



DEPARTMENT OF HEALTH AND HUMAN RESOURCES APPEALS BOARD

Pascua Yaqui Tribe of Arizona

Docket No. A-99-114; Decision No. 1704 (IBIA Docket No. 98-61-A) (10/12/1999)

Related Indian Self-Determination Act cases:

Interior Board of Indian Appeals decision, 32 IBIA 98

Administrative Law Judge decision, 11/23/1998

Interior Board of Indian Appeals decision, 33 IBIA 88

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Health and Human Services Appeals Board decision, 06/01/1999

Administrative Law Judge decision on remand, 08/18/1999



Departmental Appeals Board  
Appellate Division  
Room 637-D, HHH Building  
200 Independence Avenue, SW  
Washington, D.C. 20201

SUBJECT: Pascua Yaqui Tribe of Arizona      DATE: October 12, 1999  
Docket No. A-99-114  
Decision No. 1704

FINAL DECISION ON REVIEW OF  
RECOMMENDED DECISION  
OF ADMINISTRATIVE LAW JUDGE

The Indian Health Service (IHS) appealed the August 18, 1999 recommended decision by Administrative Law Judge (ALJ) Nicholas T. Kuzmack regarding IHS's partial declination of the proposal of the Pascua Yaqui Tribe of Arizona (Tribe), submitted pursuant to the Indian Self-Determination Act, as amended (ISDA), to contract for health care programs, functions, services and activities (PFSAs) (ALJ Decision). In a prior decision, I upheld the ALJ's finding that IHS clearly demonstrated the validity of its partial declination with respect to almost all of the PFSAs included in the Tribe's proposal. Pascua Yaqui Tribe of Arizona, DAB No. 1692 (June 1, 1999). However, I remanded the case to the ALJ with respect to a component of the Dental Services PFSA. I also remanded the case to the ALJ to make a determination as to the cost of the residual functions of the IHS area office which served the Tribe. IHS appealed the ALJ's finding on remand that IHS failed to clearly demonstrate that its determination of the cost of the residual functions was "reasonable and appropriate," as well as his finding as to what the residual amount should be. IHS raised as threshold issues whether the ALJ had authority to determine the residual amount and whether IHS's determination of that amount was entitled to deference.

For the reasons discussed below, I reject IHS's arguments on the threshold issues, concluding that the ALJ had authority to determine the residual amount and did not err in not giving deference to IHS's determination of that amount. I also conclude, however, that the holding of the ALJ Decision that IHS failed to clearly demonstrate that its determination of the

residual was reasonable and appropriate is supported only in part by substantial evidence in the record. IHS calculated a residual equal to the costs associated with 19.65 full-time equivalent positions (FTEs). I uphold the ALJ's finding that IHS did not clearly demonstrate the validity of its declination with respect to 2.50 FTEs for the contracts branch and .95 FTE for the Division of Health Systems Delivery, and reverse the ALJ's finding with respect to the remaining FTEs included in IHS's residual. Thus, the residual should be 16.20 FTEs (exclusive of the Office of Environmental Health and Engineering).

### Background<sup>1</sup>

IHS operates two types of health care programs for Indian tribes: (1) direct services, where the tribe receives health care services through federally-operated health care facilities, and (2) contract health services, where the tribe receives health care services from private health care providers funded by IHS. Under the ISDA, a tribe may also enter into a self-determination contract with IHS whereby federal funding is provided directly to the tribe for self-administration of the health care PFSAs formerly carried out by IHS for the benefit of the tribe. Certain administrative functions, known as "residual functions," cannot be contracted to a tribe under a self-determination contract, however, but must be performed by IHS. The amount of funding required to carry out the residual functions of an IHS area office, expressed as the number of full-time equivalent positions (FTEs), reduces the amount available under a self-determination contract to tribes in that area office. In addition, the residual amount may affect the availability of funding for health care functions for tribes in the same area office that do not have self-determination contracts.

IHS may decline, in whole or in part, a tribe's proposal to enter into a self-determination contract. However, under the ISDA, IHS has "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 5 U.S.C. § 450f(e)(1). See also, 25 C.F.R. § 900.163.

The Tucson Area Office (TAO) administers health care services for two tribes, the Tribe and the Tohono O'odham Nation, as well as oversees health care services for one non-tribal entity, the Urban Group. In July 1998, the Tribe submitted a proposal to

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A statement of the statutory background, as well as a more complete statement of the factual background, can be found in DAB No. 1692.

enter into a self-determination contract to assume certain PFSAs that were being carried out by the TAO for the benefit of the Tribe. The Tribe proposed a residual of 11.25 FTEs at a cost of \$894,886. The relevant figures here are 10.25 FTEs at a cost of \$814,898, since the higher figures included a residual of 1.00 FTE and \$80,988 for TAO's Office of Environmental Health and Engineering although the Tribe did not propose to contract for the functions carried out by this office. The Tribe based its proposal on the residual for the Nashville Area Office, but did not provide any detailed information about how the calculation was made.

By letter dated October 20, 1997, IHS declined substantial portions of the proposal, stating in pertinent part:

. . . we determined that the TAO's current residual, to be applied in determining [the Tribe's] tribal shares, is 19.65 FTEs and \$1,397,865.70 (which excludes FTEs and funds to TAO's Office of Environmental Health and Engineering, whose functions [the Tribe] has indicated it does not wish to contract at this time).

Letter dated 10/20/97, at 8. In order to arrive at a residual of 19.65 FTEs, IHS relied primarily on a "Functional Analysis Worksheet" completed by each TAO employee on a selected day in 1995 which detailed the functions the employee performed and the hours spent "per year" on each function. IHS Ex. RR. The time data from the worksheets was used to estimate the workload for all functions categorized as residual. Both IHS and the Tribe assumed in calculating the residual that the TAO would be operating in a "100% contracted/compacted environment," meaning that there would be a contract with both tribes to provide all of their own health care services and a contract to service the Urban Group.

The Tribe appealed IHS's partial declination of its proposal, including its declination of the proposed residual. In his April 6, 1999 recommended decision, the ALJ noted that the parties agreed as to what the residual functions were and disputed only the number of FTEs required to carry out the residual functions. However, the ALJ did not resolve this dispute. Instead, he noted that the other entities served by the TAO were not parties to the matter pending before him. He therefore directed IHS to determine the FTEs for the residual functions "either through negotiations with, or issuance of an appealable decision to, all of the interested parties." ALJ Decision at 30.

Both parties appealed the ALJ's disposition of this matter. I found that there was no basis for the ALJ's direction to IHS to

issue a determination on residuals that is appealable by all interested entities since the ISDA provides a right to appeal only where IHS declines a proposed self-determination contract. I therefore remanded the matter to the ALJ "for a determination, based on the evidence currently in the record and any additional evidence the ALJ requires the parties to present, of the appropriate amount of FTE's to be used to calculate the residuals . . . ." DAB No. 1692, at 29.

On remand to the ALJ, both parties agreed that no further briefing or evidence was necessary and that they would rely on the record of the evidentiary hearing previously held by the ALJ as well as on the briefing they had previously submitted. In his August 18, 1999 recommended decision, the ALJ found that IHS failed to clearly demonstrate that its determination of 19.65 FTEs at a cost of \$1,397,865.70 for the pertinent residual functions was "reasonable and appropriate," and that IHS thus did not clearly demonstrate the validity of the grounds for partially declining the Tribe's contract proposal based on these figures. The ALJ further found that the residual should be 12.51 FTEs for the pertinent residual functions, excluding the functions performed by the Office of Environmental Health and Engineering. The ALJ calculated that \$823,393.93 would be required to fund these FTEs; however, he stated that this figure should be adjusted to reflect any change in costs through the period immediately before the Tribe actually contracts to assume responsibility for the PFSAs in question. The residual here upheld would be subject to the same condition.<sup>2</sup>

### The Current Appeal

In its appeal of the ALJ's August 18, 1999 recommended decision, IHS took the position that the ALJ improperly assumed the authority to determine the amount of the residual. According to IHS, the ISDA merely authorizes the ALJ to determine whether IHS clearly established the validity of its declination of the Tribe's proposal regarding the residual. IHS contended, moreover, that even if the ALJ had authority to determine the residual, the ALJ should have deferred to IHS's determination since this is a matter within IHS's discretion. IHS further contended that the ALJ's determination of the residual was based on "misunderstandings and mischaracterizations of the evidence,"

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The Tribe pointed out that its share of the residual was only 17.88%, so that funding for its self-determination contract would be reduced by only 17.88% of the amount ultimately determined to be residual. Tribe's Post-Hearing Br. dated 9/9/98, at 46.

and thus was not supported by substantial evidence. IHS Objections dated 9/22/99, at 3. I discuss these arguments below.

### Analysis

1. The ALJ had authority to determine the amount of the residual.

I do not find persuasive IHS's argument that the ALJ lacked authority to determine the amount of the residual. IHS would have the ALJ simply determine whether or not IHS properly declined the Tribe's proposed residual. However, the ALJ's authority under the ISDA to determine whether IHS clearly demonstrated the validity of the grounds for declining the proposal reasonably encompasses the authority to determine the extent to which the proposal was properly declined. I see no reason why the Tribe should be compelled to re-submit a proposal on the residual--which could indefinitely delay the implementation of a self-determination contract--if the evidence in the record before the ALJ is sufficient to permit the ALJ to make a determination of the appropriate residual.

Moreover, IHS clearly contemplated that the ALJ would determine the appropriate residual since it submitted extensive evidence in the record before the ALJ in support of the determination of the residual identified in its declination letter. IHS now contends that this evidence "was not offered for the purpose of obtaining the ALJ's stamp of approval, but rather to show, by contrast, the deficiencies in [the Tribe's] calculation of the residual and thereby 'clearly demonstrate' the validity of the declination." IHS Objections dated 9/22/99, at 3. However, IHS could have shown deficiencies in the Tribe's calculation without itself calculating a different residual. Having offered evidence in support of its calculation of the residual, IHS cannot now reasonably complain that the ALJ proceeded to determine the extent to which IHS's partial declination is supported by that evidence.

Furthermore, my June 1, 1999 decision specifically directed the ALJ to determine the appropriate amount of FTEs to be used to calculate the residual, based on the evidence currently in the record and any additional evidence the ALJ requires the parties

to present. IHS did not seek reconsideration of my decision, nor did IHS contend before the ALJ that it would be inappropriate for him to determine the residual. Thus, IHS cannot reasonably object at this juncture to the fact that the ALJ proceeded to determine an appropriate residual once he found that IHS had not clearly demonstrated the validity of its determination of the residual.

2. IHS's determination of the residual was not entitled to deference.

IHS took the position that, even if the ALJ had authority to determine what the residual should be, IHS's determination was entitled to substantial deference. IHS appeared to take the position that the ALJ should defer to its determination as long as it was not unreasonable. This would be wholly inconsistent with the standard of review set out in the ISDA, however. The ISDA provides that IHS must "clearly demonstrate" the validity of the grounds for any decision to decline, in whole or in part, a tribe's proposal for a self-determination contract. The preamble to the regulations implementing the 1994 amendments to the ISDA indicates that this standard requires IHS to show the validity of its declination by more than a "preponderance" of the evidence, although the evidence need not be "clear and convincing." 61 Fed. Reg. 32482, 32497 (June 24, 1996). As part of clearly demonstrating the validity of its partial declination of the Tribe's proposal, IHS necessarily had to clearly demonstrate the validity of its determination of the residual since the residual determines in part the extent of the partial declination.<sup>3</sup> Thus, the ISDA imposes a higher burden on IHS than simply showing that its determination was a reasonable one which was entitled to deference.

In light of the specific standard of review in the ISDA, the general principle cited by IHS, that an ALJ is not to substitute

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IHS questioned whether the ALJ applied this standard, pointing to some wording in the ALJ's August 18, 1999 recommended decision which arguably indicates that the ALJ applied a different standard. However, the ALJ's summary of his findings at the beginning of his decision is couched in terms of whether IHS failed to "clearly demonstrate" that its determination of the pertinent residual functions was reasonable and appropriate, and the wording in his conclusion, "weight of the evidence," is not necessarily inconsistent with this standard. I therefore conclude that this was the standard the ALJ in fact applied.

his or her judgment for that of the agency in reviewing matters within the agency's discretion, is inapplicable here. Moreover, the cases cited by IHS involving contract declinations are also inapposite. IHS relied on the statement in DAB No. 1692 that "there is no suggestion in the ISDA that Congress intended to remove from IHS the discretion it has traditionally retained to decide how to distribute its lump-sum appropriations for the benefit of all of the tribes nationwide." At 15. However, this statement refers to a decision by IHS Headquarters regarding how funds should be allocated among the area offices, not to a decision to decline a proposal for a self-determination contract. IHS also relied on California Rural Indian Health Board v. Shalala, No. C-96-3526-DLJ (N.D. Cal., Aug. 25, 1998). However, the court simply found that IHS did not act arbitrarily or capriciously in changing the residual from an estimated to final amount and did not address the question of what the residual amount should be. Finally, IHS relied on the statement of the ALJ in Pit River Health Services, Inc. v. Indian Health Service, DAB CR333 (1994), that "I do not view my role as adjudicator in appeals from contract declinations as substituting my judgment for the review process required by ISDA." At 28. However, that case is distinguishable on its facts. It raises the issue of whether the ALJ could properly consider new evidence offered by the appellant to support its application to provide contract health services to certain individuals who were not clearly covered or substantiated under the tribe's original proposal; here, however, the Tribe did not ask the ALJ to reverse the declination based on a proposal that differed from what was originally proposed to IHS.

3. There is substantial evidence in the record to support only part of the ALJ's finding that IHS failed to clearly demonstrate the validity of its grounds for declining the Tribe's proposed residual.

As discussed above, IHS had the burden before the ALJ to clearly demonstrate the validity of its partial declination of the Tribe's proposal, including the validity of its determination of the residual. My review of the ALJ's decision on an issue of fact is whether there is substantial evidence in the record as a whole to support the ALJ's finding. Southern Indian Health Council, DAB No. 1687 (1999). Thus, I must determine here whether there is substantial evidence to support the ALJ's finding that IHS did not clearly demonstrate the validity of its determination of the residual. As discussed in detail below, I first conclude that there is no substantial evidence to support the ALJ's findings that the time and effort study used by IHS to determine the residual was not valid. I further conclude that there is no substantial evidence in the record to support the

ALJ's finding that a comparison with another area office was required to determine the residual. However, I nevertheless conclude that the ALJ's finding with respect to the residual for TAO's contracts branch and part of his finding with respect to the Division of Health Delivery Systems are supported by substantial evidence in the record.

There is no substantial evidence in the record to support the ALJ's finding that TAO's time and effort study was not a valid methodology for determining the residual.

The ALJ found that IHS's reliance on the worksheet data from TAO's time and effort study was not justified because of "the acknowledged bias of IHS employees to overestimate the amount of time spent on residual functions . . . ." ALJ Decision at 11 (citations omitted). While the ALJ noted that IHS attempted to minimize the potential for bias by not disclosing the purpose of the worksheets to the employees, the ALJ stated that the hours estimated were "certainly inflated to some extent" because each employee reported working 2,080 hours per year (or 40 hours per week) "as if no time was wasted in each 40-hour work week chatting about or attending to matters unrelated to work." Id.

The ALJ's conclusion that the hours worked on residual functions were overstated on the worksheets is entirely speculative, however. The ALJ did not explain why any potential for bias was not essentially eliminated by the precautions taken by IHS. In addition, even if the total number of hours worked per week were overstated due to time spent on non-work-related matters, this would have resulted in an overreporting of time spent on non-residual as well as residual functions. Moreover, TAO employees would presumably spend comparable amounts of time on any non-work-related matters in a fully contracted environment as well.

The ALJ also found that the hours on the worksheets amounted only to "best guesses" because the employees did not contemporaneously log the hours spent on various functions but rather estimated the hours "based on recollections." ALJ Decision at 11. However, simply because the hours reported were estimates based on the employees' experience rather than a contemporaneous record of how their time was allocated does not mean that there was any tendency to overestimate the time spent on residual functions as opposed to non-residual functions.

Accordingly, I conclude that there is no substantial evidence to support the ALJ's finding that TAO's time and effort study was

not a valid methodology for determining the residual.<sup>4</sup> As indicated later in the decision, however, there is substantial evidence to support the ALJ's finding on other grounds that IHS did not clearly demonstrate the validity of part of its determination of the residual.

There is no substantial evidence in the record to support the ALJ's finding that a comparison with another area office was required to determine the residual.

The ALJ further found that--

[g]enerally, the evidence presented by IHS suffers from a lack of analysis based on the characteristics of the Tucson Area, including the number of tribes (two), the number of communities (three or four), the geographic size of the area (very small), the number of urban programs (one), the absence of tribal consortia, the number of regional treatment centers, and any specific projects or any special relationship with non-indigenous Indian populations . . . .

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Moreover, the record contains evidence which affirmatively supports the conclusion that empirical data such as that produced by the time and effort study is a valid basis for determining the residual. The Report of the Joint IHS Tribal Residual Workgroup at IHS Exhibit PP states in relevant part:

There is no reproducible theoretical methodology for calculating residual requirements at this time. There are definable Federal functions that must be accomplished, but the level of staffing necessary is empirical in its determination.

Ex. PP at 9. The ALJ misread this report, criticizing IHS's residual figure on the ground that it was higher than the 12 to 15 FTEs which the ALJ said the report recommended as the minimum number per area. The ALJ found that, "[g]iven the characteristics of the Tucson Area, TAO's total residual ought to fall somewhere within or near" this recommended minimum range. ALJ Decision at 11. However, the report merely indicates that some workgroup participants "argued" that 12 to 15 was "probably" an appropriate range for an area office residual, and goes on to reach the conclusion quoted above.

ALJ Decision at 10. The ALJ relied on a document captioned "Draft Recommendations for the Establishment of Area Office Residual Functions and Resources," which he stated "invite examination" of the characteristics of an area office compared to the characteristics of other area offices in determining an appropriate residual. *Id.*, citing Court Ex. 2. The ALJ opined that these "size measurements . . . bear upon the level of effort required to carry out the residual functions." *Id.* Engaging in such a comparison himself (between TOA and the Nashville Area Office), the ALJ found that the residual should be substantially lower than that determined by IHS (12.51 as opposed to 19.65).

I conclude, however, that this was not a legitimate basis for finding IHS's determination of a residual to be flawed. IHS asserted, and the Tribe did not dispute, that the "Draft Recommendations" were never adopted by IHS. Accordingly, any guidance in this document concerning the proper methodology for calculating a residual was not binding on IHS. Moreover, contrary to the ALJ's reading, there is no requirement in this document for a comparison of the characteristics of area offices in determining an appropriate residual. Instead, the "Draft Recommendations" indicate only that the "characteristics" listed by the ALJ might explain any disparity between the residuals for different area offices. Indeed, appended to the "Draft Recommendations" is a "Residual Worksheet" which does not provide for any comparison between area offices. The ALJ did not cite any other basis for requiring the determination of the residual to be based on such a comparison.

Even if a comparison of the characteristics of area offices were required to determine a residual, the comparison made by the ALJ in arriving at a residual of 19.51 was problematic. The ALJ used the Nashville Area Office's (NAO's) residual as a baseline in calculating the FTEs necessary to perform each of the residual functions in the TAO, making adjustments for the relative size of the TAO. It is unclear, however, whether the residual for the NAO was representative of residuals in area offices nationwide (particularly since NAO's residual was the product of negotiations between the parties).

Accordingly, I reverse the ALJ's determination of the appropriate residual amounts to the extent that he relied solely on a comparison with the residual of the Nashville Area Office.<sup>5</sup>

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This does not mean that it would be unreasonable for IHS to adopt a policy requiring a comparison between area offices for purposes of determining a residual,

There is substantial evidence to support the ALJ's determination that IHS did not clearly demonstrate the validity of its determination of a residual for the contracts branch.

Although IHS's determination of an appropriate residual was based primarily on TAO's time and effort study, IHS's expert witness testified that IHS's determination of the FTEs necessary for TAO's contracts branch was based upon a projected workload of 75 contract actions and 1,000 acquisitions. The ALJ found that "this projection is not supported by any substantial analysis." ALJ Decision at 12. The ALJ stated specifically:

Dr. Broderick did not know if it was based upon administration of the two ISDA contracts and one Urban Group contract only or a combination of ISDA contracts, such as procurement contracts (Tr. 695). More importantly, there is little or no delineation of the types of contracts and acquisitions handled in the present environment, their complexity, or the time and effort required to handle the various types. Nor is there any analysis of the number and types that would remain TAO's responsibility in a 100% contracted/compacted environment. TAO and Dr. Broderick provided only unsubstantiated projections.

Id. The ALJ found that, in 1997, TAO's contracts branch handled 104 contract actions and approximately 3,000 acquisitions, while administering 20 to 30 contracts for the provision of health care services, which "equates to approximately 3 to 5 contract actions per contract." ALJ Decision at 13. The ALJ further found that, in a fully contracted environment, there would be three contracts (a self-determination contract with each of the two tribes and a contract with the Urban Group). The ALJ therefore concluded that the evidence shows that the administration of these contracts "would likely involve no more than 9 to 15 contract actions" (calculated by multiplying three contracts by either three or five actions). Id. As additional support for this finding, the ALJ noted the testimony of one of the Tribe's expert witnesses that administration of a typical contract involves no more than three contract actions per year and the testimony of TAO's Health Systems Specialist that the administration of an ISDA contract generally involves only one visit and one payment annually. The ALJ further noted the testimony of Dr. Broderick as to the number of contract actions and acquisitions that a contract specialist

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<sup>5</sup> (... continued)

and a procurement technician can be expected to handle annually (25 and 1200, respectively),<sup>6</sup> and concluded that the total FTEs for the contracts branch should be no more than 1.333 instead of the 3.83 FTEs calculated by IHS.

I conclude that the ALJ's determination as to the appropriate residual for the contracts branch is supported by substantial evidence. IHS did not dispute that it relied on projections of the number of contract actions and acquisitions (as opposed to the time and effort study data) as a basis for determining this residual. In support of his finding that these projections were too high, the ALJ relied on the actual number of contract actions and acquisitions in the TAO in 1997 as well as on testimony regarding the number of contract actions required by the typical contract, TAO's minimal oversight of ISDA contracts, and the annual expected workload of contracts personnel. In its appeal of the ALJ Decision, IHS argued that it was unreasonable to assume that there would be only three contracts in a fully contracted environment. However, IHS merely reiterated the general arguments made before the ALJ and did not question the credibility of any of the witnesses on whose testimony the ALJ relied or point to anything in the record that contradicted their testimony. Accordingly, I uphold the ALJ's determination of the appropriate residual for TAO's contracts branch.

There is substantial evidence to support the ALJ's finding that IHS did not clearly demonstrate the validity of its determination of the residual for the Division of Health Systems Delivery as to one FTE, but not as to another FTE.

The ALJ also found that IHS failed to justify its determination of a residual for the Division of Health Systems Delivery that consisted of one FTE for a Chief Medical Officer (CMO) and .95 FTE for a Program Analyst. The ALJ agreed with the Tribe that the

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TAO's determination of the residual for the contracts branch included .65 FTE for a senior contract specialist, 1.06 FTE for a contract specialist, 1.12 FTE for a procurement technician, and 1.00 for a procurement clerk. ALJ Decision at 12. Although the ALJ's determination of the contracts branch residual included only two of these four positions, IHS did not argue that the ALJ erred in omitting the other two positions. Since the amount and nature of the TAO's work would likely change in a fully contracted environment, it is certainly possible that a reconfiguration of the necessary personnel was warranted.

appropriate residual was one FTE for a GS-13 Health Systems Specialist. The ALJ noted first that none of IHS's witnesses discussed why a Program Analyst was needed in addition to a CMO. With respect to the need for a CMO (whose salary would be substantially in excess of that of a GS-13 Health Systems Specialist), the ALJ stated that the Tribe's expert witness "explained that much of a CMO's responsibilities" involve overseeing, evaluating and monitoring federal health care service operations that would not exist in a fully contracted environment. ALJ Decision at 15. The ALJ further noted, however, that this witness had acknowledged that some area offices "provide for a CMO in their residual to cooperate and collaborate with the tribes to determine and document unmet needs, to plan for future program development and budget requirements, and to address legislative concerns . . .," although the witness also stated that the level of such activity in an area office as small as TAO would not justify a full-time CMO. *Id.* Finally, the ALJ noted the testimony of a witness for the Tribe that if the Phoenix Area Office had a CMO position in its residual, then that CMO might be able to serve TAO as well. The ALJ concluded based on this evidence that the residual for this division should consist solely of one FTE for a GS-13 Health Systems Specialist.

I conclude that the record contains substantial evidence to support the ALJ's finding that IHS did not clearly demonstrate the validity of its determination that the residual for this division should include an FTE for a Program Analyst in addition to a CMO. In its appeal of the ALJ Decision, IHS did not address this finding at all. Thus, IHS did not contend that its time and effort study or any other evidence in the record justified the inclusion of this FTE. In the absence of any such evidence, IHS could hardly be said to have demonstrated (much less clearly demonstrated) the validity of this aspect of its declination, as required by the ISDA.

I further conclude, however, that there is no substantial evidence to support the ALJ's finding that IHS did not clearly demonstrate the validity of its determination that the residual should include one FTE for a CMO. The testimony on which the ALJ relied does not indicate that there was no work that could appropriately be done by a CMO in a fully contracted environment, but only that some of the CMO's current responsibilities would no longer exist. In addition, the ALJ did not cite any evidence supporting a finding that a Health Systems Specialist would be qualified to assume the CMO's remaining duties. IHS's witness, on the other hand, testified that these functions are preferably carried out by an individual with the medical expertise, stature and credibility of a doctor. Tr. at 610. Moreover, the ALJ did

not explain why less than one FTE would be necessary if a CMO were to perform these duties when an entire FTE would be required if the position were filled by a Health Systems Specialist. Finally, since the testimony that a CMO from the Phoenix Area Office--if it had one--might be able to serve TAO is entirely speculative, any reliance by the ALJ on that testimony is unwarranted. Thus, there is no basis for concluding that anything less than a full-time CMO was necessary.

Accordingly, I uphold in part and reverse in part the ALJ's findings regarding the residual for the Division of Health Systems Delivery.

### Conclusion

Based on the foregoing, I sustain the ALJ's findings in part and reverse them in part, resulting in a residual of 16.20 FTEs (exclusive of the Office of Environmental Health and Engineering), rather than 12.51 FTEs as found by the ALJ. The cost of the 16.20 FTEs should be re-determined based on the cost of the positions at the time the Tribe's self-determination contract is implemented.

This is the final determination of the Department in this matter.

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//original signed

Donald F. Garrett  
Member, Departmental  
Appeals Board