training to fire crews such as the Tazlina Hotshots.

In Alaska, the BIA's role in fire management is to provide direct services to the Native allotment owners, such as locating the allotments and identifying their resources, to participate in interagency fire planning, and to contribute its fair share of funding for interagency projects, such as training courses for fire crews. However, it does not fund fire crews directly because it is not responsible for fire suppression in Alaska.

The determination of which crews receive fire training is left to the DOF, responsible agency, and the interagency community. The interagency approach of pooling and allocating resources was found to be more cost-effective and efficient than each agency maintaining its own supply of equipment and trained crews to fight fires that do not recognize the boundaries between the agencies' intermingled lands. The evidence confirms the implication of the declination letter that equipment and training allocation decisions should be made by the responsible agency, the DOF, in coordination with the interagency community, to make the best use of the limited resources and thus assure adequate protection of the trust resources.

Furthermore, past experience suggests that adequate protection of the trust resources of all tribes or individual allotment owners will not be assured. The provision of \$100,000 to Chitina in FY 1996 for a similar fire management proposal did harm the effort to protect the trust resources of other tribes. Many high priority projects to protect trust resources were not funded because of the \$100,000 allocation to Chitina.

While Cilitina might use its fair share of the fire management budget for training without jeopardizing the adequate protection of trust resources, the proposed amount is far greater than its fair share. It seeks \$32,533, an amount which is greater than the \$25,000 annual maximum amount that BIA has previously contributed to training and which is approximately one-fifth of the Juneau Area Office's fire management budget. It proposes expenditure of such an extraordinary sum without the benefit of interagency input to determine whether the provision thereof is cost-effective and efficient and not duplicative of interagency efforts to assure an adequate supply of trained fire crews and equipment. Under the circumstances, it is reasonable to conclude that adequate protection of trust resources in the service areas of the non-compacting tribes is not assured.

V.

The Forest Management (Allotment Forestry) Proposal

A.

Is the Declination Letter Sufficient?

Regarding the forest management (allotment forestry) proposal, the Area Director cited two of the five specific reasons for declination, including that the amount of funds proposed is

in excess of the applicable funding level for the contract, as determined under 25 U.S.C. § 450j-1(a). The Area Director then clearly demonstrated that the proposed funding was excessive, and thus complied with 25 C.F.R. § 900.29.

Specifically, he compared the proposed funding of \$56,124 to Chitina's estimated tribal share of \$1,218 and concluded that the proposed funding exceeded the applicable funding level. This is a clear demonstration of the excessiveness of the proposed funding that requires no further explanation.

B.

Did the Area Director Clearly Demonstrate the Validity of the Ground for Declining the Proposal?

At the hearing, the Area Director clearly demonstrated the validity of declining the forest management proposal on the ground that the proposed funding exceeds the applicable funding level. A reasonable estimate of Chitina's tribal share (the applicable funding level) can be made by multiplying Chitina's percentage share of the Native allotment acreage in the non-compacting tribes' service areas by the Juneau Area Office's budget for forestry management for the non-compacting tribes. Using the generous two percent figure for Chitina's share of the allotment acreage and the pertinent budget figure of \$289,604, a reasonable high estimate of its tribal share is \$5,792.08. This estimate plus Chitina's TPA of \$912 is far less than the proposed funding level of \$56,124.

The reasonableness of this estimate of Chitina's tribal share is established by the following facts. The tribal share formulas for the subprograms of forestry management are based primarily upon comparisons of Native allotment acreage within a tribe's service area to Native allotment acreage within the entire State of Alaska. The crucial factor being either acres in general, forested acres, or commercially timbered acres. This follows from the facts that the lands in Alaska for which the Juneau Area Office has trust responsibilities are nearly exclusively Native allotments owned by individuals and that the Office's various forest management subprograms are provided to fulfill its trust responsibilities with respect to the individual Native allotments.

Further, Mr. Urvina testified that the most favorable method to Chitina of determining its share of the forestry management budget would be to use a formula based upon the percentage of Native allotment acreage located within Chitina's service area. The evidence also shows that the two percent figure used to approximate Chitina's share of the Native allotment acreage in the service areas of the non-compacting tribes is quite favorable to Chitina. In sum, a reasonable high estimate of Chitina's tribal share can be calculated and it is ten times less than the proposed funding amount.

VI.

The Agriculture Proposal

A.

Is the Declination Letter Sufficient?

Regarding the agriculture proposal, the Area Director cited one of the five specific reasons for declination: that the amount of funds proposed is in excess of the applicable funding level for the contract as determined under 25 U.S.C. § 450j-1(a). The Area Director then clearly demonstrated that the proposed funding was excessive, and thus complied with 25 C.F.R. § 900.29.

Specifically, he compared the proposed funding of \$20,902 to Chitina's estimated tribal share of \$83 and its TPA of \$1,800 and concluded that the proposed funding exceeded the applicable funding level. This is a clear demonstration of the excessiveness of the proposed funding that requires no further explanation.

B.

Did the Area Director Clearly Demonstrate the Validity of the Ground for Declining the Proposal?

At the hearing, the Area Director clearly demonstrated the validity of declining the agriculture proposal on the ground that the proposed funding exceeds the applicable funding level. The tribal share formula is based upon the ratio of the Indian population within Chitina's service area to the entire Alaskan Indian population and the ratio of one to the number of Alaskan tribes. While the entire Alaskan Indian population was not adduced, that figure is not needed to conclude that the proposed funding level is excessive.

The proposed funding level of \$20,902 is far greater than the total amount of \$3,780 available to the non-compacting tribes after the residual funding is subtracted from the Juneau Area Office's agriculture budget of \$64,780. Chitina's TPA of \$1,800 does not come close to making up for this shortfall. Even if the residual funding is not subtracted, the proposed funding greatly exceeds Chitina's TPA plus a reasonable high estimate of Chitina's tribal share.

A reasonable high estimate can be obtained from the sum of the following two calculations: (1) 50 percent of the \$64,780 budget multiplied by the ratio of the Indian population within Chitina's service area to the Indian population within the service areas of all the non-compacting tribes and (2) 50 percent of the \$64,780 budget multiplied by the ratio of

one to the number of non-compacting Alaskan tribes, which is 100. Assuming that the first ratio is 1 to 100, an assumption of an average population size that is favorable to Chitina, which has an admittedly "small" population, the calculation result is \$647.80. This is far lower than the proposed funding.

Conclusion

Based upon the foregoing, the matter is hereby remanded to the Area Director for further consideration and negotiation with Chitina. If this Recommended Decision becomes final, either through operation of law because no party files an objection to it within 30 days or through affirmance by the Board, the Area Director shall notify Chitina of its precise tribal shares along with the tribal share formulas, calculations, and supporting data for each proposal at issue within 15 days of the date this Recommended-Decision becomes final. The Area Director is further directed to allow sufficient opportunity for Chitina to comment upon and discuss the provided information with the Juneau Area Office prior to the issuance of any new decision regarding the proposals.

//original signed

Harvey C. Sweitzer
Administrative Law Judge