Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Seneca Nation of Indians
Docket No. A-16-103
(IBIA Docket No. 12-041)
Decision No. 2715
June 30, 2016

DECISION

The Indian Health Service (IHS) appealed the May 6, 2016 Recommended Summary Decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer regarding IHS's partial declination of the annual funding agreement (AFA) proposed by Seneca Nation of Indians (the Nation, Seneca) for fiscal year (FY) 2012 under its contract with the Department of Health and Human Services (HHS, Department) for operation of a health care program under the Indian Self-Determination Act (ISDA).[1] IHS, acting under authority delegated by the Secretary of HHS, declined $3,774,392 of the amount proposed for FY 2012, relying on one of the reasons specified in section 102(a) of ISDA for which IHS may decline a proposal. The Nation requested a hearing before an ALJ on the partial declination. The ALJ recommended reversal of the partial declination, concluding that, on the facts of this case, section 106(b)(2) of ISDA and 25 C.F.R. § 900.32 precluded IHS from declining the proposal. For the reasons explained below, I find no error in that conclusion. Accordingly, I reverse the partial declination.

Statutory and Regulatory Background

ISDA directs the Secretary of HHS to award self-determination contracts to Indian tribes to provide programs, functions, services, and activities for the benefit of Indians that had previously been provided by the Secretary.[2] ISDA § 102(a)(1). Section 106(a)(1) of ISDA provides that the amount of funds awarded under a self-determination contract "shall not be less than the . . . Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract."

[1] Title I of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*., is known as the Indian Self-Determination Act.

[2] ISDA and the implementing regulations also apply to self-determination contracts between Indian tribes and the Department of the Interior. I have omitted references to such contracts in quoting the statute and regulations.

Section 102(a)(2) of ISDA states that within 90 days of receipt of a tribe's proposal "for a self-determination contract, or a proposal to amend or renew a self-determination contract," the Secretary of HHS must "approve the proposal and award the contract" unless the Secretary makes one of five specific findings, including a finding that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a)."[3]

Section 106(a)(3)(B) of ISDA states:

> On an annual basis, during such period as a tribe . . . operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe . . . shall have the option to negotiate with the Secretary the amount of funds that the tribe . . . is entitled to receive under such contract pursuant to this paragraph.

The funding amount to be paid under a self-determination contract pursuant to section 106(a) is determined in an annual funding agreement. ISDA § 108(c), model agreement, § 1(c)(4)[4] ("[T]he Secretary "shall make available to the Contractor the total amount specified in the annual funding agreement . . . ."). "Such amount shall not be less than the applicable amount determined pursuant to section 106(a)" of ISDA. *Id*. An AFA contains "terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment" and is "incorporated in its entirety in th[e] Contract." *Id*., § 1(f)(2)(A), (B).

Section 106(b)(2) of ISDA states that the amount of funds "required by subsection (a)" "shall not be reduced by the Secretary in subsequent years except pursuant to" one of the circumstances listed in (A) – (E) of that section, including "completion of a contracted project, activity, or program" (106(b)(2)(E)).

Section 106(b)(5) of ISDA states that the amount of funds "required by subsection (a)"—

> may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act . . . . Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of

[3] The same language appears in the regulations at 25 C.F.R. § 900.22.

[4] Section 108(a) of ISDA states that a self-determination contract "shall - contain, or incorporate by reference, the provisions of the model agreement described in subsection (c)."

> appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

The regulations implementing ISDA are codified at 25 C.F.R. Part 900. Subpart D (sections 900.14-900.19) is captioned "Review and Approval of Contract Proposals. Subpart E (sections 900.20-900.33) is captioned "Declination Procedures" and "implements sections 102(a)(2), (a)(4), (b) and (d) of the Act." 61 Fed. Reg. 32,482, 32,486 (1996) (preamble to final rule).

Section 900.16 states that the Secretary "has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal in compliance with section 102 of [ISDA] and subpart E." Under section 900.17, that time period may be extended "with written consent of the Indian tribe." Section 900.18 states:

> A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to Section 106(a) of the Act.

Section 900.19, captioned "What happens when a proposal is approved?," states: "Upon approval the Secretary shall award the contract and add to the contract the full amount of funds to which the contractor is entitled under section 106(a) of the Act."

Section 900.32 states that if a tribe's "proposed successor annual funding agreement"—

> 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 [Bureau of Indian Affairs], 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) or any annual funding agreement proposal which pertains to a contract with an agency of DOI [the Department of the Interior] other than the BIA, is subject to the declination criteria and procedures in subpart E If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E.

A tribe whose contract proposal has been declined is entitled to a hearing on the record before an ALJ. ISDA § 102(b)(3). At the hearing, the Secretary has the burden of proof to clearly demonstrate the validity of the grounds for declining the proposal. ISDA § 102(e)(1); *see also* 25 C.F.R. § 900.163.

Any party may appeal the ALJ's recommended decision with respect to a declination by IHS to the Secretary of HHS by filing written objections to the ALJ's recommended decision within 30 days after receiving it. 25 C.F.R. § 900.166. The Secretary has 20 days from the date she receives any timely objections to modify, adopt, or reverse the recommended decision. 25 C.F.R. § 900.167. On August 16, 1996, the Secretary delegated her authority to hear such appeals to the Appellate Division of the Departmental Appeals Board. As the Board Chair, I may serve as the deciding official.

Factual Background[5]

The Nation and the Department entered into a self-determination contract effective January 1, 2000 with an indefinite term under which the Nation assumed responsibility for providing health care services to its members. ALJ Decision at 1, 3. IHS approved an AFA for FY 2010 and for FY 2011. *Id*. at 2. By letter dated April 29, 2011, the Nation "propose[d] an amendment" to its self-determination contract for FY 2010 as well as FY 2011 to increase the amount of funding for each year by $3,774,392. 4/29/11 ltr. from Porter to M. Ketcher (IBIA 12-041, Appellee's Response, Tab 3); *see also* ALJ Decision at 2. In the letter, the Nation explained that it had recently discovered that the number of patients to which it provided health care services, i.e., its user population, was undercounted by IHS and stated that it estimated that increased funding of $3,774,392 was necessary to correct for the undercount. *Id*.

IHS did not respond to the Nation's proposals for additional funding within 90 days of receiving the Nation's April 29, 2011 letter.[6] ALJ Decision at 2. By letter dated August 30, 2011, the Nation asserted that since the 90-day period—

> has expired without lawful declination by the Secretary and the Nation has not consented to any extension of the 90-day period . . . , 25 C.F.R. [§] 900.18 obligates the Secretary to treat the Nation's proposals to amend as approved as of

[5] The factual information in this section is drawn from the ALJ's Recommended Summary Decision (ALJ Decision) and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal.

[6] The Nation stated that the letter was sent by certified mail and was received by IHS on May 2, 2011. 8/30/11 ltr. from Baker-Shenk to M. Ketcher (IBIA 12-041, Appellee's Response, Tab 4) at 1.

> August 3, 2011 and requires the Secretary to award the amendments and add to the FY 2010 and FY 2011 contracts the full amount of funds pursuant to section 106(a) of the Act.

8/30/11 ltr. from Baker-Shenk to M. Ketcher at 1. The letter continued:

> For purposes of the upcoming negotiations on the Nation's FY 2012 Agreement, pursuant to Section 106(b)(2) of the Act, the amount required to be added by the Nation's proposals for FY 2010 and FY 2011 shall not be reduced by the Secretary in subsequent years.

Id. at 2. The Nation subsequently requested that the $3,774,392 be included "in the FY 2012 base, per the deemed approval FY 2011 and FY 2010 amendments and the August letter from Phil Baker-Shenk." 9/20/11 ltr. from Miller to M. Ketcher (IBIA 12-041, Appellant's Motion for Summary Judgment, Tab E).

In response, IHS advised the Nation that it needed to file a claim under the Contract Disputes Act (CDA) to dispute the amount paid under the contract for FY 2010 and FY 2011. 9/27/11 ltr. from R. Ketcher to Porter (IBIA 12-041, Appellee's Response, Tab 5). IHS ultimately denied CDA claims submitted by the Nation, stating that the amount requested in the Nation's April 29, 2011 letter was not added to the contracts for FY 2010 and FY 2011 and that even if the user population figure had been corrected, the Nation would not have received any additional funds in those years based on the corrected figure. 4/5/12 ltrs. from R. Ketcher to Porter (Dkt No. IBIA 12-041, Appellee's Response, Tab 7) .

In September 2012, the Nation sued HHS in federal district court, challenging its refusal to pay the additional $3,774,392 requested for both FY 2010 and FY 2011. ALJ Decision at 4. In a 2013 decision, the Court held that pursuant to section 102(a)(2) of ISDA and 25 C.F.R. § 900.18, "[w]hen the Secretary fails to respond to an amendment proposal to a self-determination contract within the allotted 90 days, the proposal automatically becomes part of the parties' Contract." *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F.Supp.2d 135, 152 (D.D.C. May 23, 2013). The Court further held that the Nation's April 29, 2011 letter "proposed amendments to the Contract for FY 2010 and FY 2011 that became effective when the Secretary failed to respond within 90 days." 945 F.Supp.2d 135, at 145. The Court rejected HHS's argument that its payment of the funding already approved for FYs 2010 and 2011 "fulfilled its statutory duty [to pay] the Nation the total amount required under section 106(a)" of ISDA because, according to HHS, the Secretary has determined that the amount already approved was the amount IHS spent on the programs it was operating before they were transferred to the Nation under the ISDA contract. *Id*. at 149-150. The Court stated that ISDA "explicitly contemplates that self-determination contract funds 'may, at the request of the

tribal organization, be increased by the Secretary if necessary to carry out [ISDA].'" *Id*. at 150, citing ISDA§ 106(b)(5). The Court proceeded to find that the "Nation's proposed amendment sought the Secretary's agreement to *increase* the amount of funds it received under [section 106(a) of ISDA]—that is, its 'Section 106(a)' or 'Secretarial' amount. *Id*., citing 4/29/11 ltr. from Porter to M. Ketcher at 2-3 (emphasis in original). The Court concluded that HHS could not now argue that the proposed amendment exceeded the amount required by section 106(a) since the Secretary could have declined the Nation's proposal on that ground under section 102(a)(2)(D) of ISDA but failed to timely do so. *Id*. The Court's decision became final when the U.S. Court of Appeals for the D.C. Circuit granted IHS's motion to dismiss its appeal. *Seneca Nation of Indians v. U.S. Dep't of Health and Human Servs*., No. 13-5219, 2013 WL 6818212 (Dec. 12, 2013).

While the Nation's appeal was pending in federal district court, IHS notified the Nation of its decision to partially decline the Nation's proposed AFA for FY 2012 based on the declination ground in section 102(a)(2)(d) of ISDA and 25 C.F.R. § 900.22(d), i.e., the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of ISDA. 10/31/11 ltr. from R. Ketcher to Miller (IBIA 12-041, Appellee's Response, Tab 9). IHS explained:

> Increases or decreases in user population do not affect a tribe with an established [ISDA] contract's Secretarial amount. . . . Seneca's initial program funding was calculated by using an estimated user population of eligible beneficiaries residing in Seneca's contract health service delivery area. . . . Once a tribe assumes [programs, functions, services and activities] associated with its shares, the Secretarial amount is recurring and is neither increased nor decreased, absent certain limited circumstances. . . . In other words, the administrative functions that the Secretary performed on behalf of Seneca supported the initial number of users. Once those tribal shares are transferred to Seneca, the Secretary is relieved of performing those functions and Seneca controls the resources; the Secretary has no additional funding to provide.

Id. at 4 (unnumbered). IHS also asserted that "increasing Seneca's recurring base by the amount proposed would have the effect of reducing funding for other tribes. . ., which the Secretary is not required to do." *Id*.

The Nation filed a request with the IBIA for a hearing on IHS's declination decision. Pursuant to the Nation's request, the IBIA stayed the proceedings until issuance of a final decision in the Nation's contract disputes lawsuit. After the District Court decision became final, the case was assigned to an ALJ for hearing.[7]

[7] The case was initially assigned to another ALJ and later reassigned to ALJ Sweitzer.

The ALJ Decision

The ALJ recommended reversing IHS's decision partially declining the Nation's proposed AFA for FY 2012. Relying on the District Court decision, the ALJ found that the Nation's proposed amendment for FY 2011 "sought the Secretary's agreement to *increase* the amount of funds it received under [section 106(a) of ISDA] – that is, its 'Section 106(a)' or 'Secretarial' amount." ALJ Decision at 8-9, quoting *Seneca Nation of Indians*, 945 F. Supp.2d at 150. The ALJ concluded, as did the District Court, that, pursuant to 25 C.F.R. § 900.18, the Nation's "FY 2011 Agreement included the additional $3,774,392" when IHS failed to respond to the Nation's proposed FY 2011 AFA within 90 days as required by section 102(a)(2) of ISDA and, accordingly, "[t]his additional funding became part of the Secretarial amount." ALJ Decision at 8. In addition, said the ALJ, "[e]ven if the additional $3,774,392 had not become part of Seneca's Secretarial amount by operation of law, the District Court's May 23, 2013, Order clearly amended Seneca's FY 2010 and FY 2011 Agreements thereby making the additional $3,774,392 part of the Secretarial amount in Seneca's Contract." *Id*. at 9, citing 945 F.Supp.2d 135 at 150, 152.

The ALJ further concluded that the "Department has not clearly demonstrated that any of the five circumstances" in which section 106(b)(2) of ISDA permits reduction of the Secretarial amount "was present when it declined Seneca's request, and the record does not support such a finding." *Id*. at 9. In particular, the ALJ rejected IHS's argument that section 106(b)(2)(E)— "completion of a contracted project, activity, or program"— applied here. *Id*. at 16.

The ALJ also rejected IHS's argument that it was not obligated to pay the Nation the additional $3,772,392 requested for FY 2012 because it exceeded the Secretarial amount, stating that "the Secretarial amount for Seneca's Contract already included the additional $3,772,392 as a matter of law before Seneca requested those funds for FY 2012 and the Department's attempt to decline Seneca's request." *Id*. at 11.

The ALJ further concluded that 25 C.F.R. § 900.32 "requires the Department to approve Seneca's proposed FY 2012 Agreement." *Id*. at 10. The ALJ noted that section 900.32 "allows for the declination of any portion of a successor annual funding agreement that is not substantially the same as the prior annual funding agreement." *Id*. The ALJ reasoned that "Seneca's proposed FY 2012 Agreement and its FY 2011 Agreement are substantially the same" because the same amount of additional funds in the Nation's proposed AFA for FY 2012 was "added to the FY 2011 AFA Agreement by operation of law and the District Court's May 23, 2013, Order" when the Department failed to decline the proposed FY 2011 AFA. *Id*. The ALJ rejected IHS's argument that the last sentence of 25 C.F.R. § 900.32, which states that "[i]f there is a disagreement over the availability

of appropriations, the Secretary may decline the proposal in part," permitted it to partially decline the Nation's proposed FY 2012 AFA, concluding that this provision is not reasonably read to apply to a proposal that is substantially the same as the prior AFA. *Id*. at 19-20.

The ALJ also concluded that other arguments raised by IHS had no merit. *See, e.g.,* ALJ Decision at 10, 11, 17-19. To the extent that IHS refers to these arguments in its objections to the ALJ Decision, I discuss them below.

IHS's Objections

IHS raises three principal objections to the ALJ Decision. First, IHS objects to what it characterizes as the ALJ's assumption that the amount of funds "provided" by IHS under section 106(a) of ISDA must be the same as the amount of funds "required by subsection (a)" within the meaning of section 106(b)(2) . IHS Obj. at 3-5. According to IHS, the ALJ "erred when he relied upon the District Court's decision in this regard because the District Court did not conclude that the Secretary would have otherwise spent the funds at issue for the direct operation of Seneca's [ISDA] programs" but merely "awarded damages, as specifically requested by Seneca for FY 2010 and FY 2011." *Id*. at 4-5. Consequently, says IHS, "it was an error for the ALJ to assume that the additional funds requested by Seneca were 'required' by section 106(a)(1), to be funded annually in perpetuity." *Id*. at 5. In essence, this constitutes an objection to the ALJ's conclusion that IHS was precluded by section 106(b)(2) from reducing the amount of funding in the FY 2011 AFA in FY 2012. Second, IHS objects to the ALJ's conclusion that IHS was precluded from declining the proposed FY 2012 AFA with respect to the $3,774,392 pursuant to 25 C.F.R. § 900.32. IHS Obj. at 5-9. In particular, IHS argues that the proposed FY 2012 AFA was not a successor annual funding agreement, that it was not substantially the same as the FY 2011 AFA, and that the partial declination was permitted based on what IHS identifies as "exceptions" to section 900.32. Third, IHS objects to the ALJ's determination not to follow the holding of another ALJ that section 900.32 cannot reasonably be read to apply when the prior AFA was "deemed approved" by operation of law. IHS Obj. at 9-10, citing *Delaware Tribe of Indians,* Docket No. IBIA 02-65-A (July 26, 2002).

Analysis

In prior decisions involving appeals of recommended decisions involving a declination by IHS, the deciding official has stated, "I must uphold the recommended decision unless I determine that it was based on an error of fact or law." *See, e.g., Susanville Indian Rancheria,* DAB No. 1813, at 5 (2002); *Ninilchik Traditional Council,* DAB No. 1711, at 5 (1999). After reviewing IHS's objections, the Nation's written response to the objections, and the record for the recommended decision here, I have determined that

ALJ did not err in concluding that IHS was precluded by the applicable statute and regulations from declining the Nation's proposal to add $3,774,392 to its funding for FY 2012. I address IHS's first two objections in sections 1 and 2 below. I address IHS's third objection in section 2 below since it is related to IHS's second objection.

1. **The ALJ did not err in concluding that IHS was precluded by section 106(b)(2) of ISDA from reducing the amount of funding in the FY 2011 AFA in FY 2012.**

As already noted, section 106(a)(1) of ISDA provides that the amount of funds awarded under a self-determination contract "shall not be less than the . . . Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract." Section 106(b)(2) provides that the amount of funds "required by subsection (a)" "shall not be reduced by the Secretary in subsequent years" except in certain specified circumstances. The ALJ concluded that, pursuant to section 106(b)(2), IHS was precluded from reducing the funding amount for FY 2012 below the funding amount in the FY 2011 AFA. In its Objections, IHS argues that section 106(b)(2) does not apply here because the funding provided under the Nation's FY 2011 AFA was more than the amount "required by subsection (a)" within the meaning of section 106(b)(2), and, in any event, one of the circumstances under which a reduction in the amount "required by subsection (a)" is permitted was present here. I address these arguments in turn.

Whether the funding IHS provided under the Nation's FY 2011 AFA was more than the amount "required by subsection (a)"

IHS takes the position that the amount of funds it provided to the Nation pursuant to the FY 2011 AFA was not the amount "required by subsection (a)" within the meaning of section 106(b)(2) of ISDA. According to IHS, the amount "required by subsection (a)" refers to "the amount the Secretary herself would have otherwise spent on the direct operation of the program." IHS Obj. at 4. IHS explains: "The Secretary is required by Section 106(a)(1) to provide *no less than* the amount she would have otherwise spent. The Secretary can provide additional funding, as she is able, but such funds are not 'required' by section 106(a)(1)." *Id*. (emphasis in original). IHS maintains that "the Secretary would not have otherwise spent the requested funds on Seneca's [ISDA] programs" and that the $3,744,392 was simply additional funding the Secretary was not required to provide. *Id*. According to IHS, treating the full amount provided under the FY 2011 AFA, including the $3,744,392, as the amount which may not be reduced in subsequent years under section 106(b)(2) "would eviscerate all agency discretion over funding." *Id*.

I need not decide here whether section 106(b)(2) precludes IHS from reducing a tribe's funding in the subsequent year once IHS has provided funds in an amount that exceeds the amount required by section 106(a). Like the ALJ, I am bound by the District Court's conclusion that the amount provided by IHS under the Nation's FY 2011 AFA was the amount "required by subsection (a)" within the meaning of section 106(b)(2).[8] The Court rejected IHS's argument that the existing funding level for FY 2011 constituted the amount required by subsection (a), concluding that, on the facts of this case, the amount that the Secretary was required to add to the Nation's contract for that year pursuant to 25 C.F.R. § 900.18 was the amount required by subsection (a), i.e., "its 'Secretarial' amount." *See Seneca Nation of Indians*, 945 F.Supp.2d at 150. IHS cannot reasonably argue that the Court's conclusion with respect to an issue IHS itself raised should not be binding.[9]

The Court's conclusion was predicated on its finding that the Nation's April 29, 2011 letter represented that the proposed FY 2011 AFA requested an increase in the amount required by section 106(a). Pursuant to section 900.18, that proposal was deemed approved in the absence of a timely response by IHS. It follows that the amount added to the contract in accordance with section 900.18 was what the Nation's proposal said it was: part of the amount required by section 106(a). Thus, as the Court observed, it did not need to reach the issue whether correcting the undercount in the Nation's user population would result in increasing the amount required by section 106(a). *See* 945 F.Supp.2d at 151.

IHS does not dispute the finding in the ALJ Decision that the Nation was requesting an increase in the amount required by section 106(a) when it proposed the funding increase for FY 2011.[10] In any event, the record shows that IHS understood that the Nation's

---

[8] As indicated above, the District Court's finding applied to FY 2010 as well as FY 2011, but I refer only to FY 2011 since the finding for FY 2010 is not relevant here.

[9] Contrary to what IHS asserts, the Nation sought declaratory relief as well as damages in its action in federal district court. The Nation did not seek a declaration that the additional funds it requested for FY 2011 and FY 2012 should be deemed part of the amount required by section 106(a), however. *See* Complaint for Declaratory Relief and Money Damages at 11.

[10] In making that finding, the ALJ not only quoted the District Court's finding to that effect (ALJ Decision at 8-9) but also noted that the Nation's April 29, 2011 letter stated that the Nation "request[s] that this amendment proposal be handled pursuant to 25 CFR [Part] 900, Subpart D" (ALJ Decision at 13 (emphasis added)). According to the ALJ, the subpart D regulations specify that the amount to be added to a tribe's self-determination contract upon approval of a proposed AFA is the amount required by section 106(a). *Id*., quoting section 900.19. This reading of the regulations appears to be inconsistent with IHS's position that where IHS has exercised its discretion to approve a proposal for funding that exceeds the amount required by section 106(a), the amount added to the contract does not become the amount required by section 106(a). However, as indicated above, I need not consider that issue here.

proposed FY 2011 AFA requested the additional $3,774,392 as part of the amount required by section 106(a). As indicated above, the Nation explained it was requesting the additional funding for FY 2011 because it had recently discovered that its user population had been undercounted by IHS and stated that it estimated that increased funding of $3,774,392 was necessary to correct for the undercount. In declining the Nation's request for an additional $3,774,392 for FY 2012, which the Nation made on the same basis as its FY 2011 proposal, IHS took the position that the Nation was not justified in claiming the additional funding as part of the amount required by section 106(a), stating: "Increases or decreases in user population do not affect a tribe with an established [ISDA] contract's Secretarial amount." 10/31/11 ltr. from R. Ketcher to Miller at 4 (unnumbered). In addition, IHS referred to the Nation's FY 2012 proposal as a request to increase the Nation's "recurring base." *Id*. This is clearly a reference to the amount required by section 106(a) since IHS provides that amount to a tribe on a recurring basis, i.e., for each year of a contract. *See* Wiggins Decl. (IBIA 12-041, Appellee's Response, Tab 1) at 2, ¶ 6 (the Secretarial amount "is generally assured to a contracting tribe annually" and "can only be reduced for a number of statutorily prescribed reasons"; "For this reason, this amount is also often referred to as a tribe's 'base amount' of funding.").

Accordingly, I conclude that the funding IHS provided to the Nation under its FY 2011 AFA was the amount "required by subsection (a)" within the meaning of section 106(b)(2) of ISDA.

Whether IHS was permitted to reduce the funding provided under the FY 2011 AFA based on section 106(b)(2)(E)

IHS also argues that, contrary to what the ALJ concluded, it was permitted to reduce the amount requested for the Nation's proposed FY 2012 AFA in the circumstances listed in section 106(b)(2)(E) of ISDA: "completion of a contracted project, activity, or program." IHS Obj. at 8-9. The ALJ rejected this argument, stating:

> First, because Seneca continues to provide health services to its members under the Contract, its health services program is not a completed activity within the meaning of [section 106(b)(2)(E) of ISDA]. Second, if the Department's proposed interpretation of the phrase "completion of a contracted project, activity, or program" were adopted, section 106(a) funding for [ISDA] contracts would always be subject to annual recalculation. Such a reading of [section 106(b)(2)(E)] is inconsistent with the congressional goal of structuring the [ISDA] to provide stable funding that tribes can rely on to manage their own programs. [citation omitted]

ALJ Decision at 16.[11] IHS takes the position that "the statute does not limit the term 'completed activity' to a health service program." IHS Obj. at 8. IHS explains:

> The 'completed activity' in the present case was the resolution of the alleged user population undercount. This issue was resolved when the damages award ordered by the District Court for FY 2010 and FY 2011 was paid to Seneca from the Judgment Fund, and the IHS corrected the alleged user population undercount by adjusting Seneca's user population undercount by adjusting Seneca's user population count for FY 2011. As discussed above, IHS has demonstrated that the change in user population would not have resulted in any additional funding for FY 2010 or FY 2011 anyways. Wiggins Decl. ¶¶ 12-13. Thus, the user population dispute for FY 2010 and FY 2011 became a 'completed activity' under [section 106(b)(2)(E) of ISDA].

Id. at 8.

IHS's reading of section 106(b)(2)(E) ignores its plain meaning. ISDA provides funding to tribes for programs, functions, services, or activities previously provided by IHS for the benefit of Indians. ISDA § 102(a)(1). User population is simply a factor IHS may use to allocate funds appropriated to it among programs tribes contract to provide. *See* Wiggins Decl. at 2, ¶¶ 8-9. Moreover, IHS does not dispute that its reading would be inconsistent with congressional intent to provide stable funding by prohibiting reductions of the 106(a) amount from year to year except under limited circumstances.

Accordingly, I conclude that IHS was not permitted to reduce the funding the Nation received under its FY 2011 AFA in the subsequent year, FY 2012, based on the exception in section 106(b)(2)(E) of ISDA.

2. <u>The ALJ did not err in concluding that that IHS was precluded from declining the proposed FY 2012 AFA with respect to the $3,774,392 pursuant to 25 C.F.R. § 900.32.</u>

As noted above, 25 C.F.R. § 900.32 provides in relevant part that if a tribe's "proposed successor annual funding agreement . . . is substantially the same as the prior annual funding agreement . . . the Secretary may not decline[] any portion of a successor annual funding agreement." The ALJ concluded that the Nation's proposed FY 2012 AFA and

[11] The ALJ also stated that IHS's "argument that payment of the funds owed under the FY 2010 and FY 2011 constituted a completion of a contracted project must be rejected because it is a *post hoc* rationalization." ALJ Decision at 16, citing *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (*post hoc* rationalizations offered by counsel cannot be used to justify an agency action). I need not determine if this principle applies here because the other grounds set out by the ALJ are adequate to support his conclusion.

its FY 2011 AFA "are substantially the same" and that section 900.32 therefore "requires the Department to approve" the proposed FY 2012 AFA. ALJ Decision at 10. I discuss in turn below the three grounds on which IHS objects to this conclusion: that the proposed FY 2012 AFA was not a successor annual funding agreement, that it was not substantially the same as the FY 2011 AFA, and that exceptions to 900.32 apply here.

Whether the proposed FY 2012 AFA was a successor annual funding agreement

IHS takes the position that section 900.32 does not apply here because the proposed FY 2012 AFA was not a proposed "successor annual funding agreement." IHS asserts:

> 25 C.F.R. § 900.32 was intended to reflect the IHS' actual practices with respect to "contract renewal proposals." *See* . . . 61 Fed. Reg. 32,482, 32,487 (June 24, 1996). . . . The IHS agreed, as a matter of continued practice, that it would not use the declination process to review "contract renewal proposals" if "there is no material or significant change to the contract." *Id*. Thus, the only possible definition of a successor AFA, under 25 C.F.R. § 900.32, is an AFA that accompanies a "contract renewal proposal," which . . . is a proposal to renew the existing agreement. As such, a successor AFA can only refer to a proposal that seeks to renew the contract on the same terms as those previously negotiated and agreed upon.

IHS Obj. at 5-6. According to IHS, the proposed FY 2012 AFA was not a proposal that seeks to renew the contract on the same terms as those previously negotiated and agreed upon because the amount of additional funding proposed by the Nation for FY 2012 "was awarded to Seneca as damages by the District Court for FY 2011, rather than through negotiation between the parties." *Id*. at 6.

IHS's position that section 900.32 applies to contract renewal proposals is insupportable when the regulations are viewed as a whole. Contract renewal proposals are expressly addressed in section 900.33, and the preamble language cited by IHS tracks the language of that section, which provides that IHS "will not review the renewal of a term contract for declination issues where no material and substantial changes to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe." Thus, the term "successor annual funding agreement" used in section 900.32 cannot mean a contract renewal proposal, which is addressed by a separate regulation. *See Del. Tribe*

of Indians at 13 (recognizing distinction between "successor annual funding agreement" governed by section 900.32 and "renewal contract" governed by section 900.33).[12] Moreover, the Nation's proposed FY 2012 AFA was clearly a "successor annual funding agreement" within the meaning of section 900.32. As noted above, the Nation had an ISDA contract with an indefinite term. Pursuant to ISDA, the Nation's FY 2011 AFA was part of the contract. In proposing an AFA for the next fiscal year, the Nation was not proposing to renew an expiring contract, but rather to replace the AFA under an existing contract that would continue in effect indefinitely. The Board has consistently treated a proposed AFA under an existing ISDA contract with an indefinite term as a "successor annual funding agreement" within the meaning of section 900.32. *See, e.g.*, *Susanville Indian Rancheria; Ninilchik Traditional Council.*

IHS nevertheless argues that the ALJ erred in not following the decision of another ALJ that "stands for the proposition that if a prior proposal was 'deemed approved' by operation of law due to an employee mistake, rather than by affirmative action of a contracting officer, the subsequent proposal could not be a 'successor' AFA within the meaning of 25 C.F.R. § 900.32." IHS Obj. at 9, citing *Del. Tribe of Indians*. That decision states in pertinent part:

> Although the regulations provide that "successor annual funding agreements" and "renewal contracts" will not be reviewed under the declination criteria, I agree with the government's argument that the Delaware Tribe's FY 2002 contract proposal was neither a successor annual funding agreement nor a renewal contract within the meaning of [section 900.32 and 900.33, respectively]. While I have found no authority on point, I believe the regulations are reasonably interpreted to support this position. Contracts that were first approved by operation of law due to a BIA employee's neglect, especially where that misfeasance or omission was made known to the Tribe shortly after its occurrence, should not enjoy the same status as those that were affirmatively approved by action of a line officer. I, therefore, conclude that the Regional Director properly considered declination criteria when reviewing the Delaware Tribe's FY 2002 proposal.

Del. Tribe of Indians at 13.

---

[12] The ALJ Decision describes an argument by IHS that is similar but does not expressly argue that section 900.32 applies only to contract renewal proposals. According to the ALJ, "The Department argues that annual successor funding agreements are automatically approved by [ISDA] so there is no need to negotiate them. Based on that reasoning, the Department argues that Seneca's use of the word 'negotiate' [in correspondence regarding the proposed FY 2012 AFA] indicates that Seneca did not view the proposed FY 2012 Agreement as a successor annual funding agreement for purposes of 25 C.F.R. § 900.32." ALJ Decision at 19. The ALJ concluded that "considered in context and based on the parties' course of conduct, Seneca was clearly submitting a proposed successor annual funding agreement." *Id*.

ALJ Sweitzer declined to follow this decision "because the ALJ based his holding on a finding that 'the regulations at issue are reasonably interpreted to support' BIA's position." ALJ Decision at 14 (quoting *Delaware* at 13).[13] The ALJ continued: "As discussed above, the canon of construction requiring deference to interpretations that favor Native Americans controls over the more general rule of deference to agency interpretations." *Id.*

IHS asserts that *Delaware* was correctly decided and applies here because section 900.32 "cannot be reasonably read as mandating a funding level [in future years] in excess of the amount the Secretary would have otherwise spent" "when the prior AFA was 'deemed approved' by operation of law." IHS Obj. at 10. As discussed above, however, IHS is mistaken that the Nation's FY 2011 AFA funding amount exceeded the amount required by section 106(a). In any event, even if IHS were correct, nothing in the language or regulatory history of section 900.32 suggests that it does not apply where the prior year's AFA was deemed approved pursuant to section 900.18 instead of approved pursuant to the normal process. Thus, the interpretation of section 900.32 in *Delaware* is not reasonable even if the general rule of deference to agency interpretations controls.

Accordingly, I conclude that the ALJ did not err in treating the Nation's proposed FY 2012 AFA as a "successor annual funding agreement" within the meaning of 25 C.F.R. § 900.32.

Whether the proposed FY 2012 AFA was substantially the same as the FY 2011 AFA

IHS also argues that, contrary to what the ALJ found, the Nation's proposed FY 2012 AFA was not substantially the same as the Nation's FY 2011 AFA because the basis for the Nation's request for the additional $3,774,392 was not the same for both proposals. IHS Obj. at 6-7. IHS states, "At no point has Seneca asserted an error in its user population count for FY 2012, which was the basis for Seneca's request for the additional funding in FY 2011." *Id.* at 7. Instead, according to IHS, the Nation told IHS that "the $3,774,392 must be included for FY 2012 based upon the reductions clause, Section 106(b)(2)" of ISDA. *Id.* IHS also maintains that the Board has previously held that a "proposed AFA was not 'substantially the same' as the prior AFA because the two AFAs used different bases for substantiating the tribe's funding requests." *Id.* at 6, citing *Ninilchik Traditional Council*.

[13] The ALJ stated that the recommended decision in *Delaware Tribe of Indians* "apparently became final for the Department of the Interior because it was not appealed." ALJ Decision at 14.

Addressing the same argument below, the ALJ stated:

> This argument is unfounded. Seneca's brief discussion regarding the deemed approved FY 2010 and FY 2011 Agreements in its September 20, 2011, letter was obviously used for ease of reference and to remind the department that it failed to decline its FY 2010 and FY 2011 requests within the prescribed 90-day time period. Such statements do not suggest that Seneca changed its underlying rationale (its undercounted user population) or methodology for calculating the $3,774,392 dollar figure in its proposed FY 2012 Agreement.

ALJ Decision at 17. The ALJ also determined that "*Ninilchik* does not constitute apposite or binding precedent in this matter," stating in part:

> [T]he facts in *Ninilchik* distinguish it from the present case. In its holding, the DAB explained that although the dollar amounts requested by the tribe for 1999 and 1998 were similar, "the means and circumstances for determining indirect [contract support costs] differed substantially between the agreements . . . ." *Ninilchik* . . . at 2. In the instant proceeding, the record does not indicate that Seneca used a different method to calculate its request for the additional FY 2012 funding than it used when it requested additional funds for FY 2011 and FY 2010. [footnote omitted]

Id. at 18.

IHS does not point to any error in the ALJ's analysis of its arguments. Accordingly, I conclude that the ALJ did not err in concluding that the Nation's proposed FY 2012 AFA was "substantially the same" as its FY 2011 AFA within the meaning of 25 C.F.R. § 900.32.

Whether exceptions to section 900.32 apply here

IHS asserts that "the ALJ erred when he concluded that the FY 2012 proposal did not meet any of the exceptions listed under 25 C.F.R. § 900.32." IHS Obj. at 8. IHS states, "The plain language of 25 C.F.R. § 900.32 provides that the Secretary may still apply the declination criteria to a 'successor' AFA or a proposal that is 'substantially the same as the prior' AFA, in accordance with reductions permitted by [section 106(b)(2) of ISDA], or when there is a disagreement over the availability of appropriations. 25 C.F.R. § 900.32." *Id*. The only circumstance in which a "reduction" is permitted by section 106(b)(2) that IHS argues is applicable here is "completion of a contracted project, activity, or program" (section 106(b)(2)(E) of ISDA). I concluded in a previous section of my analysis that this exception does not apply in this case.

IHS also claims that the exception created by the last sentence of section 900.32 applies here. That sentence states: "If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E." Addressing IHS's argument, the ALJ stated:

> The Department's argument fails because the quoted provision is most reasonably read as only applying to proposals that are not substantially the same as the prior annual funding agreement and contracts with Department of the Interior agencies other than the Bureau of Indian Affairs. . . . Interpreting the quoted provision as the Department suggests would create an exception that swallows the rule and violates the canon of construction requiring regulations to be construed "liberally in favor of the Indians for whose protection [they] were promulgated." [citation omitted]

ALJ Decision at 19-20. IHS states that it "disagrees with the ALJ that it is mandated to use its limited appropriation to fund a proposal in excess of the amount *required* by [section 106(a) of ISDA], and such a disagreement over the availability of appropriations to fund a proposal is an exception to 25 C.F.R. § 900.32, allowing the IHS to reach the declination criteria." IHS Obj. at 9. However, IHS's argument is based on the mistaken premise that the Nation's proposed FY 2012 AFA was for an amount in excess of the amount required by section 106(a). As discussed above, the amount proposed for that AFA was the amount required by section 106(a). Thus, even if a disagreement over the availability of appropriations to pay for funding proposals that exceed the amount required by section 106(a) would be a basis for a partial declination, that is not the situation here.

Accordingly, I conclude that the ALJ did not err in concluding that neither of the exceptions to 25 C.F.R. § 900.32 asserted by IHS were present here.

Conclusion

For the foregoing reasons, I affirm the ALJ Decision reversing IHS's partial declination of the Nation's proposed FY 2012 AFA.

/s/
Constance B. Tobias, Chair
Departmental Appeals Board