

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:	)	DATE: July 23, 2007
	)	
Yerington Paiute Tribe,	)	
	)	
Appellant,	)	IBIA Docket No. 06-55-A
	)	App. Div. Docket No. A-07-76
	)	
- v. -	)	Decision No. 2102
	)	
Indian Health Service.	)	

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FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

The Yerington Paiute Tribe (Yerington) timely appealed the March 12, 2007 Recommended Decision of Administrative Law Judge (ALJ) Robert G. Holt upholding the March 8, 2006 determination of the Indian Health Service (IHS) rejecting Yerington's final offer for increased IHS funding to provide dental services for calendar years (CYs) 2006-2008 pursuant to title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended by the Tribal Self-Governance Amendments of 2000, Public Law No. 106-260. Any party may appeal the ALJ's recommended decision with respect to IHS's rejection of a final offer to the Secretary of the Department of Health and Human Services (HHS) by filing written objections to the ALJ's recommended decision within 30 days after receiving it. 42 C.F.R. § 137.433. The Secretary has 45 days from the date of receipt of the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. 42 C.F.R. § 137.434(a). On November 27, 2006, the Secretary delegated the authority to hear appeals to the Appellate Division of the Departmental Appeals Board. I have been designated as the deciding official in this case.

IHS rejected Yerington's final offer to the extent that it included additional funds not included in the previously approved funding agreement for CYs 2003-2005. Under that funding agreement, in exchange for IHS funds for "hospitals and clinics," Yerington agreed to provide comprehensive dental services, as well as certain other services, to eligible individuals in its service area. When Yerington originally contracted to provide dental services in 1984, the IHS funds provided for these services came from a special appropriation known as "equity health care funds" which was subsequently discontinued, although Yerington continued to receive the same amount in IHS funds under the agreement, plus cost-of-living increases, for the years leading up to the years in dispute. Yerington's final offer for CYs 2006-2008 requested additional IHS funds for the same services described in the funding agreement for CYs 2003-2005. Yerington took the position that the additional funds represented IHS funds that Yerington believed IHS had acknowledged in 1984 were available in addition to the equity health care funds. IHS rejected the offer on the ground that it exceeded the funding level to which Yerington was entitled by statute, i.e., an amount "not less than the . . . Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by" the tribe's compact with IHS. ISDEAA section 106(a)(1), made applicable by ISDEAA section 508(c).

I conclude that IHS has demonstrated by clear and convincing evidence the validity of the grounds for its decision to reject Yerington's final offer and that its decision is fully consistent with provisions and policies of the statute. See ISDEAA section 518; 42 C.F.R. § 137.430. The rationale for my conclusion is fully set out in the ALJ's recommended decision, which I adopt and include as an appendix to my decision. Below, I explain why Yerington's objections to the ALJ's recommended decision have no merit.

In determining that IHS properly rejected Yerington's final offer for CYs 2006-2008, the ALJ relied principally on his finding that Yerington had a self-determination contract for CYs 2003-2005 to provide comprehensive dental services. The ALJ concluded that Yerington was therefore not entitled under section 105i(1) of the ISDEAA to any share of the funds used by IHS to provide dental services to tribes in Yerington's service unit that were "not served by a self-determination contract." Yerington argues to the contrary that it is a tribe "not served by a self-determination contract" within the meaning of section 105i(1). According to Yerington, notwithstanding the scope of the dental services described in the current funding agreement, it had not

fully contracted to provide these services because it used some non-IHS funds to provide them.

The fact that Yerington supplemented IHS funds in order to provide comprehensive dental services in CYs 2003-2005 does not mean that it did not fully contract for those services. When a tribe agrees to take responsibility for dental services or any other program, function, service or activity (PFSA) under title V of the ISDEAA, the tribe is not guaranteed that the funds it receives from IHS will be adequate to provide its desired level of service. (Indeed, section 509(k) of the ISDEAA provides that a tribe may suspend performance of a PFSA if it notifies the Secretary that the amount of funds transferred to it is not sufficient to carry out the PFSA for the full year and the Secretary does not provide additional funds.) Instead, a tribe is entitled to just the amount of funds that IHS would have otherwise provided for the PFSA. In this case, when Yerington first contracted to provide comprehensive dental services in lieu of IHS, it agreed to accept the funding IHS would otherwise have provided. In subsequent years, Yerington would be entitled to that amount plus cost-of-living increases. If Yerington believed that IHS would have spent additional funds to pay for those services when it first contracted to provide comprehensive dental services, Yerington could have made that argument before signing the funding agreement. Once it signed the agreement, however, Yerington gave up any claim it might have had that IHS "would have otherwise provided" additional funds for the services.

Yerington argues in addition that IHS withheld tribal shares to which Yerington was entitled in violation of section 508(d)(1) of the ISDEAA. That section provides that "the Secretary is expressly prohibited from"--

(A) failing or refusing to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office, or other funds due under this subchapter, except as required by Federal law;

(B) withholding portions of such funds for transfer over a period of years . . . .

However, Yerington does not point to any basis for reading this provision as creating an entitlement to funds for a PFSA in addition to those which have already been included in a funding agreement for that PFSA.

Yerington also objects to the ALJ's reliance on the fact that the funding table attached to Yerington's funding agreement for CY

2006 shows that IHS retained zero funds for dental services. ALJ Recommended Decision at 6, citing Yerington Ex. A-13, at 2. Yerington appears to argue that since this funding agreement was under negotiation at the time Yerington made its final offer, the funding table merely reflects the determination that Yerington is challenging here. However, the ALJ also viewed the fact that the funding table shows that Yerington has taken all of the contract support funds associated with dental services as confirming that IHS retained no funds for these services. Yerington does not dispute that it took all of the associated contract support funds nor does it explain why it did so if it thought that IHS was still responsible for providing some dental services to it. In any event, the record also includes a funding table for FY 2005 (prior to the calendar year in dispute) which shows that IHS retained zero funds for dental services. See Yerington Ex. A-22.

Finally, Yerington argues that, contrary to what the ALJ found, it did not "acquiesce" in the allocation of funds recommended by the tribes in its service unit in the late 1990's, which showed that IHS retained no dental service funds for Yerington. However, Yerington does not dispute that it "made no formal complaint" about this allocation, as the ALJ also found. ALJ Recommended Decision at 12. The absence of such a complaint prior to the time that Yerington entered into the current funding agreement further supports the conclusion that Yerington fully contracted to provide dental services.

Accordingly, I conclude that IHS properly rejected Yerington's final offer to the extent that it requested an amount in excess of the amount Yerington received to provide dental services for CYs 2003-2005 (and any cost-of-living increase to which Yerington may be entitled).

This is the final decision of the Department of Health and Human Services.

\_\_\_\_\_/s/  
Donald F. Garrett  
Board Member

**APPENDIX TO DAB NO. 2102**

March 12, 2007

YERINGTON PAIUTE TRIBE	:	IBIA 06-55-A
	:	
Appellant	:	Appeal of March 8, 2006 decision
	:	of Director, Indian Health Service
vs.	:	regarding dental services from
	:	Schurz Service Unit, Nevada
DIRECTOR, INDIAN HEALTH SERVICE	:	
	:	Indian Self-Determination and
Respondent	:	Education Assistance Act

**RECOMMENDED DECISION**

Appearances: Geoffrey D. Strommer, Esq., Starla Kay Roels, Esq., Duke McCloud, Esq., Portland, Oregon, for the Yerington Paiute Tribe  
Michael Shachat, Esq., San Francisco, California, for the Director, Indian Health Service

Before: Administrative Law Judge Robert G. Holt

**I. Introduction**

The Indian Self-Determination and Education Assistance Act ("ISDA")<sup>1</sup>, gives Indian tribes the option to contract with the Indian Health Service ("IHS") to assume responsibility for the services IHS provides to Indian tribes. In return, the tribe receives the funds IHS would otherwise provide for the service. For many years the Yerington Paiute Tribe had been contracting under this statute to provide dental services. In October 2005, the Tribe made a final offer to IHS for additional funds for calendar years ("CYs") 2006-2008.

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<sup>1</sup> 25 U.S.C. §§ 450 to 458bbb-2 (2000 & Supp. IV 2004).

IHS rejected the offer on the grounds that the Tribe was already receiving all the funds IHS would have otherwise provided for the dental services. The IHS rejection should be affirmed because the compact and funding agreement between the parties, at the time the Tribe made its final offer, establish that the Tribe currently receives all the funds IHS would otherwise have provided for the dental services.

I cannot sustain the Tribe's argument that it has only been receiving so called "equity health care funds" and is still entitled to "base funds." The term "equity health care funds" refers to special appropriations Congress made in the 1980s. The Tribe argues that it is still entitled to the "base funds" that IHS would have otherwise provided, absent the special appropriations. The argument ignores changes IHS made in the Tribe's dental program and its funding between the time the Tribe first contracted for funding in the 1980s and the time it made its final offer for CYs 2006-2008. The "equity health care funds" lost their separate identity when Congress stopped appropriating them and began including them in IHS's general appropriations. By the time the Tribe made its final offer, the original "equity health care funds" had become the current "base funds." In the words of the statute, the "equity health care funds" of the 1980s had become the funds that IHS would otherwise provide for the Tribe's dental program for the period of CYs 2006-2008.

This Recommended Decision will first identify the relevant provisions of the ISDA and then provide necessary background facts. The concluding discussion will demonstrate that IHS correctly declined the Tribe's offer and that the arguments made by the Tribe do not require a different result.

## II. The Indian Self-Determination and Education Act

The ISDA contains two titles (I and V) under which an Indian tribe may contract to provide services to its members. The Yerington Paiute Tribe first contracted with IHS under Title I<sup>2</sup> and then shifted to Title V<sup>3</sup> when Congress added that title in 2000. Under Title V, a tribe is entitled to the same amount of funds it would be entitled to under Title I:

The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 450j-1(a)(1) of this title \* \* \*.<sup>4</sup>

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<sup>2</sup> 25 U.S.C. §§ 450 to 450n.

<sup>3</sup> 25 U.S.C. §§ 458aaa to 459aaa-18.

<sup>4</sup> 25 U.S.C. § 458aaa-7(c).

Title I defines the amount a tribe is entitled to receive as the amount IHS would otherwise provide for the relevant program:

The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, \* \* \*. <sup>5</sup>

The parties refer to this definition as the "Section 106 (a)(1)" amount.

Under Title V, if the parties cannot reach an agreement on the amount of funding, the tribe may make a final offer to IHS:

In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, \* \* \* the offer shall be deemed agreed to by the Secretary. <sup>6</sup>

IHS may then reject the offer, but only on four specific grounds:

[T]he Secretary shall provide--

(A) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that--

(i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this part;

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

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<sup>5</sup> 25 U.S.C. § 450j-1(a)(1).

<sup>6</sup> 25 U.S.C. § 458aaa-6(b).

(iv) the Indian tribe is not eligible to participate in self-governance under section 458aaa-2 of this title;<sup>7</sup>

The tribe then has the right to a hearing on the record where IHS has the burden of proof by clear and convincing evidence:

With respect to any hearing \* \* \* , the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b) of this section.<sup>8</sup>

With this statutory structure as a foundation, the background facts may now be considered.

### III. Background

IHS operates a three tier organizational structure in Nevada. The headquarters is located in Rockville, Maryland, and supervises an area office in Phoenix, Arizona. The Phoenix Area Office provides services to Indian communities in western and southern Nevada through the Schurz Service Unit. The Yerington Paiute Tribe is one of thirteen federally recognized tribes within the service unit.<sup>9</sup>

According to the Tribe, the first money it received from IHS for dental services consisted of what it described as "equity health care funds" in the amount of \$12,000. The Tribe initially used these funds to pay for services provided by private dentists in the local communities. It did not have its own dental facility until 1994 when volunteer dentists began visits for a few days per month. Private dentists, paid with tribal or third-party funds, also provided care. By 2003, the Tribe combined enough revenue sources to hire a full-time dentist. For services the Tribe did not provide, tribal members obtained care from other IHS facilities within the Schurz Service Unit.<sup>10</sup>

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<sup>7</sup> 25 U.S.C. § 458aaa-6(c)(1).

<sup>8</sup> 25 U.S.C. § 458aaa-6(d).

<sup>9</sup> See Appellant's Motion for Partial Summary Judgment 4, Ex. A-1; Appellee's Memorandum in Support of Its Opposition to Appellant's Motion for Partial Summary Judgment, Ex. B-12..

<sup>10</sup> See, *Id.*, at 5-7; Tr. 272:19-274:13 (Andrew McAuliffe).

IHS and the Tribe entered their current ISDA contract as a compact under Title V.<sup>11</sup> They also executed a separate funding agreement which specified the exact amount of funds IHS transferred to the Tribe.<sup>12</sup>

After engaging in negotiations for additional dental service funds, the Tribe made a "final offer." It requested "inclusion of the Tribe's § 106(a)(1) amount of the Schurz Unit dental program in the Tribe's CYs 2006-2008 [Funding Agreement]," but did not specify an amount.<sup>13</sup>

IHS rejected the offer, invoking the first ground under the Title V of the ISDA as its reason. This ground allows an agency to reject an offer because "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under this title."<sup>14</sup>

The Tribe appealed. The parties subsequently waived their right to a hearing within 90 days and I conducted the hearing in Reno, Nevada on November 1-3, 2006. Posthearing briefing was completed February 9, 2007, and the parties waived the right to a recommended decision within 30 days.<sup>15</sup>

#### IV. Discussion

##### A. IHS Properly Rejected the Final Offer Because the Tribe had Compacted for all Dental Services that IHS Would Otherwise Provide.

When the Tribe made its final offer, it had both an existing compact and a funding agreement with IHS. The compact provided that the "PSFAs [programs, services, functions and activities] that will be the responsibility of the Tribe under this Compact shall be identified in the Tribe's Funding Agreement."<sup>16</sup>

The funding agreement, in turn, specifically obligated the Tribe to provide health PSFAs for all dental services:

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<sup>11</sup> Ex. A-2 at 3.

<sup>12</sup> Ex. A-3.

<sup>13</sup> Ex. A-14.

<sup>14</sup> Ex. A-15 at 2 .

<sup>15</sup> Tr. 16:1-5.

<sup>16</sup> Ex. A-2 at 11 (Article III, Section 3).

This Agreement obligates the Tribe to be responsible for and to provide health programs, services, functions and activities (PSFAs) in accordance with applicable law as set forth below and identified in the attached Tribal Self Governance FA utilizing the resources transferred under this FA:

(A) GENERAL HEALTH SERVICES

\* \* \* \* \*

(iv) Dental Services: The purpose of this program is to provide comprehensive dental services to eligible individuals in the Tribe's service area. These services include, but are not limited to, emergency services; diagnostic services; preventative services; endodontic services; periodontal services; prosthetic services; and limited oral surgery.<sup>17</sup>

The payment authorization table attached to the funding agreement for CY 2006 subdivides the total funding due the Tribe into program funds and contract support funds. The table shows "0" funds for the dental activity, but does show \$5,389 in contract support funds for the dental activity at the area office (Phoenix) and headquarters (Rockville, Maryland) level. The table shows no "retained services" funds for the dental activity in either the program or contract support categories.<sup>18</sup> As will be explained below, the table shows "0" for dental program funds because the amount IHS transfers to the Tribe for the dental activity is now included in the "hospitals and clinics" activity.

These three documents (compact, funding agreement, and table), when taken together, show that the Tribe had contracted to provide all dental services and that IHS had not retained responsibility and funding for any of the Tribe's dental services. The compact obligates the Tribe to provide the services identified in the funding agreement. The funding agreement, in turn, obligates the Tribe to provide comprehensive dental services, without any limiting language. Moreover, the payment authorization table shows that IHS retained no funds for the Tribe's dental services, as confirmed by the fact that the Tribe has taken all of the associated contract support funds.<sup>19</sup>

These three agreements, on their face, justify the IHS rejection of the Tribe's final offer. At the time the Tribe made its offer, the Tribe had compacted to provide all dental services and IHS had retained no funds. Thus, IHS correctly invoked the first statutory ground for rejecting a

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<sup>17</sup> Ex. A-3 at 1-2 (Section 2(A)(iv)).

<sup>18</sup> Ex. A-13 at 2.

<sup>19</sup> See Tr. 508:11-510:4 (Steven Tetrev).

final offer because, in the words of the statute, it "exceed[ed] the applicable funding level to which the Indian tribe [was] entitled ." <sup>20</sup> I therefore conclude that IHS has sustained its burden of demonstrating by clear and convincing evidence that it validly rejected the Tribe's offer.

B. The Tribe's Arguments Do Not Require Acceptance of the Final Offer.

The Tribe advances several arguments why IHS erred. These arguments may be grouped into several broad categories: (1) Tribal members continue to use other IHS facilities, (2) equity funding is distinct from base funding, and (3) prior contracts and funding agreements acknowledge the Tribe is due base funds. The following analysis will demonstrate that consideration of these arguments and the supporting evidence does not require acceptance of the Tribes final offer.

1. Use of Other IHS facilities by Tribal Members Does not Show that IHS has Retained Dental Program Funds.

The Tribe argues that IHS's provision of dental service to Tribal members at facilities other than the Tribe's shows that IHS still retains a portion of the Tribe's dental program and funds. Indeed, the Tribe relies upon the utilization rates at these other facilities to calculate the amount of additional funds it seeks. <sup>21</sup>

IHS explains that it permits Tribal members to use facilities other than those at Yerington, because of its "open door" policy. Under this policy, IHS provides dental services to all eligible beneficiaries who present themselves at any IHS facility. <sup>22</sup> Thus, an individual Yerington Paiute Tribe member may obtain service at a facility operated by the Tribe, or at a facility directly operated by IHS. The individual may choose whichever facility serves the member best based on such factors as proximity, appointment availability, or personal preference.

Such "cross-utilization" does not show that IHS has retained a part of the dental program it would otherwise provide for the Yerington Paiute Tribe. Rather, cross-utilization only demonstrates that individual members chose to obtain service at other facilities. So long as individual tribal members can choose a facility other than the one provided by the Tribe, use of other facilities evidences only the free choice of individual members. Such utilization does not persuasively demonstrate that IHS retains a portion of the Tribe's dental program and funds.

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<sup>20</sup> Indian Self Determination and Education Assistance Act, sec. 507(c)(1)(A)(i), 25 U.S.C. § 458aaa-6(c)(1)(A)(i).

<sup>21</sup> Tr. 112:20-141:8 (Robert Marsland).

<sup>22</sup> E.g., Tr. 274:14-23 (Andrew McAuliffe), 350:13-351:10 (Thomas Tahsuda).

2. A Legally Recognized Distinction Does not Currently Exist Between Equity Funding and Base Funding.
  - a. Neither the Statute, Regulations, or Current Policy Distinguish Between Equity Funding and Base Funding.

The Tribe also argues that when it first contracted to perform dental services in the 1980's it received only "equity health care" funds under a special congressional appropriation and did not receive any of the "base funds" that IHS would have otherwise provided for the dental program under Section 106(a)(1) of the ISDA. It now claims entitlement to the "base funding" it did not receive in the 1980s.

The Tribe's argument does not find support in the language of the ISDA or its implementing regulations. Neither of these authorities draws a distinction between what the Tribe calls "equity health care funds" and "base funds." The statute only describes the funds due a tribe as the amount "the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract \* \* \*."<sup>23</sup> The parties have not cited any other authorities, such as administrative decisions or judicial precedent, that makes the distinction drawn by the Tribe. Thus, neither the statute nor the regulations require that the Tribe receive both "equity health care funds" and "base funds."

The Tribe does assert that IHS has established a policy that "equity health care funds" must be in addition to "base funds." According to the Tribe, IHS now violates this policy when it refuses to provide additional funding.<sup>24</sup> The Tribe points to two memoranda from high level IHS managers as evidence of the policy. The first memorandum, from the Director of the Phoenix Area Office, acknowledges the termination of the "equity health care fund" at the end of fiscal year ("FY") 1984 and provides guidance for FY 1985. The guidance requires that equity health care funds must be in addition to base funds (referred to below as "IHS direct operations funds"):

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<sup>23</sup> Indian Self Determination and Education Assistance Act, sec.106(a)(1), 25 U.S.C. § 450j-1(a)(1) (2000).

<sup>24</sup> Appellant's Opening Post-hearing Memorandum 15-17.

The following guidelines will apply to the Phoenix Area for planning expenditures in FY 1985:

\* \* \* \* \*

4. As stated in the IHS guidelines for September 7, 1983, if the tribe requests a P.L. 93-638 contract, it will be to contract for services (the program). The funds to be made available for the contract will be the former [Equity Health Care Funds] as well as the funds previously available for the IHS direct operations.<sup>25</sup>

The second memorandum contains a portion of the September 7, 1983 guidelines referred to in the first memorandum.<sup>26</sup>

The statements described above do not require a different result here for at least two reasons. First, the guidelines of the first memorandum explicitly state that they apply for FY 1985 (more than 20 years ago). Further, the record does not show that IHS has continued to follow this guidance in subsequent years. Similarly, the guidelines in the second memorandum do not provide for application after the termination of the equity health care funds. Thus, whatever policy existed in 1985 has long since expired.

Second, the guidelines do not address the situation where, as with the Yerington Paiute Tribe, a tribe did not take or receive "IHS direct operations funds" (what the Tribe now refers to as "base funds") in FY 1985. Specifically, the guidelines do not require a "place holder" for the base funds a tribe could have taken in 1985, but did not.<sup>27</sup> Thus, the guidelines do not provide that a tribe may take the "base funds" in subsequent years, when it did not take them in 1985. For either of these reasons IHS did not violate the 1985 guidelines when it declined the Tribe's current offer for CYs 2006-2008.

b. Historic Equity Health Care Funding Has Become Current Base Funding.

Not only does the current statute, regulations, and policy not distinguish between "equity health care funds" and "base funds," but the history of the program shows that the "equity health

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<sup>25</sup> Ex. A-21 at 1 (Memorandum from Phoenix Area Director, George Blue Spruce)

<sup>26</sup> Ex. B-6 (Memorandum from Associate Director, Milburn Roach).

<sup>27</sup> See generally Tr. 563:2-11 (Clifton Wiggins)(ISDA does not provide for "placeholder").

care funds" of the 1980s have become the "base funds" of the 2000s. IHS began to use the term "equity health care funds" in the 1980s when Congress appropriated funds in addition to normal appropriations "to provide a supplemental source of funding" to even-out Indian health care funding and to try to better meet unmet health needs.<sup>28</sup> Congress appropriated these funds separately from IHS general appropriations during the period 1981 through 1984.<sup>29</sup> The term appears to have become a shorthand way to refer to these separate appropriations. When Congress stopped making these separate appropriations, it included the same amounts in IHS general appropriations for the following years.<sup>30</sup>

When the Tribe first contracted for dental services under Title I of the ISDA for FY 1985 the Tribe received \$12,000 in "equity health care funds"<sup>31</sup> from the separate congressional appropriation and received no funds from the IHS general appropriation.<sup>32</sup> IHS has continued to transfer this same amount of funding to the Tribe each year. Beginning in FY 1986 IHS included the amount in the hospital and clinics activity<sup>33</sup> and the total has increased as annual appropriations have increased.<sup>34</sup>

Thus, the funds originally appropriated by Congress as supplemental, and referred to by the parties in the 1980s as "equity health care funds," lost their separate identity when Congress began to include them in the annual IHS general appropriations. IHS then began to account for them in the same manner as any other funds transferred to the Tribe under Section (106)(a)(1) of the ISDA. While the term "equity health care funds" may have once had significance when Congress made separate appropriations in the 1980's, by the time the Tribe made its final offer for CYs 2006-2008, the term had no significance for distinguishing a separate category of funding. The historic "equity health care funds" had become the current "base funds."

c. IHS Does Not Currently Provide Dental Programs to or Retain Funds for the Tribe.

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<sup>28</sup> Tr. 59:7-60:19, 76:11-78:2 (Robert Marsland).

<sup>29</sup> Tr. 604:2-11 (Clifton Wiggins).

<sup>30</sup> Tr. 604:12-606:7 (Clifton Wiggins).

<sup>31</sup> Final Prehearing Order, para 2.a.

<sup>32</sup> See Tr. 72:14-73:10 (Robert Marsland).

<sup>33</sup> Ex. A-24; Tr. 399:10-400:3 (Thomas Tahsuda).

<sup>34</sup> Tr. 667:17-23 (Clifton Wiggins).

After the Tribe established its initial dental program in the 1980s, IHS continued to evaluate the dental services received by all tribes within the service unit. These services included both those provided directly by IHS and those provided under contract by tribal organizations. Each year IHS would reallocate the funds it controlled (i.e., the funds it retained for the programs it had not contracted to tribes) to best serve the needs of eligible recipients in the service unit.<sup>35</sup>

The record does not show the details of when and in what amounts IHS allocated the funds it retained for dental services after 1985. But the record does show the state of affairs in more recent years. In the late 1990s IHS created the Schurz Service Unit Management Team ("SUMT") to carry out its obligation to conduct consultation with Indian tribes.<sup>36</sup>

All tribes could send representatives to SUMT meetings and representatives of the Yerington Paiute Tribe did participate. As one of its functions the SUMT recommended allocation of the funds IHS retained for dental programs. The allocation allowed a non-contracting tribe to know the amount of funds it would receive if it desired to enter an ISDA contract. These allocations provided evidence of what, if any, dental funding IHS still retained for the member tribes, including the Yerington Paiute Tribe.

The most recent allocation table, prepared in May 2006, showed that IHS retained dental service funds for non-contracting tribes such as Fallon, Pyramid Lake and Walker River, but that IHS retained none for the Yerington Paiute Tribe.<sup>37</sup> This allocation corresponds to a finding that the Yerington Paiute Tribe had contracted for all of its dental services. Earlier allocations showed the same results.<sup>38</sup> These allocation tables demonstrate that even though IHS may have retained a portion of the dental funds for the Yerington Paiute Tribe in 1985, when the Tribe received what was then separately allocated as "equity health care funds," by the time of the SUMT meetings in the late 1990s, IHS had reallocated any retained funds to other programs.

The Tribe argues that IHS must protect each tribe's share when dividing IHS resources within a multi-tribal service unit and cites the following provision of the ISDA as authority:<sup>39</sup>

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<sup>35</sup> See Tr. 561:22-563:1, 566:19-569:3 (Clifton Wiggins).

<sup>36</sup> Tr. 332:10-16 (Thomas Tahsuda); Indian Self Determination and Education Assistance Act, sec. 105(i)(1), 25 U.S.C. § 450j(i)(1) (2000).

<sup>37</sup> Ex. A-28.

<sup>38</sup> Exs. A-26, A-27.

<sup>39</sup> Appellant's Response to Appellee's Initial Post-hearing Brief 5.

If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.<sup>40</sup>

The Tribe's reliance on this statute does not change the result for at least two reasons. First, the statute, by its own terms, protects "tribes not served by a self-determination contract." Since the Yerington Paiute Tribe has a contract, it is not among the tribes expressly covered by the statute. Nevertheless one could interpret the phrase to include a subgroup of tribes who may not have contracted for all of a program, as the Yerington Paiute Tribe asserts happened in 1985 when it took "equity health care funds" but not "base funds." The statute could not apply in this situation because the events giving rise to the alleged violation occurred in the 1980s and Congress did not even enact the statute until 1994.<sup>41</sup>

Second, the statute cited by the Tribe is the very same statute which required IHS to create the SUMT.<sup>42</sup> According to IHS participants, these SUMT consultations often involved give and take among the tribes. None of the tribes came away particularly happy with the shares they ultimately received, but because the Yerington Paiute Tribe did quite well they acquiesced and made no formal complaints.<sup>43</sup> The Tribe's participation in the SUMT thus belies its current argument that IHS has violated the same statute requiring the SUMT's consultations.

One may infer from the SUMT activities that the Tribe agreed to, or at least acquiesced in, the conclusion that the Yerington Paiute Tribe had no additional dental shares for which it could contract. Such an inference may not be conclusive because the work of this group is not binding on IHS and the Tribe now states that it does not agree with the methodology used. Nevertheless, the value of this evidence is persuasive enough, when combined with the recent compact, funding agreement, and payment authorization table, described above, to justify the finding that at the time the Tribe made its final offer for CYs 2006-2008, IHS held no additional funds to which the Tribe was entitled.

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<sup>40</sup> Indian Self Determination and Education Assistance Act, sec. 105(i)(1), 25 U.S.C. § 450j(i)(1) (2000) (emphasis added).

<sup>41</sup> Indian Self-Determination Contract Reform Act of 1994, P.L. 103-413, sec. 102 (13), 108 Stat. 4250, 4253).

<sup>42</sup> Tr. 332:10-16 (Thomas Tahsuda).

<sup>43</sup> Tr. 304:1-308:9 (Andrew McAuliffe).

This factual finding leads to the conclusion that IHS properly rejected the Tribe's final offer if one assumes that the law requires an agency to transfer the funds it would otherwise provide for a program based on spending at the time a tribe makes its final offer. The Yerington Paiute Tribe argues that because it did not receive "base funds" (it received only "equity health care funds") in the 1980s it should now receive those "base funds" it did not receive before. For the Tribe's argument to be accepted, the law must require an agency to transfer the funds it would have otherwise provided for a program based on spending at some time other than when the tribe makes its final offer.

The IHS succinctly responded to the Tribe's argument through the testimony of Clifton Wiggins, a statistician from the IHS headquarters staff. He explained that the amount of funds transferred to a tribe under the ISDA is based on:

the conditions and spending at the actual point for which in time in which the transfer is to occur. The reason I believe that is that circumstances are changing.

It becomes impractical to reconstruct, frequently reconstruct in detail, situations and circumstances before as, as a practical matter. And then, secondly, I think the purpose and intent of the Self-Determination Act is to entitle the Tribe to take over what exists; not what perhaps was, or what should be or might be, but what actually exists.<sup>44</sup>

This explanation finds support in the very language of the ISDA that requires an agency to transfer funds to a tribe (i.e., Section 106(a)(1)). The language specifies the time to determine the funding amount as the "period covered by the contract.":

The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, \* \* \*.<sup>45</sup>

The statute thus requires IHS to determine what it would otherwise provide for CYs 2006-2008 based on current spending. It does not require IHS to determine what it would otherwise have provided for some past period (such as 1985) based on spending then. I therefore conclude that the law requires an agency to transfer the funds it would otherwise provide on a program based on spending "at the time a tribe makes its final offer." This legal conclusion, when

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<sup>44</sup> Tr. 563:18-564:6 (Clifton Wiggins).

<sup>45</sup> 25 U.S.C. § 450j-1(a)(1) (emphasis added).

combined with the factual finding that IHS had previously transferred all the funds it would otherwise spend on the Tribe's dental program, requires the conclusion that IHS properly rejected the Tribe's final offer.

3. Prior Contracts and Funding Agreements Do Not Require a Different Result.

The Tribe also points out that many of their prior Title I contracts and funding agreements contained clauses which preserved the Tribe's claimed right to additional "base funds," described as the "Section 106(a)(1) amount." For example, the Title I agreement entered in 1997 contains the following clause:

(The Dental services program is funded with equity health money and does not impact the 106 (a) (1) amount that may be available for contract funding under P.L. 93-638.)<sup>46</sup>

Similar language appears in the annual funding agreements for calendar years 2000<sup>47</sup> and 2001.<sup>48</sup> After the Tribe and IHS entered a Title V compact on October 1, 2001 they dropped this language in the associated funding agreement.<sup>49</sup>

These clauses do not require a conclusion that the Tribe is now entitled to additional funds. First, the language of the clauses no longer binds the parties because the current compact and multi-year funding agreements supercede them.<sup>50</sup> Second, even if the older agreements were currently binding, the language cannot create an entitlement were none exists. By 1997, Congress had stopped providing the supplemental funding that the parties had referred to as "equity health funds" and included the same amount of funding in general appropriations. Thus, the term had no current legal significance, except as an historical description of how the program was originally funded. Further, the use of the term "may" in the second part of the clause creates no obligation and the amount could equal "0" if IHS had already provided all the funds that it would otherwise provide under Section 106(a)(1).

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<sup>46</sup> Ex. B-2 at 4 (para. (a)(2)(v)).

<sup>47</sup> Ex. A-12 at 4 (para. C.(2)(e)).

<sup>48</sup> Ex. A-20 at 4 (para. C.(2)(e)).

<sup>49</sup> Ex. A-3 at 1-2 (sec. 2(A)(iv)).

<sup>50</sup> Exs. A-2, A-3.

The Tribe also points to a 1999 letter from IHS which discusses concerns about liability coverage for programs originally funded with "equity health care" dollars.<sup>51</sup> The Tribe did not make the entire context of the letter clear, but the writer refers to the "equity health care" funds as a historical event and not as a current category of funds. Therefore, the letter does not support the Tribe's assertion that "equity health care" funds now constitute a separate category of funds for dental services. Further, the letter does not preserve the Tribe's claim to any funds it did not receive in the 1980s and does not undermine a conclusion that IHS has funded the Tribe's present dental program with all the funds IHS would otherwise provide for the program.

C. Equity Does Not Require Acceptance of the Final Offer.

The Tribe presents an attractive equitable argument that because it did not receive all the funds it should have gotten in 1985 it should receive them now. At that time, the Tribe received the special appropriation of "equity health care funds," but the Tribe claims it did not receive the funds under Section 106(a)(1) to which it may otherwise have been entitled. As described above, IHS has since reallocated these funds for other programs with the result that the Tribe presently receives all the funds that IHS would otherwise provide for operation of the Tribe's dental program. This constitutes the legal grounds upon which the Tribe's appeal must be decided.

Nevertheless, if the Tribe's appeal could be decided on purely equitable grounds, the equities do not demonstrate that IHS has unfairly funded the Tribe. Indeed, the Yerington Paiute Tribe's health care program is presently the second best funded program within the Schurz Service Unit.<sup>52</sup>

## V. Conclusion

The IHS rejection of the Tribe's final offer must be affirmed because the compact and funding agreement between the parties provides clear and convincing evidence that at the time the Tribe made its final offer for CYs 2006-2008, IHS had no additional funds to which the Tribe was entitled for dental services.

I cannot accept the Tribe's argument that it had only received so called "equity health care funds" and was still entitled to "base funds." The argument ignores changes IHS made in the dental program and its funding between the time the Tribe first received funding in the 1980s and the time it made its final offer in 2005. Because Congress eventually included the original "equity health care funds" in annual appropriations the funds lost their separate identity. By the time the

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<sup>51</sup> Ex. A-11.

<sup>52</sup> Tr. 677:11-15 (Clifton Wiggins). See Ex. B-13.

Tribe made its final offer, the original "equity health care funds" had become the "base funds" that IHS would otherwise provide for the Tribe's dental program.

Appeal Information

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.433. An appeal to the Secretary under 42 CFR 137.433 shall be filed at the following address:

Department of Health and Human Services  
200 Independence Ave. S.W.  
Washington, DC, 20201

You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

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Robert G. Holt  
Administrative Law Judge

See page 17 for distribution.

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