Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Native American Center of Recovery,	DATE: November 12, 1993
Appellant,	Docket No. C-93-083
- v. -	Decision No. CR293
Indian Health Service,	
Appellee.	

RECOMMENDED DECISION

By letter dated April 29, 1993, Appellee, the Indian Health Service (IHS), declined the proposal for a contract submitted by the Native American Center of Recovery (Appellant) under the Indian Self-Determination Act, 25 U.S.C. § 450 et seq., on February 22, 1993. Appellant sought to provide medically supervised inpatient detoxification services for members of the Indian population residing in IHS's Shawnee Service Unit area who are male and 20 to 40 years old. Following IHS's declination of the proposal, Appellant requested a hearing by letter dated May 24, 1993.

During the prehearing conference on June 17, 1993, IHS requested the opportunity to proceed by summary judgment motion. Appellant agreed to have held in abeyance its request for an in-person hearing, pending the parties' briefing certain legal issues. Accordingly, I set a briefing schedule that allowed both parties to file summary judgment motions. IHS filed such a motion, which was supported by a brief in chief (IHS Mem.) and a reply brief (IHS Rep.). Appellant responded to IHS's motion by brief (App. Mem.), but did not file a cross-motion for summary judgment.

For the reasons that follow, I recommend granting IHS's motion for summary judgment and thereby uphold IHS's decision to decline the proposed contract submitted by Appellant on February 22, 1993.

ISSUE

The sole issue in this case is whether IHS lawfully declined the contract proposal submitted by Appellant on February 22, 1993, pursuant to the Indian Self-Determination Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Under the Indian Self-Determination Act, a tribe or tribal organization may contract with the U.S. Department of Health and Human Services for "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).

2. IHS, an agency within the Public Health Service component of the U.S. Department of Health and Human Services, is responsible for providing health services to American Indian and Alaska Native people living on or near federal Indian reservations throughout the United States and in traditional Indian country in Oklahoma and Alaska. IHS Ex. 4.[1]

3. Under the Indian Self-Determination Act, if a tribal organization desires to enter into a "self-determination" contract with IHS, it must provide to IHS a tribal resolution and a contract proposal to provide health care services to eligible Indians. 25 U.S.C. § 450f(a)(1).

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[1] IHS submitted six exhibits with its motion for summary judgment, marked as IHS Ex. 1 - 6. Appellant submitted two exhibits with its response, marked as NACR Ex. 1 - 2. Attached to IHS Ex. 4 were Tabs A - K. Neither party has objected to the foregoing exhibits, and I have admitted all of them into the record for the purpose of considering the merits of the parties' positions.

4. If the contract proposal meets the statutory criteria, IHS may only decline it for one of the following reasons:

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory,
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> (B) adequate protection of trust resources is not assured, or
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

25 U.S.C. § 450(f)(a)(2)(A)-(C).

5. If a "self-determination" contract is approved, the Indian Self-Determination Act requires the transfer of resources associated with the program to the tribe or tribal organization, as follows:

> The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the . . . Secretary [of Health and Human Services] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.

25 U.S.C. § 450(j)-1(a).

6. After the enactment of the Indian Self-Determination Act, IHS has administered its health care programs either directly through operating its own health care facilities, or through "self-determination" contracts with Indian tribes and tribal organizations. IHS Ex. 1 and 4.

7. Throughout the country, IHS is organized into 12 Area Offices, which contain various basic administrative "service units." IHS Ex. 1.

8. The "service units" of IHS Area Offices are operated by IHS or by tribes or tribal organizations under "self-determination" contracts. IHS Ex. 1.

9. IHS's "service units" provide "direct care" to Indian beneficiaries at IHS operated facilities or, where a "self-determination" contract exists, at tribal health care delivery facilities, such as hospitals, health

centers, health stations, and satellite clinics. IHS Ex. 1 and 4.

10. IHS has also a Contract Health Services program for purchasing some health services that IHS does not provide through its own facilities or personnel. IHS Ex. 1 and 4.

11. The term "Contract Health Services" means "health services provided at the expense of the Indian Health Service from public or private medical or hospital facilities other than those of the Service." 42 C.F.R. § 36.21(e) (1986). See also, footnote 4 of IHS's Mem. at p. 2 regarding the inapplicability of the subsequently promulgated regulation.

12. The Shawnee Service Unit is under the IHS Oklahoma Area Office and is one of 11 service units in the Oklahoma area. IHS Ex. 4.

13. The five indigenous tribes of the area serviced by the Shawnee Service Unit are: Citizen Band Potawatomi Tribe, Kickapoo Tribe of Oklahoma, Iowa Tribe of Oklahoma, Absentee Shawnee Tribe of Oklahoma, and Sac and Fox Nation of Oklahoma. IHS Ex. 4; IHS Ex. 4 - Tab D.

14. The Shawnee Service Unit makes available to Indian beneficiaries IHS's "direct care" services at the IHS-operated Shawnee Indian Health Center, an outpatient clinic. IHS Ex. 4 - Tab A; Finding 9.

15. To supplement its "direct care" services in the Shawnee Service Unit area, IHS uses its allotted Contract Health Services funds to purchase some -- but not all -- of those services that are not available at the IHS operated Shawnee Indian Health Center or other IHS facilities. IHS Ex. 4; IHS Ex. 4 - Tabs A and J.

16. Under agency regulations, when funds are insufficient to provide the volume of Contract Health Services that appear to be needed by the population residing in a Contract Health Services delivery area, IHS must determine priority for services on the basis of relative medical need. See 42 C.F.R. § 36.21 et seq. (1986).

17. Since October 17, 1988, IHS has had in place designated priorities for using the available Contract Health Services program funds in the Oklahoma City Area. IHS 4 - Tab J.

18. IHS had assigned alcohol and drug treatment programs to Category IV (the next to lowest medical priority category) under the Contract Health Services program in the Oklahoma City Area. IHS Ex. 4 - Tab J.

19. Presently, the Shawnee Service Unit purchases services only for Categories I and II under its Contract Health Services program. IHS Ex. 4.

20. No Contract Health Services are available for persons in need of treatment for drug and alcohol problems in the Shawnee Service Unit area. Findings 18 and 19; IHS Ex. 4.

21. The IHS hospital system of the Oklahoma Area sometimes provides services for detoxification as an adjunct to the treatment of acute medical problems. IHS Ex. 4; IHS Ex. 4 - Tab I.

22. IHS does not provide any "direct care" for medically supervised detoxification needs in the Oklahoma Area, except as described in Finding 21. IHS Ex. 4.

23. Even though IHS provides no direct care for medically supervised detoxification needs in the Oklahoma Area (Finding 22), and it provides no Contract Health Services for any type of drug or alcohol treatment problems (Finding 20), Appellant and the five tribes indigenous to the Shawnee Service Unit have provided various non-medical outpatient or preventative services for dealing with alcohol and substance abuse under "self-determination contracts" with the IHS. IHS Ex. 4 - Tabs B and C.

24. On June 29, 1992, IHS entered into a "self-determination" contract with Appellant, which was previously named Indian Action Center. IHS Ex. 4; IHS Ex. 4 - Tab B.

25. Appellant is a tribal organization under the direction of a board made up of tribal representatives from the five indigenous tribes and nations within the Shawnee Service Unit area. IHS Ex. 4 - Tab D; see Finding 13.

26. The "self-determination" contract award of June 29, 1992 provided Appellant with $185,380 in direct costs, covering the period from July 1, 1992 through June 30, 1993, to administer a 35-day non-medical residential drug and alcohol treatment program for those of the Shawnee Service Unit area's Indian population who are males age 18 or older. IHS Ex. 4; IHS Ex. 4 - Tab B.

27. In addition, for an additional total of $242,178 in direct costs, IHS also entered into separate "self-determination" contracts with each of the five tribes indigenous to the Shawnee Service Unit for each tribe to administer an alcohol and substance abuse program consisting of outpatient and preventative services. IHS Ex. 4; IHS Ex 4 - Tab C.

28. Based on a population of 11,615 beneficiaries serviced by these "self-determination" contracts, IHS's expenditures for alcohol and substance abuse treatment in the Shawnee Service Unit area (totalling $427,558) is slightly less than $37 per beneficiary. IHS Ex. 4.

29. IHS's per capita expenditure for alcohol and substance abuse treatment under the aforementioned contracts in the Shawnee Service Unit area is higher than the Oklahoma Area per capita average funding for the same purpose (slightly more than $16), and it is also higher than the per capita allocations for eight of the other 10 service units of the Oklahoma Area. IHS Ex. 4.

30. The total of $427,558 made available by IHS to the five tribes and Appellant represents the total direct cost funds IHS allocated for substance abuse treatment to the Shawnee Service Unit of the Oklahoma Area Office. IHS Ex. 4; see also IHS Ex. 6.

31. On February 22, 1993, Appellant submitted a proposal under the Indian Self-Determination Act for an inpatient "Medically Supervised Detoxification" program on behalf of the five indigenous tribes of the Shawnee Service Unit area. IHS Ex. 4 - Tab D; IHS Mem., p. 9; App. Mem., p. 2.

32. Appellant proposes to provide a facility which would admit, for a recommended period of five days, those Indian individuals who are under the influence of alcohol or illegal drugs and are at high risk of physical or emotional damage as a result of withdrawal, so that they may undergo withdrawal under the supervision of the facility's trained staff. IHS Ex. 4 - Tab D.

33. The target population of the February 22, 1993 proposal is the 4,325 "at risk" Indians of the Shawnee Service Unit area who are males and between the ages of 20 to 40. IHS Ex. 4 - Tab D, p. 8.

34. Appellant's proposal sought to provide this treatment, either directly or through consultation or contractual agreements, which treatment was to be funded

by IHS Contract Health Services program funds. IHS Ex. 4 - Tab D, p. 3; IHS Ex. 5, p. 3.

35. The cost of the proposed program is $299,276. IHS Ex. 4 - Tab D, p. 21.

36. On April 29, 1993, after reviewing Appellant's proposal, Robert H. Harry, D.D.S., Oklahoma Area Director of IHS, declined the proposal by citing the statutory criterion, "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract" (25 U.S.C. § 450f(a)(2)(C)). IHS Ex. 4 - Tabs I and K.

37. Dr. Harry, for IHS, explained his use of the statutory declination criteria by stating that: (a) medically supervised detoxification services are not service elements that currently exist or are being provided in the Shawnee Service Unit; (b) providing medically supervised detoxification services as direct care in the area would constitute a new program activity or an expansion of the current alcohol services programs; and (c) IHS does not have funds available for new or expanded alcohol programs at this time. IHS Ex. 4 - Tab K.

38. Since 1987, Congress has not specifically appropriated funds for the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. § 2401, et seq.). IHS Ex. 6.

39. IHS had allocated to its various Area Offices the $16,200,000 Congress appropriated in fiscal year 1987 for services provided under the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. IHS Ex. 6.

40. The Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 does not give rise to any legally enforceable rights or obligations under the facts of the present case. 25 U.S.C. § 2401.

41. IHS receives its funds from two annual lump-sum appropriation accounts: one for "Indian Health Services" and the other for "Indian Health Facilities." IHS Ex. 3.

42. For fiscal year 1993, IHS did not receive appropriations specifically designated for implementing the Indian Self-Determination Act and the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. IHS Ex. 3; IHS Ex. 6.

43. IHS allocates and spends its appropriated funds under the authority of the Snyder Act (25 U.S.C. § 13) and the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.). Lincoln v. Vigil, 113 S. Ct. 2024, 2027 (1993).

44. Both the Snyder Act and the Indian Health Care Improvement Act speak about Indian health care in general terms. Lincoln v. Vigil, 113 S.Ct. at 2032.

45. The allocation of funds from a lump sum appropriation is an administrative decision committed to agency discretion. Lincoln v. Vigil, 113 S.Ct. at 2031.

46. Appellant cannot compel IHS to allocate funds from the lump-sum appropriation in any particular manner. See Lincoln v. Vigil, 113 S. Ct. 2024.

47. While IHS has the discretion to take funds from its lump-sum appropriation and reallocate them between programs, Appellant cannot compel IHS to do so. See Lincoln v. Vigil, 113 S. Ct. 2024.

48. At the time IHS declined Appellant's contract proposal at issue, the funds IHS had allocated to drug and alcohol treatment in the Shawnee Service Unit area had been depleted by earlier awards of "self-determination contracts" totalling $427,558 to Appellant and the five indigenous tribes of the Shawnee Service Unit area. I.G. Ex. 4.

49. The Indian Self-Determination Act is not a self-funding statute, but a statute that gives tribes and tribal organizations the means for contracting for services that are otherwise available from IHS pursuant to its allocations and expenditures under the Snyder Act or the Indian Health Care Improvement Act. Findings 41 - 44.

50. IHS's assignment of a priority code to drug and alcohol treatment under the Contract Health Services program is in accord with the regulations. 42 C.F.R. § 36.23(e) (1986); Findings 16 - 20.

51. Because no Contract Health Services funds were allocated in the Shawnee Service Unit area for purchasing treatment for drug and alcohol abuse or other services of the same medical priority code, Contract Health Services funds were not legally available for the services Appellant proposed to provide. Findings 15 - 20.

52. IHS has no legal obligation to make available contract Health Services funds for awarding a contract to Appellant for the proposal at issue. Finding 50.

53. In the absence of any inpatient medical treatment of drug or alcohol abuse provided by IHS, there is no direct care fund that can be transferred to Appellant under its "self-determination" contract proposal to provide said treatment. See Findings 21 and 22; 25 U.S.C. § 450(j)-1(a).

54. The terms of Appellant's contract proposal cannot be reasonably construed as an offer to take over that portion of the direct care services provided from time to time at IHS hospitals in the Oklahoma Area which treat alcohol and drug abuse problems as an adjunct to other acute medical conditions. See Findings 32 and 33.

55. IHS properly declined Appellant's proposed contract dated February 22, 1993, under section 102(a)(2)(C) of the Indian Self-Determination Act, 25 U.S.C. § 450f(a)(2)(C).

56. Where Appellant requires $299,276 to provide its services under the proposed "self-determination" contract, and IHS has no funds allocated for the purchase of those services and does not choose to reallocate funds as suggested by Appellant, IHS properly concluded that "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract," within the meaning of the statute. 42 U.S.C. § 450f(a)(2)(C).

ANALYSIS

The essential facts of this case are straightforward.

Appellant, formerly named the Indian Action Center Council, is a consortium of the five tribes indigenous to the Shawnee, Oklahoma area, i.e., the Citizen Band Potawatomi Tribe, Kickapoo Tribe of Oklahoma, Iowa Tribe of Oklahoma, Absentee Shawnee Tribe of Oklahoma, and Sac and Fox Nation of Oklahoma. IHS Ex. 4; IHS Ex. 4 - Tab D, pp. 1, 11. IHS's Shawnee Service Unit, which is under IHS's Oklahoma Area Office, administers the delivery of health care services to the populations of these five tribes. IHS Ex. 1 and 4.

In the months prior to Appellant's submitting the contract proposal at issue, IHS had entered into a total of six contracts under the Indian Self-Determination Act.

These six contracts were with Appellant and the five Indian tribes indigenous to the Shawnee Service Unit area and funded the administration or delivery of various types of outpatient, non-medical or preventative substance abuse treatment programs to the area's Indian beneficiaries.[2] IHS Ex. 4; IHS Ex. 4 - Tabs B and C. As a consequence of these contracts, the total amount of money committed to Appellant and the five tribes under the Indian Self-Determination Act depleted the direct cost funds IHS had allocated for substance abuse treatment in the Shawnee Service Unit area. IHS Ex. 4; see also IHS Ex. 6 and 25 U.S.C. § 450(j)-1(a).

In addition, because IHS assigned a low medical priority to substance abuse treatment in the Shawnee Service Unit, IHS had committed no Contract Health Services funds to it. IHS Ex. 2, 4, and IHS Ex. 4 - Tabs A and J; 42 C.F.R. § 36.21 et seq.[3] The available Contract Health Services funds were being used by IHS to purchase from local suppliers other health care services that were not available directly from IHS operated facilities or through sources that had been given "self-determination" contracts. Id. The supplemental services purchased by IHS with its Contract Health Services funds included those to which IHS had assigned a higher medical priority than substance abuse treatment. Id.

IHS also provides no inpatient medically supervised detoxification services in its Oklahoma Area. IHS Ex. 4. To the extent such services are provided at all in IHS's Oklahoma Area health delivery network, they are provided as an adjunct to the inpatient care rendered in IHS hospitals in the treatment of other acute medical problems. Id. Thus, IHS had no funds allocated specifically for inpatient medically supervised detoxification services.

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[2] Throughout this decision, I use "substance" interchangeably with "drug and alcohol."

[3] The currently applicable eligibility requirements for Contract Health Services are contained in the 1986 Code of Federal Regulations. IHS Ex. 2. On September 16, 1987, the Department of Health and Human Services promulgated new regulations to replace the eligibility requirements previously codified at 42 C.F.R. § 36.21; however, Congress suspended the eligibility requirements as set out in the new regulations for Contract Health Services. See Pub. L. No. 102-381, 106 Stat. 1409 (1992).

On February 22, 1993, Appellant submitted the proposed contract at issue.[4] Appellant proposed to provide an inpatient medically supervised detoxification program in the Shawnee Service Unit area to serve the "at-risk" members of the Indian population, i.e., those who are males and between the ages of 20 to 40. IHS Ex. 4 - Tab D. Appellant sought to provide such a program as direct care or through contract services under the Indian Self-Determination Act. Appellant estimated that it would need a total of $299,276 from IHS under a "Cost Reimbursement Contract." Id. at pp. 4, 6, 21; IHS Ex. 5, p. 3.

IHS declined the proposed contract on April 29, 1993, citing one of the statutorily permissible criteria, "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract" (25 U.S.C. § 450f(a)(2)(C)). IHS Ex. 4 - Tabs I and K. IHS explained that the program Appellant proposed is not currently being provided by IHS in the area and that no funds are available for new or expanded substance treatment programs at the present time. IHS Ex. 4 - Tab K. Implicit in IHS's explanation is the reasoning that because no program of the type proposed by Appellant is being offered by IHS, no funds designated for that purpose can be transferred to Appellant under the Indian Self-Determination Act. IHS relies on section 450(j)-1(a) of the Indian Self-Determination Act, which provides that the "amount of funds provided under the terms of self-determination contracts . . . shall not be less than the . . . Secretary [of the Department of Health and Human Services] would have otherwise provided for the operation of the programs . . . . " IHS Mem., pp. 6 - 7; see IHS Ex. 4 - Tab I, p. 1.

Appellant then appealed the declination of its proposed contract. IHS Ex. 5.

In its appeal letter and its brief Appellant has articulated good reasons why substance abuse needs to be treated as a disease, why more money committed to treatment of this disease may be beneficial to the population served by IHS, and why Congress should have appropriated money specifically for this purpose. In so arguing, Appellant has urged me to note the special

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[4] The proposal itself is dated March 1, 1993. IHS Ex. 4 - Tab D, p. 1. However, I use the February 22, 1993 date for the proposal because both Appellant and IHS state that the proposal was submitted on that date. App. Mem., p. 2; IHS Mem., p. 9.

relationship the United States Government has with the Indian people. Appellant has further pointed out the federal government's repeated focus on alcohol and substance abuse among the Indian people. See, e.g., App. Ex. 2; App. Mem., pp. 5 - 7. As noted by Appellant, IHS has publicly articulated that its goals are to help lower the incidence of substance abuse and to establish accessible medical and social detoxification services within each area it serves. App. Mem., p. 7. Appellant contends, among other things, that the federal government serves the Indian people in a fiduciary capacity and that it was arbitrary for IHS to decline the proposed contract due to a "lack of funds" in the Shawnee Service Unit area. App. Mem., pp. 4 and 13.

Notwithstanding all of Appellant's reasons for wishing to establish a medically supervised inpatient detoxification center in the Shawnee Service Unit area, IHS's declination of Appellant's proposed contract is valid under the law. In fact, viewing IHS's declination of Appellant's proposed contact in the broader context of IHS's duty to serve all Indian people throughout the nation, IHS's declination appears to be fair and reasonable as well.

I. IHS has no funds allocated to provide services under Appellant's proposed contract.

The crux of this dispute is money.[5] Appellant's proposal makes clear that, in order to receive the services offered by Appellant, IHS must pay $299,276. This payment is material to Appellant's proposed performance. Appellant has not offered to perform its services if IHS makes no payment or discontinues payment during the contract period. For that reason, IHS properly considered its own ability to pay the amount specified by

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[5] IHS has asked me to find that, under the Indian Self-Determination Act, a tribe or tribal organization may seek to contract only for an IHS program, or a portion of a program, that is in existence. IHS Mem., pp. 5 - 7; 10 - 13. IHS's argument is that, in addition to its having properly declined the proposed contract under a statutory declination criterion, Appellant's proposal was invalid ab initio for seeking to create a new program under the Indian Self-Determination Act. Id.. Because I find that IHS's use of the statutory declination criterion is proper and that its reference to a "new program" in the declination letter merely explains the absence of available funds, I do not reach the broader legal question posed by IHS.

Appellant during the contract period in deciding whether Appellant could properly complete or maintain the proposed contract.

IHS has established through its briefs and the documents it filed in support of summary judgment that it lacks the money to transfer to Appellant under the Indian Self-Determination Act.[6] No money can be transferred from an existing IHS program because no program of the type proposed by Appellant exists in the service area. No Contract Health Services funds can be used for Appellant's proposal pursuant to the medical priority structure established in accordance with the agency's eligibility regulations. In addition, all funds allocated to substance abuse treatment have been committed to the other previously approved "self-determination" contracts that provide services that are different from those proposed by Appellant on February 22, 1993.

It is clear that the Indian Self-Determination Act does not fund itself. Whenever IHS enters into a "self-determination" contract, Congress does not make an appropriation to IHS for the satisfaction of that contract. To the contrary, Congress has made no appropriation designated solely for the implementation of "self-determination" contracts.

Petitioner relies on the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2401, et seq., as a legal basis for its contract proposal. App. Mem., pp. 5 - 7, 15. The Indian Alcohol

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[6] I have accepted IHS's assertions as true because they were supported by affidavits and related documents that appear credible on their face and because Appellant has not interposed any valid argument or evidence for a contrary conclusion. As for Appellant's factual argument that "[t]he Indian Health Service does provide for detoxification services in the Shawnee Service Unit at the present time," it is premised on IHS's representation that its hospitals sometimes provide detoxification in connection with the treatment of other acute medical conditions. App. Mem., pp. 3 - 4. Since a review of Appellant's proposed contract shows that it is not seeking to take over the ancillary detoxification services provided in a hospital setting for the treatment of other medical conditions, Appellant's assertion that it does not know the total cost of such hospital services to IHS (App. Mem., p. 4) creates no genuine issue of material fact in this case.

and Substance Abuse Prevention and Treatment Act does not give rise to any legally enforceable rights or obligations under the facts of the present case. The Indian Alcohol and Substance Abuse Prevention and Treatment Act authorizes, but does not mandate, the use of funds for grants to Indian tribes to develop and implement tribal programs for youth employment, youth recreation, youth cultural activities, community awareness programs, and community training and education programs. While Congress appropriated monies to IHS for services provided under this Act in fiscal year 1987, Congress has made no appropriation specifically for the implementation of this Act subsequent to fiscal year 1987. IHS Ex. 6.

Moreover, even if Congress had appropriated specific funds to implement the Indian Alcohol and Substance Abuse Prevention and Treatment Act in fiscal year 1993, it would not be a basis for funding Petitioner's contract proposal. The intended beneficiaries of the Indian Alcohol and Substance Abuse Prevention and Treatment Act are Indian youths, while the intended beneficiaries of Appellant's contract proposal are adult Indian males between the ages of 20 and 40.

II. Appellant cannot compel IHS to reallocate monies from its lump-sum appropriation to fund Appellant's contract proposal.

In recent years, IHS has received all its funding from two annual lump-sum appropriations. IHS Ex. 3. IHS allocates and spends its appropriated funds under the Snyder Act and the Indian Health Care Improvement Act, neither of which speaks to Indian health care in specific terms. See 25 U.S.C. § 13, and § 1601 et seq.. The funds from these appropriations that IHS had allocated to the Shawnee Service Unit for the treatment of drug and alcohol problems had been depleted by the time Appellant submitted its proposal to provide an inpatient medically supervised detoxification program for young adult males. IHS Ex. 4.

Shortly after IHS declined the proposed contract at issue, the Supreme Court decided Lincoln v. Vigil, 113 S. Ct. 2024 (1993), which held that the allocation of funds under lump sum appropriations to IHS are matters committed to IHS's discretion, and such allocations by IHS are not subject to judicial review. The Court's reasoning and holding control my decision as to whether, if IHS lacks funds under its current allocation structure to approve the proposed "self-determination" contract,

IHS should reallocate funds from other service units or other programs.

In Vigil, the Court held that IHS has the discretionary right to discontinue a health program that did not receive specifically appropriated funding from Congress and, pursuant to IHS's broad statutory mandate to administer health care delivery to the Indian people, to reallocate to another program the funds from the discontinued one. So, too, in this case, IHS has the discretion not to transfer between programs the non-specifically appropriated funds it has already allocated. IHS's failure or refusal to reallocate such funds creates no legal right of action in Appellant.

Appellant suggests that IHS should have considered the possibility of diverting funds from other sources to satisfy Appellant's proposed contract. However, there is no law, regulation, or other agency rule that requires IHS to consider such a possibility. Moreover, IHS has responded in writing in these proceedings to Appellant's specific urgings to consider diverting funds from elsewhere. IHS has, as a practical matter, given consideration to the option and rejected the option in its briefs.

Without doubt IHS may, if it wishes, reallocate funds from its lump-sum appropriations to accomplish its various missions. However, it is not required to adopt Appellant's priorities, and IHS has no legal obligation to transfer funds as suggested by Appellant. Contrary to Appellant's arguments (App. Mem., pp. 13, 14), IHS need not demonstrate to Appellant how it made its fiscal allocations or that it had considered diverting funds from other areas or sources. See Vigil, 113 S. Ct. at 2031 - 32.

IHS noted that Appellant and the five area tribes who have previously formed "self-determination" contracts with IHS to provide various types of non-medical, outpatient or preventative services for substance abuse problems may, with IHS approval, modify their expenditures to include providing a medically supervised detoxification program for young men 20 to 40 years old, as currently proposed by Appellant. IHS Rep., p. 8. Such an approach could accommodate the medical and human needs Appellant has perceived without doing damage to the special relationship Appellant has also noted in its brief.

Even though IHS has correctly pointed out that the cases and authorities cited in Appellant's brief concerning

IHS's special relationship to the Indians are inapposite to the issues in this case, Appellant's general discussion of it underscores the fact that IHS's responsibilities are to all American Indian and Alaska Native people living throughout the United States and in traditional Indian country in Oklahoma and Alaska. IHS helps to ensure the delivery of adequate health care services at the Shawnee Service Unit as well as at the many other service units throughout the nation. For IHS to reallocate funds for a contract with Appellant may result in disadvantaging other Indian peoples living outside of the Shawnee Service Unit area.

Even though IHS has adopted goals for addressing substance abuse problems (see App. Mem., e.g., pp. 7 - 8), IHS has not adopted those goals for the sole benefit of the Indian people of the Shawnee Service Unit area. See App. Ex. 2. Especially since IHS has already made a greater per capita expenditure on alcohol and drug treatment in the Shawnee Service Unit area than in most of the other service units of the same region, the equities are against IHS's diverting resources from elsewhere to fund Appellant's project. IHS Ex. 4. As noted by the United States Supreme Court in Vigil, "Whatever the contours of that [trust] relationship [between the Indian people and the federal government], though, it could not limit [IHS's] discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." Vigil, 113 S. Ct. at 2033.

In sum, Appellant has no legally enforceable right to have IHS enter into a "self-determination" contract for which the funds required by Appellant are not available from IHS's budget allocations. Even though IHS has the discretion to allocate its funds and transfer its available resources as it deems proper to effect its health care delivery mission to all Indian people, Appellant cannot compel IHS to do so under the terms of its "self-determination" proposal. Appellant's contract proposal makes no provisions for its performance if IHS fails to make payment or discontinues payment. Therefore, IHS's response was properly, "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract," within the meaning of the third declination criteria specified in the Indian Self-Determination Act, 25 U.S.C. § 450 (f)(a)(2)(C). Because IHS's response was legally justified, it was not arbitrary and capricious, as contended.

CONCLUSION

I conclude that IHS's declination of the contract proposal at issue was legal under the Indian Self-Determination Act. I therefore recommend that the declination be sustained by granting IHS's motion for summary judgment.

/s/

Mimi Hwang Leahy
Administrative Law Judge