

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Crow Creek Sioux Tribe  
Docket No. A-12-125  
Decision No. 2496  
February 21, 2013

**DECISION**

Appellant Crow Creek Sioux Tribe (Crow Creek or the Tribe) appeals a final decision by the Indian Health Service (IHS), on July 27, 2012, voiding Crow Creek's discretionary grant awards for services provided under the Special Diabetes Program for Indians (SDPI). IHS voided the grant awards based on its determination that the Tribe was ineligible to receive an SDPI award as of November 17, 2007 because the Tribe had retroceded the health care programs it operated under its Indian Self-Determination and Education Assistance Act (ISDEAA) contract effective 11:59 p.m. November 16, 2007. Retrocession is a process whereby a tribe returns ISDEAA-contracted programs to the contracting agency of the federal government, in this case IHS. 25 C.F.R. § 900.240. Crow Creek denies that its retrocession of the contracted programs terminated its ISDEAA contract or its eligibility for the SDPI grant. Crow Creek also accuses IHS of violating its trust relationship with the Tribe.

For the reasons discussed below, we uphold IHS's voiding of the SDPI awards for the budget periods that began after November 16, 2007, but conclude that the SDPI award for the last budget period that began before November 17, 2007 was valid. The validity of a continuation grant award must be determined at the beginning of the budget period for which the award was made even if an event during that period invalidates subsequent grant awards, as happened with the retrocession here.

**Background**

Summary of Applicable Law

The Balanced Budget Act of 1997, Pub. L. No. 105-33 § 4922, 111 Stat. 251, 574 (1997), established the SDPI program as section 330C of the Public Health Service Act (the Act), 42 U.S.C. § 254c-3, and IHS administers the program on behalf of the Secretary of the Department of Health & Human Services (HHS). The Act authorizes IHS, an agency

within HHS, to award federal grant funds for the purpose of providing services to prevent and treat diabetes among Indians. SDPI services must be provided “through” one of the following entities:

- (1) [IHS].
- (2) An Indian health program operated by an Indian tribe or tribal organization pursuant to a contract, grant, cooperative agreement, or compact with [IHS] pursuant to the Indian Self-Determination Act.
- (3) An urban Indian health program operated by an urban Indian organization pursuant to a grant or contract with [IHS] pursuant to title V of the Indian Health Care Improvement Act.

42 U.S.C. § 254c-3(b).

The “Indian Self-Determination Act” (the ISDEAA) referred to in subparagraph (2) above is a separate legal authority. *See* 25 U.S.C. § 450 *et seq.* The ISDEAA directs the Secretary of HHS (through IHS), upon request by tribal resolution, to “enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof” that IHS previously operated “for the benefit of Indians.”<sup>1</sup> 25 U.S.C. § 450f(a)(1). The ISDEAA also provides that the contracted “programs, functions, services, or activities . . . shall include administrative functions of . . . [HHS] . . . that support the delivery of services to Indians. . . .” *Id.* The proposal for an ISDEAA contract must include “a brief statement of the programs, functions, services, or activities that the tribal organization proposes to perform” under the contract. 25 C.F.R. § 900.8. The annual funding agreements incorporated into the contract must include the “terms that identify the programs, services, functions, and activities to be performed or administered” by the tribe. 25 U.S.C. § 450l(c). A tribe “may retrocede a contract” under the ISDEAA. 25 C.F.R. § 900.241. “A retrocession

<sup>1</sup> We use the acronym “ISDEAA” instead of “ISDA” because the complete name of the Act is the Indian Self-Determination and Education Assistance Act. The provision quoted here appears in title I of the ISDEAA. Title V of the ISDEAA directs the Secretary to enter into a funding agreement that authorizes a tribe that has a self-governance compact to assume responsibility for health care formerly offered by IHS. *See* 25 U.S.C. § 458aaa *et seq.* Crow Creek does not allege that it had a self-governance compact.

means the return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.” 25 C.F.R. § 900.240; *see also* 25 U.S.C. § 450j(e) (regarding the “[e]ffective date for retrocession” of “any contract or portion of a contract”).

### Summary of Applicable Facts

In 2000, Crow Creek had an ISDEAA contract (captioned “Self-Determination Agreement”) with IHS under which the Tribe conducted four health programs described by the parties as: Emergency Medical Services (EMS), Alcoholism, Community Health Representative (CHR) and Tribal Health Administration. Crow Creek Br. at 5; IHS Br. at 3, citing IHS Ex. 1. On October 2, 2007, the Crow Creek Tribal Council passed Resolution #CC-10-02-07-01 in which it retroceded all four of the programs under its ISDEAA contract to HIS. Crow Creek Ex. 1, at 3-5 (unnumbered). On October 22, 2007, IHS issued Modification Number 28 to Crow Creek’s ISDEAA contract providing that the retrocession would be effective at 11:59 p.m., November 16, 2007. Crow Creek Ex. 2, at 1.

While the ISDEAA contract was in effect, Crow Creek received SDPI grant number HID9400369, awarded by IHS under the authority of 42 U.S.C. § 254c-3(b)(2). The project period for the grant began on April 1, 2000, and IHS approved continuation grant awards for budget periods through the budget period ending March 31, 2012. IHS Ex. 2; Crow Creek Exs. 3-6; Crow Creek Br. at 4; Appellant’s Response to Order to Develop the Record (the Order) at 6.<sup>2</sup> Each notice of award referred to the grantee’s responsibility to obtain annual audits as required by HHS’s uniform administrative requirements at 45 C.F.R. § 92.26. *See, e.g.*, IHS Ex. 2, at 7. Crow Creek did not submit required audits for fiscal years 2002 through 2009. Crow Creek Ex. 15; *see also* Crow Creek Br. at 5 (citing Crow Creek Ex. 12 and stating that the Tribe did not submit the annual audits or required financial reports during the “first ten years it received the SDPI grant”).

On February 14, 2012, IHS issued a final decision letter terminating Crow Creek’s SDPI grant pursuant to 45 C.F.R. § 92.43. Crow Creek Ex. 15, at 1-2. IHS stated that it was terminating the SDPI grant because Crow Creek’s failure to submit the required audit reports was a material failure to comply with federal law, regulations and the grant terms and conditions. *Id.* at 2. On March 2, 2012, Crow Creek appealed IHS’s grant termination decision, and the Board docketed the appeal as Docket No. A-12-52. On July 27, 2012, IHS withdrew its February 14, 2012 final decision to terminate Crow Creek’s SDPI grant and, instead, issued a

<sup>2</sup> Consistent with the nomenclature of 45 C.F.R. Part 16, we have substituted the term “appellant” for “petitioner.”

final decision voiding Crow Creek's SDPI "grant" as of November 17, 2007 based on the Tribe's ineligibility to receive the SDPI awards. Crow Creek Ex. 21, at 1. Also on July 27, 2012, IHS notified the Board of the withdrawal of its termination decision. Crow Creek Ex. 22. Based on IHS's withdrawal of its termination decision, the Board closed Docket No. A-12-52 on August 6, 2012.<sup>3</sup> On October 2, 2012, the Tribe filed the current appeal from IHS's final decision of July 27, 2012 voiding the SDPI awards. The record for this decision consists of briefs filed by the parties pursuant to 45 C.F.R. §16.8 and the parties' responses to the Order, which the Board issued December 21, 2012 to develop the record in order to facilitate its decision making.

### **Jurisdiction and Standard of Review**

The Board has jurisdiction to review a decision that an award in a direct, discretionary project program is "invalid because it was not authorized by statute or regulation or because it was fraudulently obtained." 45 C.F.R. Part 16, Appendix A, Paragraph C(a)(4). The standard of review is *de novo*. See Appellate Division Practice Manual, available at <http://www.hhs.gov/dab/divisions/appellate/practicemanual/manual.html> ("Who has the burden of proof in a case before the Board?").

### **Discussion**

- A. After Crow Creek retroceded the only health programs it operated under an ISDEAA contract, Crow Creek no longer met a condition for IHS's awarding, and the Tribe's receiving, SDPI grant funds.

There are no material facts in dispute here. Crow Creek does not dispute, and the record plainly evidences, the retrocession of Crow Creek's ISDEAA contract, effective 11:59 p.m. November 16, 2007. Crow Creek Exs. 1-2. Crow Creek also does not dispute that the retrocession encompassed all of the programs operated by the Tribe under the ISDEAA contract. See Appellant's Response to the Order at 3 ("To the best of the Tribe's knowledge, there are no other programs other than the ones listed that may have been included in the Self-Determination Agreement."). Crow Creek further states that "no programs, functions, services, or activities were conducted under a Self-Determination

<sup>3</sup> The Board closed Crow Creek's original appeal because it had no jurisdiction to hear that appeal after IHS withdrew the termination decision that was the subject of the appeal. Accordingly, Crow Creek is mistaken when it asserts that the Board "has jurisdiction over this [current] appeal because the Tribe is appealing a termination of a direct grant." Crow Creek Br. at 10. Since IHS's grant termination decision is not before the Board, we do not address the arguments in Crow Creek's brief addressing the merits or equities of the termination. See *id.* at 15-23.

agreement after November 16, 2007.”<sup>4</sup> *Id.* IHS concedes that it made continuation grant awards to Crow Creek under the SDPI after the effective date of the retrocession but asserts that doing so violated the SDPI statute. IHS Br. at 9. The issue here is the purely legal one of whether the SDPI statute, which conditioned the Tribe’s eligibility for SDPI funding on its having in place an ISDEAA contract for operating a health program through which the Tribe could provide the SDPI services, authorized IHS to continue awarding SDPI funds to Crow Creek after the retrocession of Crow Creek’s ISDEAA contract programs.<sup>5</sup> We conclude that, under the SDPI statute, IHS had no authority to continue making awards under the SDPI (and the Tribe was not eligible to receive them) after Crow Creek retroceded the only health programs it operated under an ISDEAA contract. However, because Crow Creek’s ISDEAA contract was still in effect at the beginning of the April 1, 2007 through March 31, 2008 budget period, when IHS made the continuation grant award for that period, we further conclude that IHS was authorized to make the award for that period, and, consequently, that continuation award was valid. We recognize that the retrocession of the Tribe’s ISDEAA contract during that budget period raises an issue as to whether any costs charged to the SDPI award for the period November 17, 2007 through March 31, 2008 were allowable. Thus, our decision does not preclude IHS’s addressing that issue and making a further determination as to the allowability of any such costs. Our decision here simply holds that the award for that period was not void ab initio.

With respect to the awards for later periods, we find no merit in Crow Creek’s argument that notwithstanding the retrocession of all of its ISDEAA contract programs, the Tribe’s eligibility to receive SDPI grant awards did not end on November 17, 2007 because “SDPI is a statutorily different program and was not included in that list of retroceded programs.” Crow Creek Br. at 9. The SDPI program would not have been included in the list of retroceded programs because it was not included in the ISDEAA contract to begin with.

<sup>4</sup> In earlier briefs, Crow Creek argued that the retrocession only modified its ISDEAA contract rather than ending it. Appellant’s Br. at 14, citing Crow Creek Ex. 2; *see also* Appellant’s Reply Brief (Reply) at 8. Crow Creek’s subsequent admission, in its response to the Order, that no programs existed under an ISDEAA contract following the retrocession renders its modification argument moot. We also note Crow Creek’s agreement, consistent with this admission, that Modification Number 28, which “extend[ed] the current period of performance, statements of work and program standards through 11:59 p.m., November 16, 2007” was the final modification to its ISDEAA contract. Appellant’s Response to the Order at 6.

<sup>5</sup> The statute specifies two alternative entities through which SDPI services can be provided, IHS or an urban Indian health program, 42 U.S.C. § 254c-3(b)(1),(3), but neither party argues that one of these alternatives applies here, and each alternative appears inapplicable on its face.

What is material here is that the statute that authorizes SDPI grants requires that SDPI services provided under those grants be provided “through” one of three specified entities, in this case, “[a]n Indian health program operated by an Indian tribe or tribal organization pursuant to a contract, grant, cooperative agreement, or compact with [IHS] pursuant to the Indian Self-Determination Act.” 42 U.S.C. § 254c-3(b)(2). Plainly read, this language conditions a tribe’s eligibility to receive (and IHS’s authority to award) SDPI grant funds on the tribe’s operating a health program pursuant to an ISDEAA contract (or other permitted instrument). Yet, Crow Creek concedes it was not operating any ISDEAA “programs, functions, services, or activities” under an ISDEAA contract after the date it retroceded its ISDEAA contract. Appellant’s Response to the Order at 3. Thus, Crow Creek has implicitly conceded it was not eligible for an SDPI grant award on and after November 17, 2007.

Attempting to avoid the conclusive effect of this concession, Crow Creek makes several arguments based on interpretation of the definition of “self-determination contract” that it speculates would justify a conclusion that its ISDEAA contract survived the retrocession of the programs in that contract. Crow Creek first argues that “the language of [the] ISDEAA [statute] supports the interpretation that an Indian tribe may need an ISDEAA contract to have programs, but a Tribe does not need a program to have an ISDEAA contract.” Appellant’s Response to the Order at 3. Crow Creek cites the statutory definition of “self-determination contract”:

“self-determination contract” means a contract (or grant or cooperative agreement utilized under section 450e–1 of this title) entered into under part A of this subchapter between a tribal organization and the . . . Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law. . . .

25 U.S.C. § 450b(j). Crow Creek argues that the word “or” between “programs” and “services” suggests a tribe may have an ISDEAA contract solely for the purpose of offering services, without an underlying program. Appellant’s Response to the Order at 4. However, this argument is irrelevant since Crow Creek does not claim to have offered any services under an extant ISDEAA contract. On the contrary, Crow Creek admits that “no programs, functions, *services*, or activities were conducted under a Self-Determination agreement after November 16, 2007.” Appellant’s Response to the Order at 3 (emphasis added).

Crow Creek also argues that the definition of “self-determination contract” set forth above “does not categorically exclude a Tribe from operating a program or services through a grant from IHS” and that “[a]s such, so long as it is possible for a tribe to plan a program or offer services, a tribe can have a valid Self-Determination Agreement with IHS.” *Id.* at 4 (emphasis added). As IHS acknowledges, section 450e-1 of the ISDEAA

statute does authorize use of “a grant agreement or a cooperative agreement . . . in lieu of a contract under sections 450f and 450g . . . when mutually agreed to by the . . . Secretary and the tribal organization involved.” 25 U.S.C. § 450e-1; IHS’s Reply to Appellant’s Response to the Order at 3. However, IHS states that it “does not as a matter of practice use the grant or cooperative agreement model . . . .” IHS Reply to Appellant’s Response to the Order at 3, n.1. Instead, IHS states, “All ISDEAA funds and programs are passed through ISDEAA contracts and annual funding agreements or compacts and funding agreements.” *Id.* at n.1. Crow Creek does not dispute this assertion or that IHS followed its asserted practice in this case.

More to the point, Crow Creek does not assert that any of the SDPI grant awards was a grant “in lieu of” an ISDEAA contract under 25 U.S.C. § 450e-1. In addition, there is nothing that would support such a finding in the SDPI notice of grant award, which cites only the SDPI authorities. *See, e.g.*, IHS Ex. 2, at 1; *see also* IHS Reply to Appellant’s Response to the Order at 3 and n.2 (discussing the authorities listed in the “award authority” box of the SDPI notice of grant award).<sup>6</sup> Moreover, as IHS points out, finding an SDPI grant to be a grant under section 450e-1 of the ISDEAA would render meaningless the eligibility condition for SDPI grants – that an Indian tribe be operating an “Indian health program . . . pursuant to a contract, grant, cooperative agreement, or compact with [IHS] pursuant to the Indian Self-Determination Act.” *Id.* at 4; 42 U.S.C. § 254c-3(b).

Rather than rely on section 450e-1 of the ISDEAA, Crow Creek relies on section 450h(b) for its argument that the ISDEAA statute “specifically allows an Indian health program, such as SDPI, to be operated by a grant with IHS pursuant to the [ISDEAA].” Appellant’s Response to the Order at 2, citing 25 U.S.C. § 450h(b). However, IHS asserts that the grants authorized by this section of the ISDEAA “do not authorize or fund Tribes to administer IHS programs, functions, services or activities . . . .” IHS’s Reply to Appellant’s Response to the Order at 5. Instead, IHS asserts, section 450h(b) is a special grant authority that authorizes grants for “planning, training, and evaluation of tribal programs to improve the capacity of a tribal organization to enter into an ISDEAA contract with IHS and also for technical assistance and planning grants.” *Id.* at 4. The purpose of these grants, IHS states, is “to assist tribes and tribal organizations to further develop and improve their management capability in order to successfully carry out an

<sup>6</sup> We also note that the requirements for contract proposals in the ISDEAA title I regulations at 25 C.F.R. Part 900, subpart C, would presumably apply to a proposal for a grant “in lieu of” a contract under section 450e-1, yet there is no indication in the record that Crow Creek made a proposal in accordance with these requirements.

ISDEAA contract or compact.” *Id.* at 4-5. They cannot be used by tribes, IHS asserts, “to administer IHS programs, functions, services or activities.” *Id.* at 5. IHS further asserts that Crow Creek does not have a planning grant authorized by 25 U.S.C. § 450h(b). *Id.* Crow Creek does not dispute these IHS assertions, which are consistent with the language of the ISDEAA.

- B. The Board may not entertain Crow Creek’s equitable argument, and Crow Creek’s construction argument is not relevant.

Crow Creek argues that IHS’s conduct before and after the retrocession breached its fiduciary duty to the Tribe. Crow Creek Reply Br. at 3-7. Crow Creek relies on a number of federal court decisions discussing what Crow Creek describes as the “trust relationship” between the federal government and Indian tribes. *Id.* Crow Creek’s fiduciary duty argument is in the nature of an equitable argument. The Board is not authorized to provide relief based on considerations of equity from an agency decision that is supported by the applicable law. *See, e.g., Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395, at 11 (2011)(holding that the ALJ and Board were not authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements); *W. Va. Dep’t of Health & Human Res.*, DAB No. 2185, at 20 (2008) (holding a claim for equitable relief is not a proper basis for overturning a disallowance supported by the evidence of record and consistent with the applicable statutes and regulations); *N.J. Dep’t of Human Servs.*, DAB No. 1142, at 4 (1990)(holding that the Board “has no authority to render decisions unsupported by a legal basis, regardless of the equitable considerations involved.”).<sup>7</sup> Here we have concluded the SDPI statute did not authorize IHS to make SDPI grant awards to Crow Creek after the Tribe retroceded the only Indian health programs it operated under the ISDEAA because at that point Crow Creek no longer met the relevant statutory condition for receiving an SDPI award, that the Tribe have an extant ISDEAA Indian health program. We may not avoid or alter that legal conclusion based on equitable considerations, as urged by Crow Creek.

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<sup>7</sup> Crow Creek does not expressly argue that IHS should be estopped from voiding its SDPI grant because it continued to make grant awards for budget period through the budget period ended March 31, 2012. However, to the extent Crow Creek’s equitable arguments might be read as indirectly raising that argument, we note the Board’s rejection of equitable estoppel claims, citing federal court precedent that estoppel against the federal government, *if available at all*, is presumably unavailable absent “affirmative misconduct” by the government. *E.g., P.R. Dep’t of Health*, DAB No. 2385, at 28 (2011)(citations omitted). While Crow Creek questions why IHS continued to make the awards if, as IHS now concedes, the awards were not authorized by law after the retrocession, Crow Creek makes no allegation of affirmative misconduct by IHS.



Crow Creek also urges us to apply what it describes as a “long-held canon of statutory construction,” arguing that “[b]ecause a federally recognized Indian tribe is involved, the Board must review the law most favorably to Indians.” Crow Creek Br. at 11. However, as IHS notes, this canon of construction becomes relevant, if at all, only when statutes are ambiguous. *See* IHS Br. at 7-8, citing cases. Since we have resolved the legal issue here based on the plain language of the applicable provisions of the SDPI statute and the ISDEAA, Crow Creek’s construction argument is irrelevant.

## **Conclusion**

For the reasons stated above, we uphold IHS’s final determination that Crow Creek was legally ineligible to receive SDPI continuation grant awards on and after November 17, 2007 and, therefore, that the SDPI continuation grant awards made after that date are void as a matter of law. However, the SDPI continuation grant award for the budget period April 1, 2007 through March 31, 2008 was valid for that period (and that period only) because at the time IHS made that award, Crow Creek’s ISDEAA contract was still in effect and IHS, therefore, had authority to make the award. As previously stated, however, this does not preclude IHS’s determining whether any costs charged to the SDPI award for the period November 17, 2007 through March 31, 2008 were unallowable.

/s/

Judith A. Ballard

/s/

Constance B. Tobias

/s/

Sheila Ann Hegy  
Presiding Board Member