



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

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

Docket No. IBIA 97-89-A (12/09/2002)

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, 12/14/2001

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



United States Department of the Interior

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HEARINGS DIVISION
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| SUSANVILLE INDIAN RANCHERIA |) | DOCKET NO. IBIA 97-89-A |
| Appellant |) | (HHS DAB DOCKET NO. A-02-30) |
| |) | |
| vs. |) | |
| |) | |
| DIRECTOR, CALIFORNIA AREA OFFICE, |) | |
| INDIAN HEALTH SERVICE |) | |
| Appellee |) | |

DECISION ON APPLICATION FOR FEES AND EXPENSES, ON REMAND

On March 7, 2002, the Susanville Indian Rancheria (hereinafter, “the Tribe”) applied for an award of fees and expenses incurred in connection with the above-captioned appeal. The Indian Health Service (IHS) filed an answer to the application, and the parties have each filed additional briefs concerning the application.

This forum issued its Decision on Application for Fees and Expenses on August 16, 2002, which denied the Application based on this forum’s finding that the Tribe had not signed the application. This decision was appealed to the Departmental Appeals Board for the Department of Health and Human Services, which reversed this forum’s decision and remanded for further proceedings.

Soon after receiving the application, this forum issued an Order requiring the Tribe to file a net worth exhibit. In its filing on appeal, IHS argued that this forum “had neither the discretion nor the authority” for allowing the Tribe additional time to file its net worth exhibit. IHS’s Response to Board’s Letter, p 5. The Board did not directly address the net worth exhibit issue in its decision to remand, perhaps because this forum’s recommended decision to reject Appellant’s EAJA application was based solely on the issue of whether Appellant had submitted a signed application. In view of the fact that this issue has already been briefed before the Board, this forum expresses no opinion as to whether the Board has made an implicit finding that the net worth exhibit issue does not preclude the further countenancing of Appellant’s application. But because this issue is jurisdictional in nature, this forum recognizes that its analysis in this decision may be moot if it should be determined upon any appeal that this forum had “neither the discretion nor the authority” to allow the Tribe additional time to file the required net worth exhibit.

Having considered the Tribe’s application and the subsequent related filings, and for the reasons set forth below, this forum has decided that the Tribe is entitled to an award of fees and expense in the amount of \$71,147.96.

Background

The procedural and factual background for this case is discussed extensively in the two Recommended Decisions issued by this forum and the two Decisions issued by the Departmental Appeals Board for the Department of Health and Human Services (the Board). That background will not be repeated here, except to the extent necessary in the discussion section below.

On December 14, 2001, this forum issued its Recommended Decision on Remand, finding that IHS's partial declination of the Tribe's proposed Annual Funding Agreement (AFA) for 1997 should be reversed. IHS appealed. On February 6, 2002, the Departmental Appeals Board for the Department of Health and Human Services (the Board) issued its Decision on Review of Recommended Decision of Administrative Law Judge, which affirmed this forum's conclusion in the Recommended Decision on Remand that IHS owed the Tribe additional funds for the Tribe's 1997 Area Office share.

Analysis

Under the Equal Access to Justice Act (EAJA), a prevailing party in an adversary adjudication is entitled to "fees and expenses incurred by that party in connection with that proceeding," unless the adjudicative officer makes certain findings. 5 U.S.C. § 504(a)(1). EAJA applies to appeals brought under the Indian Self-Determination and Education Assistance Act (ISDA). 25 CFR 900.177. EAJA claims in ISDA cases are subject to the Department of the Interior's EAJA regulations found at 43 CFR Part 4, Subpart F. See 25 CFR 900.177; 43 CFR 4.601-4.619.

Courts and commentators have identified at least two related purposes of EAJA. The first is to encourage "relatively impecunious private parties to challenge unreasonable or oppressive government behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. NLRB, 712 F.2d 539, 549 (D.C. Cir. 1983), cert. den. 466 U.S. 936 (1984). The second is to "deter wrongful behavior by federal officials and regulators, 'anticipat[ing] that the prospect of paying sizable awards of attorneys' fees when they overstepped their authority and were challenged in court would induce administrators to behave more responsibly in the future.'" Gregory C. Sisk, The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One), 55 La. L. Rev. 217, 225 (1994), quoting Spencer, supra, 712 F.2d at 550.

With regard to decisions on EAJA applications, the regulations provide:

The adjudicative officer shall promptly issue a decision on the application which shall include proposed written findings and conclusions, and the reasons or basis therefore, on such of the following as are relevant to the decision:

- (a) The applicant's status as a prevailing party;
- (b) The applicant's qualification as a "party" under 5 U.S.C. 504(b)(1)(B);

- (c) Whether the Department's position as a party to the proceeding was substantially justified;
- (d) Whether special circumstances make an award unjust;
- (e) Whether the applicant during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and
- (f) The amounts, if any, awarded for fees and other expenses, with reasons for any difference between the amount requested and the amount awarded.

43 CFR 4.616. In general, IHS focuses its arguments on its assertion that its position was substantially justified, and argues that if fees are awarded, the amount of fees requested by the Tribe should be reduced for a variety of reasons. Therefore, this forum finds that 43 CFR 4.616 (c) and (f)¹ are relevant to this proceeding, and this decision will focus on those sections.

Substantial Justification

A prevailing party in an adversary adjudication is not entitled to an award of fees and expenses if the "position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). The burden of proof is on IHS to show that its position was substantially justified. See Yang v. Shalala, 22 F.3d 213, 217 (9th Cir. 1994).

Although the term "substantially justified" is not defined by the statute, the term "position of the agency" is defined as follows: "'position of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(1)(E). Therefore, when determining whether IHS's position was substantially justified, this forum must consider IHS's rationale in the original decision under appeal, as well as its position in the subsequent litigation. See Gutierrez v. Barnhart, 274 F.3d 1255, 1259 (2001) (applying similar language in 28 U.S.C. § 2412(d)(2)(D)).

The Supreme Court has defined the term "substantially justified" as "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In other words, "[a] substantially justified position must have a reasonable basis in law and fact." Gutierrez, supra, 274 F.3d at 1258. The determination regarding whether a position is substantially justified is made considering the position of the government as a whole. Id., at 1258-59.

One of the factors in determining whether a position is substantially justified is the extent to which it involves questions of first impression. See Kali v. Bowen, 854 F.2d 329, 332 n. 2 (9th

¹Although IHS argues that the discrepancy between the amount of fees requested and the monetary relief achieved by the Tribe makes any award unjust, this forum views this argument as going to the extent to which any award should be reduced based on the results achieved.

Cir. 1988); Marcus v. Shalala, 17 F.3d 1033, 1037 (7th Cir., 1994). However, “there is no per se rule that EAJA fees cannot be awarded where the government’s litigation position contains an issue of first impression.” Gutierrez, supra, 274 F.3d at 1261.

With these basic concepts in mind, this forum will now analyze IHS’s position first in the underlying decision and then in the subsequent litigation.

1. IHS’s Position in the Underlying Decision

The decision which was the subject of the underlying appeal was IHS’s partial declination of the Tribe’s proposed 1997 AFA. See Tribe’s MSJ Memo, Ex G. The decision, issued on January 16, 1997, was in two parts. The first part dealt with the Tribe’s Area Office shares. In this part, IHS noted that the Tribe had asked for the same amount of funds as it received in 1996 for its Area Office shares – “\$88,100 (less buy backs),” but decided to award the Tribe \$59,800 instead. IHS went on to analyze sections 106(a) and 106(b)(2) of the ISDA. See 25 U.S.C. §§ 450j-1(a); 450j-1(b). Tribe’s MSJ Memo, Ex G. IHS’s rationale was that even though none of the statutory criteria for reducing contract funding applied, the reduction in funding it proposed was not a reduction of funds which were “required by” section 106(a). See 25 U.S.C. § 450j-1(b) (restricting reduction of “amount of funds required by [25 U.S.C. § 450j-1(a)]”). Therefore, IHS concluded that the partial declination was appropriate pursuant to 25 U.S.C. § 450f(a)(2)(D).

More specifically, IHS found that in prior years, the Tribe’s share of Area Office funds had been based on incorrect assumptions and calculations. Although IHS had included funds for a Youth Regional Treatment Center and Model Diabetes Program, IHS found that these funds should not continue to be included because Congress had earmarked them for specific purposes. Id., p 2. Furthermore, IHS found that the Tribe’s share of the remaining funds had been calculated using an incorrect residual.² Because it had determined that the residual should be higher, IHS found that the Tribe’s share of the remaining funds should be lower. Id., p 3.

Nowhere in its rationale for reducing the Tribe’s Area Office shares does IHS reference the language in 25 CFR 900.32. Under this provision, IHS may not “decline any portion” of a successor AFA if it is “substantially the same as the prior annual funding agreement.” Less than three months earlier, on October 31, 1996, IHS wrote the Tribe, stating in part: “Because there are no changes to your current AFA it will be processed as a successor annual funding agreement under the requirements of 25 CFR . . . 900.32.” Tribe’s MSJ Memo, Ex F. In light of this explicit acknowledgment that 25 CFR 900.32 applied to the Tribe’s proposal, IHS’s subsequent failure to even reference that provision in its declination decision was unreasonable, and

² IHS defines “residual” as : “Those activities, functions, and services necessary for the United States government to [fulfill] and maintain its moral and legal responsibilities based upon treaties, statutes, and Executive Orders and which must be carried out by Federal officials.” IHS’s Opp. to MSJ, Ex 1 p 4.

therefore not substantially justified. See Cornella v. Schweiker, 728 F.2d 978, 985 (8th Cir. 1984) (“It was not reasonable for the Secretary to ignore her own regulations.”).

Furthermore, this failure to consider the applicable regulatory provision taints the statutory analysis IHS includes in its decision. Regulations have the force and effect of law. Batterton v. Francis, 432 U.S. 416, 425 n. 9 (1977). As the Board states in its February 6 Decision:

Regardless of the merits of the interpretation of section 106(b)(2) that IHS advanced in this appeal, HHS and the Department of the Interior have promulgated a regulation to implement section 106(b)(2) at 25 CFR 900.32, and HHS is bound by the terms of that regulation . . .

Board’s February 6 Decision (Application for Attorney Fees, Ex C), p 9. When an agency promulgates a regulation implementing a statutory provision, it is not free to reinterpret that statutory provision, in the context of an administrative decision, without even considering the implementing regulation.

The second part of IHS’s decision dealt with the Tribe’s Headquarters shares. Although the 1996 annual funding agreement (hereinafter, AFA # 2) had identified \$100,499 as being available to the Tribe for its Headquarters share, IHS decided that the 1997 AFA should identify only \$40,457 for the Tribe’s Headquarters share. The Tribe had not proposed any changes to the amount for Headquarters shares set forth in section 2(D) of AFA # 2. Tribe’s MSJ Memo, Ex C, p 3. Nevertheless, IHS once again proceeded to deny the Tribe’s proposed funding level without even considering the applicable regulatory provision. As with IHS’s partial declination of the Tribe’s Area Office share, this failure to consider an applicable provision is itself unreasonable, and not substantially justified.

Accordingly, this forum finds that IHS’s position in the declination decision, which is the action “upon which the adversary adjudication is based,” was not substantially justified.

2. IHS’s Position in the Litigation

The Tribe raised 25 CFR 900.32 in its Motion for Summary Judgment, arguing that this provision was contrary to IHS’s declination because it required approval of a substantially similar successor AFA. See Tribe’s MSJ Memo, pp 13-15. The relevant portion of 25 CFR 900.32 is as follows:

Can the Secretary decline an Indian tribe or tribal organization’s proposed successor annual funding agreement?

No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act), and the contract is with DHHS or the BIA,

the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity) . . . is subject to the declination criteria and procedures in subpart E.

In its response to the Tribe's Motion for Summary Judgment, IHS set out its litigation position with regard to 25 CFR 900.32. IHS first stated: "We agree that the Tribe's renewal proposal was substantially the same as its prior AFA." IHS's Opp. to Tribe's MSJ, p 17. Nevertheless, IHS focused its attention on the phrase "to which the contractor is entitled," and asserted: "[S]ection 900.32's prohibition against declinations of renewal proposals is premised on the contractor's receipt of the correct section 106(a)(1) amount in prior AFAs." Id. According to IHS:

Where, as here, the contractor has received an amount of funds in previous years that exceed its section 106(a)(1) amount, then section 900.32 would not prohibit a partial declination in the event the contractor, in its renewal proposal, requested a level of funding that exceeded the amount of funds 'to which the contractor is entitled.'

Id. Thus, IHS argued that even if a successor AFA was substantially the same as the prior AFA, IHS retained the flexibility under the regulations to determine "the amount of funds to which the contractor is entitled" and provide the contractor with that amount.

IHS continued to hold this position in its subsequent filings. In IHS's Supplemental Opposition to the Motion for Summary Judgment, IHS argued that the holding of the Departmental Appeals Board in Ninilchik Traditional Council, DAB 1711 (1999) supported its reading of 25 CFR 900.32. IHS's Supplemental Opposition, pp 13-15. IHS once again focused on the phrase "amount of funds to which the contractor is entitled," and asserted its authority to determine this amount in any given year. Id., at 14.

This argument was repeated in IHS's appeal of the Recommended Decision:

. . . [S]ection 900.32's prohibition against declinations of renewal proposals is premised on the contractor's receipt of the correct 25 U.S.C. § 450j-1(a)(1) amount in prior AFAs, the 'amount of funds to which the contractor is entitled.' A tribal contractor is only legally entitled to receive the 25 U.S.C. § 450j-1(a)(1) amount, that is what the Secretary otherwise would have spent on the operation of the contracted program.

Where, as here, the contractor has received an amount of funds in previous years that exceed its 25 U.S.C. § 450j-1(a)(1) amount, then section 900.32 would

not prohibit a partial declination in the event the contractor, in its renewal proposal, requested a level of funding that exceeded the amount of funds ‘to which the contractor is entitled.’

IHS’s Objection to Recommended Decision, p 19. IHS argued that this forum’s interpretation of 25 CFR 900.32 was “contrary to the overriding purpose of the ISDA.” *Id.*, at 19.

In the Recommended Decision, this forum found that IHS’s reading of the regulation “robs it of any meaning at all.” Recommended Decision, p 14. Nothing IHS has stated in its filings since that time has changed that conclusion. No reasonable person, attempting an objective interpretation of 25 CFR 900.32, would come to the conclusion that IHS was in this case free to decline portions of the proposed AFA which were substantially the same as the prior AFA. IHS’s reading of the regulation takes one phrase, “the amount of funds to which the contractor is entitled,” out of context, and attempts to make that phrase the centerpiece of the provision. In doing so, IHS ignores the initial answer in the regulation, “No,” and the language “the Secretary . . . may not decline . . . any portion of a successor annual funding agreement.”

On appeal from this forum’s Recommended Decision on Remand, counsel for IHS further explained IHS’s interpretation of 25 CFR 900.32 in a telephonic conference:

MS. LEE: * * * [W]e believe that the funding portion is separate from substantially the same language, and so if the tribe is proposing to carry out the same programs, functions, services, and activities that it previously provided, and, therefore, the AFA is substantially the same, then the second part of the secretary’s obligation is then to approve and add to the contract the full amount of funds to which the contractor is entitled.

So our view is that the funding provision is separate, and at that second stage then the secretary makes the determination as to the full amount of funds to which the contractor is entitled.

* * * * *

MR. GARRETT: Now I’m confused. I was thinking at first you were suggesting that there wouldn’t be a declination at all as long as the content of what is being funded remained the same.

MS. LEE: Our view would be if the programs, functions, services, and activities are substantially the same, that there still is the authority to decline the funding portion.

Transcript of January 28, 2002, Telephonic Conference, pp 11-12. Thus, IHS asserted that the regulation should be read as a “two-step” process, which would give the Secretary considerable discretion to determine and vary the proper funding level each year.

The Board firmly rejected IHS's interpretation of 25 CFR 900.32:

There is no support in the language of section 900.32 for the dichotomy which IHS suggests. The regulation excepts from the requirement that the Secretary approve a proposed AFA that is substantially the same as the prior AFA 'funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act.' It necessarily follows from this that other changes in funding levels are subject to this requirement. In addition, the sentence requiring the Secretary to "add to the contract the full amount of funds to which the contractor is entitled" also specifies that the Secretary 'shall approve' and 'may not decline' any portion of a proposed successor AFA that is substantially the same as in the AFA for the prior year. IHS did not persuasively explain how it could approve the proposed Area Office share or Headquarters share while at the same time reducing the funding amount nor why the reduction in funding would not function as a 'declination.'

Board's Decision, pp 10-11. The Board found that the terms of 25 CFR 900.32 were "dispositive of this appeal." *Id.*, at 9.

IHS argues that its litigation position was substantially justified because it involved issues of first impression. IHS's Opp. to Appl., pp 5-6. However, the Ninth Circuit Court of Appeals recently stated in a similar case:

The only issue of first impression we were required to resolve was the impact of a failure to follow a *clear* rule contained in the [agency's] regulations. Thus the government's argument means that whenever it violates its own regulations, or assumably any clear legal rule, for the first time, the private party who succeeds in forcing government compliance nonetheless must be deprived of fees because the government gets an automatic 'first impression' free pass. This position contravenes the purpose of the EAJA, a 'clearly stated objective of [which] is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.'

Gutierrez, *supra*, 274 F.3d at 1262, quoting Ardestani v. INS, 502 U.S. 129, 138 (1991) (emphasis in original). Similarly, this forum finds that IHS is not entitled to an automatic finding that its position was substantially justified because the interpretation of 25 CFR 900.32 was an issue of first impression. Although the extent to which an issue is one of first impression is a factor to consider in deciding whether the position of the agency is substantially justified, in this case IHS did not demonstrate a reasonable effort to consider all of the language of the applicable regulation. Therefore, even though the interpretation of 25 CFR 900.32 was a matter of first impression, IHS's position with regard to that regulation was not substantially justified.

As with IHS's failure to even consider 25 CFR 900.32 in the underlying decision, IHS's failure to reasonably interpret 25 CFR 900.32 during the litigation taints its statutory analysis in the litigation. A reasonable interpretation of an implementing regulation is a necessary prerequisite to a reasonable interpretation of the underlying statute.

3. Conclusion With Regard to Substantial Justification

As set forth above, the determination of whether the position of the agency was substantially justified is determined by viewing the case as a whole. In this case, IHS took many positions on different legal and factual issues. This forum agreed with some of those positions, and others may have been substantially justified even though IHS did not prevail with regard to those issues. However, this forum views IHS's position with regard to its interpretation of 25 CFR 900.32 as being of central importance in this matter. Had IHS heeded the plain language of this regulation, much or all of this litigation could have been avoided, and any portion that remained would have been less convoluted. If IHS had acknowledged at the outset that it could not decline the Tribe's proposal to the extent it was substantially the same as the prior year's proposal, it may well have decided that a declination was not appropriate. At the time IHS made its decision, and early in the litigation, IHS took the position that the Tribe's proposed AFA was in fact substantially the same as the prior year's AFA.

Because IHS's position with regard to the interpretation of 25 CFR 900.32 was not substantially justified in the decision under appeal and in the subsequent litigation, and because the interpretation of 25 CFR 900.32 was of central importance in this matter, this forum finds that IHS has not shown that its position was substantially justified in this litigation.

Amount of Award

Having determined that the Tribe is entitled to at least some award of fees and expenses, this forum must now determine the proper amount of the award. The first step in determining the proper amount of an EAJA award is to determine the "lodestar" amount. Gregory C. Sisk, The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two), 56 La. L. Rev. 1, 107-111 (1995). Put simply, this amount is determined by multiplying the "prevailing market rates for the kind and quality of the services rendered" by the amount of time reasonably expended on the case. 5 U.S.C. § 504(b)(1)(A); Sisk, *supra*, 56 La. L. Rev. at 111. EAJA limits the "prevailing market rate" to a statutory maximum. Once the "lodestar" amount is determined, the next step is to determine whether any adjustments should be made to that amount.

In this case, the Tribe has asked for a total of \$115,946.44³ in fees and expenses. This is based on the current statutory maximum rate of \$125 per hour for attorneys fees for 803.2 hours, plus additional amounts for time spent by law clerks and legislative assistants, fees charged by an expert witness for the Tribe, and expenses. See EAJA App., Ex E p 2.

IHS challenges virtually every aspect of the amount sought by the Tribe. IHS argues that the maximum rate for attorney fees should be \$75 per hour instead of \$125 per hour, because the applicable regulations set the maximum at \$75 per hour. IHS's Opp. to Applic., p 15. IHS also challenges the rates the Tribe seeks for law clerk and legislative assistant time. Id., p 16. IHS further challenges the amount of attorney time sought by the Tribe, arguing that some of it was duplicative and unnecessary. Id., pp 17-20. Finally, IHS argues that the amount should be adjusted downward to reflect what IHS views as the limited relief obtained by the Tribe. Id., pp 11-14, 19-20.

This forum addresses each of these arguments, first by determining the appropriate "lodestar" amount and then by determining the extent to which that amount should be adjusted, if any.

1. The Appropriate Rate for Attorneys, Law Clerks and Assistants

When it was originally passed, EAJA established a maximum rate for attorney fees at \$75 per hour. 5 U.S.C.A. § 504(b)(1)(A) (1996) ("attorney or agent fees shall not be awarded in excess of \$75 per hour"). In 1996, EAJA was amended to change the maximum rate for attorney fees from \$75 per hour to \$125 per hour. 5 U.S.C.A. § 504(b)(1)(A) (2002 Supp.). The Tribe is not automatically entitled to the statutory maximum, but must show that the "prevailing market rate" for the services performed by its attorneys is at least as much as that maximum.

Here, the Tribe has made an adequate showing that the "prevailing market rate" for its services is at least \$125 per hour. Attorney Geoffrey Strommer submitted an affidavit with the application, in which he states in part:

During the course of this appeal, the hourly rate billed to and paid by our clients for whom we provided tribal governmental type services ranged between \$135 and \$225 per hour with the majority paying at least \$170 per hour. * * * The rates of \$135 to \$155 per hour charged to the Susanville Indian Rancheria for services in connection with the case was our negotiated rate in our contracts with the Tribe.

³The original amount requested was \$117,283.94. Since that time, however the Tribe has redacted 10.7 hours of attorney time from its application (10.7 x \$125 = \$1337.50; \$117,283.94 - \$1337.50 = \$115,946.44). See Tribe's Response to IHS's Opposition, Ex C, pp 3-4.

EAJA Application, Ex E p 3 (¶ 7). IHS does not argue that \$125 per hour is in excess of the “prevailing market rate.”

IHS does, however, argue that the \$125 per hour requested by the Tribe for attorney time is improper. IHS bases this argument on the Interior Department regulations implementing EAJA, which, as set forth above, are specifically made applicable to ISDA cases. These regulations were originally promulgated in 1983, and have not been amended since that time. With regard to the maximum hourly rate for attorney time, the regulations mirror the original statutory language, stating:

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that –

* * *

(2) Attorney or agent fees will not exceed \$75 per hour.

43 CFR 4.607(b)(2). IHS argues that the regulatory language limits the maximum rate for attorney time, so that the \$75 per hour limit in the regulation applies. IHS’s Opp. to Appl., pp 15-16. IHS cites to a number of Interior Board of Indian Appeal (IBIA) cases for the proposition that: “The Board lacks authority to overrule, ignore, or declare invalid a duly promulgated regulation.” IHS’s Opp. to App., pp 15-16, quoting Crow Tribe of Montana v. Montana State Director, BLM, 31 IBIA 16, 19 (1997). IHS asserts that this limit does not contradict the statutory language, which now provides for a \$125 per hour maximum, because the \$75 per hour limit set forth in the regulations is not “in excess” of the \$125 per hour limit set forth in the statute. IHS’s Opp. to App., pp 15-16.

The Tribe responds by pointing out that in the 1996 amendment to EAJA, Congress specified that the section raising the fee limit “shall apply” to actions commenced after the date of the amendment. Tribe’s Response to IHS’s Opposition, p 16. The Tribe also counters IHS’s reliance on IBIA caselaw by citing to IBIA cases which stand for the proposition that: “[W]here there are discrepancies between a BIA regulation and a later enacted statute, the statute controls.” Id. (citations omitted). The Tribe also relies on cases from other federal administrative boards, which found that the \$125 rate applied even though a regulation maintained the \$75 rate. Id.

The Tribe has also filed a motion for supplemental authorities, in which it cites to the preamble for a Notice of Proposed Rulemaking recently published by the Department of Health and Human Services. Tribe’s Motion to File Supplemental Authorities. The Tribe points out that the proposed regulations would change the current HHS EAJA regulations by in part raising the regulatory rate from \$75 per hour to \$125 per hour. The preamble states in part: “This notice also reflects the changes by Pub. L. 104-121 [the 1996 EAJA amendments].” 62 Fed. Reg. 52696, 52697 (attached to Tribe’s Motion to File Supplemental Authorities). Since the statutory change, we have been processing fee applications under the current regulations except to the extent that the amended statute requires changes.” 67 Fed. Reg. 52696, 52697 (August 13,

2002). According to the Tribe, this means that HHS has acknowledged that “if current regulations are out of date, the agency should process fee applications pursuant to the statute when that statute requires changes.” Tribe’s Motion to File Supp. Auth., p 1. The Tribe also includes a copy of a recent decision issued by Judge Greenia of the Hearings Division, which applied the statutory \$125 rate.

IHS has responded to this latest motion, arguing that the preamble language is general, and does not specifically state that HHS has been applying the \$125 statutory level instead of the \$75 regulatory level. IHS’s Response to Tribe’s Mot. to File Supp. Auth., p 2. IHS repeats its argument that the \$75 regulatory level is consistent with the \$125 statutory level, because the statute sets a maximum level, not a minimum. *Id.*, p 1. IHS also urges this forum not to follow Judge Greenia’s recent decision, arguing that the decision ignores the regulatory limit. *Id.*, p 3.

Finally, the Tribe filed a further brief, stating in part:

[T]he only logical conclusion is that the new rate applies. The purpose of the law is to set a ceiling on rates that may be reimbursed under the EAJA, not to give the agency discretion to set any rate it wishes. * * *

[I]f the agency’s position were correct, it would have the discretion to set the rate at any level it considers reasonable, be it \$10 or even zero.

Tribe’s Reply to IHS’s Response, p 2. The Tribe also repeats its argument that the statute states that the new provision “shall apply.” *Id.*, pp 1-2.

The Tribe has the better argument here. The statutory maximum for attorney fees, which began at \$75 per hour and was amended in 1996 to \$125 per hour, must be read in context. The primary requirement for attorney fees is that those fees are to be based on “prevailing market rates for the kind and quality of services furnished.” See 43 U.S.C. § 504(b)(1)(A); 43 CFR 4.607(b). The statutory maximum limits the prevailing market rate. Thus, if the prevailing market rate is lower than the statutory maximum, then it is the prevailing market rate which is used. On the other hand, if the prevailing market rate is equal to or higher than the statutory maximum, then the statutory maximum applies to limit that amount.

However, as the Tribe points out, the phrase “shall not be awarded in excess” can not reasonably be interpreted to mean that agencies are free to set lower maximums in their regulations. In other words, where Congress has dictated that attorneys fees shall be awarded at the prevailing market rate or \$75 per hour, whichever is lower, as it initially did when it passed EAJA, agencies are not free to say, for example, that attorney fees shall be awarded at the prevailing market rate or \$50 per hour, whichever is lower. To do so is to contradict the statutory language. Logically, then, when Congress changed the statutory maximum from \$75 per hour to \$125 per hour in 1996, agency regulations setting the maximum fee at \$75 per hour became obsolete, because they contradicted the new statutory language.

Therefore, this forum finds that, because EAJA was amended after DOI's EAJA regulations were promulgated, and because the regulation contradicts the statute as amended, the statutory language should control. Floyd Collins v. BIA, 30 IBIA 165, 172 (1997) ("Where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls."). Accordingly, this forum applies the \$125 per hour rate for attorneys fees in determining the lodestar amount.

With regard to the rate for law clerks and legislative assistants, the Tribe is requesting one-half of the rate it charged for attorney time for law clerks, and 3/4 of the rate it charged for attorney time for legislative assistants. EAJA Application, Ex E, p 2 (¶ 6). The Tribe seeks a total of \$5,135.55 for 66.7 hours worth of law clerk and legislative assistant fees. Id. This averages out to approximately \$77 per hour. IHS argues that fees for law clerks or legislative assistants should be no more than \$40 per hour. IHS's Opposition, p 16. Although the Tribe states it is asking for one-half of the attorney fee rate, \$77 per hour is more than one-half of the statutory maximum rate of \$125 per hour. IHS has not shown that one-half of the attorney fee rate is unreasonable for law clerks and legislative assistants, and such a rule of thumb seems reasonable to this forum. Therefore, this forum applies a rate of \$62.50 for law clerks and legislative assistants when calculating the lodestar amount. See Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994) (allowing \$30 per hour); In Re Donovan, 877 F.2d 982, 993, 997 (D.C. Cir. 1989) (allowing \$60-65 per hour).

2. The Appropriate Amount of Hours Charged

The Tribe's EAJA claim includes billing for a total of 803.2 hours of attorney time⁴ and 66.7 hours of law clerk and legislative assistant time. IHS argues in its Opposition that 205.1 hours of the claimed attorney time should not count, primarily because that time involved communication between various attorneys within the law firm ("internal communications") or duplication of effort among the various attorneys who worked on the case. See IHS Opposition, pp 17-19 and Ex A. IHS also argues that the law clerk and legislative assistant time should be eliminated. Id., p 16.

The Tribe responds that with regard to internal communications, "the rule prohibits billing for excessive communications or meetings, not any communications." Tribe's Response to IHS's Opposition, p 20 (emphases in original). The Tribe also argues that although a number of attorneys worked on the case, its attorneys worked on discrete issues and did not duplicate their efforts. Id., pp 20-23.

This forum has reviewed the billing materials submitted by the Tribe, and the detailed response submitted by IHS. While it is true that a number of attorneys worked on this case for the Tribe, it does not appear to this forum that these attorneys duplicated their efforts to any large

⁴The Tribe originally claimed 813.9 hours of billing time, but it has redacted 10.7 hours worth of that time. See note 3, supra.

extent, especially considering the fact that this case involved several distinct rounds of briefing and two separate appeals over a period of several years. Furthermore, a number of complex issues were raised in this matter, so that it is certainly conceivable that several attorneys could work on a particular brief without necessarily duplicating their efforts. Nor does it seem unreasonable that the attorneys communicated with each other during the conduct of the litigation.

Nevertheless, there are instances in the billing record where, for example, three attorneys were consulting with each other when it would appear that two might have sufficed. An example would be a conference call on February 14, 1997, involving three attorneys. See also IHS's Supplemental Opposition, p 15. This forum has therefore decided to reduce the amount of claimed hours for attorneys by 10% to account for duplication of effort, and to account for the amount of time it might have taken the various attorneys to familiarize themselves with the case.

With regard to the time spent by law clerks and legislative assistants, IHS does not set forth any basis for eliminating that time altogether. Courts have allowed such costs to the extent they are reasonable. See In Re Donovan, 877 F.2d 982, 992-93 (D.C. Cir. 1989). In its independent review of the billing records, this forum has not found a basis for eliminating these costs. Indeed, it may be cost effective for a client to have a law clerk researching a discrete issue at a lower rate than an attorney would charge. Id. Therefore, this forum has decided to allow the claimed number of hours for law clerks and legislative assistants, except for a similar 10% reduction to account for duplication of effort.

IHS also argues that the Tribe should not be allowed to recover for attorney fees for the amount of time spent pursuing the Headquarters claim, because it ultimately did not receive any additional Headquarters funds as a result of the litigation. IHS's Opposition, pp 11-14. The claim for Headquarters funds, however, involves many of the same facts and legal issues as the claim for Area Office funds. Therefore, this forum does not deem it appropriate to separate the Headquarters claim from the Area Office claim in determining the amount of hours reasonably spent on this case by the Tribe's attorneys. See Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 595-96 (3rd Cir. 1984). This forum will address this question below, as part of its determination with regard to whether and to what extent the "lodestar" figure should be reduced based on the result obtained by the Tribe.

Finally, IHS argues that the Tribe should not be awarded attorneys fees for the time its attorneys spent arguing that interest should be awarded in this matter, either because the Prompt Payment Act applied or for other reasons. IHS's Opposition, pp 19-20. As with the claim for Headquarters funds, however, this forum does not view the claim for interest as being so separate that it amounts to an unrelated claim which should be treated separately, so that the Tribe would not be deemed to be a prevailing party with regard to that claim and the hours spent on that claim would be disallowed in their entirety. Instead, as with the Headquarters claim, this forum will address the claim for interest as part of its determination with regard to whether and to what extent the "lodestar" figure should be reduced based on the result obtained by the Tribe.

3. Expenses

EAJA allows for an award of expenses as well as an award of attorneys fees. 5 U.S.C. § 504(a)(1). In addition to attorneys fees, the Tribe has applied for an award of \$5,766.89 in “attorney expenses.” Application, p 8 and Ex E, ¶ 6. The Tribe breaks down these expenses into certain categories, such as “long distance calls” and “photocopies,” and sets forth the amount spent on each category for each monthly billing statement. Application, Ex E, Att 2.

IHS argues that the Tribe’s claim for expenses should be reduced because “[t]he Tribe’s counsel has not itemized the expenses in the same manner as the attorney fees, making it an impossible task to discern which expenses have been charged for this case.” IHS’s Opposition, p 20. IHS also objects to the Tribe’s use of a percentage rate.

The Tribe responds that IHS is demanding more specificity than is needed for a fee application under EAJA. Tribe’s Response to IHS’s Opposition, p 24. For some of the months, the Tribe calculated the expenses for this case by multiplying its total expenses for the month by the percentage of time the attorneys spent on this case, as opposed to other matters for the Tribe. *Id.* The Tribe asserts that this is a reasonable method which is “in accord with industry practice.”

Another Administrative Law Judge within the Hearings Division recently dealt with this issue in St. Regis Mohawk Tribe v. IHS, IBIA 99-40-A-EAJA, IBIA 00-57-A-EAJA, and IBIA 01-88-A-EAJA, October 2, 2002. *See* Tribe’s Motion to File Supp. Authorities, Second Attachment. In this decision, which involved the same law firm, the ALJ found that the expenses were not set forth with sufficient specificity, and that the law firm’s method of applying a percentage to total expenses was “insufficient for the purposes of EAJA and the awarding of expenses.” *Id.*, p 6 (citations omitted). The ALJ denied the request for expenses in its entirety.

IHS does have a point with regard to the lack of specificity in the request for expenses. Furthermore, the “percentage” method used by IHS for some of the months carries with it the risk that other matters might have had a disproportionate emphasis on expenses, so that the government would end up paying for expenses which are not properly assigned to this case. On the other hand, this was a complicated case with numerous filings, and the Tribe’s attorneys did undoubtedly incur a number of legitimate expenses. Accordingly, this forum has decided to reduce the request for expenses by 50%, but not to deny the request in its entirety. Expenses shall therefore be allowed in the amount of \$2883.45.

5. Expert Witness Fees

The Tribe also requests an award of \$4,644.00 as reimbursement for expert witness fees paid to Robert Marsland. Mr. Marsland, who worked for IHS for 26 years and served as the “Director of Headquarters Operations” for five years, primarily helped the Tribe with understanding the calculation of tribal shares and residuals. IHS has not opposed this aspect of

the Tribe's application in its filings. Given Mr. Marsland's extensive experience and the complexity of issues related to tribal shares and the residual in this matter, this forum finds the amount requested for Mr. Marsland to be reasonable. Accordingly, the request for \$4,644.00 is granted in full.

6. The Lodestar Amount

Accordingly, in determining the lodestar figure, this forum recognizes 722.9 hours ($803.2 \times 0.10 = 80.3$; $803.2 - 80.3 = 722.9$) of attorney time at a rate of \$125 per hour, which equals \$90,362.50. This forum also recognizes 60 ($66.7 \times 0.10 = 6.7$; $66.7 - 6.7 = 60$) hours of law clerk and legislative assistant time at a rate of \$62.50 per hour, which equals \$3,750.00. In addition, this forum recognizes \$2883.45 in expenses and \$4,644 in expert witness fees. The total lodestar amount recognized is \$101,639.95 ($90,362.50 + 3,750.00 + 2883.45 + 4,644.00 = 101,639.95$).

7. The Extent to Which the Lodestar Figure Should Be Reduced, Based on the Result Obtained

Under EAJA, only "reasonable" attorney's fees are to be awarded. 5 U.S.C. § 504(b)(1)(A). The Supreme Court has held that in determining what fees are "reasonable," the "most critical factor" is the extent of the applicant's success. See Hensley v. Eckerhart, 461 U.S. 424, 436 (1982); Sisk, supra, 56 La. L. Rev. at 123. In determining how the degree of success should affect the fee award, courts have tended to avoid strict mathematical ratios based upon, for example, the amount of money obtained as a result of the action. See City of Riverside et al. v. Rivera et al., 477 U.S. 561, 574 (1985) ("We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers."); Sisk, supra, 56 La. L. Rev. at 123.

IHS argues that the Tribe achieved limited success, because it did not receive any additional amount for its Headquarters share:

While the Tribe sought an additional \$11,300 in Area Office tribal shares, it was seeking an additional \$60,000 in Headquarters tribal shares. * * * To the extent this Board awards attorney fees, this Board should proportionally allocate the attorney fees between the claim for which the Tribe recovered additional funding (the Area Office shares) and the claim on which the Tribe did not recover any additional funding (the Headquarters tribal shares), and disallow the latter.

IHS's Opposition, p 14. In a separate but related argument, IHS argues that the \$11,300 recovery for the Tribe is disproportionate to the amount requested for attorneys fees.

In response, the Tribe asserts that EAJA does not mandate that fee awards be proportionate to monetary recoveries, and argues that the hours expended by its attorneys were necessary to achieve recovery. Tribe's Response to IHS's Opposition, p 11. The Tribe warns of "an expensive IHS war of legal attrition" in which Tribes attempting to obtain relatively small

recoveries would be unable to “vindicate their legal rights.” *Id.*, p 12. The Tribe also argues that it obtained more than a monetary victory, because the ruling it obtained has significant precedential value. *Id.*, pp 12-14.

In its Motion for Summary Judgment, the Tribe sought findings that IHS had violated 25 CFR 900.32 and 25 U.S.C. § 450j-1(b) when it partially declined the Tribe’s proposed 1997 Annual Funding Agreement. Tribe’s Motion for Summary Judgment. The Tribe asked that it be awarded an additional \$11,300 in Area Office funds and an additional \$60,042 in Headquarter’s funds, as well as interest on those funds from January 1, 1997.

The results achieved by the Tribe were mixed. The Tribe was awarded an additional \$11,300 in Area Office funds, and received clear findings from this forum and from the DAB that IHS violated 25 CFR 900.32 when it partially declined the Tribe’s proposal for Area Office funds. Board’s Decision of 2/06/02, pp 7-14; Recommended Decision, pp 14-15, 17. The Tribe did not receive an additional award of Headquarter’s funds through this litigation, because this forum found that the Tribe had already received the required amount of Headquarter’s funds in 1997, after the Tribe’s initial appeal was filed.

The question of whether the Tribe ultimately received a finding that IHS violated 25 CFR 900.32 with regard to Headquarter’s shares, and the question of whether the Tribe ultimately received a finding that IHS violated 25 U.S.C. § 450j-1(b) with regard to Area Office and Headquarter’s shares, are both more complex. The Tribe did receive those findings from this forum. Recommended Decision on Remand, pp 13-14, 17-18; Recommended Decision, pp 11-15. However, the complexity lies in determining the extent to which this forum’s findings were modified on appeal.

The DAB did not reach the question of whether IHS violated 25 CFR 900.32 when it partially declined the Headquarter’s share, because it found that the Tribe would have no remedy even if IHS had violated the regulation. DAB’s Decision, p 15. The Board noted that the Tribe had not appealed this forum’s finding that the Tribe had already been paid the full amount it was owed with regard to the Headquarter’s share, and that this finding was therefore final. *Id.* The DAB also found that it was not necessary to address the merits of this forum’s statutory interpretation, and stated: “[N]othing in this decision should be viewed as either agreeing with the ALJ’s analysis of section 106(b)(2) or as suggesting that the regulatory interpretation of section 106(b)(2) is the only permissible interpretation.” DAB’s Decision, pp 11-12.

The Tribe argues that because the Board failed to specifically modify or reverse this forum’s holding that IHS violated 25 U.S.C. § 450j-1(b), that holding became final and binding on IHS. Tribe’s Response to IHS’s Opposition, pp 7-9. The Tribe relies on 25 CFR 900.167, which provides that an Administrative Law Judge’s decision becomes final unless modified or reversed by an appellate board, and which further provides that the appellate board’s decision should specify which “findings of fact or conclusions of law are modified or reversed. 25 CFR 900.167(c)(2); See 25 CFR 900.167(a). Similarly, the Tribe argues that IHS’s appeal to the Board “failed to result in either a modification or reversal of this forum’s determination that the

IHS's partial declination [of Headquarter's funding] was in violation of the applicable law and regulations." Tribe's Response to IHS's Opposition, p 14.

IHS counters that in the event of an appeal, it is the DAB's decision which is the final decision for the Department. IHS's Supp. Opp., p 11. Because the DAB specifically declined to decide "whether there was a violation of section 106(b) of the ISDA and whether there was a violation of 25 CFR 900.32 regarding Headquarter's shares," IHS argues, the DAB did not adopt this forum's conclusions on those issues. *Id.* Therefore, IHS argues, this forum's conclusions concerning statutory violations and the regulatory violation with regard to Headquarter's shares are not final. *Id.*

The applicable regulations are specifically worded so that if an appellate board does not modify or reverse an ALJ's decision, that decision becomes final. 25 CFR 900.167(a). It is not necessary, as IHS seems to suggest, for the Board to specifically adopt specific findings or conclusions in an ALJ's decision in order for those findings and conclusions to become final. It is only necessary that the Board does not specifically reverse or modify the findings or conclusions. The Board did not specifically modify or reverse this forum's conclusion that IHS violated 25 CFR 900.32 when it partially declined the Headquarter's share, which means that the \$100,499 figure stands as the designated Headquarter's share for 1997. The Board instead determined that it need not reach the question. Similarly, the Board did not specifically modify or reverse this forum's determination that IHS violated the statutory provisions. Although the Board took pains to ensure that its decision was not read as agreeing with this forum's interpretation of the statute, the Board did not specifically modify or reverse that interpretation.⁵

Therefore, the Tribe obtained the substantive findings it sought. It also achieved victories with findings regarding IHS's aggregate funding argument, and regarding IHS's argument that IHS had no funds with which to pay the Tribe.

As set forth above, a determination with regard to lowering the lodestar amount based on degree of success obtained depends to some extent on what the prevailing party hoped to achieve in the litigation. Here, the Tribe hoped to obtain monetary recovery and findings that IHS violated the law and monetary recovery. The Tribe's victory with regard to the findings it achieved was a significant part of its total victory. IHS made a choice in 1997 not to follow its own regulations. The Tribe was forced to conduct a long and protracted litigation in order to bring about that compliance. This is an important ruling not just for the Susanville Rancherica, but for all tribes that negotiate and contract with IHS, because it delivers a strong message to IHS that it must operate within the confines of the statutory and regulatory protections afforded those tribes. Had IHS prevailed with regard to its interpretation of the law, it would have been

⁵That the Board did not specifically adopt this forum's statutory findings means that those findings do not have the precedential impact they would otherwise have had. This does not, however, mean that for purposes of determining the appropriate fee award the Tribe did not achieve the findings it sought.

able to enter into annual negotiations with contracting tribes with the nearly unfettered discretion to decide each year the amounts to which those tribes were entitled. This would have amounted to a significant shift in the balance of power in IHS's direction.

It is necessarily an inexact science to attempt to quantify these results. In Farrar v. Hobby, 506 U.S. 103 (1992), the Supreme Court found that plaintiffs who were awarded nominal damages were not entitled to any fees at all. Justice O'Connor, who provided the deciding fifth vote for the case, explained in a concurring opinion that although the amount of money recovered in a suit was a factor in determining an appropriate fee award, the significance of the legal issues on which the plaintiff prevailed and the public purpose, if any, served by the case should also be considered. Farrar, supra, 506 U.S. at 122-23. In this case, as set forth above, the Tribe has achieved victories on significant legal issues, which should benefit the Tribe and other contracting tribes in the future. On the other hand, the Tribe obtained only about one-seventh of the amount of money it sought. In consideration of these factors, this forum has decided to reduce the lodestar figure by 30%, to \$71,147.96 ($101,639.95 \times 0.30 = 30,491.99$; $101,639.95 - 30,491.99 = 71,147.96$), in order to account for the mixed results achieved by the Tribe.

Accordingly, the Tribe is hereby awarded \$71,147.96 in fees and expenses.

Within 30 days of the receipt of this decision, you may file an appeal of this decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). See 25 CFR 900.177. 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 a copy 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 an appeal of this decision within 30 days, this decision will become final.

Issued at Sacramento, California. Dated: 12/09/2002

//original signed
William E. Hammett