Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Shingle Springs Rancheria,	DATE: May 26, 1994
Appellant,	
- v.-	Docket No. C-93-020 Decision No. CR318
Indian Health Service,	
Appellee	
and	
Chapa-De Indian Health Program, Inc., and Rumsey Rancheria,	
Intervenors	

RECOMMENDED DECISION

This case is before me on a request for hearing filed by Appellant, Shingle Springs Rancheria (Shingle Springs). Shingle Springs challenges an October 9, 1992 determination by the Appellee, Indian Health Service (IHS), to award Shingle Springs a contract to provide health care services for its members and the unaffiliated Indian population in El Dorado County, California, and to award Intervenor, Chapa-De Indian Health Program, Inc., (Chapa-De) a contract to provide health care services to members of the Intervenor, Rumsey Rancheria (Rumsey) and to the unaffiliated Indian population in Nevada, Sierra and Placer counties in California.

I conducted a hearing in Sacramento, California, on July 13 - 16, 1993. The parties submitted post-hearing briefs.

I have carefully considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the October 9, 1992 determination of the IHS was

lawful. Therefore, I recommend that the determination be sustained.

BACKGROUND

On October 1, 1991, the California Area Office (CAO) of the IHS received a proposal from Shingle Springs to contract, pursuant to the Indian Self-Determination Act (ISDA or Act), Pub. L. 93-638, as amended, 25 U.S.C. § 450, et seq., directly with the IHS to provide services to eligible Indians in the Chapa-De Service Area. This Service Area consisted of the California counties of El Dorado, Nevada, Sierra, and Placer. The proposal stated that Shingle Springs would provide health care services to the Chapa-De Service Area effective April 1, 1992 using leased facilities in Auburn and Placerville. IHS Ex. 1; Tr. at 346, 740, 746 - 47.[1]

On November 12, 1991, the CAO received a contract proposal submitted under the provisions of ISDA from Chapa-De to provide health services to Rumsey members and all eligible Indians in Placer, Nevada, Sierra, and El Dorado counties. IHS Ex. 2 at 1; Tr. at 159-60. Additionally, Chapa-De proposed to serve eligible members in Yolo county, including members of Rumsey. Chapa-De did not propose to serve Shingle Springs' tribal members. IHS Ex. 2; Tr. at 169, 173, 182, 185, 315, 322, 330, 580, 592, 625, 630 - 31. Chapa-De proposed to continue operating its existing facilities in Auburn and Placerville. Chapa-De was sanctioned to operate as a tribal organization under ISDA based on a resolution from Rumsey which is a federally recognized tribe. IHS Ex. 2, 4.

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[1] I cite to the exhibits of Shingle Springs as "SS Ex. (number) at (page)". I cite to the exhibits of IHS as "IHS Ex. (number) at (page)". I cite to the exhibits of intervenors as CD Ex. (number) at (page)". I cite to the transcript of the hearing as "Tr. at (page)". I cite to my Findings of Fact and Conclusions of Law as "Findings (number)". I cite to Shingle Springs' post-hearing, response and reply briefs as "SS Br. at (page)" and "SS R. Br. at (page)" and "SS Reply Br. at (page)" respectively. I cite to IHS' post-hearing, response and reply briefs as "IHS Br. at (page)" and "IHS R. Br. at (page)", and "IHS Reply Br. at (page)" respectively. I cite to Intervenors' post-hearing and response briefs as "CD Br. at (page)" and "CD R. Br. at (page)", respectively.

After the submission of Chapa-De's contract proposal, the CAO had before it two ISDA proposals for essentially the same service population. By regulation, IHS must approve an ISDA contract proposal within 90 days of receipt unless, within 60 days, IHS makes specific findings that either the services provided will be unsatisfactory, adequate protection of trust resources is not assured, or the proposed project of function to be contracted for or cannot be properly completed or maintained by the contract. 25 U.S.C. § 450f(a)(2). IHS requested Shingle Springs' permission to extend the 60 day regulatory deadline, but Shingle Springs refused. CD Ex. 9.

On December 2, 1991, the CAO accepted Shingle Springs proposal. In the letter accepting the proposal, IHS stated that it would be necessary for Shingle Springs to designate an individual other than the current tribal chairperson to act as the principal agent for Shingle Spring's contract. IHS Ex. 10. IHS' desire for another person to act as principal agent was based on the fact that the current tribal chairperson was, at the time, under investigation by the Inspector General for the Department of Health and Human Services (I.G.). Tr. at 332 - 33.

On December 17, 1991, the CAO declined Chapa-De's proposal. IHS Ex. 11. On December 23, 1991, Chapa-De appealed the declination of its proposal to the IHS Contract Proposal Declination Appeals Board under 42 C.F.R. § 214. The appeal was then referred to the Departmental Appeals Board of the Department of Health and Human Services (DAB). On December 7, 1991, Chapa-De filed a motion to stay the award of the IHS contract to Shingle Springs pending Chapa-De's administrative appeal. Chapa-De also filed an action in the District Court (Chapa-De v. Sullivan, E.D. Cal. Civ. No. S-91-1754) challenging the approval of the contract proposal of Shingle Springs and seeking a stay of the award of such contract. This court action was subsequently voluntarily dismissed by Chapa-De. IHS Ex. 20.

On January 15, 1992, IHS moved for summary dismissal of Chapa-De's appeal based on the ground that Chapa-De was not a qualified tribal organization. IHS contended that Rumsey had not properly retroceded from the Northern Valley Indian Health Program, the tribal organization

that previously was providing its members with health care.[2] Tr. at 349.

On February 28, 1992, I heard oral argument on IHS's motion via telephone conference. IHS Ex. 21. During the conference, I made a preliminary ruling that Chapa-De was properly qualified as a tribal organization within the meaning of the ISDA, based on the sanctioning resolution from Rumsey. Id.

Subsequent to my oral ruling, IHS apparently concluded it needed to reexamine its earlier positions regarding the contract proposals of Chapa-De and Shingle Springs. Based on my preliminary ruling, IHS now viewed the contract proposals of Shingle Springs and Chapa-De as competing proposals to provide services for essentially the same area. IHS Ex. 9; Tr. at 350. IHS met with both Chapa-De and Shingle Springs over the next several months to attempt to settle the matter. IHS Ex. 9. On August 7, 1992, IHS proposed a settlement. IHS Ex. 13. On September 21, 1992, the settlement was rejected by Shingle Springs.

On October 9, 1992, the CAO issued a final revised determination which had the effect of rejecting the parties' prior contract proposals. IHS approved a revised contract for Chapa-De to provide services for Rumsey members and eligible unaffiliated Indians in the counties of Sierra, Nevada, and Placer. With regard to eligible unaffiliated Indians in Yolo County, the CAO agreed to redraw service area boundaries after consultation with all interested contractors. Shingle Springs was granted a revised contract approval to provide services for its members and unaffiliated Indians in the county of El Dorado. IHS' October 9 determination revised the former Chapa-De service area into two

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[2] The statute provides that a tribe may request retrocession from an ISDA contract. 25 U.S.C. § 450j(e). Retrocession is a process whereby a tribe withdraws from participation in an ISDA contract, usually for purposes of sanctioning another tribal organization or itself to obtain an ISDA contract to provide health care services to its own members. IHS withdrew from its initial position, that Rumsey had not properly retroceded from Northern Valley Indian Health Program because one year had not elapsed between Rumsey's withdrawal from Northern Valley Indian Health Program and Rumsey's endorsement of Chapa-De, when it was pointed out that IHS had the authority to waive the one year requirement pursuant to 25 U.S.C. § 450j(e).

distinct areas, thus enabling Rumsey and Shingle Springs to exercise their respective rights to contract under ISDA. As this decision in effect declined the parties' original proposals, the CAO offered each party the right to appeal the determination according to 42 C.F.R. § 214. On November 9, 1992, Shingle Springs appealed the final revised determination and requested a formal hearing in accordance with 42 C.F.R. § 36.214(a). Chapa-De did not appeal the final revised determination and withdrew its pending request for hearing based on IHS's declination of its November 12, 1991 contract proposal. Accordingly, on November 27, 1992, I dismissed Chapa-De's request for hearing.

On November 25, 1992, I conducted a conference call between representatives from Shingle Springs, Chapa-De and IHS relating to the appeal filed by Shingle Springs. During the conference, I granted Rumsey and Chapa-De's uncontested motion to intervene in these proceedings and established a briefing schedule. Upon review of the parties' briefs, I conducted another telephone conference on April 13, 1992. I informed the parties that the briefs demonstrated that there remained material issues in dispute where credibility needed to be assessed. Accordingly, I scheduled an evidentiary hearing in Sacramento, California for July 13 - 16, 1993. I directed the parties to file proposed statements of the issues. On May 28, 1993, I issued an Order which set out eight issues that would be considered at the evidentiary hearing. I conducted a hearing in this case in Sacramento, California on July 13 - 16, 1993.

At the hearing, I admitted into evidence the following exhibits: IHS Ex. 1 through 25, inclusive; CD Ex. 1 through 16, inclusive; SS Ex. 4 - 12, 15 - 18, 20 - 24, 27, 28, 30 - 33, 35, 36, 38 - 40, 42 - 52, 55 - 61, 63, 64, 66, 68, 75 - 84, 88, 89, and 91, inclusive. SS Ex. 91 was admitted for the limited purpose of showing the target population of Chapa-De's contract proposal. I also admitted three Administrative Law Judge (ALJ) Exhibits into evidence as ALJ Ex. 1, ALJ Ex. 2 and ALJ Ex. 3.

Shingle Springs withdrew SS Ex. 13, 14, 34, 37, 65, 70, 72, 73 and 74. I rejected SS Ex. 1 - 3, 19, 25, 26, 29, 41, 53, 54, 62, 67, 69, 71, 85, 86, 87, 90, 92 and 93.

In conjunction with its posthearing response brief, Shingle Springs offered four attachments as proposed exhibits. I mark these for identification as SS Ex. 94, 95, 96 and 97. I reject all of them as being untimely submitted. Moreover, these proposed exhibits were not

submitted in accordance with the schedule or procedures outlined in my April 16, 1993 Order and Notice of Hearing. Additionally, Chapa De and IHS were unfairly prejudiced by Shingle Springs' submission of these proposed exhibits because, with the exception of SS Ex. 96 and 97, which are resubmissions of rejected exhibits, they were provided no notice to examine or contest the submission prior to Shingle Springs filing the attachments. The following are additional reasons why I reject each of them.

SS Ex. 94 is a decision of the Comptroller General of the United States dated February 18, 1976. Shingle Springs apparently submitted this document for the purpose of showing that once a contract proposal is approved under the ISDA, the award of a contract is mandatory. SS Ex. 94 is irrelevant because it is a decision that predates the 1988 Amendments to the ISDA and because it does not deal with ISDA contracting for health care. Nor does SS Ex. 94 address any of the issues as stated in my May 28, 1993 Statement of Issues to be Considered at Hearing. Even assuming arguendo that SS Ex. 94 could be construed as a statement of statutory intent, the fact remains that Shingle Springs could have submitted this in accordance with either the exhaustive prehearing or posthearing briefing processes. The issue of whether IHS is legally bound to award a contract once they approve an ISDA proposal has been an undercurrent throughout these entire proceedings, and it strains credulity for me to accept Shingle Springs' contention that SS Ex. 94 is a response to newly raised information or argument by Chapa De and IHS. Accordingly, I reject SS Ex. 94.

SS Ex. 95 is a Notice revising and updating the list of entities recognized and eligible for funding and services from the Bureau of Indian Affairs. 58 Fed. Reg. 54364 (October 21, 1993). The Notice was apparently submitted for the purpose of showing that there are many Alaska Indian Tribes with no defined geographic territory which have no authority to contract under ISDA. Why Shingle Springs believes this information to be relevant is unclear, except as background to SS Ex. 96 and perhaps to refute IHS assertions of the uniqueness of the presence of unaffiliated Indians in California. SS Ex. 95, however, is not probative of the issues before me and is rejected.

SS Ex. 96 is another Federal Register Notice entitled "Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts." 95 Fed. Reg. 27178 (May 18, 1991). This is the same document that had been offered at the hearing as SS Ex. 90. I rejected this

exhibit at the hearing and I reject it now for the reasons I stated at the hearing. Tr. at 126 - 27, 520 - 27, 566 - 67. Nothing in the parties' briefs has made this document any more relevant or probative of the issues before me than it was at the time of the hearing, and my initial ruling on this matter stands.

SS Ex. 97 is an excerpt from the document that was previously offered as SS Ex. 93. I rejected this exhibit at the hearing and I reject it now for the reasons I stated at the hearing. Tr. at 142, 515 - 522, 527, 556 - 567. At the hearing, I initially deferred ruling of SS Ex. 93 pending testimony from Shingle Springs' witness designed to lay a foundation to support the admission of this document into evidence. However, Shingle Springs failed to lay a sufficient or appropriate foundation. Moreover, as I noted at the hearing, Shingle Springs failed to overcome the prejudice and untimeliness of their submission of this exhibit by failing to make any showing that the document was relevant or probative of any of the issues before me. Id.

ISSUES

1. Whether IHS' redetermination letter of October 9, 1992 to Shingle Springs and Chapa-De constitutes a statutory declination, pursuant to 25 U.S.C. § 450f(a)(2), of Shingle Springs' October 1991 contract proposal,[3] under the ISDA, to provide medical services to all IHS beneficiaries in the four county area [the former Chapa-De Service Area].[4]

2. Whether the acceptance by IHS of Shingle Springs' contract proposal under the ISDA in December 1991 was conditional and whether Shingle Springs met such conditions and was in a position to

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[3] In my May 28, 1993 Statement of Issues, at issue one, footnote two to issue two, and issue four, the date of Shingle Springs' ISDA contract proposal, is incorrectly stated as December 1991. In fact, Shingle Springs ISDA contract proposal was dated October 1, 1991, and IHS was required to accept or decline the proposal by December 1, 1991.

[4] Shingle Springs has maintained throughout this proceeding that it does not dispute the proportional allocation of medical services between itself and Chapa-De as set forth in IHS' October 9, 1992 redetermination.

enter into such contract on January 29, 1992 to provide medical services to all IHS beneficiaries in the four-county area by April 1, 1992.[5]

3. Whether Chapa-De is a qualified "tribal organization" for the purpose of submitting a contract proposal under the ISDA.

4. Whether the statutory time frame for approving or declining self determination contract proposals as set forth at 25 U.S.C. § 450(f)(2) is applicable to Shingle Springs' contract proposal of October 1991 if such contract was conditional or overlapped with a competing proposal from Chapa-De.

5. Whether IHS has implemented IHS Policy Letter 89-4, relating to the awarding of contracts 120 days from the date the contract proposal was originally submitted, in such a manner that it would bind IHS if Shingle Springs' proposal was conditional and/or there was a competing proposal from Chapa-De which was on appeal.

6. Whether IHS has implemented IHS Circular 88-2, relating to "service units," in such a manner that "service areas" in the State of California must be established or modified in accordance with the procedures set forth in such Circular.

7. Whether IHS has adhered to designated "service areas" in accepting self determination contract proposals in the State of California, and in what circumstances, if any, has IHS modified or established, on a case-by-case basis, new "service areas" in connection with such contracts.

8. Whether IHS' letter of October 9, 1992, which modified a prior designated service area for the provision of medical services to IHS' beneficiaries, was in accord with IHS Circular 88-2 or whether it was in accord with past procedures followed by IHS in awarding contracts for self- determination in the State of California.

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[5] Another factor to be considered in determining whether IHS conditionally accepted Shingle Springs' October 1, 1991 contract proposal was the overlapping contract proposal from Chapa-De and Chapa-De's subsequent appeal of IHS's contract proposal declination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings contain general background information.[6]

1. IHS provides comprehensive health care for approximately 1,011,000 American Indians and Alaska Natives throughout the United States. IHS Ex. 3.

2. IHS is responsible for administering Indian health programs pursuant to the ISDA. 25 U.S.C. § 450 et seq; IHS Ex. 3.

3. The CAO is one of 12 IHS area offices across the country and is responsible for the comprehensive health care services provided to IHS health care beneficiaries (beneficiaries) living in the State of California. IHS Ex. 3.

4. CAO utilizes a Leadership Team to review all ISDA contract proposals and for recommending to the Area Office Director whether to approve or decline the proposal. The final decision is made by the Area Director. Tr. at 354, 400, 402.

5. The Leadership Team is composed of the five CAO Associate Directors, the CAO Deputy Director and the Contract Proposal Liaison Office (CPLO). Tr. at 343.

6. Rumsey is a federally recognized Indian tribe with a land base in Yolo County which has 31 resident members and 20 members living in nearby areas. IHS Ex. 2 at 7.; SS Ex. 38.; CD Ex. 5, 7.

7. Chapa-De is a non-profit California corporation that has provided health care services since 1974 to approximately 4,700 IHS beneficiaries in the four county area currently known as the Chapa-De Service Area. IHS Ex. 2 at 8, 3; SS Ex. 38.

8. Shingle Springs is a federally recognized Indian tribe with a land base in western El Dorado county and has approximately 18 members residing on the rancheria. IHS Ex. 14 at 2; SS Ex. 24.

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[6] I have included several headings in my Findings of Fact and Conclusions of Law. These headings are intended for the convenience of the reader and are not Findings of Fact and Conclusions of Law, nor do they alter their meaning.

9. Shingle Springs is located immediately west-southwest of Placerville, in El Dorado county. IHS Ex. 22 at 39.

10. The Chapa-De Service Area consists of El Dorado, Nevada, Placer and Sierra counties in Northern California. The counties are adjacent to each other with Sierra County being the northernmost, and in sequence to the south are the counties of Nevada, Placer, and El Dorado. Ex. 3, 22 at 39.

11. Approximately 25 percent of the eligible beneficiaries in the Chapa-De Service Area live in El-Dorado County. IHS Ex. 3.

12. Approximately 75 percent of the eligible beneficiaries in the Chapa-De Service Area live in Sierra, Nevada, and Placer counties. IHS Ex. 3.

13. The largest concentration of eligible beneficiaries in the Chapa-De Service Area is in Placer County, near Auburn, California. IHS Ex. 3.

14. The Chapa-De Service Area contains two health care facilities currently operated by Chapa-De: a comprehensive facility in Auburn located in western Placer County and a smaller satellite clinic in Placerville located in western El Dorado County near the Shingle Springs Rancheria. IHS Ex. 3.

15. In 1974, Chapa-De began providing services to Indians in the Chapa-De Service Area after receiving IHS funding pursuant to a subcontract with the California Rural Indian Health Board (CRIHB). IHS Ex. 2.

16. In 1989, after being sanctioned as a tribal organization by Shingle Springs Rancheria, Chapa-De began contracting directly with IHS pursuant to a contract under the ISDA. IHS Ex. 2 at 8.

17. Since 1989, Rumsey has been a member of an eight tribe consortium that sanctions the Northern Valley Indian Health Program, Inc. SS Ex. 38.

18. NVIH provides comprehensive health care services to approximately 8,000 eligible Indians in an eight county area including Yolo county. IHS Ex. 4, 5; CD Ex. 7.

19. Members of Rumsey receive health care services in NVIH's Oroville clinic, located approximately 90 minutes from the rancheria. IHS Ex. 3.

20. At times, members of Rumsey also would receive health care services from Chapa-De's Auburn clinic, which is located 30 - 45 minutes from the rancheria. IHS Ex. 2 at 8.

21. In November 1991, Rumsey decided to withdraw from NVIH and sanction Chapa-De to provide health care services for its members. IHS Ex. 6.

22. Unaffiliated Indians are Indians who are not members of a federally recognized tribe. Tr. at 317, 809.

23. Eligible unaffiliated Indians in California are entitled to IHS services but have no right to contract to provide their own health care services under the ISDA. See, 25 U.S.C. § 1679(b)(2) and (3).

24. No federally recognized tribe has an absolute right to be awarded an ISDA contract to provide health care services to unaffiliated Indians to the exclusion of any other Indian tribe who may propose to contract for them. Tr. at 149 - 50; See, 25 U.S.C. § 1679(b)(2) and (3).

25. The current Chapa-De Service Area contains approximately 4700 eligible beneficiaries for medical services of which almost all are unaffiliated with any federally recognized tribe. IHS Ex. 2 at 8, 3.

The following findings set forth the procedural history.

26. On June 27, 1991, Shingle Springs notified Chapa-De that it wished to contract directly with IHS to provide health care services to Shingle Springs' members and to all other eligible IHS beneficiaries in the Chapa-De Service Area. IHS Ex. 7.

27. Chapa-De's contract to provide health care services in the Chapa-De Service Area was due to expire on March 31, 1992. SS Ex. 17.

28. On June 28, 1991, Shingle Springs notified IHS that, as of March 31, 1992, it no longer would authorize Chapa-De to contract with IHS on its behalf and wished to contract with IHS directly under the ISDA to provide health services in the Chapa-De service area. SS Ex. 17.

29. On July 19, 1991, Chapa-De responded to Shingle Springs correspondence by acknowledging Shingle Springs' right to contract with IHS to provide health care services to its own tribal members, but rejected Shingle Springs' assertion that Shingle Springs had a superior right to provide services to the unaffiliated Indians in

the Chapa-De service area and further stated that Chapa-De intended to submit a proposal to the CAO for renewal of its contract. IHS Ex. 7, 8.

30. On October 1, 1991, the CAO received an ISDA contract proposal from Shingle Springs in which Shingle Springs proposed to contract directly with IHS to provide services to its members and "eligible Indians" in the four county Chapa-De area beginning April 1, 1992. IHS Ex. 1; SS Ex. 24 at 142; Tr. at 346.

31. In its October 1, 1991 proposal, Shingle Springs indicated that it would continue to provide the same comprehensive health care program as is being provided by Chapa-De, but would lease facilities in Auburn and Placerville. IHS Ex. 1 at 3; Tr. at 740, 746 - 47.

32. Shingle Springs proposed to lease facilities in Auburn and Placerville because Chapa-De would not allow Shingle Springs to use Chapa-De's health clinics. Tr. at 740, 746 - 47.

33. In its October 1, 1991 proposal, Shingle Springs did not propose to contract to provide medical services for members of any other federally recognized tribe. IHS Ex. 1.

34. On November 6, 1991, Chapa-De obtained a sanctioning resolution from the federally recognized tribe of Rumsey Rancheria. IHS Ex. 2, 6; Tr. at 159 - 60.

35. Any organization proposing to contract to provide health care services to Indians under the ISDA must have a sanctioning resolution from a federally recognized tribe. ISDA, 25 U.S.C. §§ 450(b)(l), 450(f)(a).

36. On November 12, 1991, the CAO received an ISDA contract proposal from Chapa-De to provide health care services to Rumsey tribal members "and other eligible Indians residing in Yolo, Placer, Nevada, Sierra, and El Dorado counties". IHS Ex. 2 at 6; Tr. at 159 - 60.

37. The term "eligible Indians" is customarily used by federally recognized tribes in the State of California to refer to Indians who are eligible to receive IHS services but are not members of any federally recognized tribe located in the geographical area which is the subject of the contract proposal. Tr. at 317.

38. In its November 12, 1991 proposal, Chapa-De did not propose to provide services for members of Shingle Springs. IHS Ex. 2, 3; Tr. at 137, 147 - 49, 162, 169,

173, 182, 185, 315, 322, 330, 580, 592, 594, 618 - 621, 625, 630 - 632, 808 - 809.

39. The contract proposals of Shingle Springs and Chapa-De contained competing provisions to include "eligible Indians" located in the same four county geographical area. Findings 30, 31, 33, 36; IHS Ex. 1, 2.

40. Since neither Shingle Springs nor Rumsey proposed to contract for members of any federally recognized tribe other than their own, each tribe was the sole beneficiary of its contract proposal and neither needed an authorizing resolution from the other pursuant to 25 U.S.C. §§ 450(b)(l), 450f(a).

41. IHS is required to approve a contract proposal submitted under the Act within 90 days of the date it receives the proposal, unless it rejects a proposal within 60 days in accordance with the declination criteria. 25 U.S.C. § 450f(a)(2).

42. The CAO was reviewing Shingle Springs' proposal when it received Chapa-De's proposal. The CAO had never before received, within 60 days of receipt of a proposal, an overlapping proposal that proposed to serve much of the same area and the same unaffiliated Indians. Findings 31, 36; Tr. at 153 - 162, 347, 640.

43. IHS requested Shingle Springs' permission to extend the 60-day deadline. CD Ex. 8.

44. Shingle Springs refused to grant IHS an extension of its 60-day deadline. CD Ex. 9.

45. Upon review of Shingle Springs' proposal, the CAO Leadership Team recommended that the Area Director accept the proposal. Tr. at 348.

46. The CAO Leadership Team raised a number of concerns relating to Shingle Springs' resolution, management system, accounting system, financial system and lack of a facility but determined that none of these concerns warranted declination of the contract proposal. Tr. at 372 - 75, 586 - 87.

47. Although aware of the investigation of Ms. Elsie Shilin, the Tribal Chairperson of Shingle Springs, by the I.G., the CAO did not make any recommendation to the Area Director concerning this matter. Tr. at 584 - 85, 653.

48. The principal agent is the person who negotiates, executes and administers the contract on behalf of the Tribe. Tr. at 332 - 33.

49. The investigation involving Ms. Shilin concerned the misuse of federal funds from Indian tribal organizations and falsification of travel vouchers of such magnitude that the I.G. referred the information it had obtained regarding Ms. Shilin's misuse of funds to the United States Attorney for prosecution. Tr. at 288, 290, 325 - 26, 402. CD Ex. 16 at 1 - 4.

50. Ms. Shilin was charged with four counts of violating 18 U.S.C. § 1163 (embezzlement and theft from an Indian Tribal Organization in an amount less than $100) and two counts of violating 18 U.S.C. § 1003 (knowingly and fraudulently demanding a sum not exceeding $100 in the public stocks of the United States by virtue of a false instrument). CD Ex. 16.

51. Five of the six counts against Ms. Shilin were dismissed. CD Ex. 16.

52. Ms. Shilin pled guilty to one of the six counts, specifically a violation of 18 U.S.C. § 1163 (embezzlement and theft from an Indian Tribal Organization in an amount less than $100). CD Ex. 16.

53. The CAO was concerned that the pending investigation of Shingle Springs' Tribal Chairperson put into question whether the interests of IHS and the intended beneficiaries of the proposed ISDA contract would be adequately protected. Tr. at 408, 440.

54. The CAO was faced with an impending regulatory deadline to accept or decline Shingle Springs' ISDA contract proposal, Shingle Springs' refusal to grant an extension of the deadline, an (at that time unresolved) investigation of the principal agent for Shingle Springs, and an otherwise valid contract proposal by Shingle Springs. SS Ex. 49; Findings 39 - 52.

55. IHS, through the CAO, is responsible for assuring that Shingle Springs' ISDA contract proposal is satisfactory and that the funds allocated would be used for the purpose intended. 42 C.F.R. § 36.208, See 25 U.S.C. § 450a, 450c, 450f.

56. IHS, through the CAO, has the responsibility under the ISDA to accord all federally recognized Indian tribes the right to self-determination. 25 U.S.C. § 450f(a)(1).

57. IHS, through the CAO, has the obligation to maintain the federal government's unique and continuing responsibility to the Indian people as a whole. 25 U.S.C. § 450a(b).

58. Ensuring that ISDA contract monies are used for the purpose for which they were intended is a component of IHS maintaining the federal government's unique and continuing responsibility to the Indian people. Finding 57; 25 U.S.C. §450a, 450c.

59. The CAO's December 2, 1991 letter stated that the next step in the process is to "prepare for contract negotiations and contract award." IHS Ex. 10.

60. The CAO's December 2, 1991 letter was not an award of the contract to Shingle Springs. IHS Ex. 10; Finding 59.

61. Shingle Springs' contract proposal indicated that it would begin to provide health care services as of April 1, 1992. IHS Ex. 1.

62. On January 30, 1992, Shingle Springs lacked the facilities necessary to provide health care services in accordance with its contract proposal. IHS Ex. 1; Tr. at 259 - 60, 373, 386 and 401.

63. Shingle Springs could not have begun to provide health care services as of April 1, 1992, as it proposed to do in its contract proposal. Findings 61, 62; SS Ex. 35, 40, 55, 57 - 58; IHS Ex. 19.

64. Shingle Springs could not have complied with the terms of its contract proposal even if IHS had awarded the contract as originally configured to Shingle Springs. Finding 63.

65. When IHS declines a contract proposal and the tribe requests technical assistance, IHS is obligated to provide it to the tribal organization to overcome deficiencies in a tribe's contract proposal. 25 U.S.C. § 450f(b)(2).

66. IHS informed Shingle Springs that their ISDA proposal did not adequately address the requirements of the leasing priority system (lps) and provided instruction to Shingle Springs as to how to revise their proposal. SS Ex. 20.

67. The CAO Leadership Team reviewed the Chapa-De proposal and recommended to the CAO Director that the

proposal be declined because of Rumsey's failure to properly withdraw its previous resolution supporting receipt of medical service from Northern Valley before sanctioning Chapa-De to provide such services. Tr. at 348 - 49, IHS Ex. 9.

68. On December 17, 1991, CAO declined Chapa-De's contract proposal. IHS Ex. 11.

69. The CAO declined Chapa-De's proposal on the bases that: 1) Shingle Springs' proposal was more satisfactory in meeting the self-determination and health care goals under the ISDA; and 2) since CAO had already accepted Shingle Springs' proposal, the proposed project or function could not be properly completed or maintained by Chapa-De. IHS Ex. 11.

70. IHS' declination of Chapa-De's proposal was based primarily on IHS' incorrect determination at that time that Chapa-De was not a qualified tribal organization within the meaning of the ISDA. Tr. at 349; IHS Ex. 9.

71. IHS initially believed that Rumsey could not sanction Chapa-De to submit an ISDA proposal and continue its support for the Northern Valley program. Tr. at 348 - 49.

72. On December 23, 1991, Chapa-De appealed its contract declination to the Departmental Appeals Board.

73. On December 27, 1991, Chapa-De filed a motion to stay the award of the ISDA contract to Shingle Springs pending administrative appeal.

74. On January 15, 1992, IHS moved for dismissal of Chapa-De's administrative appeal, primarily on the ground that Chapa-De was not a qualified tribal organization and therefore was not entitled to be awarded a contract under the ISDA. Tr. 349; IHS Ex. 9.

75. I heard oral arguments in this case on February 28, 1992, at which time I made a preliminary oral ruling that Chapa-De was a qualified tribal organization within the meaning of ISDA. Tr. at 349; IHS Ex. 21.

76. Subsequent to my preliminary ruling, IHS changed its position and determined that Chapa-De was a qualified tribal organization within the meaning of ISDA and therefore had rights to contract under the Act to provide health care services to Indians. IHS Ex. 9; Tr. at 350; Findings 74, 75.

77. Subsequent to my preliminary ruling, IHS viewed Shingle Springs' October 1, 1991 and Chapa-De's November 12, 1991 contract proposals as valid competing proposals. IHS Ex. 9, 14; Tr. at 350.

78. IHS conducted negotiations with Chapa-De and Shingle Springs over the next several months. IHS Ex. 9; Tr. at 350.

79. Chapa-De offered to allow Shingle Springs to take over Chapa-De's clinic in El Dorado County. IHS Ex. 9 at 5.

80. IHS proposed a settlement agreement on August 7, 1992. IHS Ex. 13.

81. Shingle Springs rejected the settlement agreement on September 21, 1992. IHS Ex. 9.

82. On October 9, 1992, CAO made a final revised determination as to Shingle Springs' and Chapa-De's contract proposals. IHS Ex. 14.

83. In its October 9, 1992 revised determination, CAO concluded that both Shingle Springs and Chapa-De had submitted acceptable proposals for the same program or service area and divided the program to best approximate the expected service population for the respective facilities while assuring that both programs would operate satisfactorily. IHS Ex. 14.

84. Under IHS' October 9, 1992 revised determination, Chapa-De would be awarded a contract to provide health care services to Rumsey members and the eligible unaffiliated Indians in Placer, Nevada and Sierra counties. IHS Ex. 14.

85. Under IHS' October 9, 1992 revised determination, Shingle Springs would be awarded a contract to provide health care services to its members and the eligible unaffiliated Indians in El Dorado County. IHS Ex. 14.

86. In its revised determination, IHS noted that Shingle Springs would have to address the availability of an acceptable facility before it could be awarded a contract. IHS Ex. 14.

87. In its revised determination, IHS indicated that, at some unspecified point in the future, it would redraw the service area boundaries to include Yolo County. IHS Ex. 14.

88. Shingle Springs appealed IHS' final revised determination and requested a formal hearing pursuant to 42 C.F.R. § 36.214(a). IHS Ex. 14.

89. At no stage in these proceedings has Shingle Springs contested the apportionment or allocation of the program or service area between itself and Chapa-De as set forth in IHS's revised determination. Statement of Issues; Tr. at 11 - 12.

90. Shingle Springs contends that it should be awarded the contract it originally proposed on October 1, 1991 and that Chapa-De is not a qualified tribal organization for purposes of submitting a contract proposal under the ISDA to serve any part of the Chapa-De Service Area. Tr. at 8 - 11.

Chapa-De is a qualified "tribal organization" for purposes of submitting a contract proposal under the ISDA.

91. For purposes of this Decision, a self-determination contract is a contract involving a tribal organization and the Secretary of Health and Human Services 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).

92. IHS is required, upon the request of any Indian tribe 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, including construction programs. 25 U.S.C. §450f(a)(1) (emphasis added).

93. For purposes of ISDA contracting, an Indian tribe is any Indian tribe, band, nation, or other organized group or community, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. §450b(e).

94. For purposes of ISDA contracting, an Indian is a person who is a member of an Indian tribe. 25 U.S.C. §450b(d).

95. For purposes of ISDA contracting, a tribal organization is a recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the

adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities, provided, that in any case where a contract is let or grant is made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant. 25 U.S.C. § 450b(l) (paraphrase) (emphasis added).

96. Rumsey is a federally recognized Indian tribe within the meaning of the ISDA. Finding 93; CD Ex. 7; 25 U.S.C. § 450f; Tr. at 579 - 81.

97. In Chapa-De's November 12, 1991 ISDA contract proposal, Rumsey stated that it would be withdrawing its sanctioning resolution from Northern Valley Indian Health, Inc., and giving an authorizing resolution to Chapa-De. IHS Ex. 2 at 7 - 8.

98. On November 6, 1991, Rumsey adopted Resolution No. 11-06-91-1, in which, effective March 31, 1992, Rumsey withdrew its resolution sanctioning Northern Valley Indian Health, Inc., as a tribal organization to provide services to Rumsey members and other eligible Indians. CD Ex. 7; IHS Ex. 6, 9.

99. Effective March 31, 1992, Rumsey designated Chapa-De as a tribal organization for purposes of providing comprehensive health care to Rumsey members and other eligible Indians in Yolo, Sierra, Nevada, El Dorado, and Placer Counties, and authorized Chapa-De to apply for, negotiate, and enter into an ISDA contract for that purpose. CD Ex. 7 at 2; IHS Ex. 6, 9.

100. As of March 31, 1992, Chapa-De is a qualified tribal organization for purposes of contracting for the purposes of providing comprehensive health care to Rumsey members and other eligible Indians in Yolo, Sierra, Nevada, El Dorado and Placer Counties. Findings 95 - 99.

101. Chapa-De did not propose to provide comprehensive health care services to the members of any of the tribes in those counties which have designated another provider for such services. CD Ex. 7; IHS Ex. 2.

102. Chapa-De's ISDA contract proposal did not propose to provide services to Shingle Springs' tribal members. IHS Ex. 2.

103. Chapa-De's ISDA contract proposal proposed to serve much of the same area as Shingle Springs' ISDA proposal. IHS Ex. 2.

104. Chapa-De's proposal did not contravene the proviso in 25 U.S.C. § 450(b)(1), since the contract proposal did not propose to benefit more than one Indian tribe. See, Kickapoo Tribe of Oklahoma v. IHS, Decision of the Director of IHS (May 22, 1992).

105. Chapa-De's ISDA contract proposal competed with Shingle Springs' ISDA proposal for the right to provide services to a large number of eligible Indians who were unaffiliated with any federally recognized tribe. Findings 99, 102, 103; IHS Ex. 9.

106. Shingle Springs does not "benefit," within the meaning of 25 U.S.C. § 450(b)(1), from Chapa-De's proposal to provide health services merely because Shingle Springs' tribal members would be eligible to obtain health care services pursuant to Chapa-De's ISDA contract proposal. Kickapoo at 8 - 9.

107. There is no requirement imposed by ISDA, its regulations, or the Director's decision in Kickapoo which prohibits Rumsey, through Chapa-De, from submitting a ISDA contract proposal to provide medical services for its members and other eligible Indians in the four county area where Shingle Springs Rancheria is located. Findings 91 - 106.

The statutory time frame for approving or declining self-determination proposals as set forth in 25 U.S.C. §450f(2) is applicable to Shingle Springs' contract proposal of October 1991, but IHS was not required to award a contract based on acceptance of Shingle Springs' proposal because it overlapped with a competing proposal from Chapa-De.

108. The ISDA mandates that IHS recognize the right of each federally-recognized Indian tribe to contract for the delivery of health services. 25 U.S.C. § 450a.

109. IHS was faced with competing contract proposals from Shingle Springs and Chapa-De. Findings 39, 77, 101, 102, 105 - 07.

110. IHS had until December 2, 1991 to decline Shingle Springs' proposal based on one of the enumerated statutory criteria. IHS Ex. 1, 3; 25 U.S.C. § 450f(2).

111. IHS had until January 11, 1992 to decline Chapa-De's contract proposal based on one of the enumerated statutory criteria. IHS Ex. 2, 3; 25 U.S.C. § 450f(2); Finding 41.

112. Shingle Springs contract proposal was submitted on October 1, 1991, prior to the submission of Chapa-De's contract proposal on November 12, 1991. Findings 36, 38, 42.

113. The 60-day deadline was December 2, 1991 for Shingle Springs' proposal and January 11, 1992 for Chapa-De's proposal. Findings 30, 36, 41.

114. Shingle Springs refused to give IHS permission to extend the 60 day deadline. CD Ex 9.

115. IHS accepted Shingle Springs' proposal within the 60 day deadline. IHS Ex. 10; Finding 113.

116. As a general principle of federal contract law, a bid protest must be resolved before a contract can be executed. Ameron v. United States Army Corps of Engineers, 809 F.2d 979 (1986).

117. As a general principle of federal contract law, an agency is authorized to suspend the procurement process pending its resolution of a bid protest. Honeywell, Inc. v. U.S., 870 F.2d 644 (Fed. Cir. 1989); Dairy Maid Dairy, Inc., v. U.S., 837 F. Supp. 1370 (E.D. Va. 1993).

118. An agency's power to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. Morton v. Ruiz, 415 U.S. 199, 231 (1973) (Morton).

119. The Court's holding in Morton does not stand for the proposition that an agency must, in all instances, follow its own internal procedures. Morton.

120. The Court's holding in Morton is limited to the specific facts of Morton. Lincoln v. Vigil, 113 S. Ct. 2024 (1993), at 2035.

121. The Court's holding in Morton does not support Shingle Springs' position that IHS was compelled in this case to award Shingle Springs' ISDA proposal within 60 days of receipt of the proposal. Morton; Finding 120.

122. An agency's attempt to harmonize inconsistent statutory provisions is sustainable if the agency acts in

a reasonable and responsible manner. Citizens to Save Spencer County v. EPA, 600 F.2d 844, 872, 890 (D.C. Cir. 1979).

123. Rules of agency organization and general statements of an agency's policy are exempt from the APA requirement of notice and comment rulemaking and are unreviewable by the courts. Lincoln v. Vigil, 113 S.Ct. 2024, 2031 - 2034 (1993); § 553(b)(A) of the APA.

124. An agency's allocation of lump sum appropriations is unreviewable. Lincoln at 2031 - 2034.

125. The special trust relationship between IHS and the Indian people does not limit IHS' discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader subgroup of Indians nationwide. Lincoln at 2031 - 2034.

126. Shingle Springs and Chapa-De's competing proposals could not both be properly maintained within the meaning of 42 U.S.C. § 450f(2)(c), because they proposed to serve almost identical geographic areas containing essentially the same eligible Indians and IHS could not award two ISDA contracts to serve the same areas and service populations. Findings 30, 33, 36, 39, 40, 77, 103 - 07.

127. IHS had to choose between Chapa-De's and Shingle Springs' competing proposals. Finding 126.

128. A prospective ISDA contractor is not automatically entitled to an award of the contract merely because its proposal is approved. 25 U.S.C. § 450f(2); Findings 108 - 127.

129. IHS complied with the regulatory deadline in the face of competing proposals from Shingle Springs and Chapa-De. Findings 109, 115.

130. Chapa-De is entitled, pursuant to 42 C.F. R. § 36.214, to appeal the IHS declination of its November 12, 1991 contract proposal to IHS' Contract Proposal Declination Appeals Board and ultimately, if necessary, to the Director of IHS to ensure that the declination was proper and in accordance with applicable statutory and regulatory guidelines. 25 U.S.C. §450f(b)(3).

131. Chapa-De promptly appealed IHS' declination of its ISDA contract proposal. IHS Ex. 11; Tr. at 351.

132. IHS could not award Shingle Springs an ISDA contract nor implement Shingle Springs' proposal without adversely

affecting Chapa-De's right to contest IHS' declination of Chapa-De's ISDA proposal. Findings 108 - 115, 126 - 131.

133. The Secretary of HHS, through the Director of IHS, is directed by statute to enter into self-determination contracts with all tribes and tribal organizations who have a valid tribal resolution. 25 U.S.C. § 450f(a)(1).

134. Both Chapa-De and Shingle Springs had valid tribal resolutions. Findings 8, 34, 96, 97, 100.

135. IHS could not fulfill its statutory mandate by awarding all of the Chapa-De Service area to Shingle Springs and denying Chapa-De its right to contract under ISDA. 25 U.S.C. § 450f(a)(1).

136. IHS could not fulfill its statutory mandate by awarding all of the Chapa-De Service Area to Chapa-De and denying Shingle Springs its right to contract under the ISDA. 25 U.S.C. § 450f(a)(1).

137. IHS was faced with a novel and unique situation, not addressed by the ISDA or the regulations, of two tribes proposing to contract for almost the exact same areas and provide services to roughly the same service population of unaffiliated Indians. Tr. at 153, 162; Findings 103, 105.

138. Shingle Springs is entitled to contract under the ISDA to provide services for its own tribal members. Finding 92; 25 U.S.C. § 450f(a)(1).

139. Chapa-De is entitled to contract under the ISDA to provide services for its Rumsey tribal members. Finding 92; 25 U.S.C. § 450f(a)(1).

140. The ISDA does not contemplate nor does it account for the presence of eligible unaffiliated Indians. Rationale.[7]

141. Unaffiliated Indians cannot provide a sanctioning resolution to a health care provider that would enable

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[7] Citations to this Decision are made using the name of the section of the Decision and the corresponding number or letter in which the information appears. Since most citations will be to the Section entitled "Rationale", most citations will appear as Rationale, (Roman numeral, letter and number). Since the citation here is contained in an introductory part of the Rationale, it is simply cited as "Rationale."

that provider to contract to provide services to them under the ISDA. 25 U.S.C. § 450, 450f.

142. Neither Chapa-De nor Shingle Springs can be endorsed by tribal resolution of the eligible unaffiliated Indians. Findings 23, 141.

143. Neither Chapa-De nor Shingle Springs has a superior right to obtain an ISDA contract to provide services to the eligible unaffiliated Indians. Findings 91 - 107, 126 - 42.

144. IHS has discretionary authority to take appropriate actions to carry out the principles of self-determination, as set forth in the ISDA, in making its determination as to how to allocate resources with regard to the competing proposals submitted by Shingle Springs and Chapa-De. Findings 91 - 143.

145. Dividing the eligible unaffiliated Indians between Chapa-De and Shingle Springs contract proposals is left to the discretion of IHS. Findings 91 - 144.

IHS has not implemented IHS Policy Letter 89-4, relating to awarding contracts 120 days from the date the contract proposal was originally submitted, in such a manner that it would bind IHS given the presence of a competing proposal and a pending appeal from Chapa-De.

146. IHS Policy Letter 89-4 provides guidance to IHS contract officers on implementing "contracts, other than construction contracts," under ISDA. SS Ex. 10.

147. IHS Policy Letter 89-4 provides for the adoption of a 120-day goal for IHS to issue a contract award, and further provides that although IHS intends to observe the time frames, the time frames may be extended at the request of an Indian tribe or tribal organization, or by IHS with the consent of the Indian tribe or tribal organization. SS Ex. 10 at 2.

148. Administrative instructions issued periodically by IHS to its officers and employees are found primarily in the Indian Health Service Manual and the Area Office and Program Office supplements. These instructions are operating procedures to assist officers and employees in carrying out responsibilities, and are not regulations establishing program requirements which are binding upon members of the general public. 42 C.F.R. § 36.2.

149. IHS Policy Letter 89-4 is a letter from the Acting Director of IHS to IHS contracting officers. SS Ex. 10.

150. The purpose of IHS Policy Letter 89-4 is to provide guidance on implementation of the 1988 amendments to the ISDA. SS Ex. 10.

151. IHS Policy Letter 89-4 is an administrative instruction as defined by the regulations. Findings 146 - 50; 42 C.F.R. § 36.2.

152. IHS Policy Letter 89-4 does not establish requirements which are binding upon members of the general public. IHS Ex. 10; 42 C.F.R. § 36.2; Findings 146 - 51 .

153. IHS Policy Letter 89-4 provides that an ISDA contract shall be awarded within 120 days from the date the proposal is submitted. SS Ex. 10; Tr. at 259.

154. It is routine for ISDA contract proposals to be modified during the period after the proposal has been approved but before the contract is awarded. Tr. at 258.

155. It is routine for ISDA contract proposals to not be awarded within 120 days in cases where the proposal is modified. Tr. at 258.

156. IHS Policy Letter 89-4 is an internal policy guideline to be followed by IHS contracting officers to ensure that ISDA contract proposals do not languish in the system. Tr. at 258.

157. There is no language contained in IHS Policy Letter 89-4 that would indicate that it was intended to limit IHS discretion in awarding ISDA contracts. SS Ex. 10.

158. IHS' policy has been to attempt to comply with its internal 120-day guideline contained in Policy Letter 89-4. Tr. at 260 -65, 413; Finding 156.

159. There is no language contained in IHS Policy Letter 89-4
that would indicate that it was meant to overrule IHS discretion in dealing with the unique and novel situations such as that presented by the overlapping contract proposals from Shingle Springs and Chapa-De in awarding ISDA contracts. SS Ex. 10.

160. IHS Policy Letter 89-4 does not mandate that an ISDA contract should be awarded within 120 days. SS Ex. 10; Findings 146 - 59.

161. IHS Policy Letter 89-4 does not mandate that an ISDA contract should be awarded in the face of competing proposals sanctioned by two federally recognized tribes. Findings 146 - 60.

162. There is no language contained in IHS Policy Letter 89-4 that would indicate that it was meant to be controlling where IHS had approved a contract to a federally recognized tribe and declined an overlapping proposal from a competing tribe which had appealed the declination. SS Ex. 10.

163. There is no language contained in IHS Policy Letter 89-4 that would indicate that it was meant to mandate that IHS award a contract where such award would serve to moot the rights of a federally recognized tribe to appeal an ISDA contract declination. SS Ex. 10.

164. IHS Policy Letter 89-4 has not been implemented by IHS in such a way as to moot the rights of a federally recognized tribe to appeal an ISDA contract declination. SS Ex. 10; Tr. at 153; 259-60; 319.

165. IHS Policy Letter 89-4 should be read in accordance with the ISDA, and, to the extent that it is contrary to the ISDA, the ISDA is controlling.

166. IHS Policy Letter 89-4 does not and cannot be read to overrule each federally recognized tribe's right to self-determination under the ISDA.

167. IHS Policy Letter 89-4 has not been implemented by IHS in such a way as to overrule any tribe's right to self-determination under the ISDA. Findings 146 - 66.

168. Neither ISDA nor the implementing regulations require IHS to award an ISDA contract within 120 days from the date the contract proposal is submitted. 25 U.S.C. § 450 et. seq.; 42 C.F.R. § 36.201 et. seq.

169. On January 30, 1992, the Director of the CAO informed Shingle Springs that he would not apply the 120 day timetable set out in Policy Letter 89-4 because of the "special situation" created by the competing proposals from two qualified contractors and the pending appeal by Chapa-De. CD Ex. 56; Tr. at 153.

170. IHS Policy Letter 89-4 is a general statement of IHS's goal of processing contracts from submission to award within 120 days. SS Ex. 10; Tr. at 153; Findings 146 - 69.

171. IHS has not implemented Policy Letter 89-4 in such a manner to bind IHS in all situations to award a contract within 120 days. SS Ex. 10; Tr. at 153 - 62, 259 - 60, 319; 42 C.F.R. § 36; Findings 146 - 70.

172. IHS had never before encountered competing ISDA proposals where two federally recognized tribes proposed to provide services for the same geographic area. Tr. at 153 - 62.

173. IHS had never before encountered competing ISDA proposals where a federally recognized tribe had appealed IHS' declination of their proposal and where IHS had already approved the contract proposal of another tribe. Tr. at 153 - 62.

174. IHS believed that it was protecting the rights of both Shingle Springs and Rumsey by not awarding the contract within the 120 day period. Tr. at 153, 262, 644 - 45, 689; IHS Ex. 24.

175. IHS has not implemented Policy Letter 89-4 in such a manner to bind IHS to award a contract in a situation IHS had never before encountered. Tr. at 153 - 62; Findings 146 - 74.

176. IHS Policy Letter 89-4 has not been implemented by IHS in such a manner so that IHS abdicates its responsibility to properly administer and award ISDA contracts. Findings 146 - 75.

177. IHS has not implemented Policy Letter 89-4 in such a manner that it served to bind IHS in all situations. Findings 146 - 76.

178. IHS has not implemented Policy Letter 89-4 in such a manner that it served to bind IHS in this case to award Shingle Springs a contract within 120 days of the time Shingle Springs submitted its proposal. Findings 146 - 77.

179. IHS' actions in this case in not following the 120-day guideline contained in Policy Letter 89-4 were a legitimate exercise of IHS' discretionary authority. Findings 116 - 78.

<u>IHS has not implemented IHS Circular 88-2, relating to "service units", in such a manner that "service areas" in the State of California must be established or modified in accordance with the procedures set forth in such Circular.</u>

180. IHS Circular 88-2 sets forth IHS policy and procedures with respect to the establishment of and

changes in the boundaries of IHS-operated and tribally-operated service units. IHS Ex. 16 at 1.

181. It has been the practice of the CAO to allow tribes to contract for part of a service area. Tr. at 216 - 233.

182. It has been the practice of the CAO to allow a tribe from one service area to become part of another service area. Tr. at 228 - 230.

183. It is the practice of the CAO not to use service areas as a bar to ISDA contracting, but rather to substantively review each ISDA proposal pursuant to the declination criteria. Tr. at 353 -54, 382.

184. Anthony D'Angelo (AD) is the Director of IHS' Division of Program Statistics. Tr. at 192.

185. AD's office manages the statistical data bases that are used by IHS to produce reports on the health status of American Indians. Tr. at 193.

186. AD gave clear, concise and comprehensive testimony. Tr. at 192 - 216.

187. AD demonstrated a detailed knowledge of IHS policies and practices through his testimony. Tr. at 192 - 216; Findings 184 - 86.

188. AD demonstrated a detailed knowledge of IHS Circular 88-2, its background and implementation. Tr. at 192 - 216. Findings 184 - 87.

189. AD is a credible witness. Tr. at 192 - 216; Findings 184 - 88.

190. AD is responsible for making a recommendation to the Director of IHS whenever an IHS Area Office requests a change of a service unit pursuant to Circular 88-2. Tr. at 195.

191. Examples of circumstances that would require IHS to change service unit boundaries include: establishment of a new tribe; a change in the utilization pattern of the service unit; a new contractual relationship pursuant to an ISDA contract. Tr. at 195.

192. Circular 88-2 becomes relevant only after the IHS Area Office establishes an ISDA contracting relationship with the tribe. Tr. at 197, 207.

193. Circular 88-2 was created to coordinate the process for assigning administrative codes for statistical purposes for both IHS and tribally operated service units. Tr. at 193.

194. Circular 88-2 is intended to assist IHS in designating service units for statistical reporting and is independent of ISDA contracting. Tr. at 202.

195. Prior to 1988, tribally operated service units, which are not entities of the federal government, could not be assigned administrative codes for statistical purposes. Tr. at 193 - 94.

196. Prior to 1988, IHS operated service units, which are entities of the federal government, could be assigned administrative codes for statistical purposes. Tr. at 193.

197. IHS needed to collect statistical data from both the IHS operated and tribally operated service units. Tr. at 210 - 11.

198. Prior to 1988, tribally operated service units were called statistical service units and did not have an administrative code. Tr. at 210 - 11.

199. Prior to 1988, official IHS service units were assigned an administrative code. Tr. at 210 - 11.

200. IHS created Circular 88-2 to eliminate the distinction between "statistical service units" and IHS operated service units. Tr. at 210.

201. IHS Circular 88-2 was intended to help IHS designate service units for statistical purposes. Tr. at 202.

202. IHS Circular 88-2 is independent of ISDA contracting procedures. Tr. at 202.

203. IHS Circular 88-2 was designed to assign administrative codes to both IHS operated and tribally operated service units. Tr. at 193 - 95.

204. It is the current IHS national policy for IHS to approve a tribe's request for its service area to be established as a service unit. Tr. at 197.

205. It is the current IHS practice in California that when the CAO receives an ISDA proposal that has the effect of changing service unit boundaries, the CAO first approves the contract proposal and then at a later date

requests a change in the service unit boundaries pursuant to Circular 88-2. Tr. at 198 -200, 202 - 03 and 215.

206. Circular 88-2 was originally part of IHS' response to congressional direction to improve its methodology for allocating health care resources to Indian tribes. See, S. Rep. No. 165, 100th Cong., 1st Sess. (1987) at 111 - 12.

207. IHS Circular 88-2 was part of a package of legislation that was never given formal or final effect due to a congressional moratorium that has been renewed annually. 52 Fed. Reg. 35044 (September 16, 1987) (final rule); Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202, 100th Cong., 1st Sess. § 315, 100 Stat. 1329 - 254, § 315 (1987) (moratorium on implementation); see also Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. 100-446, 102 Stat 1774, 1817 (1988); Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 701, 734 (1989); Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. 101-512, 104 Stat. 1915, 1952 (1990); Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. 102-381, 106 Stat. 1374, 1409 (1992).

208. Circular 88-2 has no bearing on whether IHS accepts or declines ISDA contract proposals. Tr. at 154, 155, 161, 215,
401 and 649; Findings 180 - 207.

209. Circular 88-2 is not a substantive rule which binds IHS agency discretion and private party conduct in ISDA contracting. Findings 180 - 208.

210. It has been the practice of the CAO that, when it receives an ISDA contract proposal that proposes to alter the existing service area boundaries, it reviews the proposal on a case-by-case basis without regard to the existing boundaries. Tr. at 216 - 245, 793.

211. There have been three recent approvals of requests for changes in the service unit boundaries in California. Tr. at 198.

212. The three changes in service unit boundaries were as follows: 1) the Sycuan -- CAO awarded the contract in 1989 and requested change in the service unit boundary in June 1993; 2) the Warner Mountain -- CAO awarded the contract in 1992 and requested the change in the service unit boundary in July 1993; and 3) the Manchester/Point Arena --CAO awarded the contract in 1990 and requested

the change in the service unit boundary in July 1993. Tr. at 198 - 201.

213. In each of these three instances, the CAO first awarded the ISDA contract that changed the service unit boundaries and then the CAO requested the change in service unit designation pursuant to Circular 88-2. Tr. at 198 - 201.

214. Circular 88-2 does not restrict the contracting rights of tribes who want to change the boundaries of their service area. Findings 180 - 213.

215. Approval of an ISDA contract proposal that changes the service area boundaries is not contingent on the contracting tribe's compliance with all of the requirements of Circular 88-2. Tr. at 215; Findings 180 - 214.

216. Thomas Harwood (TH) is the Area Director for IHS in California. Tr. at 398 - 99.

217. TH is a credible witness. Tr. at 398 - 442.

218. A 1988 proposal by the CAO to establish rigid service areas in California was never adopted because of a lack of consensus among the tribes. IHS Ex. 17; Tr. at 403 - 05.

219. Circular 88-2 does not restrict the contracting rights of a tribe who submits an ISDA proposal which proposes to change the service area boundaries. Findings 180 - 218.

220. Circular 88-2 has no bearing on ISDA contracting decisions. Tr. at 154, 403 - 05; Findings 180 - 219.

221. Circular 88-2 does not limit IHS' discretion to award ISDA contracts. Findings 180 - 220.

222. Circular 88-2 does not limit a tribe's right to submit ISDA contract proposals. Findings 180 - 221.

<u>IHS has not adhered to designated "service areas" in accepting self determination contract proposals in the State of California and has modified or established new "service areas" in connection with such contracts on a case by case basis.</u>

223. Athena Schoening (AS) is the Deputy Associate Director for the Office of Tribal Activities for IHS. Tr. at 145.

224. AS is responsible for the day to day management of three divisions including the Division of Self-Determination Services. Tr. at 145.

225. Immediately prior to being Deputy Associate Director for the Office of Tribal Activities for IHS, AS was the Director of the Division of Self-Determination Services from 1989 to October 1992. Tr. at 145.

226. The Division of Self-Determination Services formulates IHS policy regarding ISDA and oversees the implementation of this policy through the IHS Area Offices. Tr. at 146.

227. AS demonstrated an extensive knowledge of IHS policy as it pertains to ISDA. Tr. at 145 - 61.

228. AS demonstrated an extensive and detailed knowledge of IHS modification and establishment of service areas in California. Tr. at 145 - 61.

229. AS is a credible witness. Tr. at 145 - 61; Findings 223 - 228.

230. IHS does not restrict tribes from redesigning service areas when tribes submit contract proposals under ISDA. Tr. at 155, 161.

231. Harry Weiss (HW) is currently an IHS contracting specialist in the CAO. Tr. at 217.

232. HW has been an IHS contracting specialist in the CAO for the past 12 years. Tr. at 217.

233. Based on his professional experience, HW gave extensive and detailed testimony as to ISDA contracting practices in California. Tr. at 217.

234. HW is a credible witness. Tr. at 216 - 46; Findings 231 - 33.

235. There have been numerous changes in service areas in California. Tr. at 216 - 46.

236. These changes include three geographical areas in California -- the counties of Lassen, Shasta, Trinity, Siskiyou, and Modoc in Northern California; the counties of Sonoma and Mendocino in West Central California; and in San Diego County in Southern California. Tr. at 216 - 46.

237. IHS beneficiaries in Lassen, Shasta, Trinity, Siskiyou, and Modoc counties in Northern California originally received their services from the California Rural Indian Health Board (CRIHB). Tr. at 219.

238. From 1978 to the present, there have been numerous changes in Northern California service areas that were made by IHS pursuant to ISDA contract proposals. Tr. at 218 - 28.

239. Currently, there are six tribal contractors operating programs in the Northern California counties of Lassen, Shasta, Trinity, Siskiyou, and Modoc. Tr. at 218 - 46; IHS Ex. 22 at 8.

240. All of the changes in the service areas in the Northern California counties of Lassen, Shasta, Trinity, Siskiyou, and Modoc over the last 15 years have been at the request of a tribe pursuant to ISDA contracting. IHS Ex. 22 at 8; Tr. at 218 - 46.

241. Originally, in the West Central California counties of Sonoma and Mendocino, the Manchester/Point Arena Rancheria was part of the Consolidated Tribal Health Plan Service Area. Tr. at 229.

242. The Manchester/Point Arena Rancheria made an ISDA contract proposal in 1990 that its health care services be provided by the Sonoma County Indian Health Program. Tr. at 231.

243. The CAO altered the boundaries of both the Consolidated Tribal Health Plan Service Area and Sonoma County Service Area pursuant to ISDA contract proposals. Tr. at 228 - 31; Findings 238 - 42.

244. Originally, ISDA health services were provided in San Diego County by the Indian Health Council. Tr. at 231.

245. Currently, only the northern part of San Diego County is served by the Indian Health Council. Tr. at 231 - 32.

246. The southern half of San Diego County, excluding the Sycuan Band of Mission Indians, is currently served by the Southern Indian Health Council. Tr. at 231 - 32.

247. The Sycuan Indians currently provide their own health services. Tr. at 231 - 32.

248. The service area boundaries in San Diego County have been changed from one tribal organization providing

health services for the entire area to three tribal organizations providing services to that same area. Findings 244 - 47.

249. The service area boundaries in San Diego County have been changed pursuant to ISDA contract proposals. Finding 248.

250. Molin Molicay (MM) reviewed ISDA contract proposals for the CAO from 1977 through 1980. Tr. at 793.

251. MM testified that, during the time he worked for the CAO, he reviewed ISDA contract proposals that had the effect of changing service area boundaries. Tr. at 759 - 793.

252. IHS and the CAO have changed service area boundaries pursuant to ISDA contract proposals. Tr. at 759 - 793; Findings 223 - 251.

253. CAO received an ISDA proposal from the California Rural Indian Health Board sanctioned by Blue Lake Rancheria. Tr. at 354 - 55; California Rural Indian Health Board, Inc., and Blue Lake Rancheria v. IHS, DAB CR273, at 3 (1993) (Blue Lake).

254. Blue Lake Rancheria proposed to contract under ISDA to provide health care services to its own tribal members as well as the unaffiliated Indians in another service area. Tr. at 353 - 54; Blue Lake at 2 - 3.

255. The CAO declined the proposal on the basis that the distance the Blue Lake tribal members would have to travel to receive health services would not be satisfactory. Tr. at 353 - 55; Blue Lake at 5.

256. The CAO did not use the fact that Blue Lake's proposal redrew service area boundaries as a basis for denying the contract proposal. Tr. at 164 - 65; Blue Lake at 5 - 7; Blue Lake, Decision of the Director of IHS.

257. IHS has modified service areas on a case by case basis when accepting ISDA contract proposals. Findings 223 - 256; Blue Lake, Decision of the Director of IHS.

IHS' letter of October 9, 1992, which modified a prior designated service area for the provision of medical services to IHS' beneficiaries was in accord with IHS Circular 88-2 and past procedures followed by IHS in

awarding contracts for self determination in the State of California.

258. The term "service unit" is synonymous with the term "service area". SS Ex. 7; IHS Ex. 17; Tr. at 207.

259. In 1988, the CAO proposed to form rigid service areas in California. IHS Ex. 15, 17; CD Ex. 4.

260. The proposed service units were never adopted because of state-wide disagreement among Indian tribes as to the appropriate boundaries. IHS Ex. 15; CD Ex. 4.

261. The proposed service units were never adopted because of cultural, geographic, political and historical differences between California tribes. SS Ex. 5.

262. A service unit is an administrative entity with the responsibilities for planning, managing, and evaluating the IHS programs serving a defined geographic area less than that for which an Area Office is responsible. SS Ex. 11, 16.

263. California has never had "service units" in the formal sense, but rather has had service areas which have evolved over time to reflect demographic concentrations and political negotiations by the Indian and tribal organizations. CD Ex. 3.

264. A tribe's ability to contract to provide services under the ISDA is not conditioned upon the tribe's obtaining a resolution of support from all Indian tribes in a given service area. IHS Ex. 18; Southern Indian Health Council, Inc., v. Sullivan, CIVS-88-0240-EJG-JFM (E.D. Ca. January 8, 1990) (Southern Indian Health Council.

265. A tribe proposing to contract to provide services under the ISDA need only obtain a resolution of support from those tribes within the service area it proposes to provide services to within the service area. IHS Ex. 18; Southern Indian Health Council.

266. A tribe proposing to contract to provide services under the ISDA may divide or otherwise reconfigure the existing service area to exercise its self-determination rights. IHS Ex. 18; Southern Indian Health Council.

267. IHS may maintain rigid service areas for the purpose of planning or allocating funds for the provision of health care to California Indians. IHS Ex. 18; Southern Indian Health Council.

268. IHS may not maintain rigid service areas that, as a condition of an Indian tribe contracting under the ISDA, mandate that the tribe obtain a sanctioning resolution from all tribes in the service area, even ones to which the tribe does not propose to provide services. IHS Ex. 18; Southern Indian Health Council.

269. In 1989, Manchester Point Arena designated Sonoma County Indian Health Project, Inc., as its tribal organization. CD Ex. 6.

270. Manchester Point Arena designated Sonoma County Indian Health Project, Inc. in order to obtain what it thought would be better services for its tribal members. CD Ex. 6.

271. The California Rural Indian Health Board, Inc. (CRIHB) requested modification of its service area to include Manchester Point Arena. CD Ex. 6.

272. The CAO modified CRIHB's ISDA contract to include the Manchester Point Arena. CD Ex. 6.

273. Since 1983, Southern Indian Health Council, Inc., (SIHC) has provided comprehensive health care, pursuant to ISDA, to Indians and other eligible persons in San Diego County. IHS Ex. 18.

274. SIHC's membership originally consisted of the Barona, Campo, Cuyapaipe, Jamul, La Posta, Manzanita, Sycuan and Viejas Bands of Mission Indians. IHS Ex. 18.

275. Due to a dispute which arose in 1985, in 1986 SIHC moved its health care facilities from the Sycuan reservation to the Barona reservation. IHS Ex. 18.

276. Sycuan withdrew from the SIHC when the health care facilities were moved to the Barona reservation. IHS Ex. 18.

277. In October 1986, SIHC submitted an ISDA proposal to serve the Barona, Campo, Cuyapaipe, Jamul, La Posta, Manzanita and Viejas Bands of Mission Indians. IHS Ex. 18.

278. The CAO denied SIHC's proposal because SIHC did not have a resolution from all tribes in the service area, and because IHS took the position that to divide SIHC's health care program would be contrary to 25 U.S.C. § 450b(c). IHS Ex. 18; 25 U.S.C. § 450b(c).

279. The CAO also took the position that SIHC was not a valid tribal organization without a resolution of support

from all tribes within the service area, including Sycuan. IHS Ex. 18 at 6.

280. In 1990, the U.S. District Court found that IHS's requirement that SIHC obtain a sanctioning resolution from all Indian tribes in the SIHC, even ones which SIHC does not propose to serve, was contrary to the plain meaning of 25 U.S.C. § 450b(c). IHS Ex. 18.

281. In 1988, the ISDA was amended and 25 U.S.C. § 450b(c) (1983) was recodified as 25 U.S.C. § 450b(l). 25 U.S.C. § 450Ab(l); IHS Ex. 18 at 2.

282. A tribe that proposes to serve its own members need not obtain a sanctioning resolution from another tribe in the same service area, unless the tribe proposes to provide services to the members of the other tribe. Findings 258 - 81.

283. Chapa-De's ISDA proposal did not propose to serve members of the Shingle Springs Rancheria. Findings 36, 40; IHS Ex. 2.

284. Chapa-De's ISDA proposal did propose to serve members of the Rumsey Rancheria and the unaffiliated Indian population. IHS Ex. 2.

285. Shingle Springs has shown that, in States other than California, formal service units have been implemented. SS Ex. 9, 11, 12, 16, 64, 66, 75, 89.

286. Since the 1988 amendments to the ISDA, IHS has taken a more expansive view of service units than that espoused by Circular 88-2. SS Ex. 11, 12, 16, 64 - 66, 80 - 83.

287. In some instances in California, the CAO has implemented ISDA contracts by reconfiguring service area boundaries. IHS Ex. 22; Tr. at 759 - 773, 793; Findings 258 - 86.

288. The CAO has implemented ISDA contracts in California with flexibility with regard to service unit boundaries. Findings 258 - 87.

289. The CAO does not reject an ISDA contract proposal merely because the proposing tribe is located outside the service area they are proposing to serve. See, California Rural Indian Health Board, Inc., et al., v. IHS, September 7, 1993 Decision of the IHS Director adopting the June 23, 1993 recommended decision in Blue Lake, DAB CR273 (1993).

290. IHS' revised contract determination of October 9, 1992, was in accord with IHS Circular 88-2. Findings 258 - 89; IHS Ex. 14.

291. IHS' revised contract determination of October 9, 1992 was in accord with the past procedures followed by IHS in awarding contracts for self-determination in the State of California. Findings 258 - 90.

IHS' redetermination letter of October 9, 1992 to Shingle Springs and Chapa-De constitutes in effect a statutory declination pursuant to 25 U.S.C. § 450f(a)(2), of their respective ISDA proposals to provide medical services to essentially the same eligible beneficiaries in the four county area.

292. The Secretary is directed to approve an ISDA contract proposal within 90 days from the receipt of the proposal unless, within 60 days from the receipt of the proposal, specific findings are made that (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (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. § 450f(a)(2).

293. Shingle Springs' October 1, 1991 ISDA contract proposal proposed to operate a comprehensive health program for eligible Indians in El Dorado, Placer, Sierra, and Nevada Counties. IHS Ex. 1.

294. Chapa-De's November 12, 1991 ISDA contract proposal proposed to serve Rumsey Rancheria tribal members and the eligible Indian population residing in Yolo, Placer, Sierra, Nevada and El Dorado Counties. IHS Ex. 2 at 10.

295. IHS' October 9, 1992 redetermination revised its initial decision and divided the program to best serve the expected service population for the respective facilities while assuring that both programs would operate satisfactorily. IHS Ex. 14.

296. IHS' October 9, 1992 redetermination awarded Shingle Springs an ISDA contract to serve its members and the eligible unaffiliated Indians in El Dorado County. IHS Ex. 14.

297. IHS' October 9, 1992 redetermination awarded Rumsey via Chapa-De, a contract for Rumsey members and the

eligible unaffiliated Indians in Placer, Nevada, and Sierra Counties. IHS Ex. 14.

298. The October 9, 1992 redetermination modified the contract proposals of Shingle Springs and Chapa-De, which proposed to serve the same Indian population, and was a declination pursuant to the third declination criteria -- that neither tribe's proposed project nor the function being contracted for could be properly completed or maintained by the proposed contract. 25 U.S.C. § 450f(a)(2)(c).

299. The October 9, 1992 redetermination was a constructive declination that comported with the intent and purpose of the ISDA and the regulations. 25 U.S.C. § 450f(a)(2)(c); 42 C.F.R. § 36.212.

300. The overarching goal of the ISDA is to enable IHS to facilitate the contracting process so that each Indian tribe which desires can obtain self-determination through contracting to provide health care to that tribe's own members. 25 U.S.C. § 450(a), 450a(a) - (c), 450f(a) - (d), 450h.

301. Throughout this process, IHS has acted in good faith to facilitate both Shingle Springs and Chapa-De receiving an ISDA contract consistent with each tribe's self-determination rights. IHS Ex. 9, 10, 11, 13.

302. IHS has attempted to settle this case to accord both Shingle Springs and Chapa-De their rights to self-determination. IHS Ex. 9, 13, 14.

303. IHS, as the agency administering Indian health care contracts under the ISDA, has the discretion to address novel situations in a manner consistent with the goals of the ISDA. Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988) (Vietnam Veterans); Morton v. Ruiz.

304. The situation in this case, with Shingle Springs and Chapa-De submitting proposals which competed for largely the same service population, was a situation that had never before been faced by IHS. Tr. at 150, 178 - 79, 261, 643 - 45, 700; Findings 42, 137.

305. IHS is required to decline an ISDA contract proposal within 60 days of receipt if it makes specific findings, otherwise IHS must approve the ISDA contract proposal within 90 days of receipt. 25 U.S.C. § 450f(a)(2).

306. There is no time limit from the date of receipt of a proposal for IHS to enter into an ISDA contract with a tribe submitting a proposal. 25 U.S.C. § 450f(a)(2).

307. The statutory 60-day time frame was established to provide tribal organizations with the right to appeal contract declinations and to receive a hearing on the record. 25 U.S.C. § 450f(a)(2), (b)(3).

308. The 60-day time frame contained in 25 U.S.C. § 450f(a)(2) is designed to ensure that if IHS declines to enter into a contract with a tribal organization, it must provide both a formal notice of declination and an opportunity and procedures for hearing to the tribal organization. S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2643.

309. The 60-day time frame contained in 25 U.S.C. § 450f(a)(2) is designed to ensure that denials of requests for self-determination contracts are handled only through the declination process and not through agency-imposed threshold criteria. S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2643.

310. The 60-day time frame contained in 25 U.S.C. § 450f(a)(2) is designed to assure that a tribal organization receives a hearing in accordance with the requirements of the Administrative Procedure Act. S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2643.

311. The 1988 amendments to the ISDA were designed to eliminate practices of federal agencies which blocked tribal organizations from obtaining ISDA contracts, and which blocked tribal organizations from exercising their appeal rights. S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2643.

312. The ISDA does not acknowledge nor does it contemplate the presence of unaffiliated Indians.

313. The ISDA does not contemplate nor does it address the issue of self-determination for unaffiliated Indians.

314. The ISDA does not contemplate nor does it address whether one tribal organization should be given preference over another with regard to providing health services to unaffiliated Indians.

315. The 1988 Amendments do not contemplate nor address the situation of two tribes submitting ISDA proposals

competing to provide health care services to the same geographic area.

316. The ISDA does not contemplate nor address the situation of two tribes submitting ISDA proposals competing to provide health care services to the same geographic area.

317. The 1988 Amendments do not contemplate nor address the situation of two tribes submitting ISDA proposals within the 60- day statutory timeframe for declination of an ISDA proposal, where both proposals are competing to provide health care services to the same geographic area.

318. The ISDA does not contemplate nor address the situation of two tribes submitting ISDA proposals within the 60 day statutory time frame for declination of an ISDA proposal, where both proposals are competing to provide health care services to the same geographic area.

319. An agency has discretion to address situations that are not contemplated nor addressed by the applicable statute. Vietnam Veterans; Morton; Findings 144 - 45, 303.

320. It is left to the discretion of IHS to determine which of two qualified tribal organization will provide health care services to unaffiliated Indians. Findings 144 - 45, 303, 319.

321. IHS' October 9, 1992 determination did not take the form that the CAO customarily uses in ISDA contract declination letters. Tr. at 366.

322. IHS' October 9, 1992 determination informed both Shingle Springs and Chapa-De that each was entitled to appeal the determination pursuant to 42 C.F.R. § 36.214. Tr. at 396; IHS Ex. 14.

323. The regulations provide that a tribal organization, upon receiving a notice advising them that their ISDA contract proposal has been declined and further advising them of the basis for IHS' decision to decline, may file a written appeal within 30 days after receipt of the declination and may request a hearing. 42 C.F.R. § 36.214(a).

324. IHS' October 9, 1992 determination was not a declination in accordance with every aspect of 25 U.S.C.

§ 450f(a)(2). IHS Ex. 14; 25 U.S.C. § 450f(a)(2); Finding 321.

325. IHS' October 9, 1992 determination informed Shingle Springs and Chapa-De of their appeal rights. IHS Ex. 14; Finding 322.

326. IHS' October 9, 1992 determination modified Shingle Springs' October 1, 1991 ISDA contract proposal. IHS Ex. 1, 14; Findings 30 - 31.

327. IHS' October 9, 1992 determination modified Chapa-De's
December 2, 1991 ISDA contract proposal. IHS Ex. 2, 14; Finding 36.

328. IHS' October 9, 1992 determination was in accordance with the statutory purpose of the ISDA to accord both Shingle Springs and Chapa-De their rights to self-determination. IHS Ex. 14; Findings 292 - 327.

329. IHS' October 9, 1992 determination was in accordance with the statutory purpose of providing the opportunity for a full hearing to a tribal organization whose ISDA contract proposal has been denied. 25 U.S.C. § 450f(a)(2), (b)(3); Findings 292 - 328.

330. Shingle Springs viewed IHS' October 9, 1992 determination as a declination of its ISDA proposal and appealed to contest the declination. Tr. at 715 - 16.

331. The regulations should be construed to be flexible in the face of unique or novel situations. Findings 292 - 330.

332. The regulations should be construed to comport with the goals of the ISDA, including the 1988 amendments. Findings 292 - 331.

333. IHS' October 9, 1992 determination was a valid declination in accordance with the intent of the ISDA. Findings 1 - 332.

334. IHS' October 9, 1922 determination was a valid declination in accordance with IHS' discretionary authority. Findings 1 - 333.

<u>On January 29, 1992, Shingle Springs was not in a position to fulfill the terms of its ISDA contract to</u>

provide medical services to all IHS beneficiaries in the four-county area by April 1, 1992.[8]

335. IHS could not award an ISDA contract to Shingle Springs in accordance with the terms of Shingle Springs' proposal because the proposal overlapped with and competed with Chapa-De's proposal. IHS Ex. 1, 2, 14; Findings 30 - 31, 33, 36, 38 - 39, 77.

336. In the absence of statutory and regulatory authority permitting the conditional acceptance of contract proposals under the ISDA, IHS lacked authority to conditionally approve Shingle Springs' October 1, 1991 ISDA contract proposal. Findings 1 - 335.

337. The statutory declination criteria contain sufficient authority for IHS to have declined both of the proposals at issue in this case. 25 U.S.C. §450f(a)(2)(A) - (C); Findings 1 - 336.

338. In view of the sufficiency of the statutory declination mechanism to allow IHS to decline the proposals, IHS did not have the discretion to go outside the statute to impose a condition upon the acceptance of Shingle Springs' October 1, 1991 ISDA contract proposal. Findings 1 - 337.

339. As of November 1, 1991, Shingle Springs did not believe that it had to obtain space for its proposed health clinics through the Leasing Priority System (LPS). SS Ex. 35.

340. The LPS is a lengthy process whereby a tribe that is contracting to provide services under the ISDA must obtain congressional approval of the tribe's proposed lease site. SS Ex. 35, 55.

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[8] The phrasing of this heading is a modification of an issue contained in my Statement of Issues. The modification is due to my determination that IHS could not have accepted both Chapa-De's and Shingle Springs' proposals because they overlapped. Rationale, IIA, B and C. Additionally, IHS does not have the authority to impose a condition upon Shingle Springs' proposal and, therefore, whether or not Shingle Springs met the condition is irrelevant. Rationale, IIC. However, for illustrative purposes only, I will address whether, even if IHS was obligated to award an ISDA contract to Shingle Springs, Shingle Springs was not in a position to fulfill the contract.

341. On November 21, 1991, CAO informed Shingle Springs that Shingle Springs' proposal had not adequately addressed LPS requirements. SS Ex. 40.

342. As of November 22, 1991, Shingle Springs realized that it had to obtain leased space via the LPS and that the earliest this could occur was May 31, 1992. SS Ex. 42.[9]

343. Shingle Springs' attempts to obtain leased space on its own, outside the LPS, were not successful. SS Ex. 57, 58.

344. As of January 30, 1992, Shingle Springs was still not in a position to provide services pursuant to its ISDA contract proposal to provide medical services to IHS beneficiaries in the former four-county area by April 1, 1992, because it had not leased a facility in which to provide the services. Tr. at 259-60, 373, 386 and 701.

345. On January 29, 1992, Shingle Springs was not in a position to enter into an ISDA contract to provide medical services to all IHS beneficiaries in the four-county area by April 1, 1992. Findings 339 - 44.

CONCLUSION

346. IHS' October 9, 1992 determination accords Shingle Springs and Chapa-De their full rights to self-determination, including their right to appeal the declination of their ISDA proposals. Findings 1 - 345.

347. IHS' October 9, 1992 determination is a valid and reasonable distribution of the unaffiliated eligible Indian population between Shingle Springs and Chapa-De in order to provide sufficient resources to enable them to have viable programs and ensure that all IHS beneficiaries have satisfactory services. Findings 1 - 346.

348. IHS' October 9, 1992 determination is a valid exercise of agency discretion by IHS. Findings 1 - 347.

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[9] SS Ex. 42 gives the date May 1991. However, since at the time the letter was written, May 1991 had already elapsed, I find that May 1991 is a typographical error and that May 1992 was the date that was intended.

349. IHS' October 9, 1992 determination is consistent with the language and intent of the ISDA and the relevant regulations. Findings 1 - 348.

350. I recommend to the Director of IHS that IHS' October 9, 1992 determination be upheld. Findings 1 - 349.

RATIONALE

At the heart of this case is IHS' October 9, 1992 determination to award Shingle Springs an ISDA contract to provide health care services to its tribal members and the eligible unaffiliated Indians in El Dorado County, California and to award Chapa-De an ISDA contract to provide health care services to members of Rumsey (but not unaffiliated Indians) in Yolo County, California, and the unaffiliated Indians in Nevada, Sierra, and Placer Counties in California.

Shingle Springs' position is that it is entitled to an ISDA contract to serve the entire four-county Chapa-De Service Area (consisting of El Dorado, Nevada, Sierra, and Placer Counties). Shingle Spring contends that IHS was legally obligated to award it an ISDA contract to provide health care services to the entire Chapa-De Service Area once it accepted Shingle Springs ISDA contract proposal on December 2, 1991. Shingle Springs supports this contention based on their interpretation of the content and purpose of IHS Policy Letter 89-4.[10]

Moreover, Shingle Springs contends that IHS had no legal authority to award any part of the Chapa-De Service Area to Chapa-De because Chapa-De was endorsed by a tribal resolution from Rumsey, a tribe located outside of the existing Chapa-De Service Area. Shingle Springs' position is that, as a prerequisite to obtaining an ISDA contract, an organization must be sanctioned by a valid resolution from a federally recognized tribe within the existing service area where the services will be provided. Shingle Springs supports this view by relying on IHS Circular 88-2 and the alleged past practice in the

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[10] Shingle Springs contends that IHS had no legal authority to impose a condition on the acceptance of their contract proposal and that, even if IHS did have the authority to impose a condition, Shingle Springs met the terms of that condition. However, I have determined that the issue of whether IHS imposed a condition on Shingle Springs' ISDA proposal is irrelevant. Rationale, II.

State of California of not altering service areas without following certain specified procedures which were not followed in this case. Additionally, Shingle Springs argues that IHS' October 9, 1992 determination was contrary to the ISDA, the applicable regulations, IHS policies and procedures, and the Director's Decision in Kickapoo. Shingle Springs, however, does not contest IHS' apportionment of the Service Area between itself and Chapa-De.

IHS contends that its December 2, 1991 acceptance of Shingle Springs ISDA contract proposal does not mandate that IHS award the contract to Shingle Springs. IHS argues that neither IHS Circular 88-2 nor IHS Policy Letter 89-4 is a substantive requirement binding IHS in its contracting with Indian tribes under ISDA. IHS contends that it was faced with the unique situation of two competing proposals for an overlapping geographic area. IHS further contends that Shingle Springs' right to self-determination encompasses only the right to provide health services to its own tribal members, and does not give Shingle Springs a right superior to Chapa-De's to provide health care services to the eligible unaffiliated Indians in the area.

According to IHS, the purpose of the ISDA is to provide self-determination rights to all federally recognized tribes. To that end, IHS contends that its October 9, 1992 determination is in accord with the intent of the ISDA because it grants both Shingle Springs and Rumsey the right to provide health care services to their own tribal members. Moreover, IHS contends that its October 9, 1992 determination was in effect a declination of Shingle Springs' proposal and that neither the ISDA, the regulations, IHS policies and procedures, nor the Director's Decision in Kickapoo bind IHS to award the ISDA contract to Shingle Springs.

IHS does not point to any provision of ISDA that directly pertains to the circumstances of this case. The ISDA does not account for unaffiliated Indians, who make up the majority of the population to be served by the contracts at issue here; and ISDA did not anticipate that tribes or tribal organizations would compete to serve the same areas, because the individuals were expected to be members of one and only one tribe, and the goal of self-determination would define which persons a given tribe or tribal organization would serve.

The ISDA did expect small tribes, or tribes sharing a federally designated reservation area, to be served in some instances by common organizations (depending on

resources and efficiency of delivery), and therefore provides for multiple approvals: "[I]n any case where a contract is let. . .to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting . . .of such contract[.]" ISDA, Section 450b(l) (1988). However, the idea of self-determination, carried to its logical end, would work without direct competition, in that each tribe would eventually perform contracts for services benefiting its own membership without conflicting with the self-determination interests of any other sovereign entity.

For example, if a tribal organization had a self-determination contract to serve three small tribes (pursuant to proper sanction by each), and one tribe later wanted its own contract, that tribe would withdraw its sanction from the larger organization and make a proposal to the IHS. The principle of self-determination would require IHS to contract with that tribe, and the tribal organization's contract would be limited to the two remaining tribes which continued to sanction it. This simple one-for-one correspondence made it unnecessary for the statute, or the administrative agencies, to develop procedures for selecting from among competitive proposals between tribes or tribal organizations: either an organization had no right to serve a particular tribe, or it had an exclusive right to self-determination and IHS was directed to contract with it.

California and Alaska are the only states where the assumption that all Indian people are represented by a federally recognized tribe or the equivalent does not hold true, because treaties with particular tribes were not executed there as in other states, and consequently a significant population of Indian people belong to no federally recognized tribal entity. In Alaska, the situation was addressed by the Alaskan Native Claims Settlement Act (ANCSA), which provided a mechanism for establishing or recognizing quasi-tribal entities (tribes, ANCSA corporations and Native Villages). 43 U.S.C. § 1601 et seq. The ISDA definition of "Indian tribe" incorporates the organizational entities defined in the ANCSA. However, even in Alaska, where ISDA and ANCSA intersect and both supply parameters as to what constitutes the eligible contracting tribal entity, conflict is still possible between organizations claiming the same constituency. In such cases, IHS has established priorities for determining which competing entity is the appropriate representative. Cooks Inlet Native Association v. Bowen, 819 F.2d 1471, 1477 (9th

Cir. 1987) ("The agencies have established priorities for determining the governing body of a tribe from the eligible, competing entities. These priorities have been followed since 1977, and are consistent with the administrative interpretation of the Self-Determination Act's definition of 'tribe.' [cites omitted])." However, the situation in Alaska is not comparable to that in California. Alaska has a formal regulatory mechanism to select among competing entities. None exists in California.

Unlike ANCSA corporations, unaffiliated Indians do not appear in the ISDA at all. Unaffiliated Indians nonetheless receive services under ISDA contracts, because the ISDA creates a self-determination contract preference for all services provided to Indians by IHS, and the statute defining IHS responsibilities requires IHS to provide health services for unaffiliated Indians. 25 U.S.C. § 1679(b)(2), (3) (eligibility of Indians in California who are not members of federally recognized tribes).

No statute parallel to the ANCSA operates in California, and so a large number of individuals who are recognized as Indians there do not have a corresponding tribal entity through which to deal with federal agencies. The question for IHS then is not "which organization represents the tribe," but which tribe or tribal organization is entitled to, or best situated to, provide service to a particular geographic population of unaffiliated Indians. Thus, there is potential in California for competition for ISDA health services contracts, and there are not sovereign political entities to represent all individuals in the population to be served. This potential gave rise to the issues presented by this case.

I. Chapa-De is a qualified "tribal organization" for the purpose of submitting a contract proposal under the ISDA.

A self-determination contract is a contract involving 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. Finding 91; 25 U.S.C. § 450b(j). Under the ISDA, federally recognized Indian tribes and their members are awarded contracts to plan, conduct and administer programs or services that are otherwise provided by the federal government. In this case, both Shingle Springs and Chapa-De have submitted proposals to plan, conduct, and administer Indian health

services in a four-county area. Findings 30, 36. IHS is required upon the request of any Indian tribe by tribal resolution to enter into a self-determination contract with such tribe, or its tribal organization, to plan, conduct and administer programs or parts thereof, including construction programs. Finding 92; 25 U.S.C. § 450f(a)(1).

It is uncontested that Rumsey is a federally recognized tribe within the meaning of the ISDA. The ISDA defines a tribal organization as follows:

> A tribal organization is a recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant is made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

25 U.S.C. § 450b(l); Finding 95. Prior to November 6, 1991, Rumsey had sanctioned Northern Valley Indian Health, Inc. as a tribal organization to provide comprehensive health care services under the ISDA to Rumsey members and other eligible Indians. On November 6, 1991, Rumsey adopted a tribal resolution in which, effective March 31, 1992, it withdrew its resolution sanctioning NVIH and sanctioned Chapa-De to provide health care services to Rumsey members and other eligible Indians.

Accordingly, as of March 31, 1992, Chapa-De was a tribal organization for purposes of contracting to provide health care services under the ISDA to Rumsey members and other eligible Indians in Yolo, Sierra, Nevada, El Dorado and Placer Counties. Finding 100. Since the ISDA contract at issue in this case had a startup date of April 1, 1992, Chapa-De was a tribal organization for purposes of the ISDA contract proposal at issue here.

In its December 17, 1991 declination of Chapa-De's contract proposal, IHS based its declination on its contention that Chapa-De was not a qualified tribal organization under ISDA. Subsequent to Chapa-De's appeal of IHS' determination, on February 28, 1992, in the

context of IHS' motion to dismiss Chapa-De's appeal, I heard oral argument and made a preliminary ruling that Chapa-De was a tribal organization within the meaning of the ISDA. Finding 75. After my preliminary ruling, IHS conceded that Chapa-De was a qualified tribal organization within the meaning of the ISDA. Finding 76.

A valid sanctioning resolution from Rumsey renders Chapa-De a valid tribal organization under the ISDA. Shingle Springs has not been able to point to any evidence to the contrary, nor have they disputed this point in any meaningful way. Shingle Springs argues that if IHS determines that a tribal organization which is geographically located outside the service area is a valid tribal organization for purposes of ISDA contracting, this could lead to large, distant, tribal organizations submitting ISDA contract proposals which would reconfigure service areas and absorb small local tribal organizations. However, this fear is without merit for several reasons. First, as a practical matter, Shingle Springs has offered no evidence that the scenario they propound has or ever will occur. Second, IHS has the authority to decline an ISDA contract proposal on the basis of impracticality or, alternatively, on the fact that the tribe proposing to provide services is too far away to properly monitor and administer the contract. (See 25 U.S.C. § 450f(2)(C) which permits declination of an ISDA proposal because the "proposed [contract] project or function cannot be properly completed or maintained".) Third, even if the "outside" tribe were awarded an ISDA contract to provide services to the service area, IHS would still have to honor the right of self-determination of any tribe within the service area.

It should be pointed out that the likely underlying basis for the rigid interpretation offered by Shingle Springs is its desire to provide health care services to as many of the unaffiliated Indians as possible, for the simple reason that including these Indians will result in the award of the largest possible contract. In short, the unaffiliated Indians provide the recognized Indian tribes with a means to enlarge their contract awards. This situation is unique to California because the service areas in California contain such large numbers of unaffiliated Indians, and these Indians have no mechanism for self-determination under the ISDA. Therefore, to the extent that a tribal organization in California proposes to provide ISDA contract services in a given area, that area frequently will consist largely of unaffiliated Indians.

In this case, Rumsey, a recognized Indian tribe with a land base outside the Chapa-De Service Area, proposes to provide contractual services to its members and eligible unaffiliated Indians within the Chapa-De Service Area. Included as part of Rumsey's proposal is a request that the four-county Chapa-De Service Area be enlarged to include Yolo County, where Rumsey is located. Rumsey has not sought to provide services to tribal members of Shingle Springs. Like Shingle Springs, Rumsey seeks to include within its contract award all the eligible unaffiliated Indians located within the Chapa-De Service Area. In essence, two recognized Indian tribes have submitted competing proposals under ISDA for the same eligible unaffiliated Indians in order to justify the largest possible health services contract.

Shingle Springs argues that, under the Director's decision in Kickapoo, Chapa-De is not eligible to submit an ISDA contact proposal because its sanctioning tribe does not benefit under section 4(l) of the Act, 25 U.S.C. § 450b(l).[11] Since Rumsey's tribal land is located outside of the Chapa-De Service Area, Shingle Springs reasons that Rumsey does not benefit from services provided in that area and so is ineligible to submit or sanction a proposal. SS P.H. Br. at 34.[12] Shingle

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[11] Shingle Springs relies on the following "benefits" analysis from the Director's decision in Kickapoo:

> The IHS interprets the proviso to section 4(l) as a statutory restriction on contracting where the geographic service area and the program was established for the benefit of that tribe. If a tribe would have to get an approving resolution from another tribe because the other tribe benefits from the program proposed to be contracted then the other tribe can also propose to contract for a portion of that program. If a tribe does not have to have the approving resolution of another tribe to contract for a program, then the other tribe is not eligible to propose to contract for that program or portion of that program (without the authorizing resolution of the first tribe).

Id. at 7; SS P.H. Br. at 34.

[12] For reasons explained at Rationale, I, Shingle Springs considers Intervenors' proposal invalid because

(continued...)

Springs argues furhter that it is the only tribe benefiting from the performance of health services in the Chapa-De Service Area and is the only tribe that IHS has ever required to provide a resolution authorizing a tribal organization to enter into a contract with IHS in the Service Area. Therefore, Shingle Springs contends that it is the only possible tribe which can properly undertake an ISDA contract for the Chapa-De Service Area or sanction a tribal organization to do so.

IHS and Chapa-De contend that Shingle Springs' reliance on the Director's decision in Kickapoo is misplaced. They point out that, under the proposals submitted by Shingle Springs and Chapa-De, only Shingle Springs benefits from its proposal and only Rumsey benefits from the Chapa-De proposal. Neither proposal provides for the provision of medical services to the members of any recognized tribe other than its own members or those of its sanctioning tribe. IHS P.H. Br. at 28 - 30; Findings 30 - 36, 38, 101 - 105.

A close reading of Shingle Springs' argument reveals that it is premised on the assumption that, to "benefit" from a proposal, the tribe must be in a service area subject to an existing contract, and receiving benefits under that contract, prior to submitting its proposal.[13] It is evident from the Director's decision in Kickapoo that a tribe (or tribal organization) benefits from an ISDA contract proposal if its proposal will serve its own members within its own land base. The "benefits" analysis in Kickapoo thus means that a tribe must benefit from the program which is the subject of the contract

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[12](...continued)
it would reconfigure the pre-existing Chapa-De Service Area, the area that Shingle Springs contends is the only area that can be subject to an ISDA proposal here.

[13] Shingle Springs' position is demonstrated by the following excerpt from its post-hearing brief:

> Rumsey Rancheria, on the other hand, is located outside the Chapa De Service Area; it is not an Indian tribe that has ever benefitted under Section 4(l) of the Act from the services provided by the Chapa De Service Area; and it has never been required by IHS to provide a resolution to sanction a contract for the functions of that Service Unit.

SS P.H. Br. at 35.

proposal.[14] As pointed out by IHS and Chapa-De, under the revised determination of IHS in October, 1992, both Shingle Springs and Rumsey "benefit" from the revised division of the program. IHS proposes to provide separate programs for Shingle Springs and Rumsey, with neither tribe benefitting from the program being administered and run by the other. Moreover, under the October 9, 1992 redetermination, the former Chapa-De Service Area will be modified into two new areas, one area incorporating the land base of Rumsey and the other incorporating the land base of Shingle Springs.

If Shingle Springs' analysis of the Director's decision in Kickapoo is accepted, then there could never be a change in a service area to include a tribe not already in that area, unless that tribe received a resolution accepting such modification from each tribe already located in the existing service area and receiving benefits from the program provided in that service area. There is no such requirement under the ISDA. Moreover, a federal court in California specifically held that the ISDA does not require a tribe to obtain consent from all tribes within that tribe's service area in order to be able to provide services for its own tribal members. Southern Indian Health Council v. Sullivan, CIVS-88-0240-EJG-JFM (E.D. CA. January 8, 1990).[15] Imposition of such a requirement would significantly hamper the self-determination rights granted to federally recognized tribes under ISDA, and would be particularly inappropriate in California where service areas are modified according to the needs of individual tribes.

Section 4(l) of the Act requires that a tribe must "benefit" from the program that it proposes in its contract proposal submitted under ISDA. If more than one tribe "benefits" from a proposal, then the tribe submitting the proposal must obtain a resolution authorizing such contract from the other tribe. Such a requirement is logical, since a tribe that submits a

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[14] Such a conclusion is evident from the following language of the Director's decision in Kickapoo: "The IHS interprets the proviso to section 4(l) as a statutory restriction on contracting where the **program to be contracted** is outside a tribe's defined geographic service area and the **program was not established** for the benefit of that tribe. Kickapoo at 7 (emphasis added).

[15] Further discussion of this case can be found at Rationale, VI.

proposal to provide services both to itself and another tribe would, by the nature of the proposal, restrict the right of the other tribe to provide services to its own members. Since only one contractor may provide health services to a tribe at any given time, the tribe that consents to having its services provided by another tribal organization gives up the right to provide those same services to its tribal members, at least for the duration of the contract. Simply, two tribal organizations cannot be awarded contracts to provide identical health care services to the same tribe.[16]

In Kickapoo, the boundaries of the contract health services (CHS) were set by regulation in contract health service delivery areas (CHSDAs).[17] In contrast, both Chapa-De and Shingle Springs proposed to provide direct services. No regulatory framework exists in California regarding direct service delivery areas. Hence, here the former Chapa-De Service Area boundaries do not bar Rumsey from authorizing Chapa-De's proposal nor does the fact that Rumsey resides outside of such former boundaries preclude such proposal from being considered under ISDA.

II. The statutory time frame for approving or declining self-determination proposals as set forth in 25 U.S.C. §450f(2) is applicable to Shingle Springs' contract proposal of October 1991, but IHS was not required to award a ISDA contract to Shingle Springs based on Shingle Springs' proposal because it

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[16] The ISDA contemplates that IHS does have the discretion to divide services within the service area. This means, for example, that IHS could award one tribe or tribal organization an ISDA contract to provide clinical laboratory services and award another tribe or tribal organization an ISDA contract to provide ambulatory care within the same service area. IHS Circular 88-2.

[17] CHS are health services which are provided by third parties who are reimbursed by IHS (or the tribal contractor) with contract health funds supplied by IHS. See, 42 C.F.R. § 36.22(e). Services provided by IHS or at a tribal operated facility are considered "direct services." The boundaries of areas covered by CHS are defined by regulation, 42 C.F.R. § 36.22, and, in California, by statute, 25 U.S.C. § 1680.

overlapped with a competing proposal from Chapa-De and was the object of an appeal filed by Chapa-De.[18]

A. IHS has discretionary legal authority under ISDA to alter the time frame for approving or declining self-determination proposals in the context of this case.

25 U.S.C. § 450f(2) provides that:

> . . . a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within 90 days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that --
>
> > (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
> > (B) adequate protection of the trust resources is not assured; or
> > (C) the proposed project or function to be contracted for cannot be properly completed or maintained under the proposed contract.

There is no dispute that 25 U.S.C. § 450f(2) establishes a timetable by which IHS must decide whether to accept or reject an ISDA contract proposal. Indeed, IHS made every effort to comply with this timetable, even requesting an extension from Shingle Springs when it sought more time to properly consider the issues. Findings 43 - 44.

As a preliminary issue, a question arises as to whether the existence of the competing contract proposals submitted by Shingle Springs and Chapa-De and the pending appeal by Chapa-De of the declination of its contract proposal by IHS provides a legal basis for IHS to suspend

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[18] In my May 28, 1993 Statement of Issues, I stated the issue as follows: "Whether the acceptance by IHS of Shingle Springs' contract proposal under the ISDA was conditional and whether Shingle Springs met such conditions and was in a position to enter into such contract on January 29, 1992 to provide medical services to all IHS beneficiaries in the four county area by April 1, 1992." However, since I have determined that the issue of conditional approval is not relevant to this Decision, I treat the facts related to IHS' conditional approval of Shingle Springs' proposal in summary fashion.

the award process under ISDA in order to protect the appeal rights of Chapa-De. Shingle Springs argues that IHS has no such discretionary authority.

An examination of the law set forth in analogous procurement contract cases provides a starting point in considering this issue. In the law of federal procurement, where competition is not only contemplated but forms the basis for contract award, there are procedures for protest and appeal at various points during the process of soliciting proposals and selecting a contractor, and when a party invokes these procedures the contract process is suspended. ISDA contracts are specifically exempted from treatment as federal procurements.[19] ISDA, section 450b(j). However, even though federal procurement law does not apply to ISDA contracts, the statute setting forth rules for resolution of disputes about a federal agency's treatment of competitors for government contracts offer persuasive authority for suspending contract award or execution pending protests in order to protect the integrity of the contracting process. See, Competition in Contracting Act, 31 U.S.C. § 3551 et seq.

In Ameron Inc. v. United States Army Corps of Engineers, 809 F.2d 979 (3d Cir. 1986), the court explained that the bid protest resolution procedures under the Competition in Contracting Acts (CICA) are designed to enforce federal agencies' compliance with required bid procedures and allow disappointed bidders to compel the executive branch to explain procedural decisions to the Comptroller General. Ameron at 983-84. Ameron, Inc., a disappointed bidder, had protested a contract award. Before the protest was resolved, the Army Corps of Engineers went forward with execution of the contract by the winning bidder. Ameron sought injunctive relief in federal court, while the Army Corps of Engineers argued that, to the extent CICA imposed a stay on contract execution by the executive branch, it represented an unconstitutional legislative veto. The court interpreted the stay provisions of the CICA as follows: "CICA contains a variety of provisions regarding the timing of procurements challenged by protests. The net effect of these provisions is to suspend the procurement process until the Comptroller General has issued his

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[19] There is an exception for construction contracts, which are covered by the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and federal acquisition regulations promulgated thereunder. Section 450j(a) of the Act.

recommendation." Id. at 984. "[B]arring exigent circumstances, once a bid protest has been filed, a contract cannot be executed until the protest has been resolved." Id. at 985. The Third Circuit characterized the CICA as providing an "automatic stay provision," and "stay-extending power," reasoning that a stay of contract award pending resolution of a protest was necessary to give effect to the Controller General's recommendations. Id. at 986 - 87.

Honeywell, Inc. v. U.S., 870 F.2d 644 (Fed. Cir. 1989), a case factually similar to this case, is illustrative of the fact that an agency is empowered to suspend the procurement process pending resolution of the protest, and further supports the notion that an agency is empowered to interrupt the procurement process to correct its own procedural errors. In Honeywell, the two lowest bidders for an Army contract engaged in protests. The second-lowest bidder, Honeywell, protested to the contracting agency, the Army, that the lowest bidder, Haz-Tad, was not the type of business entity qualified to participate in the procurement. Id. at 646. The Army agreed with this characterization and rejected Haz-Tad's bid as unresponsive to the Army's solicitation for proposals. Id. Haz-Tad protested the rejection of its bid to the General Accounting Office (GAO) and prevailed. Id. When the Army reversed its initial position in accordance with the Comptroller General's recommendation and awarded the contract to Haz-Tad, Honeywell filed suit, claiming that the Army's action in following the GAO recommendation was arbitrary and capricious. Id. at 647. The Court of Claims reviewed the GAO recommendation on which the Army had acted, set it aside as lacking a rational basis, and enjoined the Army from awarding the contract to Haz-Tad. The Federal Circuit reversed, upholding the Army's reliance on the Comptroller General's recommendation. While the matter proceeded through the Court of Claims and the Court of Appeals, the Army suspended the award and execution of the planned procurement.

Another recent procurement case illustrative of the importance of mandatory stay provisions in resolving disputes between competitors for government contracts under CICA is Dairy Maid Dairy, Inc. v. U.S., 837 F.Supp. 1370 (E.D. Va. 1993). In this case, Dairy Maid objected to the Army overriding the CICA automatic stay provisions to award a contract to Contact International, Inc., ("CIC") while Dairy Maid's pre-award protest was pending. In an earlier, "virtually identical contract" involving the same two contractors, pending a protest by CIC, the Army had stayed execution of the contract it had awarded

to Dairy Maid and instead extended a previous contract with CIC. Dairy Maid argued that the Army's disparate treatment of the two situations was arbitrary and capricious. Unlike the case before me, where the statute is silent on competition altogether, CICA provides that if an agency makes specific findings it can override a pre-award protest and go forward with contract award before the GAO has issued its recommendation. Id. at 1377 - 78. The District Court held that the agency had failed to make the statutory showings necessary to permit override of the pre-award stay, and further that the agency had improperly failed to stop performance of the contract in response to Dairy Maid's post-award protest, as required by CICA.

There is general legal precedent, outside the context of procurement contract law, applicable to the circumstances of this case. Where there is no statutory language to apply to unforeseen circumstances, courts have declined to review an agency's development of policy or modification of its own procedures. Morton v. Ruiz, 415 U.S. 199 (1973), contains the most cited formulation of this principle: "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Id. at 231. For example, review of an agency action is not available under the APA where such action is committed to agency discretion by law, including "where 'statutes are drawn in such broad terms that in a given case there is no law to apply[.]'" Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (applying 5 U.S.C. § 701(a)(2).

Also, an agency's rule which attempted to harmonize two inconsistent statutory provisions has been sustained because "the agency in a reasonable and responsible manner exercise[d] the discretion that by inadvertence or legislative impasse it has been afforded[,]" even though "[o]ther, equally reasonable accommodations of the above competing interests can be imagined, and we do not suggest that [the federal agency]'s procedures or final solutions in any sense approach the ideal." Citizens to Save Spencer County v. EPA, 600 F.2d 844, 872, 890 (D.C. Cir. 1979).

Here, although the statutory requirements may not have been clearly inconsistent at the time they were enacted, the unexpected competition between two valid contractors for overlapping areas created a conflict between the ISDA requirement to accept proposals timely and the requirement to contract with "any" tribe or tribal

organization. The ISDA does not provide for the circumstances presented by this case. Therefore, IHS must fill in the gap left by the Act through the exercise of its discretionary authority to ensure that the Act's Indian self-determination contract rights are available to both Shingle Springs and Rumsey.

When an agency exercises such discretionary authority, some cases have held that an agency may depart from a prior norm, but the agency has a judicially enforceable obligation to explain its departure, even if the practice or policy has not been formally promulgated or published. Atchison, Topeka and S.F. R. Co. v. Wichita Board of Trade, 412 U.S. 800, 807-808 (1973); Greyhound Corp. v. I.C.C., 551 F.2d 414 (D.C. Cir. 1977). IHS included such justification in its redetermination letter of October 9, 1992. IHS explained that, following its initial determination, it had two acceptable competing proposals for the same service area, and that, therefore, it was necessary to divide the area for contract purposes. The purpose of enforcing informal norms against agencies is to prevent them from frustrating the expectations fostered in private individuals by agency practice or by an agency's publication of guides and manuals. As I will discuss, acceptance of IHS self-determination contracts proposals or awarding contracts based on an accepted proposal can be delayed under the statute, either to allow time for technical assistance to bring a proposal to a point where it can be approved, or to allow time for a tribe to acquire facilities and personnel required to perform a contract. Rationale, IIA - C.

While Shingle Springs argues to the contrary, the record demonstrates that past IHS practice reflects such flexibility in contracting. Rationale, V - VI. Shingle Springs cites the following language for the proposition that an agency's internal procedural rules are enforceable against it if those rules affect the substantive rights of private individuals: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Morton v. Ruiz, 415 U.S. 199, 235 (1973). However, a close reading of Morton demonstrates that this generic statement is not applicable to the facts of this case. There is nothing in Morton that suggests that IHS policy letters and circulars must be followed in all cases, irrespective of any extenuating circumstances, or when they were never applied as substantive rules. In Morton, the court was addressing a situation where the Bureau of Indian Affairs (BIA) had denied general assistance benefits to an Indian (Ruiz) because of a provision in the BIA manual that limited eligibility for benefits to Indians who were

living on reservations. Since Ruiz had moved off of the reservation, BIA denied him general assistance benefits based on the provision contained in the manual. Morton, at 199.

The court's holding in Morton was therefore targeted to the situation where an internal policy memo, not promulgated in accordance with the APA, was used by the BIA to extinguish the entitlement of Indians residing outside of reservations to general assistance benefits. The court noted that the manual provision cited by BIA to support its denial of benefits to Indians not residing on reservations was solely an internal agency brochure that was intended to control policies that do not relate to the public. Morton at 235. The court held that while the underlying statute arguably gave the BIA the authority to deny benefits to Indians residing outside of reservations, the BIA could not use the provision contained in its manual to extinguish the rights of those Indians and could do so only via the notice and comment rulemaking via the APA. Morton at 235 - 36.

In reaching its conclusion, the court in Morton noted that the use of the provision in the BIA manual to deny general assistance benefits to Indians living off of reservations was contrary to the requirements contained in the BIA's own manual that required publication of all directives that "inform the public of privileges and benefits available" and of "eligibility requirements". Morton at 235. Therefore, Morton does not support Shingle Springs' position, because it holds that an internal agency policy that affects the rights of individuals and that is not promulgated in accordance with agency standards is ineffective. Morton at 236.

Admittedly, there is language in Morton stating that an agency is bound to follow its own policies and procedures. Morton at 235. However, this language does not stand for the proposition that an agency is bound by the letter of all of its publications. Rather, the language points to an inconsistency in BIA's own manual. Specifically, it alludes to the fact that BIA was using its manual to deny benefits to Indians living off the reservation, while the same manual mandated that the public be informed, via formal rulemaking, of eligibility requirements and of privileges and benefits available. Morton, at 235.[20]

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[20] Contrary to the facts in Morton, here there are no regulations, policies, circulars, or any previously

(continued...)

Additionally, while some courts have used the language in Morton that is cited by Shingle Springs as supporting a requirement that an agency is bound to follow strictly its own internal policies and procedures, the rule has only been applied in circumstances distinguishable from the instant matter. Some have arisen in the context of adverse personnel actions by federal agencies against their own employees, and courts have required those agencies to comply with procedures for appealing such actions even where the procedures were not formally promulgated. Paige v. Harris, 584 F.2d 178, 184-85 (7th Cir. 1978) (an agency must abide by its own personnel regulations, even when it is not clear whether their language was precatory or mandatory); Doe v. Hampton, 566 F.2d 265, (1977) (provisions of the Federal Personnel Manual may be binding on an executive agency, although "not 'every piece of paper emanating from a Department or Independent Agency is a regulation.'" [cites omitted]); Service v. Dulles, 354 U.S. 363 (1957) (an agency must comply with informal procedural guarantees such as those mentioned in the Federal Personnel Manual). These cases of employee removals have a constitutional flavor, in that the manual provisions invoked due process rights of the employees facing removal.

Similarly, an internal procedural rule which required the agency to inform individuals facing deportation proceedings of their right to counsel was held to bind the Immigration and Naturalization Service, at least to the extent that the INS's failure to apply the rule was deemed reversible error, causing the deportation to be reversed and remanded to the INS. Montilla v. INS, 926 F.2d 162, 166-67 (2d Cir. 1991). Formerly, an alien would have had to show that the agency's procedural error was prejudicial, but Montilla held that failure to follow a procedural rule designed to benefit aliens was sufficient to require reversal. Notably, the rules in Montilla were published in the Code of Federal Regulations, not informal manual provisions. A later district court case within the same circuit criticized Montilla for its failure to limit its applicability explicitly to the quasi-constitutional right at issue

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[20](...continued)
stated IHS formal comment on the regulatory impact under ISDA of two valid competing contract proposals from recognized tribal entities. This case is a matter of first impression. Shingle Springs does not point to any IHS document that provides specific guidance regarding the circumstances presented by this case.

there. Ali v. Reno, 829 F.Supp. 1415, 1427 (S.D. N.Y. 1993).

Another case cited by Shingle Springs to the same effect involved a formal (adjudicatory) rulemaking process which was tainted by ex parte contacts with one of the competitors affected by the rule. Sangamon Valley TV Corp. v. U.S., 269 F.2d 221 (D.C. Cir. 1959). The informal agency procedure upheld in this case was one which forbade such ex parte contacts. As in the cases involving personnel removals and the deportation hearing, the reviewing court here appeared to uphold an agency's internal procedural rules for the purpose of preserving the integrity of an adjudicatory process. It is not clear that the Morton holding that an agency must follow its own informal procedural rules would ever be applied outside this context.

A line of cases opposing the Morton rule, also in an adjudicatory context, holds that "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953); see also Modern Plastics Corp. v. McCulloch, 400 F.2d 14, 19 (6th Cir. 1968) (informal procedures, even though published in the Code of Federal Regulations, are "mere guidelines"). IHS cites a similar "guideline" case in a prosecutorial context. U.S. v. Craveiro, 907 F.2d 260, 263-64 (1st Cir. 1990) (no rights are created by procedural rules calling for pre-trial notice to defendants of the possibility of enhanced sentencing). A Supreme Court case held that the Department of Justice was not bound by a Circular Letter which purported to limit grand jury discretion, because "It was never promulgated as a regulation of the Department and published in the Federal Register. It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized powers of the grand jury[.]" Sullivan v. U.S., 348 U.S. 170, 173 (1954).

The holdings of these cases permitting agencies to depart from their procedural rules may be restricted to their adjudicatory and prosecutorial settings. However, Lincoln v. Vigil, 113 S.Ct. 2024 (1993), suggests that rules of agency organization and general statements of policy, which are exempt from the APA requirement of

notice and comment rulemaking, are likewise unreviewable by courts.[21]

In Lincoln, southwestern Indians who had benefitted from an IHS pilot program serving disabled children protested IHS' termination of that program. The Supreme Court refused to accept uncritically the APA presumption-of-review analysis suggested by parties and federal courts below, but instead examined the statutory authority upon which the program was based. Finding that there was no explicit statutory reference to the project, the Court concluded that it was developed as a discretionary use of unrestricted appropriations that Congress had supplied to IHS, and, therefore, there was no law against which to review IHS's acts in developing or terminating the program:

> We hold that the Service's decision to discontinue the Program was 'committed to agency discretion by law' and therefore not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), and that the Service's exercise of that discretion was not subject to the notice-and-comment rulemaking requirements imposed by § 553.

Vigil at 2027.

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[21] This case, like the case at bar, involves IHS actions in dealing with competing interests among beneficiaries of its programs. From 1975 to 1985, IHS had been providing diagnostic and treatment services to handicapped Indian children in the Southwest pursuant to a specific local program. IHS was exercising its discretionary authority to allocate resources among eligible Indians having equal rights to health services. I suspect that recipients of services from the local program felt that they would not do as well under the national program and, therefore, brought legal action to maintain their program. Similarly, Shingle Springs' appeal is to maintain the sole use of the resources from the population of unaffiliated Indians in the Chapa-De Service Area. It too must believe there will be a diminution of its services if a significant portion of its former resources are used to fund a program for Rumsey. I presume this to be the case even though Shingle Springs has not challenged the allocation of resources in the October 9, 1992 redetermination between itself and Rumsey.

Although arguably Morton would support treating the decision by IHS to terminate the program as a "rule" requiring notice and comment (and indeed some courts have followed Morton in finding that similar agency actions require rulemaking)[22], the Supreme Court barely considered this argument. The Court in Lincoln stated that: (1) agency allocation of lump-sum appropriations is unreviewable; (2) to the extent Morton appears to require special procedural protections for Indian programs based on the special trust relationship between Indian people and the federal government, there are no such protections because "that relationship. . .could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide;" and (3) the administrative framework of the discontinued program, as well as its termination, were "rules of agency organization," or possibly "general statements of policy," specifically exempt from notice and comment rulemaking by section 553(b)(A) of the APA. Lincoln at 2031 - 34.[23]

The case before me is analogous to Lincoln because here, as in Lincoln, IHS is operating within a statutory framework that does not provide for the consideration of competing contract proposals and there is no specific statutory constraint barring IHS' proposed action. Therefore, even assuming in this case that there are agency policies or guidelines that directed the outcome sought by Shingle Springs, a conclusion vigorously opposed by IHS and Intervenors, the holding in Lincoln supports the finding that IHS has the discretionary authority to decline to follow such policy or guidelines unless there exists a direct congressional mandate to the

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[22] See, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982); Curry v. Block, 738 F.2d 1556 (11th Cir. 1984); Matzke v. Block, 738 F.2d 799 (10th Cir. 1984); First Bancorporation v. Board of Governors, 728 F.2d 434 (10th Cir. 1984).

[23] Justice Souter, in delivering the Court's opinion, wrote the following instructive language on the APA: "Determining whether an agency's statement is what the APA calls a 'rule' can be a difficult exercise. We need not conduct that exercise in this case, however. For even assuming that a statement terminating the Program would qualify as a 'rule' within the meaning of the APA, it would be exempt. . ." and it goes on to enumerate the two exemptions of § 553(b)(A) referenced above. Lincoln at 2034.

contrary. Shingle Springs can point to no such mandate in this case.

Based on the above legal analysis, I find that the IHS has discretionary authority to take appropriate actions to carry out the principals of self-determination set out in ISDA in considering the competing proposals where there is no Congressional mandate prohibiting such exercise of discretion. I further find that IHS had the authority and discretion to suspend the award of the ISDA contract at issue here, pending resolution of the competing proposals from Chapa-De and Shingle Springs.

B. The statutory framework under ISDA for accepting or rejecting contract proposals does not impose a requirement on IHS that, irrespective of the cicumstances, all such accepted proposals be awarded.

The CAO received Shingle Springs' ISDA contract proposal on October 1, 1991. Finding 30. Therefore, under the statute, IHS had to approve Shingle Springs' proposal by no later than December 30, 1991, unless IHS determined that one of the three specific declination criteria applied. In the event one of the declination criteria applied, IHS was required to decline Shingle Springs' ISDA contract proposal by no later than December 2, 1991. Finding 110; 25 U.S.C. § 450f(a)(2). On November 12, 1991, while Shingle Springs' ISDA contract proposal was pending, IHS received Chapa-De's ISDA contract proposal. Chapa De's proposal proposed to serve much of the same geographic area as Shingle Springs' proposal. The ISDA mandated that IHS had to approve Chapa-De's proposal by February 10, 1992, unless IHS determined that one of the three specific declination criteria were met. If IHS determined that one of the declination criteria was applicable to Chapa-De's proposal, IHS was obligated to decline the proposal by January 11, 1992. Finding 111.

IHS officials testified that having two tribal organizations submit ISDA proposals for practically identical overlapping geographic areas was a situation they had never before encountered. Finding 137. IHS, upon receipt of the two competing proposals, recognized the novelty and potential difficulties of the situation and was unsure of how to proceed. Findings 105, 137. Accordingly, IHS requested an extension of the 60-day declination deadline, but Shingle Springs refused to grant IHS an extension. Finding 114.

Because Shingle Springs refused to extend the deadline, IHS was compelled to approve Shingle Springs' proposal by

December 30, 1991. IHS did have the option of declining Shingle Springs' proposal by November 30, 1991, pursuant to the statutory declination criteria. However, IHS chose to accept the proposal. IHS did little, if any, analysis of the merits of Shingle Springs' proposal, but chose to accept it based on IHS' assumption that Chapa-De's proposal was deficient because it lacked a valid sanctioning resolution. Finding 70. Specifically, IHS found that Shingle Springs' proposal better served the self-determination goals of the ISDA, because Shingle Springs' proposal had a valid sanctioning resolution and IHS believed at that time that Chapa-De's did not. Finding 69. I have already concluded that Rumsey's sanctioning resolution supporting Chapa-De's November 12, 1992 ISDA contract proposal was valid. Rationale, I; Findings 91 - 107.

IHS contends that its December 2, 1991 letter was a conditional acceptance of Shingle Springs' ISDA contract proposal. Specifically, IHS conditioned its approval on Shingle Springs' designating an individual other than Elsie Shilin, Shingle Springs' tribal chairperson, to serve as principal agent for its ISDA contract. IHS' concerns were based on the I.G's investigation of Ms. Shilin, pending at the time of the contract proposal, for misuse of federal funds from Indian tribal organizations and falsification of travel vouchers. CD Ex. 16; Tr. at 288, 290, 325 - 26, 402, 408, 440; Finding 53.

Shingle Springs argues that under 25 U.S.C. § 450f(a)(2), IHS was obligated to accept its ISDA contract proposal within 90 days unless it declined the proposal within 60 days. Shingle Springs contends that because IHS did not decline its proposal using the statutory declination criteria within the 60-day statutory time frame, IHS was required to unconditionally award the ISDA contract to Shingle Springs. SS R. Br. at 3.

Additionally, Shingle Springs contends that, where two ISDA proposals for the same area are received at different
times, IHS is required to act on the proposal it receives first. According to Shingle Springs, only if IHS declines the first ISDA proposal using the criteria at 25 U.S.C. § 450f(2) can IHS then consider the ISDA proposal that is received subsequently. In this case, Shingle Springs argues that since it submitted its ISDA proposal first, and because IHS did not decline it using the declination criteria, IHS could not even delve into the merits of Chapa-De's ISDA proposal. Moreover, Shingle Springs argues that IHS was compelled to decline Chapa-De's proposal because, in IHS' December 2, 1991 letter,

it had awarded the contract to Shingle Springs and could not award an ISDA contract to Chapa-De for that same area. SS R. Br. at 6 - 7.

IHS and Intervenors argue that the ISDA does not address the problem of competing proposals to provide services in the same service area. They contend that 25 U.S.C. § 450f(2) only requires IHS to decide whether to accept a proposal within 90 days or reject a proposal within 60 days, and does not establish a time frame for awarding a contract once the proposal has been approved. IHS R. Br. at 1.

Upon review of the Act, I find that 25 U.S.C. § 450f(a)(2) confers no right to an automatic award of an ISDA contract merely because a proposal is accepted. In most cases award of the contract will follow from acceptance of the contract proposal. Here, however, IHS has contended all along that because the situation of competing proposals has never before arisen, the facts do not come under the rubric of the normal contract declination process. I find that, as IHS and Intervenors assert, the Act does not address the possibility that two validly sanctioned proposals for overlapping areas could be submitted.

Moreover, I find that the ISDA makes no distinction between ISDA contract proposals based on the timing of their receipt by IHS.[24] Under Shingle Springs' analysis, the time a proposal is received by IHS determines whether IHS can accept the proposal. However, no such distinction exists in the ISDA, which obliges IHS to ensure the self-determination rights of each tribe and each tribe's right to appeal the declination of its proposal. 25 U.S.C. § 450f(a), 450f(b)(3); S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988) reprinted in 1988 U.S.C.C.A.N., 2620, 2643. Additionally, the analytical framework proposed by Shingle Springs would provide an incentive for a tribe to submit an incomplete or vague ISDA proposal to IHS simply to get priority over another tribe. This would penalize the tribal entity whose ISDA proposal may have taken longer to submit because it was thoughtful and well-conceived. Thus, the Act neither establishes a preference for contracts submitted earlier, nor ensures automatic contract award once a proposal has been approved.

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[24] This is true a fortiori, since timing of proposals can only come into play where proposals are in competition, and I have found that the Act does not contemplate such competition.

Further, IHS' December 2, 1991 acceptance of Shingle Springs' proposal clearly does not constitute a contract award, contrary to Shingle Springs' assertion, as it states "The next step of the contracting process is to prepare for contract negotiations and contract award." IHS Ex. 10. Therefore, Shingle Springs was informed from the outset that it had not yet been awarded the ISDA contract by virtue of IHS December 2, 1991 approval of its ISDA contract proposal.

Furthermore, IHS and Intervenors contend that the specific statutory deadlines must be construed in conjunction with the ISDA as a whole, to assure each tribe's right to appeal the declination of its proposal. IHS and Intervenors argue that Shingle Springs' interpretation of the statute would defeat Intervenors' rights to appeal the declination of their ISDA contract proposal because IHS would be obligated to award the ISDA contract to Shingle Springs once 60 days had passed from Shingle Springs' submission and IHS could no longer decline it. Such a result would moot the appeal process for Intervenors, because a contract including services their tribal organization proposed to deliver would have already been awarded before Intervenors' appeal resulted in a decision.

The statute states that the Secretary shall approve the proposal within 90 days of receipt, unless she makes one of several specific findings and declines the proposal within 60 days of receipt. 25 U.S.C. § 450f(a)(2). Nowhere in this provision is it stated that IHS must award a contract within either 60 or 90 days. The provision merely specifies deadlines for the approval or declination of an ISDA contract proposal.

Accordingly, Shingle Springs' contention that the IHS becomes obligated to award an ISDA contract if it has not declined the contract proposal within 60 days of receipt is without merit. Shingle Springs' contention that the earliest of two or more validly sanctioned ISDA proposals that IHS receives has priority over a proposal received subsequently is also without merit.[25] Finally, Shingle Springs' argument that the IHS letter approving its

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[25] The timing of IHS' receipt of the proposals could conceivably be determinative if a tribe submitted an ISDA proposal after IHS had awarded the contract to the first tribe submitting a proposal (assuming that the proposals overlapped with respect to unaffiliated Indians which either tribe could properly include in its service population). However, such is not the case here.

proposal in effect awarded the contract is without merit.

C. While IHS erred by failing to decline Shingle Springs' proposal under the third declination criterion at 25 U.S.C. § 450f(a)(2)(C) and by conditionally accepting Shingle Springs' contract proposal, IHS' error was mooted by the following: 1) Shingle Springs' and Chapa-De's proposals overlapped and were in competition; 2) Shingle Springs' failed to be in a position to begin operations pursuant to the terms of the contract; and 3) IHS' obligation to accord Chapa-De the right to appeal the declination of its ISDA proposal.

IHS could have avoided much of the controversy arising under the approval and declination deadlines if it had declined both contract proposals pursuant to § 450f(a)(2)(C) of the Act, i.e., that the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract, based on the fact that the two proposals overlapped with regard to provision of services to eligible unaffiliated Indians residing in the same geographical area. Under § 450f(b) of the Act, once the contract proposals were declined, IHS could have provided technical assistance to both Shingle Springs and Chapa-De in an effort to reconcile their overlapping contract proposals. If this had been done, there would be no issue of whether acceptance of a contract proposal absolutely commits IHS to award a contract based on such proposal.

Even if IHS was not obliged to decline both proposals on the basis of the overlapping service populations, it should have declined Shingle Springs' proposal because of the ongoing fraud investigation of the tribal chairperson designated to administer the proposed contract. [See n. 28 of this Decision]. Instead, IHS accepted Shingle Springs' proposal, but attempted to address the risk posed by the fraud investigation by inserting a condition to its acceptance, requiring Shingle Springs to designate as principal agent someone other than the individual that was under investigation.[26]

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[26] I recognize that Shingle Springs argues at some length that no such condition was imposed. My review of the record demonstrates otherwise. However, I do not need to make findings on this issue since, even assuming the condition was imposed, I find that IHS has no

(continued...)

IHS was without authority to impose a condition on approval of an ISDA contract proposal. In view of the existing statutory mechanism, which permits IHS to decline a proposal based on the specific declination criteria and offer technical assistance to the tribe or tribal organization to address the objections and promote development of an acceptable ISDA proposal,[27] the same declination criterion cited supra as applicable to the problem of overlapping proposals applies here to the objection based on the fraud investigation of the proposed principal agent.[28] This circumstance rendered

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[26](...continued)
authority under ISDA to conditionally accept contract proposals. Rationale, II.

[27] This does not imply, and I do not hold in this Decision, that IHS is completely without authority to delay or deny a contract award after the deadline for declination has passed. If IHS approves a contract proposal and, after the 60-day deadline has passed, the contracting tribe or tribal organization modifies the proposal, for example by substituting as administrator an individual who had been convicted of criminal fraud, the ISDA does not oblige IHS to award the contract as modified. In fact, in those circumstances, IHS would be obligated to void the award of the contract and protect program funds, for instance by deeming the modification a new proposal (with a new 60 day declination period) and proceeding to decline it, thus initiating the proposer's right to appeal. The declination provision of the Act cannot be read to give ISDA contractors power to unilaterally modify their proposals after 60 days. Similarly, when the proposed contractor is not in position to carry out its obligations under the contract proposal by the effective date, and the contractor is unwilling to extend the date of the contract award, IHS would not be required to award the contract in such circumstances. See, Rationale, IIC2.

[28] At the time of the investigation, IHS did not know the extent or nature of the fraud committed by Ms. Shilin. The record before me shows that, on January 21, 1993, Ms. Shilin was formally charged with six counts of criminal offenses relating to allegations that she had misappropriated money from a tribal organization. The record further reflects that, on April 23, 1993, Ms. Shilin pled guilty to count 3 (violation of 18 U.S.C. § 1163, embezzlement and theft from Indian Tribal Organizations in an amount not in excess of $100) and
(continued...)

the proposed contract defective, in that "the proposed project or function. . .cannot be properly completed or maintained" where the proposed agent is under suspicion of misuse of program funds with respect to prior federal grants or contracts. ISDA, section 450f(a)(2)(C).

Shingle Springs also argues that IHS, by conditionally accepting Shingle Springs' contract proposal, has improperly imposed threshold criteria upon its right to self-determination, thereby failing to apply the declination criteria and afford Shingle Springs its appeal rights under ISDA. Shingle Springs asserts that such threshold criteria were explicitly rejected by Congress when it amended the Act in 1988. SS R.P.H. Br. at 13 - 16. Since I have agreed with Shingle Springs' conclusion by finding that IHS did act improperly in imposing a condition on its approval, rather than declining Shingle Springs' proposal, it is not necessary to address this contention at length. The essence of the

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[28](...continued)
that the remaining five counts were dismissed. CD Ex. 16. Therefore, at the time IHS was considering Shingle Springs' ISDA contract proposal (October 1, 1991 through December 30, 1991), IHS did not have a complete set of facts before it regarding the allegations against Ms. Shilin. At the time it was considering Shingle Springs' proposal, IHS had sufficient information to decline the proposal based on the potential threat to ISDA funds that would be awarded to Shingle Springs by Ms. Shilin acting as principal agent.

IHS would have been entitled to decline Shingle Springs' proposal pursuant to 25 U.S.C. §450f(a)(2)(C) on the basis that the proposed contract cannot be properly completed or maintained, until it fully explored the facts surrounding the charges against Ms. Shilin. Indeed, the record reflects that the CAO's contracting officer stated that he could not sign the contract as long as Ms. Shilin remained as Shingle Springs' principal agent. Tr. at 283 - 85.

Now, in accordance with this Decision, Shingle Springs will have to submit to IHS a new, more limited, ISDA contract proposal. If Shingle Springs chooses again to make Ms. Shilin the principal agent in its revised ISDA proposal, IHS will have to weigh all of the facts surrounding Ms. Shilin's conviction and past conduct and determine whether she still poses a sufficient threat to contract funds to warrant IHS' declination of Shingle Springs' proposal, pursuant to 25 U.S.C. §450f(a)(2)(C).

argument is that Congress intended the declination criteria to restrain IHS from refusing to award contracts based on objections other than those Congress considered substantial enough to specify as justifying declination.[29] Congress, in enacting the amendments to the ISDA, wanted to insure that IHS had no mechanism for declining an ISDA proposal without appeal rights inuring to the disappointed contractor. As discussed below, the fact that Shingle Springs has been accorded and indeed is currently exercising its appeal rights defeats the argument that IHS intended by its conditional approval to impose illegal "threshold criteria" against Shingle Springs which would deprive them of any appeal rights.

Shingle Springs is correct in its assertions that IHS: 1) should have relied on section 450f(a)(2)(C) of the Act to decline Shingle Springs' contract proposal and 2) acted improperly by approving the proposal with a condition. SS R. Br. at 15 - 16. Absent the other circumstances in this case, Shingle Springs would be correct in its contention that IHS' action in offering a conditional approval was improper and denied Shingle Springs the appeal rights that would otherwise have vested at the time its proposal was declined. However, the question of conditional approval, as well as the issue of whether or when Shingle Springs met or failed to meet the condition, were rendered moot by other factors.

1. <u>That the ISDA does not address nor contemplate competing proposals compelled IHS to deviate from the statutory deadlines</u>.

First, the Act contains no provision that addresses the existence of two valid, overlapping, and therefore competing, proposals. IHS was therefore compelled to deviate from the statutory deadlines because it was required to address a situation that was not contemplated by the statute. Until IHS found a way ultimately to meet

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[29] The legislative history relied on by Shingle Springs indicates that the practice Congress intended to abolish through the amendment was IHS' categorizing certain elements of ISDA contract proposals as "threshold criteria." By applying these threshold criteria to determine that some proposals submitted by tribes did not supply enough information to qualify as proposals, IHS could avoid the deadlines for approval or declination, and more importantly could effectively decline proposals without specifying one of the statutory criteria and without triggering the statutory appeal rights afforded tribal contractors under section 450f of the Act.

its statutory obligations to both Rumsey and Shingle Springs by reconfiguring the preexisting service area and awarding non-competing contracts to both tribes, award of a contract to either party was impossible. IHS' letter of June 19, 1992 notified Shingle Springs and Intervenors that their proposals were competing. IHS Ex. 9.[30] This letter shows that, once IHS correctly realized it had two competing proposals, IHS also realized that it could not award an ISDA contract in accordance with either of the proposals.

Faced with an obligation to approve an ISDA proposal unless it could be declined within 60 days of receipt, and confronted with competing proposals and no statutory basis for choosing between them, IHS chose to extend the statutory deadlines while attempting to design contracts fulfilling the self-determination rights of both Shingle Springs and Rumsey. Initially, whether or not an improper condition had been imposed, and regardless of Shingle Springs' response to it, IHS would have required more time to resolve the situation than the statutory deadlines provide. Based on the parties' positions prior to the hearing, it is evident that IHS would have had to engage in the same lengthy process of attempted negotiation to arrive at the solution that IHS proposed in its October 9, 1992 letter. This is especially true because IHS was, for the first time, confronted with a situation where both parties were entitled to an ISDA contract to provide health care services to a part, but not all, of the territory contained in their overlapping proposals.

2. Shingle Springs' failure to be in a position to carry out the terms of its ISDA proposal renders IHS' error moot.

Secondly, the contract could not have been awarded within the 120-day suggested deadline in any case, because as a practical matter Shingle Springs had not yet acquired the facilities necessary to perform the contract as proposed and was therefore not in a position to enter into its

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[30] After my preliminary ruling February 28, 1992, IHS altered its position on the validity of Chapa-De's proposal. However, IHS notified Shingle Springs on January 30, 1992 that award of its contract proposal would be stayed pending the appeal by Chapa-De of the declination of its contract proposal. At least temporarily, this decision mooted the issue of the propriety of the conditional acceptance of Shingle Springs' contract proposal.

ISDA contract on January 29, 1992 to provide medical services to all IHS beneficiaries in the four county area by April 1, 1992.

As I stated previously, even assuming IHS' December 2, 1991 acceptance of Shingle Springs' contract proposal was conditional, IHS lacked the authority to impose a condition upon the acceptance of Shingle Springs' ISDA proposal and IHS erred in failing to decline the proposal. However, I find that even absent IHS' error, Shingle Springs was not in a position to satisfy the terms of its proposed ISDA contract.

I now focus on whether, by January 29, 1992, Shingle Springs was in a position to enter into a contract to begin providing services to the IHS beneficiaries in the four-county area as of April 1, 1992, the date that Shingle Springs proposed to begin to provide services under its contract. The date of January 29, 1992 is relevant also because, as I noted earlier, Policy Letter 89-4 provides that an ISDA contract proposal shall be awarded within 120 days from the date a proposal is submitted. Rationale, IIB; Findings 146 - 79. Shingle Springs has contended throughout these proceedings that, since Policy Letter 89-4 mandates an award within 120 days of the submission of an ISDA proposal,[31] IHS was

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[31] This assumes, of course, that the proposal has not been declined in accordance with the declination criteria. Rationale, II. Shingle Springs has contended all along that IHS did not decline its proposal in accordance with the declination criteria. Therefore, in this section, I assume, for the sake of argument, that Shingle Springs should have been awarded an ISDA contract within 120 days, as they contend. This assumption allows me to better approach the real issue in this section, which is whether Shingle Springs was in a position to carry out that contract as of January 29, 1992, (120 days from the date Shingle Springs submitted its proposal), or as of April 1, 1992 (the date the Shingle Springs was supposed to begin to provide services to the Chapa-De Service area under the new contract). Please note, however, that I make this assumption only for illustrative purposes only and that in this Decision, I conclude as a matter of law that IHS is not bound by the 120 day requirement contained in Policy Letter 89-4. Rationale, IIB.

obligated to award Shingle Springs the ISDA contract by no later than January 29, 1992.[32]

Therefore, I now examine the contracting situation as it existed on these two dates to determine whether Shingle Springs was able to fulfill the terms of the contract as of either of those dates. While Shingle Springs has contended throughout these proceedings that it should have been awarded an ISDA contract for the entire Chapa-De Service area, Shingle Springs was not in a position to provide services pursuant to that contract as of January 29, 1992 or as of the April 1, 1992 startup date of the contract.

The primary reason for this is that Shingle Springs did not timely take the steps to obtain leased facilities through the LPS. As of November 1, 1991, Shingle Springs believed erroneously that it did not have to use the LPS to obtain leased space for its proposed health clinics. SS Ex. 35; Finding 339. Shingle Springs believed erroneously that it could obtain leased space independent of the leasing priority system, through the Indian Health Care Improvement Act. SS Ex. 35. Shingle Springs also believed erroneously that the LPS did not apply to facilities under 11,000 square feet. SS Ex. 35.

In a letter dated November 21, 1991 the CAO advised Shingle Springs that its proposal did not adequately address the requirements of the leasing priority system and suggested it revise its proposal to do so. SS Ex. 40. In a November 22, 1991 letter to the CAO, Shingle Springs conceded that its previous position regarding the LPS was in error, and admitted that, due to the complexities and delays associated with the leasing priority system, the earliest Shingle Springs could obtain leased space through the leasing priority system was May 31, 1992. Finding 342. Therefore, Shingle Springs knew as of November 22, 1991 that it could not fulfill the terms of the contract because it lacked the office space in which to provide the services.

In a letter dated January 25, 1992, the CAO requested that Shingle Springs consent to an extension of the current Chapa-De contract through May 31, 1992 to allow time for congressional approval of Shingle Springs' proposed lease site. IHS Ex. 19; SS Ex. 55. In a letter dated February 28, 1992, Ms. Shilin and Shingle Springs demonstrated an intention to lease facilities to enable

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[32] January 29, 1992 is 120 days after Shingle Springs submitted its proposal on October 1, 1991.

it to carry out services in accordance with its ISDA proposal. SS Ex. 57. However, Shingle Springs was thwarted in this attempt because it had not obtained the requisite Congressional approval. SS Ex. 58. Thus, according to this correspondence, Shingle Springs could not have executed the contract even had IHS awarded the contract in accordance with Shingle Springs' proposal. SS Ex. 55, 57, 58. Even if I were to find that IHS was mandated to award the ISDA contract to Shingle Springs by January 29, 1992, the fact remains that Shingle Springs could not have carried out the terms of its contract. Likewise, even as of April 1, 1992, Shingle Springs was not in a position to fulfill the terms of their ISDA contract proposal.

Additionally, the implementation of an ISDA contract to serve the eligible Indians in the area was put on hold because of the unique circumstances of competing proposals which compelled IHS to extend the statutory deadline while attempting to design contracts that would fulfill the self-determination rights of both Shingle Springs and Rumsey. The result of this was that the parties entered into settlement negotiations that lasted most of 1992. IHS Ex. 9. Shingle Springs, which initially balked at IHS extending Chapa-De's contract, subsequently realized that it was not in a position to carry out the terms of the contract and consented to several extensions of Chapa-De's contract to ensure uninterrupted service to its tribal members.

Shingle Springs vehemently objects to IHS' failure to meet deadlines it argues are imposed under ISDA. However, ironically, through its own missteps and omissions, Shingle Springs could not have implemented the contract timely even if IHS had awarded it within the 120-day time frame suggested by Policy Letter 89-4. The record shows that the delay that Shingle Springs claims occurred in IHS awarding it a contract was due to a combination of Shingle Springs' failure to obtain leased space and the parties' voluntary good faith attempts to settle the case. IHS Ex. 9; Findings 26 - 90, 301, 302, 342 - 46. Therefore, even assuming that IHS should have awarded the contract to Shingle Springs as of January 29, 1992 or as of April 1, 1992, Shingle Springs could not have carried out the contract as of either of those dates. Moreover, once Shingle Springs chose to reject the modification of its October 1, 1991 contract proposal as set forth in IHS' October 9, 1992 redetermination, all

efforts to implement its initial proposal were put on hold pending the outcome of its appeal under ISDA.[33]

3. IHS' obligation to accord Chapa-De a right to appeal its ISDA declination permits IHS to extend the deadlines for contract approval and contract award.

Thirdly, on January 30, 1992, IHS stayed the award of Shingle Springs' October 1, 1991 contract proposal pending the appeal filed by Chapa-De of the decline of its November 12, 1991 contract proposal which involved essentially the same geographical area and service population as that proposed by Shingle Springs. SS Ex. 56. This action was consistent with IHS' obligation under ISDA to provide declined proposed contractors full appeal rights. Act, section 450f(b)(3).

Any of the intervening circumstances mentioned above would have prevented IHS from meeting the statutory deadline for contract approval and the internal agency deadline for contract award following approval. Therefore, the conditional approval had no effect on the treatment of Shingle Springs' proposal. Moreover, because IHS' October 9, 1992 redetermination letter was treated as a constructive declination, it accorded the statutory appeal right to both Shingle Springs and Intervenors. The parties' appeal rights have therefore been preserved.

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[33] As indicated previously, Shingle Springs' arguments about IHS' failure to meet certain deadlines are made for the purpose of challenging IHS' determination not to award it a contract for the entire Chapa-De Service Area. I have no doubt that, assuming Shingle Springs and IHS could have worked out a mutually satisfactory program, the issues of Ms. Shilin's participation in the contract execution and administration and the timing of obtaining leased space would have been resolved easily. IHS has an obligation to ensure that Shingle Springs is given the opportunity to exercise its self-determination rights under ISDA. The record demonstrates that IHS has made every reasonable effort to allow Shingle Springs to exercise such rights. However, it will not and cannot allow Shingle Springs to exercise contract rights under ISDA which unlawfully restrict the contract rights of another recognized Indian tribe under ISDA. To do otherwise would have violated the mandates of ISDA.

IHS' refusal to award the contract as originally proposed by Shingle Springs was due to circumstances that arose after the contract proposal was accepted, was not in contravention of the self-determination rights afforded Indian tribes under ISDA, and was consistent with its discretionary authority to take necessary actions to carry out its responsibilities under the Act. The fact that Shingle Springs in this case exercised its appeal rights proves that, although the conditional approval was not proper, the concern Congress addressed in amending the Act to eliminate "threshold criteria," and thereby guarantee appeal rights for tribes whose proposals are declined, is not present in this case.

III. IHS has not implemented IHS Policy Letter 89-4, relating to awarding contracts 120 days from the date the contract proposal was originally submitted, in such a manner that it would bind IHS if IHS gave conditional approval to Shingle Springs' proposal and/or there was a competing proposal from Chapa-De.

On August 14, 1989, the Acting Director of IHS' Division of Grants and Grants Policy issued IHS Contract Policy Letter 89-4 to IHS Contracting Officers. SS Ex. 10. Policy Letter 89-4 was issued in response to the 1988 amendments to the ISDA and provides in relevant part:

> . . . While the time frames contained in the Amendments are self-implementing and IHS will adhere to them, a process must be followed to make this provision meaningful. The process detailed below is based on existing regulatory language under 42 C.F.R. 36 as well as language from the regulations drafting process for the Amendments, i.e., the adoption of a 120-day standard for the issuance of an award.
> . . . If the proposal is not declined or otherwise denied, by the 90th calendar day (or such date representing an authorized extension) from receipt of the complete proposal, the Area Director shall advise the Indian tribe or tribal organization that its proposal has been approved and that an award will be issued following negotiations but no later than 120 calendar days following receipt of the proposal (or such date representing an authorized extension), unless both parties agree to a later date.

SS Ex. 10 at 2 and 3.

Shingle Springs contends that Policy Letter 89-4 is binding upon IHS as a matter of law because of the "plain

language of the Policy Letter and . . . [the] federal law on the binding effect of internal agency guidelines." Also, it argues that an agency is bound by its own rules when the interests of private parties are affected and "ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned." Reuters, Ltd. v. F.C.C., 781 F.2d 946, 950 (D.C. Cir. 1986).

Shingle Springs states that Policy Letter 89-4 is a substantive rule which directly affects and impacts the rights and interests of ISDA contractors. Relying on Morton v. Ruiz, Shingle Springs further argues that such policy has the force and effect of law and must be followed. SS P.H. Br. at 25 - 26. Shingle Springs' view is that Policy Letter 89-4 is binding upon IHS in all situations and mandates that IHS award the ISDA contract no later than 120 days following the receipt of the contract proposal. Moreover, according to Shingle Springs, Policy Letter 89-4 mandates that the 120-day deadline must always be followed by IHS unless it is waived with approval of the contractor. Under Shingle Springs' analysis, IHS' failure to decline Shingle Springs' ISDA proposal under the statutory declination criteria compels IHS to enter into an ISDA contract with Shingle Springs. Shingle Springs also points to the fact that IHS, prior to this case, has always awarded ISDA contracts within the 120-day time frame. Lastly, Shingle Springs emphasizes that IHS did not request, nor did Shingle Springs ever agree to, an extension of this deadline. SS P.H. Br. at 27.

IHS contends that Policy Letter 89-4 is an unpublished and internal agency timetable for reviewing contract proposals within 120 days, the purpose of which is to prevent ISDA proposals from languishing in the system.[34] IHS contends that, accordingly, Policy Letter 89-4 is not intended to limit IHS agency discretion and is a policy statement rather than a substantive rule. Vietnam Veterans of America, et al. v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988). According to IHS, under Vietnam Veterans, unless an agency intends to establish a substantive rule which creates or modifies rights that can be enforced against the agency, the issuance of a policy statement by an agency cannot bind the agency's discretion. As such, IHS argues that it is free to relax

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[34] IHS concedes that Policy Letter 89-4 has achieved its intended goal at the CAO, which, with the exception of the Shingle Springs and Chapa-De proposals, had always awarded ISDA contracts within the 120-day time period. IHS P.H. Br. at 21, n. 5.

or modify Policy Letter 89-4. Additionally, IHS contends that the situation of competing proposals, as is the case here, is a unique situation, and therefore does not fall within the framework of the routine situations that Policy Letter 89-4 was designed to encompass. IHS Br. at 22. However, as Shingle Springs correctly indicates in its reply brief, the D.C. Circuit in Vietnam Veterans distinguished the non-binding policy statement at issue from informal procedural rules affecting substantive rights of private parties, which the court said would be binding on the agency despite their informality. Id. at 537, 538; SS Reply Br. at 11.

My prior discussion of the cases involving agency discretion, Rationale, IIA, is applicable here. As discussed, in Morton the Court refused to give effect to a "legislative-type rule," which determined eligibility for welfare services and which had not been promulgated through notice and comment rulemaking but merely published in an internal Bureau of Indian Affairs (BIA) manual.

> This conscious choice of the Secretary not to treat this extremely significant eligibility requirement affecting the rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries contemplated by the Congress is concerned.

Id. at 236. However, the Court in Morton held that the BIA was bound by the policy stated in its internal operations manual to the effect that eligibility criteria for agency benefits would be published in the Federal Register. Id. at 233 - 35. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Id. at 235. Thus, the Court held that the BIA was bound by an informal procedure that prohibited the agency from enforcing an informal substantive rule. Where the statement that agencies must follow their own procedures has been followed as a general rule, the cases have involved adjudicatory settings (adverse personnel actions, deportation hearings, on-the-record rulemaking -- Doe V. Hampton, Montilla, Sangamon Valley which have quasi-Constitutional implications, or in contexts such as licensing processes where competition is a given.)

Shingle Springs cites Reuters, Ltd. v. F.C.C., 781 F. 2d 946, 950 (D.C. Cir. 1986) for the proposition that agencies may not depart from procedural rules that confer substantive rights on private parties, even to achieve

laudable aims. However, Reuters is easily distinguished from the case before me because in Reuters, the court was dealing with the F.C.C.'s ad hoc departure from a published rule. Reuters at 947 - 950. Moreover, the court in Reuters, in stating that an agency must adhere to its own rules and regulations, made clear that it was explicitly addressing the situation of an agency's fidelity to rules that have been properly promulgated, consistent with statutory requirements. Reuters at 951.

Similarly, Shingle Springs relies on Massachusetts Fair Share v. Law Enforcement Assistance Administration, 758 F.2d 708 (D.C. Cir. 1985) for the proposition that an agency cannot alter procedures that affect substantive rights of private parties. However, in Massachusetts Fair Share, the court was addressing the joint administration of a grant program where one of the agencies had unilaterally denied a grant application, in direct contradiction to the agencies' jointly established application process. Massachusetts Fair Share at 712. Holding that the procedures established for the administration of the grant program precluded unilateral action by one of the administering agencies, the court specifically noted that the Federal Register notice announcing the grant program had characterized it as jointly developed and administered. Id. at 712.

Shingle Springs' reliance on Massachusetts Fair Share is therefore misplaced, because, in that case, the court's objections to the agency's action were based on the fact that the agency acted outside the clear mandates contained in the federal register and in the program documents. In the case before me, unlike Massachusetts Fair Share, there is no federal register publication nor is there a wealth of underlying documents that mandates the manner in which the CAO or IHS is to administer competing ISDA proposals. To the contrary, this is a case of first impression. Unlike the agency in Massachusetts Fair Share, IHS here did not have unambiguous instructions, nor did IHS have a clear policy mandate. As I stated earlier, the record reflects that IHS was torn between following 89-4 and according Shingle Springs and Intervenors their respective rights to self-determination. Further, Massachusetts Fair Share does not squarely address the situation of agencies' discretion to vary their procedures (as Shingle Springs asserts), because Massachusetts Fair Share does not indicate whether both of the empowered agencies could validly have changed their application process by informal means had they acted jointly.

Policy Letter 89-4 does not resemble a legislative-type rule so much as it does a rule of agency organization, or a general statement of policy (statement issued by an agency to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"). Chrysler Corp. v. Brown, 441 U.S. 281, 301 n.3 (1979), citing Attorney General's Manual on the APA (1947). Indeed, pursuant to section 450k(a) of the ISDA, such rules cannot be imposed on private parties without notice and comment rulemaking. Further, section 450k(a) stipulates that regulations which impose "requirements" on tribes or tribal organizations must be promulgated by APA section 553 notice and comment rulemaking, implying that other "necessary and proper" rules, such as agency organizational rules for carrying out the mandatory provisions, need not be so promulgated.

Although Policy Letter 89-4 contains a self-imposed agency deadline for contract award and thus affects substantive rights of private parties proposing contracts, that deadline is not one of those required by the otherwise highly specific ISDA. Rather, the purpose of Policy Letter 89-4 is to advise the public prospectively of the manner in which the IHS proposes to exercises its discretionary power. As such, it is an internal organizational rule, within the meaning of Chrysler Corp., which enables IHS to carry out its statutory mandate. A rule of agency organization or general statement of policy is not subject to notice and comment procedures under section 553 of the APA, and under Lincoln v. Vigil, an agency's departure from such rules would be an unreviewable exercise of statutory discretion. Lincoln v. Vigil at 2034. Thus, Shingle Springs cannot invoke Policy Letter 89-4 as an authority to bind IHS, especially in this case, where the departure from the internal deadline was necessary to permit IHS to comply with its statutory mandate to accord all tribes the right to self-determination via the ISDA contracting process.

The ISDA directs IHS to enter into a self-determination contract with "any tribe or tribal organization," and gives a right of appeal to tribes and tribal organizations whose proposals are declined. Thus, had IHS adhered to the deadline, it would have effectively precluded Chapa-De from exercising its appeal rights. For IHS to apply a deadline that would prevent Chapa-De from going forward with its ISDA proposal, and therefore prejudice Chapa-De's right to contract, the deadline would have to be promulgated by APA notice and comment rulemaking. See, Chrysler Corp. v. Brown. No such notice was promulgated in this case.

IHS disputes Shingle Springs' contention that Policy Letter 89-4 is binding because it affects the interests of private parties. According to IHS, Shingle Springs has confused the situation in this case with situations where an agency has created an adjudicative process for determining the rights of a private party. IHS believes that Policy Letter 89-4, as an internal agency guideline for entering into an ISDA contract once IHS has approved a proposal, conveys no such rights.

Moreover, IHS contends that it needs flexibility in administering ISDA contracts. According to IHS, it is routine for proposals to be modified after they have been approved but before the contract is awarded. Finding 154. IHS points out that it has no means of ensuring that all difficulties can be ironed out in the 120-day period mentioned in Policy Letter 89-4. IHS avers that under Shingle Springs' scenario of a mandatory award of an ISDA contract within 120 days, a tribe whose ISDA proposal has been accepted could simply refuse to compromise in implementing the details of its proposal. The tribal entity could do this knowing that IHS is bound to award them the contract within 120 days even if the tribe is not in a position to begin providing services as of that date. IHS points out that Policy Letter 89-4 was not implemented so as to limit IHS' discretion to withhold award of an ISDA contract pending a necessary modification of that contract. n. and Finding 155.

Lastly, IHS contends that Policy Letter 89-4 cannot be used to defeat Rumsey's and Chapa-De's rights to appeal an ISDA contract declination. IHS and Intervenors state that ISDA gives a tribal entity whose proposal has been declined the right to appeal the declination. IHS and Intervenors contend that to interpret Policy Letter 89-4 as mandating award of a contract within 120 days would serve in this instance to moot the appeal rights of the tribal entity whose proposal was declined. IHS contends that it could not act to deprive a tribe or tribal organization of its right to appeal absent a mechanism promulgated in accordance with the notice and comment procedures of section 553 of the APA.

I find that the purpose of Policy Letter 89-4 is, as is stated in the document itself, for the Director of IHS to provide guidance to IHS contract officers on implementing non-construction contracts under ISDA. SS Ex. 10; Findings 146 - 79. The plain language of Policy Letter 89-4 indicates that IHS intends to follow the 120 days as a guideline and that IHS is free to remain flexible and institute changes in this "deadline" as the situation warrants. SS Ex. 10; Findings 146 - 79.

Contained in the implementing instruction of Policy Letter 89-4 is a specific reference to the implementing regulations at 42 C.F.R. § 36. The implementing regulations state as follows:

> Administrative Instructions. The Service periodically issues administrative instructions to its officers and employees which are primarily found in the Indian Health Service Manual and the Area Office and Program Office supplements. These instructions are operating procedures to assist officers and employees in carrying out their responsibilities and are not regulations establishing program requirements which are binding upon members of the general public.

42 C.F.R. § 36.2. Although the regulation is silent as to the extent to which informal administrative instructions bind IHS, it clearly shows that IHS viewed them as providing guidance and assistance to its staff rather than mandating strict limits to their methods of carrying out their duties under the program. Thus, the implementing regulations provide further support that the 120-day guideline is a date that is not binding upon IHS.

The statement in IHS' regulation is supported by the Supreme Court in Lincoln v. Vigil, which found an IHS program decision unreviewable because it was either a "rule of agency organization" or a "general statement of policy" under the APA. Id. at 2034. The Court did not find it necessary to determine which of these two categories described IHS' action (discontinuing a particular regional program funded by lump-sum appropriation), but held that just as both are exempt from APA rulemaking requirements, both represent exercises of agency discretion which are not reviewable by courts. Id.

I find that Policy Letter 89-4 is an administrative instruction as defined by the regulations at 42 C.F.R. § 36.2. Finding 151; 42 C.F.R. § 36.2; SS Ex. 10. As such, it is not binding upon members of the general public, but is instead a procedure to assist IHS employees in carrying out their responsibilities. Findings 146 - 79. Additionally, I find that the intent of IHS in implementing Policy Letter 89-4 was, as IHS claims, to speed processing of ISDA contract proposals and to assure that they do not languish in the system. Findings 170 - 78; Tr. at 258. While this is an admirable goal, it is not a standard that IHS is required to meet in all cases. In short, Policy Letter 89-4 is,

by its express terms, a policy and is not a procedural rule that establishes enforceable rights for tribal contractors. Moreover, there is no language in Policy Letter 89-4 that suggests that the 120-day time frame was intended to apply to situations involving IHS' consideration of two valid competing contract proposals submitted within 45 days of each other.

I am, however, troubled by the factual circumstance that, in all cases prior to Shingle Springs' proposal, IHS has strictly adhered to the 120-day time frame. Thus, despite the express language of Policy Letter 89-4, it can be argued that, by its past conduct, IHS has created an expectation in the minds of tribal contractors that once their ISDA contract proposals are accepted by IHS, they will be awarded within 120 days, unless they agree to an extension. Such factual circumstances might suggest the presence of a procedural rule providing substantive rights to private parties in routine situations involving ISDA self-determination contracts.

However, the clear goal of the ISDA is to provide equal self-determination contract rights to all recognized tribes. No priority is established for a tribe that was previously receiving services within an established service area that would enable that tribe to block all other recognized tribes from proposing to serve its members in that area or a portion of that area. Such an interpretation was expressly rejected by the court in Southern Indian Health Council. Rationale, I.

As indicated previously, the ISDA is silent on the issue of competing tribes. Rationale. Accordingly, absent a congressional mandate requiring IHS to uniformly apply the 120-day time frame set forth in Policy Letter 89-4 in all situations irrespective of whether rights of tribes may be adversely affected, I find that it is still a rule of agency organization or policy which does not require notice and comment rulemaking nor provide enforceable rights to third parties. See Vigil, Findings 108 - 79.

An additional distinction is that, even though IHS created this expectation generally, in this case it advised Shingle Springs prior to the end of the 120-day time period that IHS could not adhere to that time frame due to the pending appeal of the declination of a competing proposal from Chapa-De. An agency's decision may depart from the norm, providing that the agency provides an opinion or analysis indicating that the norm is being changed and not ignored, and assuring that it the decision is faithful to and not indifferent to the

rule of law. Greyhound Corp. v. I.C.C., 551 F.2d 414 (D.C. Cir. 1977) at 416.

In this case, IHS did provide Shingle Springs with an opinion or analysis within the meaning of Greyhound when it informed Shingle Springs that, because IHS now had two acceptable proposals for the same program, it was necessary to divide the program to best approximate the expected service population while assuring that both programs would operate satisfactorily. IHS Ex. 14. On that basis, IHS revised its initial determination and divided the Chapa-De program for purposes of contracting. IHS Ex. 14. Therefore, to the extent that IHS' October 9, 1992 was a departure from the past practice of awarding an ISDA contract within 120 days, it falls within the rubric of agency discretion as articulated in Greyhound, because IHS did not simply disregard its past practices, but indicated the reasons for the departure from those practices and gave a basis for its final decision.

An analysis of IHS' actions under the standards articulated in Atchison, Topeka and Santa Fe R.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1972) (Santa Fe. R.R.) gives the same result as that mandated by Greyhound. In Santa Fe R.R., the Court noted an agency may flatly repudiate a norm by which it operates, provided the agency provides a clear explanation for its doing so. Santa Fe R.R., at 808. In this case, as noted above, IHS departed from its norm of awarding ISDA contracts within 120 days. However, in accordance with Santa Fe R.R., IHS provided the parties with an explanation as to why it was departing from this past practice. IHS Ex. 14. Indeed, throughout settlement negotiations that occurred for the better part of 1992, IHS made the parties aware of why it had not awarded the ISDA contract within 120 days. IHS Ex. 12, 13.

That IHS' alleged failure to comply with the 120-day guideline of Policy Letter 89-4 confers no right upon Shingle Springs is further supported by the analysis contained in U.S. v. Craveiro, 907 F.2d 260 (1st Cir. 1990). In Craveiro, a defendant in a criminal proceeding argued for a remand of his sentence. The defendant's contentions were grounded on three separate arguments, one of which was the prosecutor's failure to provide pre-trial notice of an enhanced penalty for a repeat offender in accordance with the Department of Justice's published guidelines. Craveiro, at 263 - 64. In rejecting the defendant's arguments, the court stated that internal guidelines of a federal agency, that are not mandated by

statute or the Constitution, do not confer substantive rights on any party. Craveiro at 264.

Even if I had found persuasive the cases cited by Shingle Springs supporting the conclusion that Policy Letter 89-4, as applied by IHS, creates an enforceable private right, the circumstances in this case would create an exception to such an application to Shingle Springs. The awarding of the contract within the 120-day time frame is a bilateral act between IHS and the tribal contractor. At the time of such award, each party to the contract must be in position to carry out the terms of the contract. Here, as previously found, Shingle Springs, by January 29, 1992, was not in position to carry out the terms of its ISDA contract proposal. It did not acquire the necessary lease facilities to operate the medical clinics until the middle of April 1992 -- substantially after the expiration of the 120-day time period. Rationale, IIC2.

To the extent that a substantive right arose by virtue of IHS' past practices regarding Policy Letter 89-4, Shingle Springs' actions could be construed as a waiver to have its proposal awarded in accordance with Policy Letter 89-4.[35] Additionally, arguably, Shingle Springs' failure to be in a position to be able to carry out the terms of the contract, and its consent to allow Chapa-De to continue

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[35] Contracts, 3d Ed, Calamari and Perillo, West Publishing Co. (1987) defines a waiver as "a voluntary and intentional relinquishment of a known right." Id. at 491. Restatement of the Law, Contracts, Second Ed. § 84 interprets the term waiver as follows:

> Waiver is often inexactly defined as 'the voluntary relinquishment of a known right.' . . . The common definition of waiver may lead to the incorrect inference that a promisor must know his legal rights and must intend the legal effect of the promise. Under § 93, it is sufficient if he has reason to know the essential facts.

Under either definition, an argument could be made that Shingle Springs' actions amounted to a waiver of any rights it had under Policy Letter 89-4 (if, indeed it accrued any rights at all), due to 1) Shingle Springs' consent to allow Chapa-De to be awarded an interim contract after April 1, 1992; and 2) Shingle Springs' failure to be in a position to carry out the terms of the proposal because it had failed to obtain the necessary leased office space.

to provide health care services after April 1, 1992 could rise to the level of an estoppel of Shingle Springs right to assert that it was harmed by IHS' failure to follow the 120 day guideline, or that IHS was bound by Shingle Springs' interpretation of Policy Letter 89-4.[36]

Lastly, for IHS to award Shingle Springs' contract within the 120-day time frame would essentially moot Chapa-De's appeal of IHS' declination of its contract proposal. The ISDA does not give priority to Shingle Springs over Intervenors merely because IHS incorrectly accepted Shingle Springs' proposal before recognizing that two legitimate and competing proposals had been submitted. Such circumstance provides an exception to application of a private right to Shingle Springs, since it would deprive Chapa-De of its contract rights under ISDA.

Based on the foregoing, I find Shingle Springs' arguments regarding the enforceability of Policy Letter 89-4 to be without merit. IHS Policy Letter 89-4 contains no language that would indicate that it was intended to limit IHS' discretion in awarding ISDA contracts. SS Ex. 10. The implementing regulations make clear that this is not the intent of the document. 42 C.F.R. § 36.2. Although IHS' goal is to comply with the 120-day

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[36] The doctrine of equitable estoppel is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. ATC Petroleum, Inc., v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988), See generally 3 J. Pomeroy, Equity Jurispendence § 804, at 189 (5th ed. 1941). In Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 51 (1984) the Court noted: ". . . the party claiming estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse' and that reliance must have been reasonable in that the estoppel did not know nor should it have known that its adversary's conduct was misleading."

In this case, arguably, IHS could assert the following factors as precluding Shingle Springs from asserting that it was harmed by IHS' violation of the 120-day guideline contained in Policy Letter 89-4: 1) Shingle Springs' failure to be in a position to begin providing services as of April 1, 1992, in accordance with the terms of the proposed contract; 2) Shingle Springs' consent to Chapa-De continuing to provide services after the April 1, 1992 startup date; and 3) the parties' good faith participation in the lengthy settlement process.

guideline, and it has met that goal in all prior instances, except when a tribe has agreed to an extension of time, the record reflects that the situation here was a unique one not contemplated by the ISDA. Never before had the CAO encountered a case of two federally recognized tribes submitting competing proposals for an ISDA contract for essentially the same geographical area that primarily would serve unaffiliated Indians. Finding 137. Given the unique situation of competing proposals for an overlapping service population, it is reasonable that IHS would need more than 120 days to award the contract for the Chapa-De Service Area. This is particularly true here, since IHS needed to undertake the necessary evaluation to properly allocate the unaffiliated Indians in a manner that would allow each tribe to have a viable program and exercise their individual self-determination rights under ISDA.

This is precisely what happened. On January 30, 1992, the Director of the CAO informed Shingle Springs that he would not apply the 120-day timetable set out in Policy Letter 89-4 because of the "special situation" created by the competing proposals from two qualified contractors and the pending appeal by Chapa-De. CD Ex. 56; Tr. at 153. Shingle Springs was nonetheless engaged in negotiations with Intervenors and IHS that lasted the better part of 1992, and which culminated in IHS' redetermination of October 9, 1992. IHS Ex. 9, 10, 13, 14. Therefore, Shingle Springs' objection to IHS' failure to follow the 120 day guideline seems more a protest of IHS' October 9, 1992 redetermination than it is a legitimate argument against IHS violating a binding rule. In essence, Shingle Springs raised this argument once it became aware that IHS was not going to award it a contract for the entire Chapa-De Service Area.

Lastly, I find that Policy Letter 89-4 should not be construed in such a way that is contrary to the intent of the ISDA, nor should it be construed in such a way that it would compel IHS to award a contract where it had legitimate reasons for not doing so. The ISDA contemplates that all tribes have a right to self-determination and that IHS must assist them in achieving this goal. 25 U.S.C. § 450f(a)(1). ISDA regulations provide specific procedures to ensure each tribal organization's right to appeal the declination of its proposal. 25 U.S.C. § 450b(f)(3); S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in U.S.C.C.A.N. 2620, 2643 (1989). In this case, were I to find that IHS had to award Shingle Springs an ISDA contract within 120 days, Intervenors' right to appeal would have been rendered meaningless, because the contract would have

been awarded before the appeal was decided.[37] Shingle Springs' interpretation of Policy Letter 89-4 is unreasonable because it would force IHS to award the contract despite their legitimate reservations and their responsibility to the Indian people as a whole to ensure that IHS funds are used for the purpose for which they are intended.

IV. IHS has not implemented IHS Circular 88-2, relating to "service units," in such a manner that "service areas" in the State of California must be established or modified in accordance with the procedures set forth in such Circular.

IHS Circular 88-2, issued by IHS on March 25, 1988, provides as follows:

> Purpose: To set forth Indian Health Service (IHS) policy and procedures with respect to the establishment of and changes in the boundaries of IHS-operated and tribally-operated service units. . .

Shingle Springs argues that Circular 88-2 sets forth specific procedures applicable for establishing and changing service unit boundaries and that IHS did not follow these procedures with regard to their contract determination in this case. Shingle Springs contends that IHS' redetermination of October 9, 1992 reconfigured the Chapa-De Service Area in violation of the procedures contained in Circular 88-2. Shingle Springs contends that IHS' October 9, 1992 redetermination redrew the boundaries of the Chapa-De Service Area and that this action was impermissible absent the formal procedures contained in Circular 88-2.

With two exceptions, Shingle Springs contends that the CAO has never permitted a tribe located in one service unit to take over an adjoining service unit when that tribe has no land base in the adjoining service unit and when the tribes in the adjoining units do not consent to changing the unit's boundaries. According to Shingle Springs, neither exception involved a situation where a tribe objected to the change and redrawing of the service

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[37] This might have been the case if Shingle Springs had agreed to designate another principal agent in accordance with IHS' instructions and had obtained leased facilities prior to April 1, 1992, the starting date of the ISDA contract at issue here.

area boundaries. Shingle Springs argues further that the IHS policy on competing proposals qualifies as a substantive rule requiring notice and comment rulemaking under section 551(4) of APA, a formal procedure that was not followed by IHS in this case.

IHS contends that Circular 88-2 governs internal administrative procedures when adjusting IHS service unit boundaries and it does not establish any procedural rights for contractors or IHS beneficiaries. IHS argues that Circular 88-2 was created to assign administrative codes to tribally operated service units so that IHS could collect statistical data on these units. IHS refers to the testimony of Anthony D'Angelo as proof of this point. Tr. at 193 - 216. Therefore, IHS' position is that Circular 88-2 is intended to assist IHS in designating service units for statistical reporting and is independent of ISDA contracting. IHS avers that, since Circular 88-2 was not intended to limit IHS' discretion to resolve the unique situation that exists in this case, under Lincoln v. Vigil it cannot be relied upon by Shingle Springs to do so.

IHS states that it has been its practice to allow changes in service unit boundaries based on a variety of reasons including new tribes, a change in utilization rates within the service unit, or a new relationship established with a tribe pursuant to ISDA contracting. IHS' position is that approval of an ISDA contract proposal can change service area boundaries and that this has occurred on several occasions. IHS states that it modifies service areas on a case-by-case basis, and that it does not require that modifications to service areas be created in accordance with Circular 88-2. Moreover, IHS states that it does not view Circular 88-2 as a restriction on a tribe's reconfiguring its service area. IHS states that it does not impose geographic barriers on the submission of ISDA contracts.
Shingle Springs counters that the testimony of Mr. D'Angelo is contradicted by the plain language of Circular 88-2. Moreover, Shingle Springs cites testimony that it contends shows that Circular 88-2 was binding upon IHS when it reviewed Shingle Springs' and Chapa-De's proposals. Tr. at 202, 426. However, contrary to Shingle Springs' contentions, a complete review of the testimony and of the language of Circular 88-2 itself reveals that it imposes no restrictions upon reconfigurations of service area boundaries. IHS Ex. 15; Tr. at 193, 202.

At the hearing, IHS presented credible testimony that the purpose of the procedures outlined in Circular 88-2 is to

coordinate the process for assigning administrative codes for statistical purposes for both IHS and tribally operated service units. Finding 193; Tr. at 193 - 216, 398 - 442. IHS demonstrated that Circular 88-2 is intended to assist IHS in designating service units for statistical reporting and is independent of ISDA contracting. Findings 194, 202; Tr. at 193 - 205. Accordingly, the purpose of Circular 88-2 was not to bind IHS' discretion in reconfiguring service areas, but to enable IHS to gather information about service units.

Moreover, a 1988 proposal to establish formal and inflexible service areas in California was never approved, due to a lack of consensus among California tribes. IHS Ex. 15; Finding 218. Since the tribes themselves could not agree on formal service areas, it is not plausible that IHS would resurrect this failed attempt in the form of Circular 88-2. Against this background, IHS' explanation of the purpose of Circular 88-2 being for statistical reporting purposes seems even more plausible.
The evidence shows that IHS has, on at least three other occasions in California, reconfigured established service areas pursuant to a tribal request to accommodate the tribe's right to self-determination. Findings 180 - 257. In 1989, the CAO awarded an ISDA contract to the Sycuan Indians. The service area was reconfigured in June of 1993 pursuant to tribal request. In 1992, the CAO awarded an ISDA contract whose service area boundary was subsequently reconfigured in July 1993 at the request of the Warner Mountain tribe. In 1990, again the CAO awarded an ISDA contract which boundaries were changed in July 1993 pursuant to the request of the Manchester/Point Arena tribe. IHS's policy and practice has been to approve a tribe's request to alter service area boundaries in California in accord with the principles of self-determination for Indian tribes within the State. Findings 223 - 257. Accordingly, I find that IHS practice in California has been to implement service areas on a case-by-case basis and that Circular 88-2 does not limit IHS' discretion in this area.

Therefore, under Lincoln v. Vigil and Morton, Circular 88-2 is not a substantive rule because there was no intent on IHS' part that Circular 88-2 would mandate a limit on IHS reconfiguring service areas. Nor has IHS been limited in its ability to alter service areas as necessary to meet the legitimate self-determination rights of tribes under ISDA. For these reasons, I find that Circular 88-2 is not a substantive rule which binds IHS agency discretion in this case.

Circular 88-2 created uniform procedures for designating and modifying IHS service units, which had formerly been treated differently, based on whether they were originally established as federally-run units or as tribally-run units. IHS Ex. 16 at 1; SS Ex. 6 at 1. Circular 88-2 defined how service units should be configured, based on a number of management factors, so that they would be relatively uniform nationally, and described them as elements of larger areas, called Health Service Delivery Areas (HSDAs), which were defined in a regulation which was never given effect, due to a congressional moratorium. 52 Fed. Reg. 35044 (1987) (final rule); Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329-254, § 315 (1987).

Congress had voiced concern to IHS about variation in funding levels of service units within areas, as well as between areas, and had directed IHS to improve its resource allocation methodology "to actually calculate the needs of multiservice unit medical centers and small service units." S.Rep. No. 165, 100th Cong., 1st Sess. (1987) at 111-12 (accompanying 1988 appropriation bill, enacted as Pub.L. 100-202). IHS responded to the request for better measurement and more equitable allocation by developing standards for defining the building blocks being measured and compared, i.e., the HSDAs and service units. Accordingly, IHS published a final rule governing designation and modification of HSDA boundaries in 1987, and prepared Circular 88-2 which provided factors for establishing and updating formalized service units. The geographical designations, along with tribal affiliations, functioned to identify individuals eligible for IHS services. 42 C.F.R. § 36.12(a)(2). Because Congress was concerned about the unknown costs of redefining eligibility for IHS services, the regulation was subjected to a congressional moratorium in September 1987 and renewed annually, and has never been implemented. Pub. L. 100-202, 100th Cong., 1st Sess. § 315, 100 Stat. 1329-54 (1987). As a result, IHS was prohibited by Congress from adopting the Circular to the extent it implemented those regulations, and the status of any part of the Circular as agency law is at best questionable in the face of this Congressional prohibition.

Even assuming, arguendo, that Circular 88-2 could be said to bind IHS, Shingle Springs could not compel IHS to enforce its provisions, because ISDA imposes a statutory obligation on IHS with respect to all Indians, not just Shingle Springs. A particular group of Indians that has benefited from IHS services may not assert a right to continued services where the agency has decided to change

from a local service program to a national study benefitting all Indian people. Lincoln v. Vigil, 113 S.Ct. 2024, 2033 (1993); Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102 (9th Cir. 1986) (fiduciary duty of federal government is owed to all Indians). Thus, Shingle Springs' claim of entitlement to its proposed self-determination contract cannot succeed, because applying Circular 88-2 solely to benefit Shingle Springs would cause detriment to Intervenors.

Lastly, even if Circular 88-2 had survived Congressional action and applied to service areas in California, by its own terms the Circular appears to permit the redefinition of an area for contract purposes which IHS made in its October 9, 1992 redetermination letter. The Circular explicitly provides that "IHS may contract below the service unit level for the delivery of a specific health service (where effectiveness, efficiency and quality considerations are satisfied), [but] such contracts do not constitute new service units." IHS Ex. 16 at 2; SS Ex. 6 at 2. The Circular distinguishes between the purpose of the proposed service units (planning, gathering of statistics, and resource allocation) and the concerns driving health service contracts (efficient delivery under particular local circumstances, including availability of resources and population distribution). IHS Ex. 16 at 2-3 (secs. 4A, B, C, and E), SS Ex. 6 at 2 - 3 (sections 4A, B, C, and E). Therefore, the distribution of the original Chapa-De service area between the two validly sponsored organizations for contract purposes might fall under IHS' discretion to contract for services below the service unit level and therefore might not even be considered a modification to a service unit.

V. IHS has not adhered to designated "service areas" in accepting self-determination contract proposals in the State of California and has modified or established new "service areas" in connection with such contracts on a case by case basis.

Shingle Springs contends that IHS adheres to designated service areas in California in awarding ISDA contracts. While Shingle Springs concedes there have been two exceptions to this rule, it asserts that both occurred with the consent of the tribes involved. According to Shingle Springs, there exists an historical rule that tribal resolutions sanctioning tribal organizations to contract under ISDA must be obtained only from tribes within the service unit.

Shingle Springs states that a service unit has never been altered without the consent of all of the affected tribes. Shingle Springs also contends that Circular 88-2 does not address the issue of a proposal from a tribe outside the service area.[38] Lastly, Shingle Springs argues once more that the "benefits" analysis in the Director's decision in Kickapoo would bar Chapa-De from providing program services in the former Chapa-De Service Area. I have already discussed the Director's decision in Kickapoo in dealing with Shingle Springs' argument that Rumsey's resolution sanctioning Chapa-De is invalid to permit Chapa-De to provide program services in the former Chapa-De Service Area. Rationale, I; Findings 91 - 107. There is nothing in the Director's decision in Kickapoo which supports Shingle Springs' tortuous interpretation of the "benefits" analysis set forth in that decision.

The record also does not support Shingle Springs' contention that the practice in California regarding service areas would act as a bar to modification of the Chapa-De Service Area as proposed by IHS. IHS presented testimony from Athena Schoening. Ms. Schoening is currently IHS' Deputy Associate Director for the Office of Tribal Activities and formerly was the individual in charge of the IHS component that, at the time this case arose, formulated IHS policy regarding the ISDA and supervised its implementation at the area offices. At the hearing, Ms. Schoening testified that IHS does not restrict tribes from redesigning service areas when they submit ISDA contract proposals.

Additionally, IHS presented the testimony of Harry Weiss, who is currently and has been a contracting specialist for the CAO for the past 12 years. Mr. Weiss testified that there have been numerous changes in service areas in California. Mr. Weiss stated that, pursuant to the request of tribal organizations, there have been changes in three service areas in California. Specifically, he detailed changes in service areas in the counties of Lassen, Shasta, Trinity, Siskiyou, and Modoc in northern

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[38] This is somewhat in conflict with Shingle Springs' position regarding the applicability of Circular 88-2. Shingle Springs argued that Circular 88-2 should be construed as formally and rigidly outlining procedures which must be followed in all cases to reconfigure service areas. With regard to this issue, Shingle Springs contends that Circular 88-2 does not address the case of a tribe from outside the service area submitting an ISDA contract proposal.

California; Mendocino and Sonoma Counties in west central California; and in San Diego County. Tr. at 216 - 46, Findings 223 - 256.

IHS beneficiaries in Lassen, Shasta, Trinity, Siskiyou, and Modoc Counties originally received their health services from the CRIHB. Mr. Weiss testified that, over the last 15 years, tribes within these counties have requested changes in the service areas and that IHS has accommodated these requests by reconfiguring the service areas in this region. Finding 235. He further testified that Manchester Point Arena Rancheria requested to leave the Consolidated Service Area and to have its ISDA health care services provided by Sonoma. Pursuant to this request, the CAO altered the boundaries of both the Consolidated Tribal Health Plan Service Area and Sonoma County Service Area. Tr. at 228 - 231; Finding 243. In doing so, the CAO permitted a tribe from one service area to sanction a tribal organization in an adjoining service area. That is precisely the same situation that is at issue here.

Lastly, Mr. Weiss testified that ISDA health services in San Diego County were provided by an organization called the Indian Health Council. However, pursuant to request from a tribal organization, the majority of the southern part of San Diego County is now served by an organization called the Southern Indian Health Council. Finding 248. A tribe called the Sycuan Band of Mission Indians, also located in the southern part of San Diego County, provides its own ISDA health care services. Therefore, in San Diego County alone, there have been two reconfigurations of the service area pursuant to tribal request.
Other witnesses confirmed the testimony of Mr. Weiss that, pursuant to ISDA contract proposals, the geographic area in which services are provided has often changed. Tr. at 353 - 54; 759 - 77. Shingle Springs' witness, Errin George Forrest, testified that the right of self-determination encompasses the ability to alter or maintain existing services areas, as the tribe sees fit. Tr. at 469 - 71. Accordingly, IHS policy and practice in California has been to reconfigure service area boundaries pursuant to ISDA contract proposals. Tr. at 353 - 54, 469 - 71, 759 - 77; Findings 223 - 257.

Additionally, reconfiguring the Chapa-De Service area in accordance with Chapa-De's ISDA contract request does not violate Shingle Springs' right to self-determination, or, for that matter, the rights of any other tribe seeking self-determination. Although Shingle Springs has argued that its right to self-determination mandates that it be

awarded the Chapa-De Service area, the fact is that the vast majority of the Indians in the counties at issue here are unaffiliated and are not associated with Shingle Springs in any formal way. Findings 8, 25. The only connection the unaffiliated Indians have to Shingle Springs is that they have been receiving services from the same ISDA contractor for a number of years.

Shingle Springs would have me believe that this tenuous connection gives them an undisputed and exclusive right to provide ISDA services to these people. However, the ISDA does not give either Shingle Springs, or for that matter Chapa-De, such a right. Under the ISDA, no tribal organization has a superior claim to contract to provide services to the unaffiliated Indians merely because they happen, through historical coincidence, to be located in a service area that receives services in conjunction with the unaffiliated Indians.

What Shingle Springs is really asking for is the undisputed right to provide health care services to 4300 unaffiliated Indians residing in four counties. However, three of the counties are not even located on Shingle Springs' tribal land. Findings 7, 9, 10 - 14. Under the ISDA, Shingle Springs' right to self-determination entitles it only to control its own destiny and provide services to its own members. Shingle Springs has no undisputed or superior claim to providing ISDA services to the unaffiliated Indians. It is within IHS' discretion to decide whether a tribe is awarded an ISDA contract for the unaffiliated Indians in conjunction with its award of an ISDA contract to serve its own members, just as it is within IHS' discretion to reconfigure the service areas in California pursuant to the request of a tribal organization. Findings 223 - 291.

In closing on this issue, Shingle Springs' argues that wealthy tribal organizations from distant locations outside the service area would act like monopolistic conglomerates and absorb local Indian-run health programs. I do not believe that this is a likely scenario, because in order to be permitted to contract to provide services in the service area, such a tribal organization must show "benefit" in accordance with the Director's decision in Kickapoo. IHS would be compelled, under the Director's decision in Kickapoo, to reject as a matter of law any contract where a tribal organization could not establish that it benefited from the program contained in the contract proposal. Assuming that it could meet the "benefit" requirement, the tribal organization could obtain an ISDA contract to provide services to another tribe only to the extent that the

other tribe did not exercise its right to self-determination and contract to provide services for its own members.[39]

VI. IHS' letter of October 9, 1992, which modified a prior designated service area for the provision of medical services to IHS' beneficiaries was in accord with IHS Circular 88-2 and the past procedures followed by IHS in awarding contracts for self-determination in the State of California.

Shingle Springs argues that IHS' October 9, 1992 redetermination violates IHS practices and policies and was not in accordance with the past procedures for awarding ISDA contracts because IHS has never altered a service area without the consent of all of the affected tribes. Shingle Springs contends that IHS was required to obtain its consent before it awarded any part of the Chapa-De Service area to Chapa-De.

IHS states that the CAO proposed to establish formal service areas in California in 1988 and that the proposal was rejected out of hand. Therefore, IHS and Intervenors argue that absent a system of formal service areas, IHS is entitled to reconfigure service areas pursuant to the request of a tribe. IHS contends that this is mandated in light of the district court's decision in Southern Indian Health Council v. Sullivan, No. CIVS-88-0240-EJG-JFM (E.D. Ca. January 8, 1990).

In Southern Indian Health Council, the court was confronted with the CAO's decision to decline Southern Indian Health Council's (SIHC) ISDA contract proposal due to the failure of SIHC to obtain consent from all tribes within its geographic service area. The difficulty arose because the Sycuan Band of Mission Indians' (Sycuan) had opted out of the SIHC service area so that it could provide services to its own members.

SIHC's membership originally consisted of the Barona, Campo, Cuyapaipe, Jamul, La Posta, Manzanita, Sycuan, and

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[39] Moreover, it is within IHS' discretion to decline an ISDA proposal in which the proposed project or function cannot be properly completed or maintained. 25 U.S.C. § 450f(a)(2)(C). To the extent that a distant tribe would be unable to overcome the likely administrative, efficiency and effectiveness considerations to managing health care services associated over long distances, IHS would be entitled to decline its proposal.

Viejas Bands of Mission Indians. Due to a dispute between the Sycuan and the SIHC, Sycuan withdrew from the SIHC and SIHC moved its health care facilities from the Sycuan Reservation to the Barona Reservation. After the expiration of their ISDA contract, SIHC submitted another proposal in which it proposed to provide health care services to all of the eligible Indians in SIHC's territory, except the Sycuan. The CAO denied SIHC's proposal, stating that SIHC needed to obtain a sanctioning resolution from all of the tribes in SIHC's service area and that SIHC's service area could not be divided.

The court refused to interpret section 450b(c) of the Act, a provision concerning the need for sanctioning resolutions as a basis for IHS to maintain rigid, inflexible, service areas that, as a condition of an Indian tribe contracting under the ISDA, mandate that the tribe obtain a sanctioning resolution from all tribes in the service area, even ones to which the tribe does not propose to provide services. The court accordingly rejected the requirement imposed at that time by IHS that a tribe needed to obtain a sanctioning resolution from all other tribes within the service area as a precondition to providing services solely to that tribe's own members. Southern Indian Health Council at 5 - 6; IHS Ex. 18 at 5 - 6. Since this decision, the CAO has used Southern Indian Health Council as a guideline and implemented ISDA contracts in California with flexibility with regard to service unit boundaries.[40]

Accordingly, under Southern Indian Health Council, the CAO may not reject an ISDA contract proposal because the proposing tribe is outside the service area it proposes to serve. Accord Kickapoo. Therefore, Shingle Springs' argument that the CAO must reject out of hand Chapa-De's proposal because Rumsey's land base is outside the Chapa-De service area is without merit. Also, under Southern Indian Health Council, Chapa-De is not required to have a sanctioning resolution from Shingle Springs as long as it does not propose to provide services to Shingle Springs' tribal members. Chapa-De, having a valid sanctioning resolution from Rumsey, is entitled to contract to provide services to its own members and IHS is obligated to reconfigure the service area boundaries to allow them to do so.

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[40] In California, there is no distinction between service units and service areas for purposes of contracting under ISDA. Finding 258.

Additionally, IHS has shown that, on at least three other occasions, in the counties of Lassen, Shasta, Trinity, Siskiyou, and Modoc in northern California; in Mendocino and Sonoma Counties in west central California; and in San Diego County (the Mission Indians' situation dealt with by the court in Southern Indian Health Council), service areas have been redefined pursuant to tribal request.

Shingle Springs argues that those three instances are distinguishable from this case because, in this case, Shingle Springs has not requested nor has it authorized a reconfiguration of the Chapa-De service area. This characterization misses the point. The fact remains that, under Southern Indian Health Council, Shingle Springs' lack of consent (in the form of an authorizing resolution) only serves as an obstacle to Chapa-De's (and Rumsey's) ISDA proposal to the extent that Chapa-De (and Rumsey) are proposing to contract to provide ISDA services to Shingle Springs' tribal members. It would not prevent Chapa-De from contracting to provide services to unaffiliated Indians who happen to reside in an area containing Shingle Springs tribal members. The fact that Shingle Springs does not sanction Chapa-De does not block Chapa-De from providing services to eligible unaffiliated Indians throughout the entire Chapa-De service area. Shingle Springs is not entitled to an ISDA contract to provide services to the Chapa-De Service Area based on historical precedent. The ISDA gives Shingle Springs only the right to contract to provide services to its own members. Therefore, as I stated earlier, Rumsey may contract, via the ISDA, to provide health care services to the Chapa-De Service Area, with the proviso that they may not contract to provide services to Shingle Springs' members without Shingle Springs' consent.

As I stated previously, Circular 88-2 is not a barrier to IHS reconfiguring service areas in California pursuant to a tribal request. The Director's Kickapoo decision is only a barrier to the extent that Rumsey, the sanctioning tribe, cannot show it benefits in the service area as it is reconfigured. Since Rumsey can show it benefits from its ISDA proposal, Kickapoo provides no barrier to Rumsey sanctioning Chapa-De to provide ISDA health services in the Chapa-De Service area as reconfigured. Moreover, IHS has demonstrated that on three other occasions, it has modified service areas in California. Therefore, IHS has demonstrated that its October 9, 1992 redetermination was in accordance with its previous practices in awarding ISDA contracts in California and in accordance with Circular 88-2. Accordingly, IHS' October 9, 1992 determination was in accordance with Circular 88-2 and

IHS' past procedures for awarding ISDA contracts within California.

VII. IHS' redetermination letter of October 9, 1992 to ShingleSprings and Chapa-De constitutes in effect a statutory declination, pursuant to 25 U.S.C. § 450f(a)(2), of their respective October 1, 1991 and November 12, 1991 contract proposals under the ISDA to provide medical services to essentially the same eligible beneficiaries in the four county area.

The Act states as follows:

> The Secretary is directed to approve an ISDA contract proposal within 90 days from the receipt of the proposal unless, within 60 days from the receipt of the proposal, a specific finding is made that
>
> > (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
> > (B) adequate protection of trust resources is not assured; or
> > (C) the proposed project or function cannot be properly completed or maintained by the proposed contract.

25 U.S.C. § 450f(a)(2).

The Act further provides that:

> Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall --
>
> > (1) state any objections in writing to the tribal organization,
> > (2) provide assistance to the tribal organization to overcome the stated objections, and
> > (3) provide the tribal organization with a hearing on the record and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

25 U.S.C. § 450f(b).

The regulations provide that:

> Upon being advised that an Indian Self-Determination Contract Proposal has been disapproved by the approving official, and having been informed of the basis of such decision, the tribal organization may file a written appeal to the Contract Proposal Declination Appeals Board within thirty (30) days . . .

42 C.F.R. § 36.214.

The regulations also provide that IHS must promptly notify the tribal organization in writing of the decision to approve or disapprove its ISDA proposal. If the proposal is disapproved, the notice shall contain but need not be limited to the following:

> 1. Specific objections, which are based on failures to meet applicable program or administrative standards or fund restrictions, which preclude acceptance of the proposal;
>
> 2. Guidance to the tribe regarding the steps which need to be taken to overcome stated objections;
>
> 3. Identification of assistance which can practicably be made available to the tribe upon request to overcome the stated objections;
>
> 4. Notification to the tribal organization of its right to appeal and to request an informal or formal hearing.

42 C.F.R. § 36.212.

Shingle Springs argues that the ISDA and the regulations set forth specific procedures which should have been followed by IHS when it made its October 9, 1992 redetermination. Shingle Springs contends IHS' redetermination is invalid because it is a declination that was not in accordance with the declination criteria contained at 42 C.F.R. § 36.212. According to Shingle Springs, the ISDA procedures detailed above must be followed to the letter in every instance where IHS declines to enter into an ISDA contract.

Specifically, Shingle Springs' position is that IHS' October 9, 1992 redetermination is invalid because it does not: 1) specifically identify IHS' objections to Shingle Springs proposal which warrant declination; 2) indicate which applicable program or administrative standards or fund restrictions would not be met such that acceptance of the proposal should be precluded; or 3)

give Shingle Springs any advice or provide any assistance on how to overcome the objections which served as a basis to decline the proposal. SS P.H. Br. at 19 - 23.

Shingle Springs contends further that award of an ISDA contract must occur within 120 days unless the tribe consents to extension and that it had a substantive right to the award of the contract which vested the moment that IHS approved Shingle Springs' proposal on December 2, 1991. Shingle Springs contends generally that IHS' actions in this case constitute a violation of the statutory and regulatory formalities and that these irregularities make the declination invalid or ineffective. According to Shingle Springs, IHS has, after the fact, characterized its determination as in effect a declination because it knows the determination is not in accordance with the declination criteria. Moreover, Shingle Springs argues that IHS has no discretion to create a new declination mechanism that would undermine the entire declination process and criteria contained in the ISDA and that IHS' actions in awarding the contract in this case frustrate congressional policy as expressed in the legislative history.

IHS admits that its October 9, 1992 determination was not an appropriate declination in accordance with all of the declination criteria. In fact, the Deputy Director of the CAO specifically stated: "I'm not aware a declination letter was ever sent to Shingle Springs." Tr at 366 - 67.

However, while IHS concedes that its October 9, 1992 redetermination may not have been impeccable, it did alter both Shingle Springs and Chapa-De's initial proposals and informed each of them of their right to appeal. IHS points out that the redetermination states "it is therefore necessary to revise our initial determination and divide the program for the purposes of contracting." IHS Ex. 14. Moreover, three of the four counties Shingle Springs wanted to serve in its initial proposal were deleted in the redetermination.

IHS emphasizes that the redetermination noted that the CAO had two acceptable proposals for the same program, and, therefore, it was a partial declination pursuant to 25 U.S.C. § 450f(a)(2)(C). IHS contends that Shingle Springs was, at a minimum, informed that its initial proposal was being substantially modified. Therefore, IHS argues that its October 9, 1992 redetermination, if not a valid declination in accordance with the declination criteria, was in effect a declination because

it modified Shingle Springs' initial proposal and put Shingle Springs on notice of its appeal rights. 42 C.F.R. § 36.212; 42 C.F.R. § 36.214. IHS states that Shingle Springs' rights were protected by the redetermination, because it promptly appealed from the redetermination, proving that it received sufficient notice.

IHS contends that the situation of two tribes submitting competing proposals is unique and is not contemplated by the ISDA. IHS further contends that it is entitled to use its discretion in situations that are not specifically addressed by the statute. IHS states that it has acted in good faith, as evidenced by the fact that it negotiated with the parties for almost one year to attempt to resolve this situation through negotiations and that, after the parties could not reach an agreement, IHS was compelled to issue its redetermination. Lastly, IHS contends that Shingle Springs's claim that it is entitled to contract to provide health care services to the entire Chapa-De Service Area is flawed, because it is based on the assumption that all of the unaffiliated Indians throughout the Chapa-De service area are Shingle Springs tribal members.

I find that IHS' redetermination was a valid declination in accordance with 25 U.S.C. § 450f(a)(2)(C). The redetermination does state that IHS has two proposals for the same program. IHS Ex. 14 at 1. The letter continues "it is necessary to divide the program to best approximate the expected service population for the respective facilities while assuring that both programs will operate satisfactorily. It is therefore necessary to revise our initial decision and divide the program for purposes of contracting." IHS Ex. 14 at 1.

While the redetermination letter does not make an explicit reference to the statutory declination criterion (25 U.S.C. § 450f(a)(2)(C), stating the proposed project or function cannot be properly completed or maintained), it does articulate IHS' position that neither Shingle Springs' nor Chapa-De's original proposals could be properly completed or maintained because each tribal organization was proposing to serve the same geographic area and IHS could not award the same contract twice. IHS Ex. 14.

This interpretation is supported by the CAO's December 17, 1991 letter declining Chapa-De's ISDA proposal. IHS Ex. 11. IHS declined Chapa-De's ISDA proposal on the grounds that the proposed contract or function could not be properly completed or maintained. IHS Ex. 11; 25

U.S.C. § 450f(a)(2)(C). While part of this rationale was based on IHS' erroneous belief that Rumsey had not properly retroceded from its previous ISDA contract, IHS believed also that the contract could not be properly completed or maintained because it was faced with two proposals for the same area and could not award the same contract twice. IHS Ex. 11.

Once I made my preliminary ruling that Chapa-De was a valid tribal organization for purposes of ISDA contracting, IHS realized that it had to look to the declination criteria for a basis for declining Chapa-De's ISDA proposal. IHS Ex. 9, 10, 11. This can be seen by comparing IHS' initial position, as articulated in IHS Ex. 9, with IHS' position after my preliminary ruling, as articulated in IHS Ex. 10 and 11. Once IHS came to view Chapa-De's and Shingle Springs' proposals as competing, it realized also that the only declination criterion that could be used to decline competing proposals was that the competing proposals could not be properly completed or maintained, since IHS could not award the same contract twice. IHS Ex. 10, 11; 25 U.S.C. § 450f(a)(2)(C). Therefore, while IHS' October 9, 1992 redetermination was not as artfully crafted as it could have been, it nonetheless sufficiently articulated a declination of both Chapa-De's and Shingle Springs original proposals pursuant to 25 U.S.C. § 450f(a)(2)(C).

Moreover, Shingle Springs' position that the declination was not in accordance with 42 C.F.R. § 36.212 is without merit. In accordance with 42 C.F.R. § 36.212, IHS' October 9, 1992 redetermination does identify which objections warrant declination and does indicate the applicable program or administrative standards or fund restrictions which preclude acceptance of the prior proposal. It does this by stating that IHS had to divide the program in the face of competing proposals for the same service area. IHS Ex. 14.

I find no merit also in Shingle Springs contention that IHS' redetermination gave them no advice or assistance on how to overcome the objections which served as a basis for IHS to decline the proposal. Shingle Springs' October 1, 1991 ISDA contract proposal was rejected because it proposed to serve the same eligible unaffiliated Indians as Chapa-De proposed to serve. The purpose of the October 9, 1992 redetermination was to divide the prior Chapa-De Service Area program which encompassed these eligible unaffiliated Indians between Rumsey and Shingle Springs in such a manner that each tribe would have sufficient resources to operate successful and legitimate programs for its members. In

short, the redetermination letter provided Shingle Springs with the guidance it required to submit an acceptable proposal under ISDA. Shingle Springs disagreed with the allocation of resources provided by the eligible unaffiliated Indians, rejected it as a compromise and settlement of its dispute with IHS, and filed an appeal under ISDA.

As stated previously, Shingle Springs does not challenge the propriety of IHS' allocation of the ISDA contract to the eligible unaffiliated Indians. Rather, Shingle Springs challenges IHS' authority to reconfigure the service area and modify Shingle Springs' October 1, 1991 ISDA contract proposal.

The regulatory criteria are designed to insure that tribal organizations are provided with notice informing them of the reasons that IHS has declined their ISDA proposals. The regulatory criteria are designed also to insure that a tribal organization can appeal an adverse determination. IHS' redetermination here permitted them to do that. The fact that Shingle Springs has shown that IHS may not have worded the declination as artfully as possible does not change the fact that it was in accordance with the purpose of the regulations.

Additionally, I find that IHS' redetermination was in effect a declination in accordance with the intent of the ISDA. Shingle Springs' October 1, 1991 ISDA proposal proposed to provide services to its tribal members and eligible Indians in El Dorado, Placer, Sierra, and Nevada counties. Findings 30 - 31. Chapa-De's November 12, 1991 ISDA contract proposal proposed to serve Rumsey tribal members (residing in Yolo County) and eligible unaffiliated Indians residing in Placer, Sierra, and Nevada Counties. Findings 36, 38. IHS' redetermination of October 9, 1992 awarded Shingle Springs an ISDA contract to provide health services to its members and the eligible unaffiliated Indians in El Dorado County and awarded Chapa-De an ISDA contract to provide health care services for Rumsey members and the eligible unaffiliated Indians in Placer, Sierra, and Nevada Counties. IHS Ex. 14.

While a more detailed and specific declination of both Shingle Springs' and Chapa-De's proposals perhaps would have been preferable, IHS' redetermination letter fulfilled the purpose of the statute by reconfiguring the proposals of each tribe and placing each tribe on notice of its appeal rights. Findings 325 - 334. The record reflects that, in its redetermination, IHS reconfigured the initial proposals of both Shingle Springs and Chapa-

De. IHS Ex. 1, 2, 10. Moreover, it is apparent that Shingle Springs viewed IHS' redetermination as a declination of its ISDA proposal, because they determined it was an adverse result and appealed it.

Even assuming that IHS' redetermination was not in accordance with the declination criteria, it is difficult to see how Shingle Springs was harmed in this case by any of the procedural irregularities that they allege. IHS worked with Shingle Springs, Rumsey and Chapa-De for almost one year in an attempt to negotiate a settlement to this matter. IHS Ex. 13. The record reveals that, in attempting to resolve the dispute, IHS tried to accord each tribe its right to self-determination under the ISDA. While it is true that the scope of Shingle Springs' proposal was narrowed by IHS' redetermination, Shingle Springs cannot contest that they were accorded their right to self-determination because they were given the opportunity to provide health care services to their own tribal members and to provide services to the unaffiliated Indian population in El Dorado county. IHS Ex. 14.
Shingle Springs would have me believe that they were harmed because they did not receive an ISDA contract to serve the entire unaffiliated population in the four-county area. There can be no doubt that the size of the area in which they proposed to provide health care services has been reduced by IHS' October 9, 1992 redetermination. However, ISDA does not provide Shingle Springs with the exclusive right to provide services to unaffiliated Indians. This is especially true where, as here, Shingle Springs' concern appears directed toward maximizing the size of ISDA contract monies allocated to its health care program by proposing to provide services to all unaffiliated Indians who happen to reside in adjoining areas. Moreover, Shingle Springs has no inherent right to maximize the size of the services provided under its ISDA proposal to the detriment of other eligible tribal organizations which could benefit from those same resources. The Act gives neither Shingle Springs nor Intervenors an inherent right to provide services to the unaffiliated Indians. Findings 24, 143. Nor does ISDA contemplate or even address the issue of unaffiliated Indians. Finding 140. As I have stated, it is left to the discretion of IHS to allocate health care services to unaffiliated Indians. Findings 108 - 45; Rationale, I.

Accordingly, I find that IHS properly wielded its discretion in the presence of the novel situation of competing proposals in deciding, absent statutory guidance, who would provide ISDA health care services to

the unaffiliated Indians in the area. Therefore, even assuming that its October 9, 1992 redetermination was not a letter perfect declination, the record shows that it was a constructive declination, because it reconfigured both Chapa-De's and Shingle Springs' original proposals. Furthermore, it was a logical solution to a case of first impression that preserved the rights of both Shingle Springs and Chapa-De by placing them on notice and preserving their right to appeal.

CONCLUSION

Based on the foregoing, I conclude that IHS' October 9, 1992 redetermination is a valid and appropriate exercise of IHS discretion that accommodated both Rumsey's and Shingle Springs' rights to self-determination, in accordance with the statutory intent and purpose of the ISDA. The contentions raised by Shingle Springs to challenge IHS' determination and to support its position that it is entitled to serve all the eligible unaffiliated Indians in the Chapa-De Service Area have no merit in fact or law.

Many of the issues addressed in this case are matters of first impression under ISDA. The Act does not envision competing tribes, with each attempting to incorporate within its program the resources provided by the unaffiliated Indians. IHS' determination in this matter has modified both Shingle Springs' and Chapa-De's initial ISDA contract proposals, thus ensuring that the resources provided by and for the unaffiliated Indians are allocated fairly to permit each tribe to operate a satisfactory program for its members. While not contesting this distribution, Shingle Springs is adamant that, under the ISDA it is entitled to serve all the unaffiliated Indians in the Chapa-De Service Area. This case holds that ISDA does not confer upon Shingle Springs an exclusive right to serve the unaffiliated Indians. Both Shingle Springs and Rumsey have equally lawful contracting rights under ISDA to provide services to their own tribal members. However, neither can exercise those rights to the detriment of the rights of the other.

/s/

Edward D. Steinman
Administrative Law Judge