Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Pit River Health Service, Inc.,	
Appellant,	
- v. -	DATE: September 12, 1994
Indian Health Service,	
Appellee,	Docket No. C-94-303
and	Decision No. CR333
Susanville Indian Rancheria, and Modoc Indian Health Project,	
Intervenors.	

RECOMMENDED DECISION

On January 31, 1994, the Indian Health Service (IHS) notified Appellant that IHS was in part declining Appellant's proposal to renew its contract with IHS pursuant to the Indian Self Determination Act (ISDA), 25 U.S.C. § 450 et seq.[1] IHS told Appellant that it was declining the proposal because the proposed project or function to be contracted for could not be properly completed or maintained as proposed. IHS cited 25 U.S.C. § 450f(a)(2)(C) as authority for its decision to decline the proposal. IHS advised Appellant that the specific reason for the declination was that those individuals residing outside of Appellant's current service area are currently included in the funding provided to other tribal programs. IHS explained to Appellant that it could not fund two or more different contractors to provide the same services at the same time.

[1] Appellant's contract with IHS and other contracts executed by IHS pursuant to ISDA are referred to at times in the exhibits in evidence in this case as "Pub. L. No. 93-638 contracts."

Appellant requested a hearing and the case was assigned to me for a hearing and a recommended decision. On April 21, 1994, the Susanville Indian Rancheria and Modoc Indian Health Project (Intervenors) filed a motion to intervene in the case, alleging that they had property interests which might be affected by the decision of the case. Appellant opposed the motion. IHS did not oppose the motion. I granted Intervenors' motion. However, I limited Intervenors' participation in the case to the filing of briefs and exhibits.

Both IHS and Appellant moved for summary disposition of the case. Neither party requested an in-person hearing.[2] Appellant, IHS, and Intervenors filed briefs and exhibits. No one objected to the admission into evidence of any exhibits. I admit all of the exhibits into evidence.[3] I base my recommended decision in this case on the exhibits, applicable law, and the arguments of the parties and intervenors. For the reasons which I discuss below, I conclude that IHS lawfully declined Appellant's contract proposal.

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[2] Although the parties have styled their motions as motions for summary disposition, they are in fact requesting that I issue a recommended decision based on exhibits. A motion for summary disposition is based on the absence of disputed material facts. Here, there are facts in dispute which are arguably material. In particular, the parties dispute whether IHS promised Appellant that IHS would enter into a contract with Appellant to provide health care services to all unaffiliated Indians who reside in the Pit River Tribe's ancestral territory. The parties have opted to argue their positions as to the fact issues based on exhibits. No party has asserted that there exists a need in this case to provide testimony at an in-person hearing. Therefore, I base my decision on the exhibits which I have admitted into evidence. I use those exhibits to resolve disputed issues of fact.

[3] IHS submitted 31 exhibits which I admit into evidence as IHS Ex. 1 - 31. Appellant submitted two declarations (Declaration of Betty George and Declaration of Loomis Jackson). I have identified the Betty George declaration as App. Ex. 1 and the Loomis Jackson declaration as App. Ex. 2, and I admit them into evidence. Intervenors submitted 22 exhibits, which I have identified as Int. Ex. 1 - 22, and I admit them into evidence.

I. Issues, recommended decisions, and findings of fact and conclusions of law

There are two central issues in this case. These are whether IHS lawfully declined to enter into a contract with Appellant to provide health care services to: (1) unaffiliated Indians who reside in Appellant's ancestral territory, and (2) members of the Pit River Tribe who reside in southern Oregon. Below, I set forth my recommended decisions as to these issues and the findings of fact and conclusions of law which support them. After each finding or conclusion, I list the page or pages of this recommended decision at which I discuss the law and evidence which supports the finding or conclusion.

A. Recommended decision and findings of fact and conclusions of law concerning IHS' declination of Appellant's proposal to provide health care services to unaffiliated Indians who reside in Appellant's ancestral territory

IHS lawfully declined to enter into a contract with Appellant to provide health care services to unaffiliated Indians who reside within the Pit River Tribe's ancestral territory. I base this recommended decision on the following findings and conclusions:

1. IHS may not enter into a contract pursuant to ISDA where to do so would necessarily require IHS to modify unilaterally the terms of other contracts entered into by IHS pursuant to ISDA, including the funding for those contracts. Pages 12 - 20.

2. IHS never promised Appellant or the Pit River Tribe that it would enter into a contract with Appellant to provide health care services to the unaffiliated Indians who reside within the Pit River Tribe's ancestral territory. Pages 8 - 11.

3. IHS is not estopped from declining to enter into a contract pursuant to ISDA where the consequence of the estoppel would be to require IHS to modify unilaterally the terms of other contracts entered into by IHS pursuant to ISDA, including the funding for those contracts. Pages 21 - 22.

4. Appellant's contention that other contractors continue to provide health care services to members of the Pit River Tribe who reside within the Tribe's ancestral territory is not an issue raised by this declination appeal. Pages 12 and 25.

5. Appellant waived the statutory requirement that IHS accept or decline Appellant's proposal to provide health care services within 60 days of its receipt by IHS. Pages 22 - 24.

6. Even if Appellant did not waive the statutory deadline for acceptance or declination of its proposal, IHS is not required to accept Appellant's proposal by virtue of its failure to decline it timely. The statutory deadline for acceptance or declination of a proposal does not operate to force IHS to accept a proposal where to do so would require IHS to modify other contracts unilaterally, in violation of ISDA. Pages 24 - 25.

B. Recommended decision and findings of fact and conclusions of law concerning IHS' declination of Appellant's proposal to provide contract health care services to members of the Pit River Tribe who reside in southern Oregon

IHS lawfully declined to enter into a contract with Appellant for Appellant to provide health care services to members of the Pit River Tribe who reside in southern Oregon. I base this recommended decision on the following findings and conclusions:

7. Appellant's proposal to provide health care services to members of the Tribe who reside in southern Oregon lacked information which IHS needed to make an informed decision to accept or decline the proposal. Under the circumstances, IHS had not choice but to decline it. Pages 11 - 12, 25 - 27.

8. Appellant may not cure fundamental defects in its proposal by providing evidence which arguably cures the defects at an administrative appeal of the declination. Pages 27 - 28.

9. IHS is not obligated to provide technical assistance to a party proposing to contract for health care services where the proposal is so lacking in necessary information as to make it impossible for IHS to evaluate it meaningfully pursuant to the criteria in ISDA. Pages 28 - 29.

10. Even if Appellant had provided IHS with facts necessary to identify the population which Appellant intended to serve under its proposal, IHS would have been justified in declining the

proposal pursuant to regulations which govern contract health services. Pages 29 - 30.

II. Material facts

A. Background

Appellant is authorized by the Pit River Tribe, a federally recognized Indian tribe, to contract with IHS pursuant to ISDA to provide health care services to members of the Pit River Tribe and to other eligible Indians.[4] Appellant and the Pit River Tribe have sought to contract with IHS to provide health care services to all members of the Tribe and all unaffiliated Indians who reside within the Tribe's ancestral territory. IHS Ex. 20, page 3.[5]

The Pit River Tribe's ancestral territory is part of the lands described as the Tribe's territory in Article II of the Tribe's constitution. IHS Ex. 14, page 1. The Tribe's constitution describes the Tribe's territory as including lands owned by the Tribe. Id. The constitution describes the territory to include also lands which were found to comprise the Tribe's ancestral territory in a 1959 decision by the Indian Claims Commission. Id.; Pitt River Indians of California v. United States, Docket No. 347 (July 29, 1959); IHS Ex. 2. The ancestral territory includes portions of Lassen, Modoc, Shasta, and Siskiyou Counties in California. Much of the ancestral

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[4] Appellant was known previously as the Pi-Ma-Pa Indian Health Consortium, Inc. IHS Ex. 7, page 1. I use the term "Appellant" to refer to Pit River Health Service, Inc. and to its predecessor.

The Pit River Tribe is referred to by various names in the exhibits. These include the "Pitt River Indians of California," the "Pitt River Nation," and the "Pitt River Tribe." IHS Ex. 2, page 1; IHS Ex. 6, page 1; IHS Ex. 7, page 1. I use the names "Pit River Tribe" or "Tribe" to identify the Tribe throughout this decision, except where I quote from documents which identify the Tribe by another name.

[5] An "unaffiliated Indian" is an individual who is eligible to receive health care services from an entity that contracts with IHS pursuant to ISDA. However, that individual is not a member of the tribe or tribal organization which provides health care services to him or her. As I shall discuss in greater detail below, the unaffiliated Indians who reside in the Pit River Tribe's ancestral territory and to whom Appellant seeks to provide health care services are receiving health care services under other ISDA contracts between IHS and other entities.

territory is no longer owned by the Pit River Tribe, but has been acquired by the United States. IHS Ex. 2, page 35.[6]

Portions of the Tribe's ancestral territory overlap or encompass service areas which have been contracted for between IHS and tribal organizations other than Appellant. These other entities include Intervenors. IHS Exs. 3 - 5; Int. Ex. 1, page 2; Int. Exs. 4 - 7. Contracts between IHS and Intervenors have become mature. IHS Exs. 3 - 4; 25 U.S.C. § 450(h). As a consequence, these contracts are for indefinite terms and have reduced reporting requirements. 25 U.S.C. §§ 450e(2) and 450j(c)(1)(B). The contracts between IHS and Intervenors authorize Intervenors to provide contract health care services to eligible Indians (including unaffiliated Indians) who reside within their service areas. Int. Ex. 1, page 2. Thus, Intervenors have contracted with IHS to provide health care to unaffiliated Indians who reside within the Pit River Tribe's ancestral territory.

On September 1, 1988, Appellant and IHS entered into a contract to provide health care services to members of the Pit River Tribe and to unaffiliated Indians within the eastern one-third of Shasta County, California. IHS Ex. 8, page 1. On September 27, 1991, Appellant and IHS agreed to expand the scope of services of the contract. IHS Ex. 13. The expanded scope of services included all members of the Tribe who reside within the Tribe's ancestral territory and also other eligible Indians within the community around Bieber, California. IHS Ex. 13, page 1. The contract modification did not authorize Appellant to provide contract health care services to unaffiliated Indians residing in the Pit River Tribe's ancestral territory.

B. Appellant's December 30, 1992 contract renewal proposal

On December 30, 1992, Appellant submitted a proposal to IHS to renew its contract to provide health care services. IHS Ex. 20. IHS received the proposal on January 3, 1993. Id. at 1.[7] The proposal sought to expand the scope of the health care services provided by Appellant in two respects. First,

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[6] The purpose of the Indian Claims Commission decision was to decide whether the Pit River Tribe was entitled to compensation for the taking of its ancestral lands. IHS Ex. 2, page 1. The decision did not direct a transfer of title to the ancestral lands to the Pit River Tribe. Id.

[7] The date stamp on the proposal which identifies its receipt by IHS is illegible. IHS Ex. 20, page 1. However, no one disputed IHS' assertion that it received the proposal on January 3, 1993.

Appellant sought to contract to provide health care services to unaffiliated Indians who reside in the Pit River Tribe's ancestral territory. Second, Appellant sought to provide health care services to members of the Tribe who reside in southern Oregon. Id. at 4.

Appellant did not state that its objective was to reduce the scope of services provided by other contractors with service areas in Appellant's ancestral territory. However, that would have been the inevitable consequence of IHS accepting Appellant's proposal. As I find above, there are other contractors, including Intervenors, who have designated service areas within Appellant's ancestral territory that provide contract health care services to unaffiliated Indians who reside in those service areas. If IHS agreed that all unaffiliated Indians residing in the Tribe's ancestral territory would be served by Appellant, then, necessarily, those unaffiliated Indians would no longer be served by other contractors whose service areas are within the Tribe's ancestral territory. That, in turn, would require IHS to reduce the level of funding to the other contractors.

IHS did not accept or decline Appellant's proposal within 60 days of its receipt of the proposal. IHS Motion for Summary Disposition at 19. Appellant consented to several extensions of its contract while it negotiated its proposal with IHS. IHS Exs. 21 - 28. The last extension request was made by Appellant on December 23, 1993. IHS Ex. 28. In that request, it agreed to extend the life of its contract with IHS until January 31, 1994. Id.

During the period within which Appellant's contract was extended, IHS attempted to negotiate the terms of Appellant's proposal with Appellant. IHS Ex. 24. Negotiations were unsuccessful. On January 31, 1994, IHS declined to accept that part of Appellant's proposal which would allow Appellant to expand its contract services to include unaffiliated Indians in the Pit River Tribe's ancestral territory and members of the Tribe who reside in southern Oregon.[8]

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[8] The declination letter is ambiguous. On its face, it suggests that IHS declined the renewal proposal in its entirety. However, as is evident from IHS' recitation of the facts it contends to be material, it declined only that aspect of the proposal which sought to expand the contract services provided by Appellant to unaffiliated Indians in the Pit River Tribe's ancestral territory and members of the Tribe who reside in Oregon. IHS Motion for Summary Disposition at 19.

III. Appellant's additional allegations of fact

Appellant makes allegations as to the existence of facts in addition to those facts which I find to be material to this case. I find that some of these allegations are not substantiated. Furthermore, at least some of these allegations address alleged facts which, even if true, are not material to the outcome of this case.

A. Appellant's allegation that IHS promised it that it would be allowed to contract to provide health care services to unaffiliated Indians in the Pit River Tribe's ancestral territory

Appellant alleges that IHS promised it that it would be permitted to contract to provide health care services to unaffiliated Indians who reside within the Tribe's ancestral territory. This allegation is central to Appellant's argument that IHS is estopped from declining the December 30, 1992 contract proposal. For reasons which I explain in Part IV of this decision, I find that this alleged fact, even if proven, is immaterial, because, as a matter of law, IHS may not be estopped from declining Appellant's proposal. However, I find also that Appellant did not prove its point.

IHS never promised Appellant that it would contract with Appellant to provide health care services to all unaffiliated Indians within the Pit River Tribe's ancestral territory. At one time, IHS agreed with Appellant and the Tribe that the provision of such services was a legitimate goal of these parties and it agreed to work with them to attain that goal. But that did not comprise a promise to enter into a contract.

The centerpiece of Appellant's alleged proof that IHS promised to enter into a contract with Appellant for the unaffiliated Indians consists of a letter which the Deputy Director of the California Area Office of IHS sent to the Pit River Tribe on June 21, 1988. IHS Ex. 6. Appellant contends that the letter both explicitly and implicitly promises that Appellant would receive a contract from IHS to provide health care services to unaffiliated Indians in the Tribe's ancestral territory. I find that the letter proves neither an explicit nor an implied promise to enter into such a contract.

Appellant asserts that the alleged explicit promise is embodied in the following statement:

> The IHS has made the strong suggestion to you that the current proposal continue its service area to . . . [Appellant's then-designated service area] and reserve any statement about the future service area for a formal letter more appropriately

> addressed to . . . [the California Area Office Director]. A part of this understanding is the agreement of IHS to work with the Pitt River Nation to phase-in the tribe's original proposal over the next three (3) years.

IHS Ex. 6, page 1 (emphasis added). I do not find the explicit promise which Appellant alleges is in this statement. First, it refers ambiguously to an "original proposal" which is not described.[9] More significant, the statement does not manifest a commitment to accept that proposal, but only to "work with" the Tribe to implement it over a three-year period.

IHS' hedged statement of support for the "original proposal" falls short of a binding commitment to accept that proposal. The pledge to "work with" the Pit River Tribe to attain its objective is too ephemeral to be construed as the binding promise alleged by Appellant. The phrase "work with" is an expression of general support of the Tribe's objective of ultimately providing health care services throughout its ancestral territory. Further, it comprises at least a suggestion by IHS that it would help the Tribe and Appellant attain this objective. However, the phrase suggests also that IHS was uncertain that these objectives were feasible.

Moreover, it is apparent that Appellant and the Pit River Tribe understood that IHS had not made a firm commitment to them of a contract to provide health care services to the unaffiliated Indians in the ancestral territory. In its June 21, 1988 proposal to IHS, Appellant stated:

> [I]t should not be interpreted from this application that the Tribe is in any way moving away from their desire to establish their ancestral lands as a service area. However, since the IHS is not accustomed to dealing with ancestral boundaries, but rather census tracts or counties, negotiations will continue until the Tribes rights under all federal contracting legislation is realized.

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[9] However, on the same date, Appellant sent a contract proposal to IHS which described three phases of proposed contract services. IHS Ex. 7, pages 9 - 10. Phase III of that proposal includes a statement of the Pit River Tribe's intent to establish its ancestral territory as a contract service area. Id. at 10. It is reasonable to infer from this exhibit that the Tribe's "original proposal" included the objectives of eventually establishing its ancestral territory as a contract service area and providing contract health care services to unaffiliated Indians within the ancestral territory.

IHS Ex. 7, page 10 (emphasis added). This statement establishes that Appellant and the Pit River Tribe were not operating on the belief that IHS had assured them that Appellant would receive a contract to provide services to all Indians in the Tribe's ancestral territory. To the contrary, Appellant and the Tribe envisioned future negotiations with IHS before this objective would be attained.

Appellant asserts also that the alleged promise by IHS is implied on the second page of the June 21, 1988 letter from IHS to the Tribe. IHS Ex. 6, page 2. Appellant asserts that IHS' acknowledgement that IHS must have a resolution of support from the Tribe before IHS renews contracts with entities other than Appellant to serve Modoc and Shasta Counties in California is an admission that Appellant had the right to provide health care services to unaffiliated Indians in those counties (which are part of the Tribe's ancestral territory).

I do not read this language as Appellant contends it must be read. When read in context, it is apparent that IHS was not addressing the question of service to unaffiliated Indians in the ancestral territories, but was acknowledging that contractors serving Modoc and Shasta Counties should not provide health care services to members of the Tribe without a resolution of support from the Tribe. This is apparent from IHS' statement on page two of the letter:

> We agree and understand that the term "unaffiliated" should not be used to deny the identity of tribal members. We also agree that the IHS will work to identify members of the tribe currently served by the contacts in Trinity, Shasta, Lassen, and Modoc counties, which the [Pit River] tribe claims as its ancestral territory.

Id.

Appellant contends that IHS restated its alleged promise in other documents generated after June 21, 1988. See IHS Exs. 10, 11, 17. I find no language in these communications which states a promise by IHS to contract with Appellant to provide services to unaffiliated Indians in the Pit River Tribe's ancestral territory.

The communications between IHS, Appellant, and the Pit River Tribe after June 21, 1988 do not suggest any commitment by IHS to contract with Appellant to provide health care services to the unaffiliated Indians in the Pit River Tribe's ancestral territory. Rather than providing proof of an unequivocal promise by IHS, these communications establish that the issue of service to the unaffiliated Indians remained open and undecided.

It is apparent from these communications that the issue of service to unaffiliated Indians in the ancestral territory remained unresolved after June 21, 1988. The communications show that the Tribe and Appellant were dissatisfied by IHS' failure to approve expeditiously a contract with Appellant to provide health care services in the Tribe's ancestral territory. As early as November 1988, Appellant and the Tribe complained to IHS that IHS was unfairly denying Appellant the opportunity to provide such services. IHS Ex. 9, pages 2, 4 - 5. Even after IHS and Appellant had agreed to expand the scope of Appellant's services to include members of the Tribe who reside in the ancestral territory, Appellant and the Tribe continued to maintain that Appellant should provide health care services to unaffiliated Indians in the Tribe's ancestral territory. IHS Ex. 18, pages 2 - 3. In December 1991, Appellant characterized the question of services to unaffiliated Indians in the ancestral territory as being one of the "unresolved issues" between Appellant and IHS. Id. at 2.

Appellant relies also on the declaration of Betty George, who was chairperson of the Tribe from 1987 to 1989. App. Ex. 1. Her declaration does not satisfy me that IHS promised to Appellant and the Tribe that Appellant would receive a contract for the unaffiliated Indians in the Tribe's ancestral territory.

Ms. George avers that, at a meeting held on May 27, 1988, a representative of IHS promised explicitly that Appellant had a right to contract to serve the Tribe's ancestral territory, and that IHS would not renew other contracts in Shasta and Modoc Counties without resolutions of support from the Tribe. App. Ex. 1, page 7. The "explicit promise" recited by Ms. George does not necessarily embody a promise that Appellant would be permitted to contract to serve unaffiliated Indians in the ancestral territory. As I observe above, an issue which IHS focused on in its June 21, 1988 letter to the Tribe (which was signed by the individual to whom Ms. George attributes the promise) was whether it was appropriate for contractors besides Appellant to provide health care services to members of the Tribe who reside in the Tribe's ancestral territory. The promise described by Ms. George arguably addresses that issue and not the issue of contract services to unaffiliated Indians. Furthermore, I find that the best characterization of IHS' representations to Appellant and the Tribe is contained in the June 21, 1988 letter, which I have discussed above. IHS Ex. 6.

B. Appellant's contention that other contractors continue to provide health care services to members of the Tribe who reside within the Tribe's ancestral territory

Appellant contends that other contractors with service areas within the Tribe's ancestral territory continue to provide health care services to members of the Tribe who reside in the territory, for which the contractors receive funds from IHS. Appellant's Motion for Summary Disposition at 24, 30. It asserts that it is entitled to a finding that, as a matter of law, IHS must adjust its funding to these contractors to eliminate services to members of the Tribe who allegedly are being served by these contracts.

Appellant has offered no evidence to substantiate the allegation that members of the Tribe continue to be served under other contracts. However, it is apparent that there is some overlap in the services provided to members of the Tribe by Appellant and by Intervenors. Intervenors' Brief at 32 - 34. In Part IV of this decision, I conclude that Appellant's allegations are not properly part of the declination appeal before me. Therefore, Appellant's allegations concerning alleged services to members of the Tribe by other contractors are not relevant to this case.

C. Appellant's contentions of fact about members of the Tribe who reside in southern Oregon

In its December 30, 1992 proposal, Appellant made assertions concerning the need for contract health services for members of the Tribe who reside in southern Oregon. Appellant made these assertions without any factual substantiation.[10]

In its proposal, Appellant asserts only:

> [M]any Pit River Tribal members live in Oregon for various reasons. The Tribal members living on the Oregon side encounter difficulties in receiving adequate health care.

IHS Ex. 20, pages 7 - 8. Appellant provides no facts in its proposal to support its contention that "many" members of the

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[10] As I discuss in Part V of this decision, a party making a contract proposal to IHS has a burden to describe its proposed services sufficiently so that IHS is able to make an informed decision whether or not to accept the proposal. That plainly was not done by Appellant in its December 31, 1992 proposal.

Tribe reside in Oregon. It does not describe the location of the Oregon members. It provides no information concerning the proximity of these alleged Oregon residents to Appellant's California facilities, or the relative ease or difficulty of travel from Oregon to these facilities. It provides no information to support its allegation that members of the Tribe who reside in Oregon have difficulty obtaining health care in Oregon, nor does it provide information which would enable IHS to compare ease of accessibility of health care services to members of the Tribe who reside in Oregon with that which Appellant proposes to offer in California. Finally, Appellant offers no information from which IHS might compare the relative quality of services offered to members of the Tribe who reside in Oregon with that which Appellant proposes to offer in California.

Appellant now provides evidence to show that 18 members of the Tribe reside in southern Oregon. App. Ex. 2, page 2. Appellant asserts that these individuals reside about 30 miles from the Tribe's reservation and about 10 miles north of the border of the Tribe's ancestral territory. Id. Appellant alleges that they are active in tribal affairs and make use of tribal health care facilities in California. Id.

As I discuss at Part V of this decision, this information, had it been supplied with the proposal or during the period when IHS and Appellant were discussing the proposal, might have been relevant to IHS' evaluation of the proposal. However, Appellant neither provided this information to IHS with its application nor during the ensuing negotiations. For reasons which I explain in Part V, this information is not material to my consideration of the propriety of IHS' declination of the part of Appellant's proposal which relates to the southern Oregon Pit River members.

IV. IHS' declination of Appellant's proposal to provide health care services to unaffiliated Indians who reside within the Pit River Tribe's ancestral territory

IHS lawfully declined to accept Appellant's proposal to provide contract health care services to the unaffiliated Indians who reside in the Tribe's ancestral territory, because the proposed project or function to be contracted for cannot be properly completed or maintained as proposed. 25 U.S.C. § 450f(a)(2)(C). IHS could not have accepted Appellant's proposal without reducing the scope of services and the funding that IHS had contracted to provide to other contractors. That action by IHS would violate the requirements of ISDA as they pertain to other contractors.

As I find above, there is no factual support for Appellant's contention that IHS is estopped from declining its proposal. IHS never made an unequivocal promise upon which Appellant would have had a reason to rely. Furthermore, there is no evidence to show that Appellant relied on this alleged promise to its detriment. However, I find also that there is no basis to estop IHS from declining Appellant's proposal, even assuming Appellant's allegations about promises by IHS are true. IHS cannot be estopped from declining a contract where the consequence would be to interfere unlawfully with the terms of contracts between other contractors and IHS.

I find also that IHS' failure to meet the 60-day time limit for contract review established in ISDA does not require IHS to accept Appellant's proposal. Appellant waived any rights it might have been able to assert under the time limits for contract reviews set forth in ISDA. Moreover, the circumstances of this case do not comport with the circumstances under which Congress mandated a 60-day review period. Congress did not intend that IHS be bound by the 60-day requirement where enforcement of the requirement would result in unlawful interference with the terms of contracts between other contractors and IHS.

Finally, it is not germane to this case that IHS allegedly contracts with other entities to provide health care services to members of the Tribe who reside in the Tribe's ancestral territory . This case involves the issue of whether IHS properly declined Appellant's proposal to provide health care services to unaffiliated Indians who reside within the Tribe's ancestral territory. IHS' alleged failure to abide by the terms of previous agreements is simply not an issue to be resolved here.

A. The basis for the declination of Appellant's proposal

IHS declined Appellant's proposal to provide health care services to unaffiliated Indians within the Pit River Tribe's ancestral territory because the proposed project or function to be contracted for cannot be properly completed or maintained as proposed. That is one of the grounds provided by ISDA for declining a contract proposal. 25 U.S.C. § 450f(a)(2)(C).

IHS argues that it declined Appellant's proposal because the proposal could not be implemented lawfully by IHS. Acceptance of Appellant's proposal would mean that unaffiliated Indians served by other contractors, including Intervenors, would no longer be served by those contractors. IHS would have to reduce the funding allocated to those contractors and reallocate it to Appellant, so that Appellant could provide health care services to the unaffiliated Indians. IHS argues

that such action would violate its statutory duty not to reduce funding to other contractors. 25 U.S.C. § 450j-1(b)(2).

Intervenors support this argument. They argue, additionally, that ISDA prohibits a unilateral modification of a contract by IHS. 25 U.S.C. § 450m-1(b). Intervenors contend that any adjustment of their contracts by IHS to reallocate scopes of service or funding, in order to accommodate acceptance of Appellant's proposal, would constitute an unlawful unilateral modification of their contracts by IHS.

Appellant asserts that IHS abuses its discretion and violates its duty of trust to Indian tribes by refusing to consider the merits of Appellant's proposal. It argues, additionally, that IHS' basis for declining its proposal constitutes a grant of veto authority to other contractors, a delegation not contemplated by ISDA. Appellant contends also that IHS' reliance on 25 U.S.C. § 450j-1(b)(2) is improper, because that section addresses only the question of reduction of contract funds serving a tribe. Appellant argues that reduction of funds to other contractors in this case would not be a reduction of funds serving a tribe, because the funds withdrawn from the other contractors consist of monies which are being paid by IHS for health care services for unaffiliated Indians.

Appellant argues additionally that 25 U.S.C. § 450j-1(b)(2) prohibits only reductions in total funding by IHS of contractors serving an Indian population. Therefore, according to Appellant, IHS may reallocate funds among contractors serving a population without violating this section. Finally, Appellant asserts that 25 U.S.C. § 450j(c)(2) confers express authority on IHS to modify a contract unilaterally or to reduce funding for a contract. Appellant argues that the unambiguous language of this section takes precedence over section 450m-1(b), which, according to Appellant, is a "far less specific" section of ISDA. Appellant's Reply to Intervenors' Response at 10.

Although an Indian tribe or tribal organization may have a statutory right under some circumstances to contract to provide health care services to its members, that right does not extend to providing health care services to unaffiliated Indians. ISDA confers no right on Appellant or the Pit River Tribe to contract for health care services to unaffiliated Indians in the Tribe's ancestral territory. At most, ISDA confers a qualified right on Appellant and the Tribe to contract to provide health care services to members of the Tribe. It provides only that a "self-determination contract" means a contract "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).

ISDA does not confer on tribes or tribal organizations a statutory right to provide health care services outside of their respective communities. 25 U.S.C. § 450b(l). Tribal communities are not defined as coincident with ancestral territories. As is quite evident in this case, the Pit River Tribe's ancestral territory is at present home to Indian communities other than the Tribe.

Thus, neither Appellant nor the Pit River Tribe has a statutory right to contract for the unaffiliated Indians within the Tribe's ancestral territory.[11] Nor does the fact that the unaffiliated Indians who are the subject of Appellant's proposal reside within the ancestral territory give Appellant a superior interest over other entities to contract to provide health care services to these Indians. Indeed, existing contracts between IHS and other entities to provide health care services to the unaffiliated Indians in the Tribe's ancestral territory are protected by law.

Appellant does not assert that it has a statutory right to provide contract health care services to the unaffiliated Indians who reside in the Tribe's ancestral territory. It argues, however, that IHS should be required to evaluate the merits of its proposal against the alternative of allowing Intervenors to continue providing services to unaffiliated Indians pursuant to their contracts. Appellant characterizes the Intervenors' contracts as competing proposals.

This argument ignores the status of the Intervenors' contracts with IHS. They are not proposals. Rather, they are contracts which have been accepted and implemented by the parties. These contracts enjoy specific statutory protections provided by ISDA against unilateral modification of their terms by IHS.

ISDA protects contracts between IHS and Indian tribes or tribal organizations from unilateral modifications by IHS or from funding reductions, except in defined circumstances which are not applicable here. ISDA specifically prohibits the Secretary (or her delegate, IHS) from modifying a contract unilaterally. It states:

> [T]he Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

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[11] IHS was nonetheless obligated to evaluate Appellant's proposal in good faith pursuant to the standards for review established by ISDA. In this case, a good faith evaluation consisted of determining that IHS could not accept the proposal without violating ISDA.

25 U.S.C. § 450m-1(b). This is an unequivocal prohibition against unilateral substantive changes in contracts by IHS.[12] I do not agree with Appellant's contention that this section is not specific.

The modifications which IHS would have had to effect to its contracts with entities serving the unaffiliated Indian population of the Pit River Tribe's ancestral territory, in order to accept Appellant's proposal, would affect substantively the operation and funding of these contracts. There is nothing in this case to suggest that the affected contractors would consent to such modifications. Therefore, IHS could have accomplished the modifications only by making them unilaterally, an action prohibited by ISDA.

The Act specifically prohibits IHS from reducing funding for contracts except in narrowly defined circumstances. 25 U.S.C. § 450j-1(b)(2).[13] The reductions which would result from acceptance of Appellant's proposal do not fall within those circumstances. Consequently, IHS cannot reduce funding for

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[12] IHS contract policy is consistent with this statutory requirement. A 1989 IHS contract policy letter states:

> [C]ontract[s] may not be modified unilaterally except that modifications which only change a mailing address, correct a typographical error, make similar nonsubstantive changes which do not affect the contractual rights of the parties, or add funds up to a previously authorized contract funding level may be made unilaterally by the IHS Contracting Officer.

IHS Contract Policy Letter 89-4 (August 14, 1989) at 4; Int. Ex. 22, page 4.

[13] These circumstances are the following:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
> (C) a tribal authorization;
> (D) a change in the amount of the pass-through funds needed under a contract; or
> (E) completion of a contracted project, activity, or program . . . .

25 U.S.C. § 450j-1(b)(2)(A) - (E).

other contractors -- the inevitable consequence of accepting Appellant's proposal -- without violating ISDA.

Appellant contends that ISDA does not bar IHS from reducing funding to contractors, including Intervenors, to the extent that the reductions apply only to funds that had been authorized for services to unaffiliated Indians. Appellant observes that 25 U.S.C. § 450j-1(b)(2) is applicable expressly to "self-determination" contracts issued by IHS pursuant to ISDA. Appellant argues from the definition of "self-determination contracts" contained in 25 U.S.C. § 450b(j) that self-determination contracts are for the benefit only of members of tribes. According to Appellant, funding reductions which apply to non-members of a tribe whose tribal organization receives a self-determination contract from ISDA (unaffiliated Indians) are not prohibited by 25 U.S.C. § 450b(j).

I do not agree with this interpretation, because it is based on an artificial and unreasonably narrow reading of the law. It is true that ISDA gives tribes only the right to contract for health care services for their own members. However, the protections written into ISDA to protect self-determination contracts against unilateral modifications or funding reductions by IHS were intended to protect existing contracts as they apply both to tribal members and to unaffiliated Indians that are covered under those contracts.

In order to be eligible for services under a self-determination contract, Indians must be members of a tribe, but not necessarily of the tribe which receives the contract. In prohibiting funding reductions, 25 U.S.C. § 450j-1(b)(2) does not distinguish between funds that are paid for members of the tribe contracting for services, and funds that are paid for unaffiliated Indians who may be covered by a contract.[14]

There is a sound policy reason for the statutory prohibitions against unilateral funding reductions and contract modifications by IHS. IHS could not reduce funding under a self-determination contract based on deletion of unaffiliated Indians from the contract's scope of services, without harming potentially the delivery of services to Indians who remain covered by the contract.

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[14] Similarly, in protecting against unilateral contract modifications by IHS, 25 U.S.C. § 450m-1(b) does not distinguish between prohibitions against modifications which apply to members of tribes with contracts, and prohibitions against modifications which apply to unaffiliated Indians covered by such contracts.

The self-determination contracts which are in evidence in this case do not treat members of the tribe which contracts with IHS as classes of individuals who are segregable from the unaffiliated Indians who are covered also by those contracts. Payments are made by IHS for the eligible Indians who are covered by a contract, whether or not they are members of the tribe receiving the contract. For example, the contract executed between IHS and Intervenor Susanville Indian Rancheria on December 30, 1988, estimated the total Indian population to be served as 865 individuals. Int. Ex. 1, page 4. The contract did not break down this population into Susanville Indian Rancheria members and unaffiliated Indians. Nor were the services provided under the contract allocated between members and unaffiliated Indians.

These contracts calculate the price of services based on total Indian populations covered by the contracts. They assume efficiencies and economies of scale in the delivery of services based on the size of the populations they serve. Potentially, a unilateral funding reduction by IHS to account for removal of unaffiliated Indians from a contract's scope of services could jeopardize the services offered to the individuals who remained covered by the contract, because the services might not be deliverable to a smaller population with the same cost efficiency that such services may have been delivered to the population served originally by the contract.

Appellant argues additionally that 25 U.S.C. § 450j-1(b)(2) assures only that total funding for self-determination contracts to serve Indian populations shall not be reduced unilaterally by IHS. From this, Appellant contends that IHS could reduce funding to any contractors, including Intervenors, so long as IHS correspondingly increases funding to Appellant to cover transfers of Indian populations from Intervenors to Appellant.

I do not agree with Appellant's interpretation. The ISDA specifically prohibits reduction of funding "under the terms of self-determination contracts entered into pursuant to" ISDA. 25 U.S.C. § 450j-1(a)(1) (incorporated by reference into section 450j-1(b)(2)). This language protects individual contracts, not contracts as a class, from funding reductions by IHS.

Furthermore, I do not agree with Appellant's contention that 25 U.S.C. § 450j(c)(2) permits IHS to reduce funding to a contract unilaterally. This section permits changes to contracts to be negotiated annually, to accommodate changed circumstances. I conclude that the term "renegotiated" in this section must be used consistent with its common and ordinary meaning. It connotes an agreement between parties to change funding -- not a unilateral change, as is asserted by Appellant -- and does

not support Appellant's contention that IHS may rely on this section to reduce funding to a contractor unilaterally.

I do not find that IHS abused either its discretion or its trust obligations by declining Appellant's proposal. IHS' discretion to accept or decline a contract proposal does not include discretion to ignore the requirements of ISDA. IHS' duty of trust does not extend to Appellant or to the Pit River Tribe in isolation from other Indian tribes or tribal organizations. ISDA was enacted as much to protect contracts as it was enacted to enable Indian tribes to provide services for their members. Here, IHS' statutory obligation was to protect the contracts already issued by IHS to other contractors.

Contracts are issued and contractors perform their duties predicated on the understanding that contract conditions, once accepted, are binding on the parties to the contracts. If IHS were to accept Appellant's arguments, then, potentially, any contract IHS issues would be vulnerable to reopening and modification based on subsequent submission to IHS by competing entities of arguably better proposals.[15] Services offered by a contractor could be jeopardized by such proposals. I find it difficult to envision how contractors could operate effectively in such an environment.

Appellant's argument that IHS unfairly gives other tribes or tribal organizations a veto over their proposals is misplaced. Although Congress has not given tribes or tribal organizations a veto right over contract proposals by other tribes or tribal organizations, it has imposed on IHS a duty to not accept contracts where acceptance would dictate substantive revisions to existing contracts. In evaluating Appellant's proposal, IHS was not obligated to obtain the approval of other tribes or tribal organizations that might be affected indirectly by the

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[15] Indeed, another party could just as readily propose to provide services to unaffiliated Indians covered under a contract between IHS and Appellant as Appellant could propose to provide services to unaffiliated Indians covered under contracts between IHS and other contractors.

proposal.[16] However, IHS is obligated by law to protect existing contracts.

The contracts between IHS and Intervenors are "mature," meaning that they are of indefinite duration. 25 U.S.C. § 450e(2). Appellant contends that the mature status of these contracts should not be an impediment to a unilateral reduction by IHS of the scope of health care services provided by these contracts. I do not agree with this contention. The Act plainly prohibits IHS from modifying contracts unilaterally. The mature status of the contracts between Intervenors and IHS means that the Intervenors need not annually propose that these contracts be reapproved by IHS. The scope of services provided under these contracts thus is immune from unilateral modification by IHS and is not subject to annual review and approval or declination by IHS.

B. Appellant's estoppel argument

There is no basis in fact for Appellant's estoppel argument. However, I would not find that IHS was estopped from declining Appellant's proposal even if I were to find that IHS had promised to Appellant that it would be permitted to contract to provide health care services to unaffiliated Indians in the Pit River Tribe's ancestral territory and that Appellant relied on that promise.

IHS may not be estopped from declining a proposal under ISDA where the consequence would be to force IHS to take action that is unlawful. Here, the consequence of estopping IHS from declining Appellant's proposal would be to force IHS to modify contracts with other contractors and to reduce the funds available to those contractors. As I find in subpart A of this section, that would violate specific prohibitions in ISDA, and would therefore be unlawful. The United States Supreme Court

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[16] Had Appellant proposed to provide contract health care services to members of another tribe in a service area which had been assigned to that tribe, then Appellant would have had to obtain a resolution of approval from that tribe. 25 U.S.C. § 450b(l). In that sense, the other tribe would have had "veto" authority over Appellant's proposal. However, Appellant did not need a resolution of approval here, because it was seeking to contract to provide health care services to unaffiliated Indians.

held in Utah Power & Light Co. v. United States, 243 U.S. 389, 408 - 409 (1917) that:

> [T]he United States is neither bound nor estopped by the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.

C. Appellant's timeliness argument

I conclude that Appellant waived the statutory requirement that IHS act on Appellant's proposal within 60 days of its receipt by IHS. However, IHS would not be required to accept this proposal even if Appellant had not waived the statutory requirement.[17]

ISDA provides that, unless IHS declines a contract proposal within 60 days of its receipt, for one of three specified reasons, then it must approve that proposal within 90 days of its receipt. 25 U.S.C. § 450(a)(2).[18] In this case, IHS received Appellant's proposal on January 3, 1993. It declined it on January 31, 1994.

The purpose of the 60-day review requirement is to ensure that IHS not resort to inaction on a proposal as an alternative to accepting or declining that proposal. As a corollary, the 60-day review requirement assures an applicant for a contract that, at some point in time, it will have a right to seek administrative appeal should IHS determine to decline that applicant's proposal. S. Rep. No. 274, 100th Cong., 2d Sess. 24 (1988), reprinted in 1988 U.S.C.C.A.N. 2620, 2643.

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[17] Appellant suggests that IHS regulations require that it act on proposals for contracts within 30 days of their receipt by IHS. See 42 C.F.R. § 36.230(b). The 30-day time limit in this section applies to proposals to make revisions or amendments to contracts.

[18] The statutory bases for declination are:

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function 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. § 450(a)(2)(A) - (C).

Appellant's willing participation in a review process that exceeded 60 days constituted a waiver of the review limitation. Appellant consented to an evaluation process that exceeded the 60-day period provided by ISDA. By agreeing to repeated extensions of Appellant's contract while IHS considered the proposal, and by providing IHS with supplemental materials to assist IHS in evaluating the proposal, Appellant signalled to IHS that it did not intend to hold it to the 60-day review requirement. At any point during the process, Appellant could have told IHS that it would not consent to further delays in the review. Appellant had it in its power at all times after the lapse of the 60 days to demand that either IHS accept its proposal, or decline it and thereby afford Appellant its rights to administrative review.

The evidence establishes that, during the interim between IHS' receipt of the proposal and the date it declined it, Appellant agreed several times to extend its previous contract with IHS so that IHS could consider, and act on, the merits of the proposal. The last extension request was made by Appellant on December 23, 1993, and covered the period through January 31, 1994. IHS Ex. 28. IHS declined Appellant's proposal on the last day of the final contract extension.

It is true that the first extension granted by Appellant was dated March 10, 1993, five days after the expiration of the 60-day review period. IHS Ex. 21. However, in granting the extension, Appellant did not suggest that it intended to hold IHS to the 60-day requirement. Id. Rather, it contemplated a period of negotiations with IHS over its proposal. Id.

Some of Appellant's extension requests show plainly that it understood that IHS required more than 60 days to evaluate Appellant's proposal and that Appellant did not object to a lengthier review process. For example, on May 20, 1993, Appellant agreed to extend the contract until June 30, 1993. IHS Ex. 23. In that request, Appellant stated that:

> [W]e have been notified that key personnel from . . . [the IHS California Area] office will not be available for our contract negotiations. Please extend our . . . [contract] to June 30, 1993. This should allow sufficient time to properly prepare for our negotiations.

Id.

In a letter dated June 30, 1993, counsel for Appellant complained about IHS' failure to complete its review and asserted that IHS had not timely evaluated the proposal. IHS Ex. 24, page 2. In that letter, counsel consented to "one more 30-day extension of . . . [Appellant's] existing contract."

Id. at 1. Counsel for Appellant asserted that, if the remaining issues relevant to the proposal could not be resolved during this extension period, then Appellant "will have no choice but to seek to resolve these issues outside of the contracting process." Id. at 2. Notwithstanding, Appellant consented to additional extensions and negotiations. Appellant's consent to additional extensions and negotiations shows that it acquiesced in a review process that exceeded 60 days.

Appellant made evident its willingness to extend the review process beyond 60 days by providing IHS with supplemental documents to assist IHS in its evaluation of Appellant's proposal. On October 26, 1993, Appellant sent additional documents to IHS. In the transmittal letter to IHS, Appellant argued that these documents should be sufficient to satisfy IHS that its proposal is justified. IHS Ex. 29, page 2. Appellant did not suggest that it was entitled to have its proposal accepted by IHS because IHS had not declined it within 60 days of its receipt by IHS.

Although I conclude that Appellant waived the 60-day review requirement, I would not require that a contract be issued based on Appellant's proposal even if I were to find that the review requirement had not been waived. I do not find that Congress intended the time limits it established for contract reviews to operate to force IHS to accept contracts in contravention of ISDA.

What Appellant is demanding of IHS, by virtue of IHS' failure to decline its proposal within the 60 day-review period, is that IHS disrupt other lawful contracts in contravention of express statutory prohibitions against such action. In effect, Appellant is asserting it should be advantaged, and that other contractors must pay the price, for IHS' failure to conduct a timely review of Appellant's proposal. This is a result which Congress did not contemplate and which would do violence to the congressional intent that the rights of parties with contracts be protected under ISDA.

Congress did not intend that the statutory protections of existing contracts fall in the face of failure by IHS to timely decline a contract proposal. In this case, the right that Appellant may have had to a timely disposition of its application must give way to the statutory rights of other contractors. Otherwise, contractors' rights under ISDA could be held hostage to delays by IHS in cases involving IHS and other parties.

Although I base my conclusion on an analysis of congressional intent, it is clear also that the equities in this case preponderate in favor of those contractors, including

Intervenors, who have contracts with IHS to serve the unaffiliated Indians in the Pit River Tribe's ancestral territory. Appellant has demonstrated no harm in IHS' failure to complete its review within 60 days. That is made evident by Appellant's failure to assert that the review be completed timely. By contrast, other contractors who are innocent bystanders to the dispute between IHS and Appellant would be harmed palpably if IHS were forced to accept Appellant's proposal due to IHS' failure to act timely.

D. Appellant's assertion that other contractors continue to provide health care services to members of the Pit River Tribe who reside in the Tribe's ancestral territory

The issues encompassed by this case simply do not include the question of whether other contractors continue to provide health care services to members of the Pit River Tribe who reside in the Tribe's ancestral territory. This issue was not subsumed by Appellant's December 30, 1992 contract proposal or by IHS' declination of that proposal. Therefore, the issue is not before me as an issue which I may hear and decide.

I am not suggesting by this conclusion that Appellant is without recourse if, in fact, IHS continues to contract with other contractors to provide health care services to members of the Tribe in contravention of the October 1991 contract modification between Appellant and IHS. Neither am I suggesting that Appellant does have a cause of action if its contention is, in fact, true. My holding on this issue is limited to the conclusion that the issue is not an aspect of the contract proposal or the declination which is the subject of this case.

V. IHS' declination of Appellant's proposal to provide health care services to members of the Pit River Tribe who reside in southern Oregon

As I find at Part III C of this decision, Appellant's proposal to provide health care services to members of the Tribe who reside in southern Oregon provided no information to IHS about the identity of these individuals, their residences, or their access to health care services provided by IHS or by entities having contracts with IHS. Appellant barely mentioned the issue of the members of the Tribe who reside in southern Oregon in its appeal of the declination. Appellant did not offer any facts concerning the members of the Tribe who reside in southern Oregon until it submitted its motion and brief in this case. App. Ex. 2.

Appellant did not devote serious attention to the proposal to provide health care services to members of the Tribe who reside in southern Oregon during the period when IHS was reviewing Appellant's contract proposal. Appellant began to take this issue seriously only with its submission of briefs and exhibits in this case. None of the documents in evidence in this case which relate to the proposal or to negotiations between IHS and Appellant concerning that proposal, with the exception of the proposal itself, even mention the proposal to provide health care services to members of the Tribe who reside in southern Oregon. The issue on which Appellant and the Tribe focused during the period after Appellant submitted its December 30, 1992 proposal to IHS was the status of unaffiliated Indians in the Tribe's ancestral territory. The issue of contract health care services to members of the Tribe who reside in southern Oregon became lost in the negotiations about the issue of Appellant's proposed service to unaffiliated Indians in the ancestral territory.

I am not surprised that IHS failed to address meaningfully the issue of service to members of the Tribe who reside in southern Oregon, given Appellant's failure to treat that issue seriously. The specific reason which IHS gives for declining Appellant's contract proposal was that "those individuals residing outside of . . . [Appellant's] current service area are currently included in the funding provided to other tribal programs, and IHS cannot fund two or more different contractors to provide the same services at the same time." Based on the record of this case, this reason appears applicable only to that part of the proposal which offers to provide health care services to unaffiliated Indians in the Tribe's ancestral territory.

Nothing of record concerning Appellant's proposal or the negotiations which ensued suggests that IHS had information which would enable it to determine that the members of the Tribe who reside in southern Oregon either are or are not "currently included in the funding provided to other tribal programs." (Appellant now avers that they are not covered by such programs. App. Ex. 2, pages 2 - 3.) There is certainly nothing in the record to suggest that IHS based its declination of that aspect of Appellant's proposal on the conclusion that members of the Tribe who reside in southern Oregon are covered by other tribal programs.

Now, belatedly, Appellant makes assertions concerning the members of the Tribe who reside in southern Oregon and the proposal to provide contract health services to these individuals. Appellant now contends for the first time that there are 18 affected individuals residing in Oregon, within 30 miles of the Tribe's reservation. App. Ex. 2. Appellant contends that these individuals have close connections with the

Tribe, participate in tribal affairs, and even make use of Appellant's clinics to obtain health care services. Id.

IHS contends that Appellant is barred by IHS contract regulations and ISDA from contracting for health care services to members of the Tribe who reside in southern Oregon. IHS Reply Brief at 13 - 16; see 42 C.F.R. §§ 36.22, 36.23. This argument is based not on Appellant's proposal, but on the facts offered by Appellant subsequent to its appealing IHS' declination of that proposal. Id.

Although IHS did not express an explanation for its determination to decline the proposal to provide health care services to members of the Tribe who reside in southern Oregon, it had no choice but to decline that proposal based on the application which it had to review. It would not have been possible for IHS to make an informed decision based on the information supplied to it by Appellant.

ISDA does not specify what must be contained in a contract proposal in order that IHS may review and either approve or decline the proposal. However, ISDA implicitly requires that an organization proposing to contract with IHS must provide it with sufficient information about a proposal so that IHS may make an informed determination as to whether the proposal should be accepted or declined. IHS cannot be expected reasonably to make the determination required by 25 U.S.C. § 450f(a)(2) where a contract proposal fails to contain information which even minimally identifies the population which the proposing party seeks to serve. That information was singularly absent from Appellant's proposal to provide health care services to members of the Tribe who reside in southern Oregon.

Neither ISDA nor applicable regulations suggest that the administrative hearing process is designed to cure fundamental defects in a proposal to contract. ISDA provides that, where IHS determines to decline a contract proposal, it shall:

> provide the tribal organization with a hearing on the record and the opportunity for appeal on the objections raised, under the such rules and regulations as the Secretary may promulgate.

25 U.S.C. § 450f(b)(3). I read this section as allowing a party that is dissatisfied with a contract declination the opportunity to appeal that declination. ISDA contemplates that, in such a hearing, a party may offer evidence to show that IHS' declination is unlawful. A hearing under ISDA is not intended to substitute for the fact finding and evaluation that occurs during review of a contract proposal. ISDA does not

suggest that a party may, in effect, write its application on appeal.

The regulation governing hearings involving contract declinations does not state or suggest that parties may use those hearings to cure fundamental defects in their contract proposals. It assures that these hearings will be conducted in accord with the requirements of due process. Parties who appeal contract declinations are entitled to: written notice of the issues; representation by counsel; a written record of the hearing; cross-examine witnesses who may be called; file written statements prior to the hearing; and take depositions where appropriate. 42 C.F.R. § 36.214(c)(1) - (6). The hearing regulation does not address the question of what substantive issues may be addressed at a hearing. The regulation does not provide a party with substantive rights not contained in ISDA.

I do not view my role as adjudicator in appeals from contract declinations as substituting my judgment for the review process required by ISDA. ISDA properly allocates that role to IHS. My role at this stage is to examine the review performed by IHS to determine whether it was conducted lawfully. It would be inappropriate for me now to permit Appellant to cure fundamental defects in its application and, based on that, for me to perform the evaluation and review which Appellant should have requested IHS to perform based on a complete application. For that reason, the evidence which Appellant now offers concerning members of the Tribe who reside in southern Oregon is immaterial to this case.[19]

At the oral argument of this case, Appellant asserted that if, in fact, its application was deficient, IHS should have provided it with technical assistance to cure any deficiencies. 25 U.S.C. § 450f(b)(2). It contended that IHS should have assisted it in identifying the members of the Tribe who reside in southern Oregon. I find this assertion to be, at the least, anomalous. Appellant and the Tribe know who the Tribe's members are and where they reside. That is made obvious by the fact that Appellant provided more specific information in its brief about the members of the Tribe who reside in southern Oregon.

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[19] At the oral argument of this case, IHS conceded that there is no bar in ISDA or in the regulations to Appellant resubmitting to IHS its proposal to provide health care services to southern Oregon Pit River members. Presumably, if Appellant were to provide sufficient information to permit IHS to evaluate the proposal, then IHS would be in a position to either approve or decline the proposal.

I do not interpret 25 U.S.C. § 450f(b)(2) as requiring IHS to provide a tribe with technical assistance to cure defects to an application which are so basic and fundamental as to render the application defective on its face. This section requires IHS to provide assistance to a tribal organization to overcome objections that IHS may have to an application. 25 U.S.C. § 450f(b)(2). But that presumes that IHS has found problems with an application which are, potentially, correctable. Where, as in this case, the application is so devoid of information as to be fatally flawed, there is no duty on IHS' part to resurrect the application through technical assistance.

It is unnecessary for me to decide whether, as IHS argued, Appellant's proposal to serve members of the Tribe who reside in southern Oregon would be in violation of IHS regulations governing contract health services. As I find here, the proposal to provide such service is on its face defective, and not a serious proposal by Appellant. IHS' arguments concerning whether contracting for health care services to members of the Tribe who reside in southern Oregon by Appellant would violate IHS regulations is not premised on Appellant's proposal to provide such services, but on fact allegations which Appellant made as part of its submission in this case.

However, there appears to be substantial merit to IHS' argument. IHS asserts that its regulations require that, in order for Indians to be eligible to receive contract health care services, they must reside within a contract health service delivery area (CHSDA) that has been established by IHS and be able to demonstrate that they maintain close economic and social ties to the local tribe or tribes. It argues, additionally, that a tribe may not contract to provide health care services for its members unless those members are within a CHSDA that has been designated by IHS for that tribe. IHS cites 42 C.F.R. § 36.23(a)(1) - (2) and the Director's decision in Kickapoo Tribe of Oklahoma v. Indian Health Service, May 22, 1992, to support this argument.[20]

Essentially, IHS argues, alternatively, from the facts now alleged by Appellant. It contends that if, as Appellant alleges, members of the Tribe who reside in southern Oregon are not within a CHSDA, then they are not eligible for contract health services. If that is so, then Appellant may not contract to provide health care services for them. Alternatively, if they are within a CHSDA, they are not within a CHSDA that has been designated as a service area for

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[20] Regulations governing eligibility for contract health services were last published in the Code of Federal Regulations in 1987. Congress imposed a moratorium on IHS regulations adopted after 1987, and this moratorium remains in effect.

Appellant. Under that alternative, the Tribe would not "benefit" from a contract to provide health care services to these individuals within the meaning of ISDA. Kickapoo at 2.

IHS' interpretation of its regulations governing contract health care services appears to be correct, based on the Director's decision in Kickapoo. I conclude that Appellant would not have demonstrated a basis to contract for health services to the members of the Tribe who reside in southern Oregon, assuming its application had provided the essential information. Had Appellant provided IHS with sufficient information concerning the members of the Tribe who reside in southern Oregon, then IHS would have been obligated to decline the application to provide health care services to those members on the statutory ground that the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract. Id.; 25 U.S.C. § 450f(b)(3).

/s/

Steven T. Kessel
Administrative Law Judge