



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Susanville Indian Rancheria v. Director, California Area Office,  
Indian Health Service

Docket No. IBIA 97-89-A (12/14/2001)

Related Indian Self-Determination Act cases:

Administrative Law Judge decision, 04/06/2001

Health and Human Services Appeals Board decision, 05/29/2001

Administrative Law Judge decision on Equal Access to Justice Act claim, 08/16/2002

Administrative Law Judge decision on Equal Access to Justice Act claim, 12/09/2002



# United States Department of the Interior

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SUSANVILLE INDIAN RANCHERIA	)	DOCKET NO. IBIA 97-89-A
Appellant	)	(HHS DAB DOCKET NO. A-01-64)
	)	
vs.	)	RECOMMENDED DECISION
	)	ON REMAND
DIRECTOR, CALIFORNIA AREA OFFICE,	)	
INDIAN HEALTH SERVICE	)	
Appellee	)	

## **INTRODUCTION**

This case involves Appellant Susanville Indian Rancheria’s (hereinafter, “the Tribe’s”) appeal of Appellee Indian Health Service’s (hereinafter, “IHS’s”) partial declination of the Tribe’s proposed successor annual funding agreement for calendar year 1997. Pursuant to 25 C.F.R. § 900.165(a), this forum issued a Recommended Decision in this matter on April 6, 2001 (hereinafter, “Recommended Decision”). Both parties filed objections with the Departmental Appeals Board for the Department of Health and Human Services (hereinafter, “the Board”). See 25 C.F.R. § 900.166.

On May 29, 2001, the Board remanded this case to this forum through its “Decision Remanding Case to Administrative Law Judge” (hereinafter, the Board’s Decision).<sup>1</sup>

In the Board’s Decision, the Board notes that HHS raised a new issue on appeal, and directs this forum to “take any actions necessary to fully develop the record” on the new issue. Board’s Decision, p 2. Furthermore, to the extent this forum finds that the new issue is not dispositive of the case, the Board’s Decision authorizes this forum to consider the record as expanded on appeal and on remand, and to determine whether to adopt or modify the Recommended Decision. *Id.*, p 4. The Board also requires this forum to “receive additional

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<sup>1</sup> This forum defers to the Board’s implied holding that the remand was sufficient to prevent the Recommended Decision from becoming final in accordance with 25 C.F.R. § 900.167(a), which provides that a recommended decision automatically becomes final unless the relevant Board modifies, adopts, or reverses the Recommended Decision within the specified time frame. This forum respectfully suggests, however, that this question may deserve further examination.

argument and evidence regarding the Tribe's argument on appeal that it was paid only \$53,102 in Headquarter's funds for 1997 . . ." Id.

The new issue raised by IHS (hereinafter, "the aggregate funding argument") can be summarized as follows: If a Tribe receives at least as much aggregate funding for a self-determination contract in a certain year as it received in the prior year, does IHS violate 25 U.S.C. § 450j-1(b)(2) if it unilaterally reduces the Tribe's Area Office and Headquarter's shares? The parties have agreed that the Tribe received more money in the aggregate in 1997 than it received in 1996, even though IHS reduced the amount of funds the Tribe received for its Area Office and Headquarters shares. See Joint Stipulation Re the Tribe's Funding for 1995-1997 and the Parties' Positions Re Non-Recurring Funding (hereinafter, "Joint Stipulation"), Ex A.

As set forth below, this forum finds on remand that the aggregate funding argument should not be heard because it was not set forth in the HHS's declination decision, and because it was raised too late. Even if the aggregate funding argument is considered, this forum finds that it should be rejected, because it does not conform to the Indian Self-Determination Act (hereinafter, "ISDA") or its implementing regulations. Finally, this forum adopts the Recommended Decision with modifications.<sup>2</sup>

## **DISCUSSION OF AGGREGATE FUNDING ARGUMENT – PROCEDURAL ISSUES**

### **The Issues in an ISDA Appeal of a Declination Decision are Limited to Those Actually Raised in the Decision**

If an agency decides to decline a contract proposal, the ISDA requires that agency to issue a written declination within ninety days of receiving the proposal. See 25 U.S.C. § 450f(a)(2). The declination must contain "a specific finding that clearly demonstrates that" one of five criteria are met. Id. (emphases added). If the agency fails to provide this finding in writing within 90 days of the date the agency receives the proposal, the agency is required to accept the proposal. Id. Furthermore, the agency must "state any objections in writing to the tribal organization" which made the proposal, "provide assistance to the tribal organization to overcome the stated objections," and provide the tribal organization with a hearing on the record, "with the right to engage in full discovery relevant to any issue raised in the matter . . ." See 25 U.S.C. § 450f(b).

The regulations concerning declination procedures repeat the statutory requirements discussed above, and further elaborate what is required. For example, an agency must include a "detailed explanation of the reason for the decision to decline the proposal," and must provide

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<sup>2</sup> Although the parties have provided a record concerning the question of whether the residual used by the IHS to calculate Area Office shares in 1997 was proper, this forum does not reach that question in this decision. A determination on that question is unnecessary in light of this forum's holding.

the tribe or tribal organization with “any documents relied on in making the decision.” 25 C.F.R. § 900.29(a) (emphasis added). The regulations go on to provide a number of deadlines designed to limit the length of the administrative process. See, e.g., 25 C.F.R. §§ 900.155, 900.160, and 900.161.

Together, these statutes and regulations outline a process which functions only if the agency that is declining the proposal states its complete rationale in the declination decision. Stating the rationale in the decision is not only a statutory and regulatory requirement, it is a necessary first step to providing “the tribal organization with assistance to overcome the stated objections,” to providing the right to engage in discovery “relevant to any issue raised in the matter,” to providing a “detailed explanation of the reason for the decision to decline the proposal,” and to providing the Tribe with “documents relied on in making the decision” within twenty days of issuing the declination decision.

In addition, one of the more obvious reasons for providing an explanation in the decision is to provide the tribe with the opportunity to decide whether it wishes to challenge the decision. It may be that the tribe will agree with the rationale and accept the decision, especially after the tribe has an opportunity to engage in discovery and to review the documents relied on by the agency. A clear and complete explanation has the potential to save time and resources for all concerned, and lets the tribe know the areas in which it may be deficient and need further assistance. Such a process is consistent with the goals of the ISDA. Withholding part or all of the rationale accomplishes none of the goals of the ISDA.

Furthermore, an alternative rationale raised after the declination decision is issued essentially amounts to a new declination decision, because the rationale is an essential part of a declination decision under the statutory and regulatory process outlined above. As discussed, an agency has ninety days from receipt of a tribe’s proposal to decline a proposal. See 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.21. Allowing IHS to raise its new argument over three years from the date of IHS’s original partial declination would have the effect of extending this statutory deadline, which this forum has no authority to do.

Therefore, an agency is required to provide a complete rationale for declining a proposal in the declination decision. An agency is not allowed to provide an alternative rationale after the time frame for issuing a declination decision has expired, because such action is contrary to the declination process set forth in the ISDA and its implementing regulations.

In this case, IHS did not raise its aggregate funding argument in its declination decision. Rather, IHS asserted that the declination was proper because the Tribe’s proposal exceeded the contract’s 25 U.S.C. § 450j-1(a) (hereinafter, “§ 450j-1(a)”) amount. IHS further explained that the Tribe’s proposed Area Office share exceeded the Tribe’s portion under a newly calculated residual, and that the Tribe’s proposed Headquarter’s share exceeded the Tribe’s recurring share of Headquarter’s funds. Nowhere in the declination decision does IHS argue that the partial declination was proper because the Tribe was to receive an aggregate funding level which was higher than the prior year’s aggregate funding level.

IHS argues that “[t]he aggregate funding level argument is implied in the declination.” Appellee Indian Health Service’s Response . . . Letter (hereinafter, IHS’s Opening Brief on Remand<sup>3</sup>), p 14. In support of this assertion, IHS relies on the following language from the declination decision: “While the Tribe may in fact receive a total amount of Headquarters funds in CY 1997 of at least \$100,433, any additional funds beyond the \$40,457 will be distributed on a non-recurring basis based upon program formulas.” See Tribe’s Motion for Summary Judgment, Ex G, p 3. According to IHS, this means that “the declination indicated that the Tribe may not, in fact, suffer any overall loss in funding.” IHS’s Opening Brief on Remand, p 15.

However, it is not enough that a declination decision “imply” a rationale. The declination process is not supposed to be a guessing game for the tribe making the proposal. Rather, the declination decision must clearly state the rationale and demonstrate that the rationale meets one of the declination criteria. See 25 U.S.C. § 450f(a)(2). The explanation for the rationale must be “detailed.” See 25 C.F.R. § 900.29(a). Indeed, IHS’s statement that the aggregate funding level argument is “implied” is essentially an admission that the statutory and regulatory requirements have not been met.

Furthermore, even if an implied rationale were enough, the language quoted by IHS does not imply the aggregate funding argument. Rather, it notes, as partial justification for IHS’s reduction of the Tribe’s Headquarters share, that the Tribe’s total Headquarter’s share may ultimately be at least as much as it was in the prior year. That is a far cry from “implying” that one of the reasons IHS is partially declining the proposal (including the Area Office share) is that the contract’s aggregate funding amount is expected to be higher.

IHS also argues that regulations allowing it to file a response to the appeal, and allowing it to conduct discovery, support its interpretation that the rationale for the declination need not be set forth in the declination decision. IHS’s Opening Brief on Remand, p 15. However, authorization to file a response to an appeal is not the same thing as an invitation to provide additional bases for the decision. It is not illogical to require an agency to state the rationale for its decision in its decision, yet allow that agency to respond to specific grounds of error raised by a tribe in its appeal. Furthermore, discovery in an ISDA administrative appeal is not intended to provide IHS with an opportunity to “discover” additional reasons for declining the tribe’s proposal. Rather, IHS must determine any reasons for declining a tribe’s proposal within ninety days of receiving that proposal. See 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.21.

IHS goes on to assert that the declination decision is an informal document, which is not issued in the context of litigation. IHS’s Response Brief on Remand, p 11 n 3. As support for this assertion, IHS states that it has an obligation to provide technical assistance to overcome the

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<sup>3</sup> The parties each filed three briefs on remand – an opening brief, a response brief, and a reply brief. Although the parties titled their briefs differently, this forum will refer to all briefs filed on remand in the manner used here.

objections set forth in the declination decision, and that a tribe has many options when it receives a declination decision, which include filing an action in federal court. Id.

IHS accurately states its obligations and a tribe's options. However, those factors do not mandate the conclusion that a declination decision is a mere informal document "issued at the most preliminary stage of the declination process." IHS's Response Brief on Remand, p 11. If the declination decision is not appealed, it becomes IHS's final decision. If a tribe exercises its option to immediately challenge the declination decision in federal court, the decision will stand or fall on the reasons it contains. An agency would not be able to raise alternative rationales in a federal court proceeding. As the Ninth Circuit stated in regard to an argument raised by an agency for the first time in federal court:

This argument is nowhere raised in the [agency's] order approving the acquisition. As a reviewing court, we must judge the propriety of the agency decision only on the grounds invoked by the [agency] . . . . It would be improper for us to accept as sufficient justification for the [agency's] decision . . . a reason that is not even hinted at in the agency orders that we are reviewing.

Railway Labor Executives' Asso. v. Interstate Commerce Com., 784 F.2d 959, 974 (9th Cir. 1986) (citations omitted). Therefore, this forum declines to treat IHS's declination decision as anything other than a final document.

Furthermore, as set forth above, IHS's obligation to help a tribe overcome its stated objections requires that IHS first state those objections in its decision. Supra, pp 2-3. This obligation remains even if a tribe decides not to appeal a decision. 25 U.S.C. § 450f(b) ("Whenever the Secretary declines . . ." (emphasis added)).

IHS next argues that the question is really one of "issue exhaustion," and that "issue exhaustion" should not be applied to this proceeding. IHS's Response Brief on Remand, p 11. IHS argues that "[a]dministrative issue exhaustion usually arises in the context of judicial review of an administrative agency's final decision," and that "[a]dministrative issue exhaustion requirements are usually prescribed by a statute or regulation." Id., pp 11-12. IHS further argues that the rationale for issue exhaustion is that arguments should be fully developed at the administrative level, and that this rationale supports allowing IHS to raise its arguments late in the process.

However, as set forth above, and as the Tribe points out, the requirement that an agency state its reasons for the declination in the declination decision is derived from the ISDA and its implementing regulations, and is not based on the judicial concept of "issue exhaustion." Supra, pp 2-3; See Tribe's Reply Brief on Remand, pp 3-4. This forum is not required by federal case law to hear new arguments when to do so would be contrary to applicable statutory and regulatory law.

IHS argues that this forum cannot assess the Tribe's damages or "harm to the Tribe" without first deciding the aggregate funding argument. IHS's Response Brief on Remand, p 13. However, the question of damages is a separate issue from the question of whether IHS properly partially declined the Tribe's proposal. As set forth above, the Tribe may not rely on a newly raised rationale to support its partial declination.

Finally, although IHS argues that the aggregate funding argument is based on the concept of mootness, what IHS has really done is to raise a new legal argument. IHS's Opening Brief on Remand, p 17. To the extent the case is rendered moot, it is only rendered moot if the legal question is answered in favor of IHS. As the Tribe states, the aggregate funding argument "remains an issue of adversity which must be decided by a judge." Tribe's Opening Brief on Remand, p 20. IHS must raise such an argument in its declination decision, not after the decision issued.

Therefore, the aggregate funding argument should not be heard, because it was not raised in the declination decision. Rather, the question of whether IHS properly declined the Tribe's proposal should be evaluated on the basis of the arguments actually raised in the declination decision.

One of the statements made by IHS with regard to this question deserves further comment. IHS asserts that if the ISDA and its implementing regulations are interpreted to require IHS to state its complete rationale in the declination decision:

[R]ather than setting forth its actual objections to the contract proposal, IHS will be required to set forth every conceivable objection, whether or not those objections were the true bases for declining the contract, in order to preserve such arguments for appeal."

IHS's Opening Brief on Remand, p 16 (emphases added). This disturbing statement carries with it the suggestion that IHS is willing – in its view, would be "required" – to make false statements in its declination decisions, and does not reflect well on the agency. The statement instead reflects a "win at all costs" approach that is antithetical to the spirit and purposes of the ISDA. Although used in a different context, the following quote from the ISDA legislative history applies equally well to IHS's position: "This argument reflects a total disregard for the intent of the Congress as expressed in the Indian Self-Determination Act, an abandonment of the [agency's] trust obligations to tribal contractors, and amply illustrates the necessity of enacting the remedial measures provided in [the 1988] amendments." See S. Rep. No. 100-274 (1987), reprinted in 1988 U.S.C.C.A.N. 2620, at 2657.

IHS's goal should not be to preserve all conceivable objections regardless of the truth. IHS's goal should instead be to carry out the purposes of the ISDA in the manner contemplated by Congress. IHS is reminded that it has a trust relationship with tribes proposing ISDA contracts, and that its charge in implementing the ISDA is to facilitate tribal self-determination. See 25 U.S.C. § 450a(b). If IHS sets forth "reasons" in a declination decision merely as a

tactical maneuver to preserve arguments for appeal, it will have chosen to do so. IHS should consider the potential effect of such a choice, as well the effect of the statement it has already made, on its own credibility.

### **The Aggregate Funding Argument Should Not Be Heard, Because It Was Raised Too Late in the Process**

Even if a new rationale can be raised after the declination decision is issued, the aggregate funding argument still should not be heard, because it was raised too late in the process. The Board has published a set of guidelines which are entitled “Appellate Review of Recommended Decisions of Administrative Law Judges in Indian Self-Determination Act Declinations” (hereinafter, the guidelines).<sup>4</sup> These guidelines are applicable to this case, because the Recommended Decision concerned an ISDA declination and because the Recommended Decision was appealed to the Board.

The guidelines provide in part: “The Board will not consider issues not raised in the written objections, nor issues which could have been presented to the ALJ but were not.” See Charles W. Wheeler and Appellate Petitioners v. The Inspector General, DAB No. 1123, 1990 HHSDAB Lexis 1076, p \*7, n 5 (1990) (discussing similar guidelines). These guidelines are consistent with the ISDA’s statutory and regulatory scheme, as set forth above. Supra, pp 2-3. The term “written objections,” which is used earlier in the guidelines, refers to the objections which may be filed under 25 C.F.R. § 900.166. The guidelines therefore describe two types of issues which the Board will not consider: 1) Those issues which were not raised in the written objections, and 2) Those issues which could have been presented to the ALJ but were not.

The aggregate funding argument meets both of these descriptions. First, it was not raised in IHS’s written objections. Compare [IHS’s] Objection to Recommended Decision of Administrative Law Judge (hereinafter, “IHS’s Objections”) with [IHS’s] Reply to Susanville’s Objection to ALJ’s Recommended Decision, pp 2-4. Second, it is an argument that could have been presented to this forum before the Recommended Decision was issued, because IHS must have known by the end of 1997 how much money it had paid to the Tribe in that year.<sup>5</sup>

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<sup>4</sup> The guidelines are available at <http://www.hhs.gov/dab/selfdete.html>.

<sup>5</sup> In response to a question from this forum, IHS asserted that it did not “realize” until after the Recommended Decision was issued that the Tribe had received more aggregate funding in 1997 than in 1996. See IHS’s “Response to Questions Set Forth . . . Letter,” pp 16-17. However, it does not seem a stretch to charge an agency with at least constructive knowledge of the amount of money it has paid out for a contract in any given year.

Therefore, in accordance with the Board's guidelines, the aggregate funding argument should not be heard. Rather, the case should be decided on the basis of the arguments that were timely raised.

Furthermore, the aggregate funding argument was not made within the time period allowed by the applicable regulation, which provides in part: "Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision" (emphasis added). 25 C.F.R. § 900.166. In this case, IHS's time period for raising its objections to the Recommended Decision ended on May 9, 2001, because IHS received the Recommended Decision on April 9, 2001. However, the aggregate funding argument was first raised in a filing dated May 17, 2001. The Indian Health Service's Reply to Tribe's Objection to ALJ's Recommended Decision, p 2. The aggregate funding argument was therefore made after the regulatory deadline, and should not be heard on this basis as well.

### **DISCUSSION OF AGGREGATE FUNDING ARGUMENT - SUBSTANTIVE ISSUES**

Although this forum has held that the aggregate funding argument should not be heard, it offers the following discussion of that argument in the alternative, and in recognition of the Board's desire for an expanded record on this issue.

#### **The Restriction on Reducing Funding Found at § 450j-1(b) is Tied to the Structure of the Contract and Its Associated Annual Funding Agreements**

The first step in resolving the aggregate funding issue is to analyze any statutory language which may be relevant. The principal statutory language is that found in 43 U.S.C. §§ 450j-1(a) and 450j-1(b), because these provisions concern the restriction on reducing contract funding which is at issue in this case. The funding restriction itself, found at § 450j-1(b), refers to "the amount of funds required by subsection (a)." This language does not expressly refer to aggregate funding, but also does not expressly refer to the amount of funds set forth in each funding category or for each program, function, service, or activity (hereinafter, "PFSA"). The language in 450j-1(a)(1), on the other hand, refers to the "amount of funds provided under the terms of self-determination contracts," which cannot be less than "the Secretary would have otherwise provided for the operation of programs or portions thereof . . ."

The use of the phrase "provided under the terms of self-determination contracts" evidences a focus on the terms of contracts themselves. Therefore, the funding restriction found in § 450j-1(b) should be read to apply to aggregate funding if the contract only discusses a single aggregate funding amount, but should apply to separate categories of funding if the contract discusses those categories. Thus, an exclusive focus on aggregate funding is not a reasonable reading of the statute if the applicable contract instead focuses on separate categories of funding.

Even if the statutory phrases "amount of funds required by subsection (a)" and "amount of funds provided under the terms of self-determination contracts" could reasonably be read as

referring exclusively to the total amount of funds provided under a contract, the statute would still be subject to at least two reasonable interpretations. It is also reasonable, at a minimum, to read those same phrases as referring to separate categories of funding if the contract provides for those categories.

This ambiguity in the statutory language would then lead back to the question of how ambiguities should be resolved in this matter. In the first Recommended Decision, this forum found that in the Ninth Circuit, the canon of statutory construction requiring deference to agency interpretations was superior to the canon of statutory construction requiring that ambiguities in statutes benefitting Indians be read in the light most favorable to Indians. Recommended Decision, p 10. This forum went on to apply recent Supreme Court caselaw limiting the canon concerning deference to agency interpretations. *Id.* Later, this forum noted IHS's contractual commitment to read the ISDA in favor of the contractor, but did not attempt to reconcile that commitment with the earlier discussion of statutory construction. *Id.*, p 13.

However, upon further analysis, this forum finds that IHS's contractual commitment to read the ISDA in favor of the contractor, in this case, the Tribe, should control. The contractual language is found in Article I, Section 2 of the contract, and provides: "Each provision of the Indian Self-Determination Act . . . shall be liberally construed for the benefit of the Contractor to transfer the funding and [certain PFSAs] . . . from the Federal Government to the Contractor . . ." IHS expressly agreed to this language when it entered into the contract. More importantly, this language is specifically required by Congress. See 25 U.S.C. § 450f(a)(1). Cases concerning the ISDA are therefore distinguishable from the Ninth Circuit cases holding that agency interpretations of statutes benefitting Indians are still entitled to deference, because those cases did not involve the ISDA and its mandatory contractual language. See Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 n 4 (9<sup>th</sup> Cir. 1990). Similarly, ISDA cases are distinguishable from Supreme Court cases requiring that agency interpretations of statutes are entitled to "respect" to the extent they have the "power to persuade." See Recommended Decision p 10 (citing cases).<sup>6</sup>

It should be emphasized that the contractual language required by Congress mandates that the ISDA be construed in favor of the Contractor, and not in favor of Indians in general. This is in keeping with the ISDA's Congressional declaration of policy, which states in part:

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian

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<sup>6</sup> Furthermore, a finding that the statute be construed for the benefit of the Tribe brings this case into conformity with the Board's finding in Ninilchik Traditional Council, DAB 1711 (1999). In Ninilchik, the Board stated that the principle that the ISDA is to be construed in favor of Indians was "not in dispute." Ninilchik, p 15.

communities so as to render such services more responsive to the needs and desires of those communities.

25 U.S.C. § 450a(a). The ISDA is not just a statute which benefits Indians – it is a statute whose whole *raison d’etre* is to encourage and facilitate Indian self-determination. Therefore, as Congress has specifically required, IHS must construe it in the light most favorable to a contracting tribe – a tribe which is attempting to achieve self-determination.

Interpreting the statute so that the § 450j-1 (b)’s restriction on reducing contractual funding is tied to the structure of the contract itself is beneficial to the contracting tribe. For one thing, such an interpretation prevents an agency from conducting the sort of pre-emptive re-budgeting that IHS believes it was entitled to conduct in this case. Allowing an agency to unilaterally reduce funding in one contractual category, while raising funding in another category, forces a contracting tribe to undertake re-budgeting and creates extra work for the contracting tribe. Such unilateral action does not contribute to helping tribes in the “planning, conduct and administration” of the programs they seek to acquire, and is more an example of the “Federal domination” of Indian service programs that Congress sought to limit when it enacted the ISDA.<sup>7</sup> Furthermore, applying the restriction to separate funding categories is beneficial to the contracting tribe because it prevents an agency from reducing funding in a particular category, and avoiding the restriction on reducing funds by providing additional money in a category which cannot be re-budgeted, such as the Maintenance and Improvement funds which the agency provided in 1997. See IHS’s Opening Brief on Remand, p 21 (Tribe obligated to use maintenance and improvement funds for maintenance and improvement activities only). Finally, such a reading prevents an agency from using general cost-of-living increases to justify reductions in particular funding categories. See Tribe’s Opening Brief on Remand, pp 22-23; Tribe’s “Supplemental Response,” p 4 n 2.

Tying the statutory funding restriction to the structure of the contract also makes sense because of the level of detail found in the contracts. The contracts are where unique factual circumstances and complex questions concerning funding may be addressed and resolved. For example, the parties have, with one exception,<sup>8</sup> chosen not to include specific amounts in the

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<sup>7</sup> In its declaration of policy for the ISDA, Congress stated in part : “The Congress declares its commitment to the maintenance of the Federal government’s unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 USC §450a(b).

<sup>8</sup> The parties included non-recurring funding in the Headquarter’s share allocation for the 1996 Annual Funding Agreement (AFA) (Section 2(D)).

Annual Funding Agreements for non-recurring funds, apparently because the non-recurring funding level may not be known at the time the AFA is signed, and, perhaps more importantly, because non-recurring funds vary from year to year. Allowing non-recurring funding to remain unspecified in the AFA allows the parties to have an AFA in place at the start of the contracting year, and facilitates the year-to-year flexibility required by non-recurring funding. On the other hand, if the funding restriction only applies to the aggregate funding level, the contract loses its significance, and the complex questions resolved by the contract, such as how to treat non-recurring funds, must be addressed without the benefit of the contractual language. Therefore, IHS's aggregate funding argument does not comply with statutorily mandated contractual agreement to construe the ISDA in the light most favorable to the Tribe.

Moreover, regulations interpreting the ISDA, which are joint regulations issued by the Department of the Interior and the Department of Health and Human Services, are the best indication of how the Departments have chosen to interpret the ISDA. These regulations are consistent with interpreting § 450j-1(b) to prohibit reductions on individual categories of funding when the contract sets forth such categories. Specifically, 25 C.F.R. § 900.32 provides that when a successor annual funding agreement is substantially the same as a prior annual funding agreement, the relevant Secretary may not decline any portion of the successor agreement. This regulation evidences an intent on the part of the two Departments to focus on specific portions of the prior year's annual funding agreement when determining the appropriate level of funding for a subsequent year. See 25 C.F.R. § 900.32 (“ . . . and may not decline, any portion of a successor annual funding agreement.”). Therefore, both Departments have already interpreted the statute, through the regulations, to focus on funding for particular categories if the Annual Funding Agreement sets forth those categories, because each category is itself a “portion” of the AFA.

IHS bases its aggregate funding argument partially on the view that Tribes are free to rebudget and redistribute funds from one PFSA to another. IHS's Response Brief on Remand, pp 8-9. According to IHS, it should not matter if it reduces funding for any particular PFSA, or for broader categories such as Headquarters and Area Office shares, so long as the overall funding is the same. If the overall funding is the same, and a particular category of funding has been reduced, some other category must have received an increase. According to IHS, the Tribe can, with little effort, take the “extra” funding in the other category and apply it to the category which IHS decreased. So, under IHS's interpretation, when IHS reduced Area Office funding by \$20,800 in 1997, the Tribe could have taken money from non-recurring funding, which received an increase in 1997, and could have applied that increase to the Area Office funding category.

However, as might be expected from an argument that is raised for the first time very late in a proceeding, IHS's current viewpoint is not consistent with its earlier actions. Specifically, if in fact the funding in particular categories has little meaning, why would IHS make a point of reducing funding for particular categories in a declination decision? See IHS's Motion for Summary Judgment, Ex G, pp 3-4. Why not instead issue a declination decision which addressed only the aggregate funding level, rather than particular categories? Such a decision would have determined the aggregate funding level in the Tribe's proposal, reduced this amount to the “correct” aggregate funding level in IHS's view, and provided reasons for the reduction.

Furthermore, if the Tribe received additional contract funding later in the year, and if the additional funding raised the aggregate contract funding level for that year to an amount equal to or greater than the Tribe's original proposal, IHS would logically have no reason to pursue its declination. Rather, as a federal agency theoretically concerned with its own time and resources and with the time and resources of the Tribes for which it acts as a fiduciary, IHS would have withdrawn its declination. This, IHS did not do.

Even with the actual declination decision currently under appeal, IHS's aggregate funding position should lead IHS to the conclusion that continuing to assert its declination of the Tribe's 1997 proposal is unnecessary. If the aggregate funding level is the only funding level that is important, then it should not matter at this point whether the 1997 Area Office funding level is set at \$76,013 or \$56,700.

However, IHS still continues to assert that its 1997 declination decision should be affirmed, which would have the effect of setting the 1997 Area Office and Headquarters shares funding levels at a lower figure than the amount the Tribe received in 1996. Apparently, IHS believes that this is still important, even though the Tribe ultimately received a higher aggregate funding level for 1997 than it received in 1996. See Joint Stipulation Regarding Funding, Ex A. Unless and until IHS withdraws its 1996 declination decision as no longer necessary, the only conclusion that can be reached is that, despite what IHS argues in its eleventh hour aggregate funding argument, the 1997 Headquarters and Area Office tribal share funding levels really are important to IHS. Essentially, IHS wants to have it both ways – it wants the Tribe's appeal of its 1997 declination decision to be dismissed because the Area Office and Headquarters tribal share funding levels are not important, and it wants to ensure that its declination decision is affirmed so that the 1997 Area Office and Headquarters tribal shares are reset to a lower level.

In light of this contradiction between IHS's assertions and its actions, this forum finds that IHS has not "clearly established the validity" of the aggregate funding argument. Rather, IHS's actions, as opposed to its rationalizations, have clearly established that the 1997 funding levels for the Area Office and Headquarter's tribal shares are still relevant and important.

Therefore, this forum finds that § 450j-1(b)'s restriction on reducing funding applies to individual funding categories which are set forth in a self-determination contract, including that contract's associated annual funding agreements.<sup>9</sup> In this case, the restriction applies to the specific amounts for the Area Office and Headquarter's tribal shares which are found in sections 2(C) and 2(D) of the 1996 Annual Funding Agreement. IHS therefore violated § 450j-1(b)'s

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<sup>9</sup> Because the categories at issue in this case, Area Office and Headquarters shares, are set forth in the text of the AFAs, this forum does not reach the question of whether each separate category in the tables accompanying the AFAs are subject to the funding restriction.

restriction on reducing funding when it reduced funding for Area Office and Headquarter's tribal shares in 1997.<sup>10</sup> See *infra*, pp 17-18 (discussion of Headquarter's share and § 450j-1(b)).

## **DISCUSSION AND MODIFICATION OF FIRST RECOMMENDED DECISION**

### **The Recommended Decision Should Be Modified to Hold That the Second AFA Reset the § 450j-1(a) Amount**

In the first Recommended Decision, this forum held that the parties did not reset the § 450j-1(a) amount to a higher figure in AFA # 2. In doing so, this forum focused on the following language in the contract: "Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the Annual Funding Agreement incorporated by reference in Article VII, Section 2." Tribe's MSJ Memo Ex A p 6 (Contract p 3). This forum interpreted this language to refer only to the first AFA, and found that the Contract thereby established the § 450j-1(a)(1) amount in the initial year of the contract. This forum further found that "[i]n the absence of express language evidencing an intent on the part of both parties to reset the § 450j-1(a)(1) amount to a higher figure, . . . the § 450j-1(a)(1) amount remains as set out in AFA # 1." Recommended Decision, p 16.

However, this forum did not focus on the language in Section 3 of AFA # 2, which is entitled "Consolidation of Annual Funding Agreements." This Section provides: "The AFA negotiated in 1995 shall be amended or terminated to transfer applicable contracted funds into this AFA." Tribe's MSJ Memo, Ex C p 5. This forum interprets this language to mean that, once the second AFA was signed, the first AFA was terminated and replaced by the second AFA. Therefore, when AFA # 1 is replaced by AFA # 2, AFA # 2 becomes "the Annual Funding Agreement incorporated by reference" in Article VII, Section 2 of the contract, and the § 450j-1(a) amount is then reflected in AFA # 2. The same would hold true for subsequent AFAs.

Therefore, the § 450j-1(a) amount is reset each year and is reflected in each year's Annual Funding Agreement. The funding restriction set forth in § 450j-1(b) means that an agency cannot reduce funding in a subsequent year below the amount reflected in the prior Annual Funding Agreement. Furthermore, § 450j-1(a) requires that in any given year the amount of funds provided to a Tribe not be less than what the Secretary "would have otherwise

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<sup>10</sup> Even if the statutory restrictions were read to apply only to the aggregate contract funding level, and in light of the necessary parallel finding that the particular amounts provided for Headquarter's and Area Office funding are not relevant to the statutory restrictions, IHS's declination should be reversed. IHS had no reason, under its own theory, to pursue its declination after it paid the Tribe its non-recurring funds in 1997, because at that point the aggregate funding for 1997 exceeded that for 1996. IHS must have an affirmative reason to pursue its declination, and in the absence of such a reason, IHS's declination should be reversed. See 25 U.S.C. § 450f(a)(2).

provided” to fund the PFSAs which are the subject of the contract.<sup>11</sup> Together, § 450j-1(b) and § 450j-1(a) establish two floors for an agency, and the agency must at a minimum provide the Tribe with either the amount reflected in the prior year’s AFA, or the amount the Secretary would have otherwise provided for the PFSAs that year, whichever is higher.

**Despite the Objections Raised by IHS on Appeal, the Recommended Decision’s Essential Holding Should Not Be Changed**

Although this case has generated much briefing and discussion with regard to a number of issues, it is helpful to remember that the Recommended Decision addressed a relatively straightforward question: Whether IHS properly reduced funding for the Tribe’s contract by partially declining the Tribe’s proposed 1997 AFA. To answer this question, this forum addressed the extent of IHS’s authority to reduce funding for a contract under the statute and regulations, and held that IHS’s partial declination exceeded that authority. See generally, Recommended Decision pp 9-17.

In addition to its new aggregate funding argument, IHS raised a number of objections to this forum’s holding. Several of these objections are specifically addressed below.

Impact on Other Tribes

IHS argues that in reaching its Recommended Decision, this forum failed to consider the impact its decision would have on other tribes. In particular, IHS relies on the following language in 25 U.S.C. § 450j-1(b):

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.

IHS essentially argues that if this forum does not read the statute to authorize IHS to make unilateral adjustments to a contract’s funding level, IHS will be forced to take money from other tribes or from other programs. See IHS’s Objection to Recommended Decision, pp 5-11; IHS’s Opening Brief on Remand, pp 29-34.

The Tribe points out that IHS did not raise this argument in its declination decision, and that consequently the record contains little information to support IHS’s claims. Tribe’s Response Brief on Remand, p 29. The Tribe also argues that IHS agreed to the contract

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<sup>11</sup> The § 450j-1(a) restriction should prevent the scenario the Tribe is concerned with, wherein cost-of-living increases are used to justify actual reductions in funding. See Tribe’s Response Brief on Remand, pp 7-8.

provisions at issue, and that IHS must have considered the impact to other Tribes before it made such agreements. Tribe's Response to IHS's Objection, p 3.

This issue has some of the same procedural problems as the aggregate funding argument. It was not raised in IHS's declination decision, and for the reasons set forth above, should not be considered on that basis. See supra, pp 2-6. Moreover, IHS has never provided any factual support, in the form of a declaration or other documentation, for its assertion that paying the Tribe the full amount of Area Office and Headquarter's shares set forth in the Tribe's 1997 proposal will necessarily result in reducing funding for PFSA's for other tribes. In the absence of such support, IHS has failed to meet its significant burden of proof with regard to this issue. As the Tribe points out, IHS apparently managed to find the money in 1996, when it paid the Tribe the requested amount of Area Office shares even after it had recalculated its residual. Tribe's MSJ Memo, Ex C p 13. IHS's lack of proof is fatal to its argument concerning impact on other tribes.

Moreover, the quoted language really involves the remedy in this matter, as opposed to the substantive question of whether IHS properly declined the Tribe's proposal. The quoted language may under certain circumstances prevent IHS from having to pay a legal obligation resulting from an improper declination out of its own appropriations, but it does not transform an improper declination into a proper one. Otherwise, no declination decision could be held improper, regardless of whether that decision complied with §§ 450f(a)(2) or 450j-1(b), so long as IHS asserted that it would have to take money from PFSA's for other tribes if it lost. The exception would, in most cases, swallow the rule.

Furthermore, IHS's argument once again reflects a troubling attitude on the part of the agency. The result of this forum's reversal of IHS's partial declination is that the Tribe is entitled by statute, regulation, and contracts signed by IHS officials, to a certain sum of money. IHS has known since early 1997 that the Tribe was appealing its partial declination of the Tribe's proposal. Yet the record reflects no effort on the part of IHS to find a way to meet a potential legal obligation. Federal agencies are not merely passive recipients of appropriation dollars, and it is not enough for an agency to turn its pockets inside out and shrug. Rather, the agency should make every effort to obtain the funding necessary to meet its legal obligations, including approaching Congress for supplemental appropriations.

Without, at a minimum, evidence that IHS has made such efforts, affirming the declination on the basis that IHS has no money to pay would be tantamount to rewarding IHS for its apparent lack of effort and planning. This forum declines to do so.

#### This Case is Distinguishable from Ninilchik

IHS argues that this forum improperly distinguished the Board's decision in Ninilchik Traditional Council, DAB 1711 (1999) (hereinafter, "Ninilchik"). In its Recommended Decision, this forum stated the following concerning Ninilchik:

The Board's decision in Ninilchik is distinguishable from this case. Under the contract in Ninilchik, the contract support costs were supposed to be based upon an underlying indirect rate agreement. Ninilchik p 5. However, "the prior year funding agreement was not based on any current negotiated or approved rate or methodology." Ninilchik, p 10. Therefore, at the time the IHS partially declined the Tribe's proposal in Ninilchik, the contract did not set out any current § 450j-1(a)(2) amount. Without a defined § 450j-1(a)(2) amount, there could not have been any reduction in that amount, and § 450j-1(b) did not apply. . . .

Here, however, the Tribe and IHS did establish amounts pursuant to § 450j-1(a)(1), which were set forth in AFA # 1 and which were current at the time IHS issued its declination decision. This difference is key, because if a § 450j-1(a)(1) amount has been established, § 450j-1(b) prohibits IHS from reducing that amount unless certain limited circumstances apply. Therefore, Ninilchik does not require this forum to read § 450j-1(a)(1) and § 450j-1(b) in the manner asserted here by IHS.

IHS argues that contrary to the assertions made by this forum, the applicable AFA in Ninilchik did set forth a specific amount. IHS's Objections to Recommended Decision, pp 15-16. IHS attaches that AFA, which does show certain amounts set forth for contract support costs. IHS argues that Ninilchik stands for the proposition that IHS may make "corrections" to any amount under § 450j-1(a) without violating § 450j-1(b), and is therefore applicable to this case.

The Tribe responds that the key to the Board's holding in Ninilchik was the fact that the tribe's proposal in Ninilchik was based on an expired provisional rate. Tribe's Response to IHS's Objection, p 6. Because contract support costs are by their nature recalculated each year, the Tribe argues, the Board's holding in Ninilchik should not be applied to this case.

This forum agrees with IHS that the relevant agreements in Ninilchik did, in fact, set forth specific amounts for contract support costs, and modifies the Recommended Decision to reflect this reality. However, this forum also agrees with the Tribe that the important point here is that the proposal for contract support costs in Ninilchik was based on an expired provisional rate, when the contract required "negotiated indirect cost rates," and IHS determined in that case that the proposed contract support costs violated § 450j-1(a)(3(A)). Ninilchik, pp 5, 15. This contrasts sharply with the situation in this case, wherein the parties agreed to amounts for the Area Office and Headquarter's shares in conformity with the contract, and IHS has not found a reasonable violation of § 450j-1(a)(1).<sup>12</sup>

Furthermore, nowhere in Ninilchik did the Board make the sweeping statement that "corrections of the 25 U.S.C. § 450j-1(a) amount . . . are not reductions in funding within the

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<sup>12</sup> Even if IHS's residual were determined in this proceeding to be reasonable, a question this forum does not reach, § 450j-1(a)(1) establishes a floor, not a ceiling.

meaning of 25 U.S.C. § 450j-1(b)(2).” IHS’s Objection to Recommended Decision, p 16 (emphasis in original). Such a broad holding would render the funding restriction in § 450j-1(b)(2) essentially meaningless, because an agency could avoid that restriction merely by characterizing its actions as “corrections” of the § 450j-1(a) amount rather than funding reductions. It is hard to believe that Congress, concerned in 1988 with the government’s handling of the ISDA, would go to the trouble to write a restriction on agency authority which could be so easily avoided.<sup>13</sup> Ninilchik must be read in the context of its particular facts.

#### Other Objections Raised by IHS

IHS argues that the Recommended Decision is contrary to 25 U.S.C. § 450j-1(a) because it awards program formula funds on a recurring basis. IHS Objection, pp 16-17. However, it is IHS that decided to establish a § 450j-1(a)(1) amount for its Headquarter’s share using program formula funds. And in light of IHS’s own statements in its decision in the Tribe’s 1996 CDA claim, this forum finds that IHS intended to do this: “Thus, when the IHS Headquarters identified \$100,499 in section 2(D) of the CY 1996 AFA as being available to the Tribe for IHS Headquarters shares, it did so with the understanding that this amount would consist of both TSA pool funds and program formula funds.” Tribe’s Opening Brief on Remand, Ex G p 2 (emphases in original). Because this amount has been established as the § 450j-1(a)(1) amount for Headquarter’s shares, IHS cannot violate § 450j-1(a)(1) by adhering to this amount. Moreover, § 450j-1(a)(1) establishes a floor, not a ceiling. Therefore, even if IHS provided funds in excess of an established § 450j-1(a)(1) amount, it would not be in violation of § 450j-1(a)(1).

With regard to the district court decision in California Rural Indian Health Board v. DHHS, et al., No. C-96-3526 DLJ (N.D. Cal.), the Tribe correctly points out that it was not a party to that case. Moreover, the particular issues in this case, concerning the application of § 450j-1(b) and 25 C.F.R. § 900.32 to the Tribe’s ISDA contract, were not addressed by the Court in CRIHB. Thus, the District Court was not faced with the question of whether a particular Area Office share, even if based on a different residual, was arbitrary and capricious if IHS was prohibited by statute and regulation from reducing that amount.

To the extent IHS has made additional objections to the Recommended Decision, these additional objections have been considered and rejected. The Recommended Decision’s essential holdings, that IHS violated 25 U.S.C. § 450j-1(b) when it reduced the Tribe’s Area Office share, and that IHS violated 25 C.F.R. § 900.32 when it reduced the Tribe’s Area Office and Headquarter’s shares, are hereby affirmed. The Recommended Decision’s discussion of how ambiguities in the ISDA should be resolved, however, should be modified as set forth in this decision (supra, pp 9-10). Finally, the Recommended Decision’s holding that IHS did not violate 25 U.S.C. § 450j-1(b)’s restriction on reducing funding when it reduced the Tribe’s

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<sup>13</sup> In addition, as set forth above, § 450j-1(b)’s restriction on reducing funding must be read in the light most favorable to the contractor. Allowing IHS to unilaterally reset the § 450j-1(a)(1) amount would be to read the statute in the light most favorable to IHS.

Headquarter's share should also be modified. Because the 1996 AFA reset the agreed upon § 450j-1(a)(1) amount for the Headquarter's share (supra, pp 13-14), IHS also violated 25 U.S.C. § 450j-1(b) when it reduced that amount in 1997.

### **Remedy Issues**

The parties have raised several issues concerning this forum's authority to require IHS to pay money to the Tribe, should this forum determine that IHS's partial declination was improper. These arguments essentially boil down to three questions: 1) Whether the IHS has funds which are legally available to pay the Tribe for any deficiencies in the Tribe's 1997 AFA; 2) Whether this forum has the authority to award interest; and 3) the amount of IHS's obligation with regard to the Tribe's Headquarter's share in 1997. These issues are addressed in turn.

As an initial matter, however, it is helpful to articulate the proper focus of this forum's inquiry. The task of this forum is to determine the legal obligations between the parties and not necessarily to resolve all manner of issues related to the implementation of a remedy or remedies. That it may be difficult or inconvenient for IHS to take action to satisfy its legal obligation under the statute and regulations does not excuse IHS's improper partial declination and the attendant consequences thereof, nor does it change or excuse the legal obligation itself. It may well be that IHS will need to go to Congress to ask for supplemental or deficiency funding.

Furthermore, even if IHS has no funds currently available to satisfy its legal obligations, the Tribe is not precluded from seeking relief in other forums, such as the United States district courts or the United States Court of Claims. See 25 U.S.C. § 450m-1(a). A determination from this forum that IHS's partial declination was improper would be relevant in such a proceeding. For that reason alone, this matter would not be moot even if IHS had no funds which were currently available, and Congress refused supplemental funding.

#### **IHS Has Met Not Its Burden of Showing That Funds Are Not Currently Available to Meet Its Obligation to the Tribe**

Citing to statutory authority, and to the Principles of Federal Appropriations Law authored by the General Accounting Office, IHS argues that it has no funds currently available to pay the Tribe the full amount of Headquarter's and Area Office Shares which the Tribe proposed in 1997. With regard to Fiscal Year (FY) 1997, IHS argues that although the 1997 appropriations language states that funds which are deemed to be obligated in 1997 remain available after 1997, only that portion of the 1997 Area Office and Headquarters shares which IHS approved in 1997 were actually obligated in 1997. IHS's Opening Brief on Remand, p 25. As support, IHS points to the 1997 AFA, which sets forth the amounts IHS asserted were proper in its declination decision (albeit under protest by the Tribe). IHS also references the Declaration of Duke McCloud, in which Mr. McCloud states that IHS "did not and has not obligated funds for liability that may result from the Susanville declination appeal pursuant to 31 U.S.C. § 1501(a)(6)." See Tribe's Reply Brief on Remand, Declaration of Duke McCloud. The

Tribe does not directly respond to these assertions, but instead argues that IHS has not met its burden of proof to show that funds are not available, either from the 1997 appropriation or from later appropriations. Tribe's Response Brief on Remand, p 17.

Especially in the absence of any countervailing evidence, the 1997 Annual Funding Agreement, together with the declaration of Duke McCloud, establishes that IHS has not recorded the full amount of the Tribe's 1997 proposal as an obligation. This means that, in accordance with the language of IHS's 1997 appropriations act, funds from 1997 are not available to meet any legal obligations IHS may have which arise from this litigation. This makes sense, because the 1997 proposal was never agreed to by IHS and was the subject of an administrative appeal.

Nevertheless, if IHS ultimately has its partial declination overturned in whole or in part, it should record the unpaid remainder of the Tribe's 1997 proposal, for Area Office shares, Headquarters shares, or both, depending on the holding of the final decision, as an obligation in the fiscal year in which final judgment is rendered. This is the point at which the 1997 proposed contract will have been completed for purposes of 31 U.S.C. § 1501(a)(1).<sup>14</sup> The General Accounting Office implies as much when it states:

In some types of litigation, a court may order an agency to take some specific action . . . . . [I]t seems clear from the application of 31 U.S.C. § 1501(a) in other contexts that no recordable obligation would arise while this type of litigation is still pending.

II Principles of Federal Appropriations Law 7-37 (2d ed. 1992). In this case, this forum is ordering the agency to comply with the terms of the 1997 proposal, and this case falls within the description of cases in the language quoted above. If the recordable obligation does not arise while the litigation is pending, it must arise when the litigation ends (if, of course, the agency loses). IHS appears to agree, stating: "In [declaratory judgments where compliance would result in expenditure], the agency is advised to record the obligation at the time of judgment." IHS's Opening Brief on Remand, p 26 n 1.

Moreover, recording the unpaid remainder of the Tribe's 1997 proposal as an obligation under the current appropriation, as set forth above, is not the same thing as paying an expense for 1997 or funding a contract for 1997. See IHS's Opening Brief on Remand, p 26. Rather, IHS would be addressing an obligation which has arisen in the current year. Therefore, IHS has not met its burden of showing that funds are not available for it to comply with the Tribe's 1997 proposal.

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<sup>14</sup> This does not mean that the contract is a "new" contract. See Pascua Yaqui Tribe of Arizona, DAB No. 1676 (1999). It does mean, however, that the obligation is a new obligation.

### An Award of Interest is Beyond the Scope of This Forum's Authority

On appeal, the Tribe raised objections to the following language set forth in the Recommended Decision:

This forum considers an award of interest to be an award of interest to be an award of damages. This forum lacks the authority to award damages. See Dailey v. Billings Area Director, Bureau of Indian Affairs, 34 IBIA 128, 129 (1999). This does not mean that the Tribe lacks options with regard to obtaining damages, it means only that this forum is not the appropriate place to do so.

Recommended Decision, p 17. The Tribe argues that the ISDA and the contract authorize payment to the Tribe in a lump sum, and allow the Tribe to retain whatever interest it may receive before disbursing the funds received in a particular year. Tribe's Memorandum in Support of Objection, p 6. The Tribe further argues that in this context, an award of interest is in the nature of specific performance, rather than damages. Id.

In addition, the Tribe points to Article II, Section 6(B) (iii) of the contract, which states: "Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the Annual Funding Agreement referred to in clause (i)." Title 31 of the United States Code, Chapter Nine, is also known as the Prompt Payment Act (hereinafter, PPA), and requires the government to pay interest if it is late in making payments which are due on a certain date. The Tribe argues that "[a]n award requiring the IHS to specifically perform its contractual obligation to pay funds in the form of lost interest under the Prompt Payment Act does not implicate any prohibitions on the IBIA's authority to award damages." Tribe's Opening Brief on Remand, pp 30-31.

In response, IHS argues that the ISDA does not authorize the Secretary of Health and Human Services or this forum to award damages, although it does provide that certain federal courts have jurisdiction over claims for damages. IHS's Response to Objections Raised by Tribe, pp 5-6. The IHS further argues that the Prompt Payment Act does not apply to requests for payment that are disputed by the agency. IHS's Response Brief on Remand, p 14.

As IHS points out, the Interior Board of Indian Appeals (IBIA) has held that "it is not a court of general jurisdiction and has only the power delegated to it by the Secretary of the Interior." IHS's Response to Objections Raised by Tribe, p 5; See Dailey v. Billings Area Director, Bureau of Indian Affairs, 34 IBIA 128, 129 (1999). In Dailey, an appellant argued that he was entitled to interest from the Bureau of Indian Affairs (BIA) because BIA's actions had delayed the receipt of funds which were due him. IBIA interpreted the appellant's argument to mean that he was seeking money damages, and concluded that it had "not been delegated authority to award money damages against BIA." Dailey supra, 34 IBIA at 129.

Although this forum does have the authority to order specific performance, an award of interest would not involve specific performance. The contract does not require IHS to make

interest payments to the Tribe, except under circumstances where the Prompt Payment Act would apply. See Motion for Summary Judgment, Ex A (Contract, at Article II, section 6(B) (iii) (p 5)). And as IHS points out, the Prompt Payment Act does not require that interest be paid when the delay in making a payment is the result of a dispute over the amount of payment. The dispute in this case concerns the amount of money the Tribe was due in 1997. Therefore, the Prompt Payment Act does not require that interest be paid in this case, and neither does the contract. Funds are not “due” unless and until the declination appeal is decided in favor of the Tribe.

Although the ISDA states that contracting tribes are not “held accountable for interest received,” the statute does not require agencies to pay interest to contracting tribes or include such provisions in the terms of the model contract. See 25 U.S.C. §§ 450j(b), 450l(c). The statute does not grant contracting tribes a “right” to obtain interest. Instead, it relinquishes any claim the United States might have to such interest. Therefore, the terms of the ISDA do not lead to the conclusion that interest payments are required under an ISDA contract, or that requiring specific performance of such a contract would include the payment of interest for payments withheld over a dispute.

As set forth above, this forum holds that IHS did not properly decline the Tribe’s proposed 1997 AFA. To the extent the Tribe has been damaged by loss of interest as a result of that improper declination, its remedy must be found in the federal court system. See 25 U.S.C. § 450m-1(a).

#### The Tribe Was Paid its Full Share in Headquarter’s Funds in 1997

On appeal, the Tribe objected to this forum’s finding that the Tribe had already received the full amount of the Headquarter’s share it was owed in 1997, and that IHS therefore did not owe the Tribe any money with regard to the 1997 Headquarter’s share. See Recommended Decision, p 17. The Tribe correctly states that this statement in the Recommended Decision was made in reliance on the following statement by IHS:

The CAN’s Office of Environmental Health and Engineering (OEHE) recently completed a “Project Summary Document” that identifies \$57,153 as available to the Tribe in FY 1997 for facilities maintenance and improvement (M & I). . . . In addition, the CAI has identified \$12,527 as available to the Tribe in FY 1997 for equipment replacement. (Although distributed by the Areas, both the M & I funds and the equipment replacement funds are considered IHS Headquarters funds for purposes of tribal share funding.) With the addition of these two sums to the Tribe’s CY 1997 [sic], which is currently in the process of being completed, the Tribe will have a received a total of \$110,137 in IHS Headquarters funding for administrative functions, or \$9,538 more than the amount (\$100,499) the Tribe itself claims it is entitled to receive in IHS Headquarters funding for CY 1997.

IHS's Opposition to Summary Judgment, p 14 n 9.

The Tribe argues that IHS improperly calculated the amount the Tribe ultimately received for its Headquarters share under section 2(D) of the proposed 1997 AFA. Tribe's Objections to Recommended Decision, p 5. Specifically, the Tribe notes that IHS included Maintenance and Improvement (M & I) funds in its calculations, and states that M & I funds "are not properly included within the calculation of Headquarter's shares." *Id.*<sup>15</sup> As support for this statement, the Tribe relies on the Declaration of Robert Marsland, a former Director of Headquarters Operations for IHS. Mr. Marsland states that based on his recollection, M & I funds "have always been allocated to Area Offices," and that they are "traditionally treated as Area Office funds." Tribe's Response to Questions Posed by the DAB (May 17, 2001 filing), Declaration p 3 (¶¶s 4 and 6). The Tribe goes on to argue that other types of funds should not be included in the calculation of the amount received for the Tribe's Headquarter's share under section 2(D) of the proposed 1997 AFA. Tribe's Supplemental Response (May 22, 2001 filing), pp 9-10. Therefore, the Tribe argues, it only received \$53,102 of the \$100,499 it should have received under section 2(D) of the proposed 1997 AFA.

For its part, IHS asserts that the Tribe's argument is contradictory, because the Tribe is arguing both that non-recurring funds are a part of the 1997 Headquarter's share and that certain types of non-recurring funds should not be a part of that share. IHS's Opening Brief on Remand, p 23. IHS also points to a decision issued in response to a Contract Disputes Act (CDA) claim filed by the Tribe, in which the Tribe claimed among other things that it had not received full payment for its Headquarters share pursuant to the 1996 AFA. *See* IHS's Opening Brief on Remand, Ex G. IHS claims that this decision stands for the proposition that IHS never agreed to pay the Tribe its full share of program formula funds under section 2(E) of the 1996 AFA, and additional amount of program formula funds under section 2(D) of the 1996 AFA. IHS's Opening Brief on Remand, p 23.

In response, the Tribe claims that the CDA decision relied on by the IHS does not contradict its position, because that decision established that the Tribe would be owed a minimum of \$100,499, which would include program formula funds. Tribe's Response Brief on Remand, p 15. The Tribe further argues that section 2(E) requires that the Tribe be paid any additional program formula funds which the Tribe might be entitled to receive. *Id.* Finally, IHS responds that the CDA decision makes clear that in 1996, M & I funds were included as part of the \$100,499 the Tribe was to receive under section 2(D) of the 1996 AFA. IHS's Reply Brief on Remand, pp 8-9.

The starting point for analyzing this issue is to determine the intent of the parties when they drafted the 1996 AFA. If the parties intended to include all types of non-recurring funds as a portion of the \$100,499 the Tribe was to receive under section 2(D) of the 1996 AFA, then this would have also been the Tribe's proposal in 1997, because that proposal mirrored the 1996

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<sup>15</sup> Maintenance and Improvement funds are a subset of non-recurring funds. *See* Joint Stipulation, Exhibit B.

AFA. On the other hand, if the parties intended to include only certain types of non-recurring funding as a portion of the \$100,499, then that intent should carry over to 1997.

The plain language of the 1996 AFA does not explicitly state that the \$100,499 set forth in section 2(D) includes only certain types of program formula funding, and in fact does not discuss program formula funding at all. See Tribe's MSJ, Ex C p 3. Rather, the 1996 AFA merely states that the "Tribe shall be paid funds for IHS Headquarters Tribal Shares in the amount of \$100,499." The parties have, however, agreed from the start that the \$100,499 includes program formula funding. For example, IHS made the following statement in an early filing:

Since the spreadsheet attached to the Tribe's AFA No. 2 clearly identified only \$43, 975 as available from the IHS Headquarters TSA pool for FY 1996, the balance of \$100,499 identified in section 2(D) had to be "program formula" funds, since these are the only other funds available from IHS Headquarters for tribal administrative PFSAS.

IHS's Opp. to MSJ, p 13. In its initial filing, the Tribe made a similar statement:

In Calendar Year 1996, the parties agreed to identify in section 2(D) of the AFA an amount due which included all recurring funds (from the tribal size adjustment (TSA) pool) and some of the non-recurring funds (the program formula (PF) pool) available for distribution to the Tribe.

Tribe's MSJ Memo, pp 8-9 n 2. Until now, however, the Tribe has not attempted to differentiate between the various subsets of program formula funds.

However, the CDA decision provides some illumination. According to this decision, in 1995 the Tribe received a total of \$100,499 "for the Tribe's IHS Headquarters CY 1995 tribal shares." IHS's Opening Brief on Remand, Ex G p 2. This amount included a number of types of program formula funds, including "OEHE M & I." Id. "Thus, when the IHS Headquarters identified \$100,499 in section 2(D) of the CY 1996 AFA as being available to the Tribe for IHS Headquarters shares, it did so with the understanding that this amount would consist of both TSA pool funds and program formula funds." Id. (emphases in original).

The Tribe has not disputed this version of events. Because the total amount of the 1995 Headquarter's tribal share included M & I funds, and because the \$100,499 set forth in the 1996 AFA is based on the 1995 total, it follows that the parties did not intend to exclude M & I funds as part of the \$100,499 set forth in section 2 (D) of the 1996 AFA.

This forum accepts the Tribe's and Mr. Marsland's assertion that M & I funds are not generally considered to be a part of the Headquarter's share. However, IHS's general policy with regard to how M & I funds are categorized, although relevant, is not dispositive. The key is what the parties specifically intended to include in the Headquarter's share in 1997 for this

particular contract. If the parties based the \$100,499 figure on the 1995 total, as seems almost certain barring a very strange coincidence, then the parties did not intend to exclude M & I funds as a part of the \$100,499 figure.

With regard to the other funding categories the Tribe claims should be excluded, this forum can discern no basis for doing so. See Tribe's Supplemental Response, pp 9-10. Although not all of these categories were included as part of the 1996 total, the record contains no basis for distinguishing these categories from other types of non-recurring funding. At any rate, this forum's finding concerning the M & I funds makes it unnecessary to decide whether the additional categories should be excluded, because the M & I funds alone take the Tribe's total award for section 2(D) to the \$100,499 mark.

Therefore, this forum agrees with its finding in the Recommended Decision that the Tribe has been paid the full amount of Headquarter's funding for 1997.

In conclusion, with regard to the remedy, IHS owes the Tribe \$20,800, or the difference between the amount the Tribe should have received for its Area Office Share under the proposed 1997 AFA and the amount the Tribe actually received in 1997. See Tribe's MSJ Memo, Ex C p 2; Joint Stipulation, Ex A. IHS does not owe the Tribe any additional amount for the Tribe's 1997 Headquarter's share.

### CONCLUSION

For the above reasons, this forum recommends that IHS's partial declination of the Tribe's proposed 1997 AFA be **REVERSED**.

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address:

Departmental Appeals Board  
U.S. Department of Health and Human Services  
Room 637-D, Humphrey Building  
200 Independence Ave., S.W.  
Washington, DC 20201.

You shall serve copies<sup>16</sup> of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files

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<sup>16</sup> As in original (25 C.F.R. § 900.165(b)). Probably intended to be "a copy." At any rate, only one copy need be served on this forum in the event of an appeal.

