DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Delaware Tribe of Indians v. Bureau of Indian Affairs

Docket No. IBIA 02-65-A (July 26, 2002)

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Hearings Division
215 Dean A. McGee Avenue, Suite 820
Oklahoma City, Oklahoma 73102-3423

DELAWARE TRIBE OF INDIANS, Appellant	:	IBIA 02 - 65 - A
vs.	:	
BUREAU OF INDIAN AFFAIRS, Appellee	:	Appeal from decision of BIA Midwest Regional Director dated November 26, 2001

RECOMMENDED DECISION

APPEARANCES: Jessie Huff Durham, Office of the Field Solicitor, US DOI, Tulsa, Oklahoma, for appellant

Gina Carrigan-St. Clair, Attorney General, Delaware Tribe of Indians, Bartlesville, Oklahoma, for Appellee

BEFORE: Richard L. Reeh, Administrative Law Judge

INTRODUCTION

This case involves Appellant Delaware Tribe of Indian's (Appellant, Delaware Tribe or Tribe) appeal of a decision of the Midwest Regional Director of the Bureau of Indian Affairs (BIA, government or Bureau) relating to the Tribe's proposal for a FY 2002 contract to perform Bureau programs pursuant to the Indian Self-Determination and Education Assistance Act, 26 U.S.C. § 450 *et seq.*,(ISDA or Act).

Notice of the Tribe's appeal was received March 8, 2002, and the matter was assigned to OHA-OKC March 13, 2002. A telephonic pre-hearing conference took place March 25, 2002, and the parties later agreed upon a pre-hearing schedule for exchange of information and briefing. By agreement, the hearing was conducted in Tulsa, Oklahoma during the week of May 13, 2002 and parties agreed to submit post-hearing materials on or before June 28, 2002 understanding that a recommended decision would issue within the ensuing thirty (30) days. The Cherokee Nation was given notice of these proceedings, but it did not enter an appearance.

The hearing took place over the course of four days in a courtroom generously made available by the Oklahoma Court of Civil Appeals. Parties stipulated to the authenticity and admissibility of the exhibits. While they agreed upon many facts and, while some witnesses were called by both parties, each side also presented several of its own witnesses. Larry Morrin, Regional Director of the Midwest Region and deciding official for the contract proposals at issue, was present during the hearing but was not called to testify. Government witnesses gave testimony as follows.

Charles L. Head, BIA Eastern Oklahoma Regional Office (EORO) Finance Officer, provided testimony that recounted a history of services once delivered by the Tahlequah Agency (Agency) to Indian people within a 12 county area in Eastern Oklahoma. (Exhibit M) He indicated this service area was historically considered that of the Cherokee Nation of Oklahoma (Cherokee Nation or CNO). He said that, in the mid 1970's, the Agency's work was taken over by compact with the Cherokee Nation, and the CNO compacted to provide services to all Indians in the service area, including members of other tribes.

Mr. Head agreed that he was an enrolled member of the Cherokee Nation and that he had been employed 14 years by the CNO before going to work for the BIA. (Tr. 39, 40) He said that the Delaware Tribe did not achieve restoration recognition until 1996. Further, he said he understands that all persons eligible for membership in the Delaware Tribe are also eligible for membership in the Cherokee Nation. He agreed that the Delaware Tribe receives Tribal Priority Allocation (TPA) funds designated, "G08." GO8 is a formal funding location identifier for the former Tahlequah Agency. The fact that the Delaware Tribe receives G08 funding demonstrates that not all G08 funding is directed to the CNO.

Mr. Head testified that he believed the Cherokee Nation began contracting to provide services sometime during the mid 1970's. He stated that he has reviewed the Cherokee Nation Consolidated Tribal Government Compact, its FY 2001 and FY 2002 Annual Funding Agreements (AFAs) and BIA budget justifications for these funding agreements. He said these documents show the BIA made funding awards to the CNO for delivery of services that, in the past, have included Higher Education, Job Placement and Training, and Economic Development programs for both fiscal years. (Tr. 50-52) He admitted, however, that the CNO's FY 2002 AFA (Ex. L) does not require that it operate these programs because it is authorized to reallocate or redesign programs according to tribal priorities, (Tr. 75-77) but he understands that it has continued to operate all these programs. (Tr. 85) He stated he understands that persons of Delaware blood are eligible for CNO programs.

Michael R. Smith was called by both parties. He stated that he is the BIA's Director of Tribal Services and works at the Central Office in Washington, D.C. He indicated that, during the course of his career, he has worked on many self determination contracts, including several for new tribes. From June, 2001 to October, 2001, he was Acting Director of the EORO. While Acting Regional Director, he was responsible for negotiating with and providing technical assistance to the Delaware Tribe for its proposed FY 2002 contract.

Mr. Smith described the meaning and significance of New Tribes Funding (NTF), Tribal Priority Allocations (TPA) and Programs Operations Funding. He said that NTF involves moneys that are set

aside to assist newly recognized tribes and help them establish viable administrations. New tribes receive this type of assistance for three years. He stated that base level funding is normally transferred to specific tribal operating programs, beginning in the fourth year.

Mr. Smith testified that, while Acting Director, he conducted technical assistance meetings with the Delaware Tribe. (Tr. 92-98) During the first meeting, he said there was considerable discussion about whether the Tribe was eligible for a Consolidated Tribal Government Program (CTGP) contract, and he recommended the Tribe break its single proposal into separate or distinct programs. He said the Tribe agreed to do so. (Tr. 127, 128) Mr. Smith said that a second technical assistance meeting was conducted to see what might be done " . . . to get the Bureau and the Tribe closer together so that we could award a contract." (Tr. 129) During this meeting, he identified (1) overlapping Delaware-CNO service area and (2) overlapping Delaware-CNO service population as specific conditions that result in duplication of services, impeding the government's ability to lawfully contract with the Delaware Tribe because such duplications are not allowed. He observed that the problem of two separate tribes providing the same services for part of the same population had not been overcome. Mr. Smith said that tribes frequently are able to attain mutually acceptable solutions to this problem, but the Delaware Tribe and CNO were unable to do so. Mr. Smith set up a committee in an attempt to facilitate further discussions. After Mr. Smith sent the Tribe an October 11, 2001 technical assistance letter (Ex. 27) outlining government conditions about what the Tribe must accomplish before the EORO could approve the proposals, his detail as EORO Acting Director ended.

Mr. Smith provided a great deal of background about self governance, New Tribe Funding (NTF), Tribal Priority Allocations (TPA), Aid to Tribal Government (ATG), Consolidated Tribal Government Programs (CTGP) and Annual Funding Agreements (AFAs). He agreed the Tribe had received both NTF and ATG prior to his being detailed to the EORO. Although he has worked with many new tribes during a long career with the BIA, he has never encountered a situation in which tribes were unable to agree upon a service area, service population and formula for allocation of tribal shares. He agreed that the EORO was aware of the absence of agreement before it approved the CNO FY 2002 AFA and declined the Delaware proposals. (See Tr. 133)

Mr. Smith described his understanding of overlapping service area and overlapping service population. He said, broadly, that tribal programs must be set up to insure that one person could not receive the same services from more than one tribal organization. He said that he understood the Delaware Tribe's FY2002 proposal was intended for service to only its own nonduplicative service population, a subset of its own tribal membership. Although the Delaware Tribe requested that Mr. Smith remain responsible for review of its FY2002 proposal even after his EORO detail expired, he understood this responsibility was transferred to another person, the Director of the Midwest Regional Office. (Tr. 147)

Mr. Smith stated that it would be unusual for a Regional Director to unilaterally make a decision on issues relating to overlapping service population and allocation of funds if that Director believed that one Tribe would be adversely impacted. He observed that the CNO was already providing services to a service population that included its own membership but also included members of the Delaware Tribe.

He also observed that negotiations between the tribes had broken down. (Tr. 133, 134) He knew of no legal mechanism for the government to unilaterally reduce the service population of a Compacted tribe in order to make the reduced part available to another tribe. He did not believe that the BIA was authorized to reduce funding from the CNO Compact. (Tr. 155)

Notably, Mr. Smith stated that he knew of no reason why Delaware FY2002 proposals should not be funded, even if the CNO funding was not reduced because the Tribe and BIA had proposed a " . . . mechanism to provide services to their membership that they'd identified." A mechanism acceptable to Mr. Smith was identified while he continued to serve as Acting Director and was identified in the October 11, 2001 letter. (Ex. 27) He felt that the BIA and Tribe were very close to agreement at the time he left, October 12, 2001. (Tr. 156-8)

Mr. Smith was not aware of subsequent EORO Acting Director Deerinwater's October 25, 2002 letter (Ex. 28) until the time of the hearing and he did not understand why the new requirement was necessary for the BIA to determine the amount of funds that could be allocated to the Tribe's FY2002 proposals, since the funds would have come from the Tribe's TPA, the TPA had already been allocated to the Tribe, and TPA can, by definition, be spent in any way the tribe chooses. (Tr. 170) He observed that requiring the Tribe to provide the BIA with a certified list of Delaware Tribal members who were not also enrolled with any other federally recognized tribe went beyond what had been required of tribes on the West coast in similar situations while he served as Deputy Regional Director for the Pacific Regional Office. (Tr. 101, 168)

Robert K. Impson testified that he is Deputy Regional Director of the Southern Plains Regional Office, having been with the BIA for 24 years. He stated that he was Acting Regional Director for the EORO from October, 1999 to June, 2000. (That is, he was EORO Acting Director about a year before Mr. Smith became EORO Acting Director.) He said that, while he was Acting Regional Director, a service provider selection process was undertaken by the Delaware Tribe. The Tribe attempted to verify to the satisfaction of the BIA that specific individuals in a narrowed five county service area elected to use it as a service provider for specific programs.

After receipt and review of the Delaware Tribe's FY 2000 (4th year) contract, the EORO missed the 90 day declination deadline established by 25 U.S.C. § 450f(a)(2). A Regional Office employee had failed to meet the deadline. (Tr. 187) Director Impson negotiated a monetary settlement with the Tribe but also issued declination letters, evidently in an effort to either make known or establish the fact that the contracts had been approved by operation of law rather than by affirmative action of a line officer.

While he was EORO Acting Regional Director, Mr. Impson understood that the Tribe and Bureau had earlier agreed on a selection process to address duplication of federal service issues. After issuing the declination letter noted above, he learned that the Tribe was very unhappy and that it believed the selection and duplication of federal spending issues had already been resolved. With the Delaware Tribe's cooperation, he sent Karen Ketcher to tribal headquarters in order that the BIA could verify that Delaware members confirmed they had elected the Delaware Tribe for delivery of specific services. At

the end of this process, in February, 2000, Mr. Impson was satisfied the 553 Delaware members had made such an election. He said he was prepared to go to the CNO for negotiations relating to Delaware tribal shares. (See Tr. 193, *ff*) He said that the CNO refused to give up any of its Compact funding for a Delaware share. He also said that the Cherokee's response had no impact on his decision and that he, " . . . was prepared to go after a tribal share for the Delaware Tribe." Like that of Michael Smith, however, Mr. Impson's tour ran out. He believed that – while EORO Acting Director – he had been very close to resolving the duplicate service area / duplicate service population / duplicate federal spending issues. Before a resolution could be accomplished, his detail ended.

Karen J. Ketcher was listed as a witness by both parties. She testified that, having been with the BIA for 22 years, she is Tribal Operations Officer for the EORO. She stated that she is also a member of the Cherokee Nation. (Tr. 228) She confirmed that she traveled to the Delaware Tribal Headquarters to observe ongoing tribal efforts to identify and verify a specific service population that elected to have the Delaware Tribe deliver specific services. "I was just verifying that those people had signed up." (Tr 229) She said she spent about a week in this process. She said she had several specific concerns about the process. Her principal concerns were that – during the process – she could not know (1) whether individuals interviewed were members of the Cherokee Nation or (2) whether they lived in the 14 county service area of the Cherokee Nation. She felt answers to these questions were necessary to resolve the duplicate federal spending issue. (Tr. 226)

Curtis D. Wilson testified that he has worked for the BIA for 27 years. He was a contracting officer at the Eastern Oklahoma Regional Office for many years and was the Delaware Tribe's BIA contact person for self determination matters. Mr. Wilson stated that he had been a Contracting Officer at the EORO since 1976. He described the 638 contracting process and identified "duplication of service population" and "overlap of service area" as known obstacles to contracting with the Delaware Tribe. He said that he had encountered similar obstacles in several instances and described the "Eddy Brown Memo" as a statement of ongoing Bureau Policy that prohibits duplication of federal spending. (See Govt Ex I)

Mr. Wilson also said that, from 1996 to 2001, the EORO was headed by numerous Acting Directors, namely: James Fields, Stanley Speaks, Bob Impson, Frank Keel, Mike Smith, Dan Deerinwater and Dennis Wyckliffe. (Tr. 262) This is significant because approval of 638 contracts is the responsibility of Regional Directors. The testimony of various witnesses establishes a time line that looks something like the following:

Fiscal Year	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Acting Director	Fields	Fields	Fields	Fields	Fields Impson	Impson	Impson Smith Deerinwater Wyckliffe Keel

Significant Event		Delaware Tribe Recognized			Population Service Selection Process Began	FY2001 CTGP Proposal submitted "Deemed Approved	FY2002 Proposal(s) submitted Deerinwater Letter Morrin named Deciding Official
Delaware Funding				NTF - $162K ATG - $82 K	NTF - $163K ATG - $82K	NTF-$163K ATG-$82K	$241,930 (negotiated allocation)
	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**

The testimony did not show precisely when Mr. Stanley Speaks served as EORO Acting Director. His name is mentioned as one who served in that capacity some time between 1995 and 2001.

Mr. Wilson said the Delaware Tribe's FY 1998 contract involved Aid To Tribal Government (ATG) in the amount of $82,000 and NTF in the amount of $162,000. In FY 1999, the Tribe was awarded $82,000 ATG and $163,000 NTF (second year). Combining NTF and ATG for these FY's results in total tribal funding of $244,000 per year. In FY 2000 the Tribe was awarded $82,000 ATG. Mr. Wilson described the Delaware Tribe's FY 2001contract submissions as proposals for five separate programs. He said the Tribe's Tribal Priority Allocation (TPA) proposal in the amount of $241,930 was approved by operation of law because the BIA failed to timely issue declination letters relating to these proposals. Mr. Wilson said he was disciplined as a result of what happened in these transactions. He said that, during the year 2001, he recommended that the Tribe prepare a consolidated proposal. Then he worked with the Tribe to prepare one that would be acceptable, and the Tribe's FY 2002 submission (Exhibit 9) reflects that work. He said he believes that everything that could have been done by the Tribe was done, that the Tribe's FY 2002 proposal addressed all issues and that it should have been approved. Mr. Wilson agreed that the Delaware Tribe's FY 2002 proposal was to provide services for specific Delaware members, a non-duplicative service population. (See Tr. 297-300)

Pat Ragsdale testified that he is the CNO's director of Government Resources and is actively involved with tribal self governance. He stated that he was employed with the BIA from 1969 to 1993, having been Deputy Assistant Secretary for Indian Affairs and Acting Assistant Secretary for Indian Affairs. He stated that the CNO operates higher education, adult education, job placement and training and economic development programs by virtue of a self governance compact. He broadly described the CNO service area as a 14 county area in northeast Oklahoma. He said that is it responsible for providing service to any eligible Indian person. He went on to say that the Cherokee Nation is not willing to give up its federal funding in order that the Delaware Tribe can serve its own population. He agreed that the CNO is in litigation about whether the Delaware Tribe should be recognized by the Secretary.

Stuart Sterling Mani testified that he has been employed by the BIA for 12 years, that he has been a Senior Awarding Official since 2001 and that, as a holder of a Level IV Warrant, he has the highest level of authority to bind the government for contractual services. He stated that ISDA Contracting Officers (CO's) are officers who have special knowledge relating to the 638 contracting process but who do not have authority to approve an ISDA contract. He said that only a line officer, such as a Regional Director, has authority to approve 638 contracts. Mr. Mani further stated that a CO's authority is limited to the award of contracts that have already been approved.

The government offered Mr. Mani as an expert witness. Expert witnesses are allowed to testify about their knowledge and opinions if they are likely to aid triers of fact in the search for truth. Expert testimony is allowed to assist the finder of fact, not to substitute the expert's opinion for that of the finder of fact. The Delaware Tribe objected to Mr. Mani's testimony being characterized as "expert." While I was troubled that an acquisition and appropriations law witness offered as an "expert" in these proceedings has not been awarded a bachelor's degree (Tr. 359), I noted that Mr. Mani did possess sufficient skill, knowledge and experience in these areas to offer views that would be helpful. As the finder of fact, I also had an obligation to determine whether or not this witness was credible and, if credible, how much, if any, weight his testimony should receive. I found Mr. Mani to be a credible witness whose testimony provided broad brush Federal acquisition and appropriations background.

Consistent with the statute and regulation, Mr. Mani stated that there are only five grounds for the government to decline an ISDA contract proposal. Generally, grounds for declination are (1) the proposed contract fails to afford adequate protections for trust resources; (2) the proposed contract funding level exceeds that which is available; (3) the project to be performed cannot be carried out by the proposed contract; (4) the proposed services will not be satisfactory; and (5) the services proposed are outside the scope of services that can be lawfully contracted. (Tr 373, 4)

Mr. Mani described the Consolidated Tribal Government Program (CTGP) as a budgetary concept that enables a tribe to make a single line item contract proposal for delivery of two or more services, pursuant to 25 U.S.C. §450f(3). He stated that tribes are not eligible to participate in the CTGP until they have successfully performed two or more "mature" contracts without material audit exception. Significantly, Mr. Mani stated that, until the hearing, he did not know that EORO CO Curtis Wilson had encouraged the Delaware Tribe to propose a CTGP-type contract and assisted the Tribe with its FY2002 consolidated proposal. (Tr. 382) He did not believe that such a recommendation was legally well-grounded. (Tr. 381)

Mr. Mani said he believed that the Delaware Tribe had done an extremely good job of addressing the issue of duplication of services, but their work did not adequately address the issue of duplication of funding. ". . . (I)t is against federal appropriation law for them to use funding that they may have received for some other purpose, and then put it to the same purpose as those funds which are already provided for in the Cherokee Compact." (Tr. 391, 392)

Mr. Mani also discussed 30 U.S.C. § 1301 and what has become known as the Necessary Expense Doctrine. He said this law requires that an expense bear a logical relationship to the appropriation, that

it not be prohibited by law and not be ". . . otherwise provided for." (Tr 387) Mr. Mani said that the expense attendant to the Delaware FY 2002 proposal was unlawful because funds for the proposed services had already been allocated to the Cherokee Nation. He explained that only so much money was appropriated for Indian people within a designated service area. He concluded that allocating additional FY2002 funds to the Delaware Tribe would result in duplication of funding that would be in violation of the Necessary Expense Doctrine. Approving the proposal, he said, would have resulted in duplication in federal service spending because the Cherokee Nation was already receiving funds for the same services in the same service area to the same population. The ultimate reason for declination, he said, was that all funding for these services had already been appropriated to the CNO.

James Fields testified that he has been employed by the BIA for 36 years, that he is currently Superintendent of the Osage Agency and that he served as Acting Area Director of the Muskogee Area (a position that would now be characterized as Acting Regional Director of the EORO) from 1995 to 1999. He stated that, during his tenure as acting Regional Director, he initiated a dialogue between the CNO and the Delaware Tribe, he negotiated and consulted with the Delaware Tribe to develop and establish programs and he appointed Curtis Wilson as EORO contract (and contact) person for all Delaware questions, principally because Mr. Wilson was not a Cherokee. (Tr. 433)

Mr. Fields stated that, while he was EORO Acting Director, he attempted to assist the Tribe overcome dual enrollment issues (duplication of service population), he recommended that the Tribe take steps to address issues relating to duplication of services and he suggested some possible courses of action intended to avoid proscriptions against duplication of federal service spending. Before leaving in October, 1999, Mr. Fields believed the Delaware Tribe and the CNO had agreed upon a viable selection process. He noted that the CNO was still in litigation about whether the Delaware Tribe should have been recognized, and he observed that the CNO was not receptive to the Delaware Tribe's receiving federal funds for providing services.

The Delaware Tribe also presented several witnesses.

Gary L. Frye testified that, as Business Manager for the Delaware Tribe, he developed the FY2002 proposal, he was involved with various negotiations with EORO Acting Directors, and he worked very hard to always provide more than was requested by the government. Regarding the FY2002 proposal, he said the proposal document was formatted in the way the BIA (Curtis Wilson) asked. He said that, after BIA suggestions during technical assistance meetings, the Tribe amended its Enrollment Act to make sure there would be no duplication of services for any federal programs. The amended Act requires Delawares to sign affidavits electing the Delaware Tribe as service provider and agreeing, if they are dually enrolled, to volunteer relinquishment of tribal memberships in other tribes. (Tr. 500, 501) Mr. Fry said the Tribe took Curtis Wilson's suggestions and laid the proposal out accordingly. He said the tribe went into great detail about each requirement. He said that line items were not broken out into Aid to Government (ATG), Higher Education, Adult Education, Job Placement / Vocational Rehabilitation and Economic Enterprises / Economic Development, only because that was the way Mr. Wilson told them to submit the proposal. He also indicated that there were no substantive changes of any proposed program from FY 2000 to FY 2002.

Dan Cooper Arnold testified briefly about his membership status in both the Delaware Tribe and the CNO. In January of 1999, at a CNO Satellite Office in Vinita, Oklahoma, he applied for a Certificate of Degree of Indian Blood (CDIB) Card and requested that his status be shown as a Delaware member. He stated that the office refused to issue him a Delaware CDIB, but it did issue a Cherokee Tribal Enrollment Card. (Tr. 27-35)

Dee W. Ketchum testified that he has been Chief of the Delaware Tribe for about three and a half years. Prior to that, he was a long-time council member. Chief Ketchum stated that, on behalf of the Tribe, he participated in several negotiations and technical assistance meetings with the BIA and Solicitor's Office to identify specific Delaware members and avoid problems relating to duplication of services and duplication of service population. He said he believed these issues had been set to rest after EORO representative Karen Ketcher verified enrollment information and personally observed or overheard conversations with Delaware members who elected to have the Delaware Tribe deliver certain services.

Chief Ketchum said that in August, 2001 Acting Regional Director Michael Smith told the Chief he was prepared to approve the Tribe's contract proposals if they were broken out into separate line items. In later meetings, Mr. Smith continued to advise the Tribe that he anticipated approving the FY2002 proposal. (See Tr. 534 and Ex. 11) The Tribe did re-format its proposal and identify separate line items, but Bureau approval was not forthcoming. The government continued to express concerns about duplicate service population and duplication of service spending. An October 11, 2001 EORO letter from Director Smith to the Tribe requested the Tribe take steps to amend its proposal and respond to additional government requests. (Ex. 27) Chief Ketchum said Mr. Smith continued to re-assure the Tribe that he anticipated approving the proposals. Chief Ketchum stated that the Tribe kept trying to comply with all government requests.

Chief Ketchum said that Dan Deerinwater became EORO Acting Director shortly after the October 11 letter, and the new Director made additional requirements relating to duplication. The new Director's October 24, 2001 letter (Ex. 28) required the Tribe provide the BIA with a list of Delawares that are not members of any other federally recognized Tribe. Chief Ketchum said the Tribe reached its breaking point on receipt of this letter. He said it flew in the face of earlier agreements. He further said he was particularly concerned about this new demand because the BIA had previously agreed that the Tribe would not have to provide such a list. In consequence, he said, the Tribe, noting that it had gone through six acting Regional Directors and that it had jumped through every one of the government's many, many hoops, declined to do so. The Chief's feeling was that, by the time the Tribe satisfied requirements made by one Director, a new Director would come in and impose new requirements. He admitted, however, that the Solicitor's Office had consistently expressed concern about the duplicate federal spending issue.

FINDINGS

Based upon stipulations of the parties, the testimony summarized above, and the exhibits received, I find and determine that

1. For FY 2002, the Delaware Tribe proposed a single self-determination contract to perform five Bureau programs, namely: the Higher Education (Scholarships) program, the Adult Education program, the Job Placement and Training program, the Economic Development (Credit & Finance) program and the Aid to Tribal Government (ATG) program.
2. Midwest Regional Director Larry Morrin was tasked with the responsibility for reviewing and either approving or declining the Delaware proposal. Mr. Morrin timely declined the Delaware Tribe's FY 2002 proposal by decision dated November 26, 2001 but faxed to the Tribe November 28, 2001.
3. After the initial declination, the ATG element of the Tribe's proposal was approved.
4. Mr. Morrin used § 900.22 declination criteria to review the Delaware FY 2002 contract proposal, after having determined 25 C.F.R. §§900.32 and 900.33 inapplicable.
5. For Fiscal Year 2002, the Delaware Tribe submitted a contract proposal to perform essentially the same BIA programs that it proposed to administer in its FY 2000 and FY 2001 proposals.
6. The Tribe's FY 2001 contract proposal was deemed approved by operation of law because the BIA failed to either approve or decline the proposal within 90 days, as required by 25 U.S.C. §450f(a)(2).
7. The Tribe's FY 2001 contract was not approved by affirmative action of a BIA line officer.
8. EORO Contracting Officer, Curtis Wilson, awarded the FY2001 contract.
9. Some time after discovering this action, EORO Acting Director Wyckliffe wrote to the Tribe:

> . . . The Tribe submitted a proposed CTGP contract on or about June 1, 2000. As you know, the contract was not declined within 90 days. Accordingly, the contract is deemed approved by operation of law. 25 U.S.C. §450f(a)(2) and 25 C.F.R. §900.18. On November 29, 2000, the Contracting Officer sent an award letter on your contract and shortly thereafter the full amount of funds requested under the contract were disbursed to the Tribe (with the exception of contract support funds which you have been assured will be disbursed to the Tribe when available). Under these circumstances, it is not necessary for your contract to be signed to be effective. If it is not already doing so, the Tribe should be providing services under this contract.
>
> The Regional Contracting Officer has been directed not to execute the contract in its present form because it contains terms which we believe are contrary to law and which may duplicate and/or violate the terms of the Secretary's Compact with the Cherokee Nation. The provisions which refer to the Delaware "service area" and the provisions which purport to "retrocede" certain services and programs presently compacted by the

Cherokee Nation are of particular concern. If you have any questions or concerns, or if the Tribe is amenable to further negotiations regarding this contract, please advise.

10. In 1996, EORO Acting Director James Fields designated Contracting Officer Curtis Wilson to be the Delaware Tribe's point of contact for contracting and self governance issues. The Tribe relied on Mr. Wilson's recommendations and incorporated them into its FY2002 consolidated contract proposal.
11. From 1995 to 2001, the EORO was managed by six Acting Regional Directors.
12. The Tribe's FY 2002 proposal was timely submitted and it was substantially the same as its FY 2001 proposal.
13. The Delaware Tribe requested that review of its FY 2002 proposal remain with Michael Smith the BIA's Director of Tribal Services who had been EORO Acting Director, who had conducted technical assistance meetings and who provided the Tribe with technical assistance letters.
14. EORO Acting Director Smith wrote an October 11, 2001 technical assistance letter outlining BIA concerns regarding the Delaware Tribe's FY 2002 proposal. Among other things, this letter provides, "We have determined that contracts might be awarded to the Delaware Tribe for the requested programs, *provided* 1) that appropriate amendments are made to the contracts and 2) that the award of contracts for all programs except ATG would be contingent upon the approval of budget re-programming requests made by the Bureau to move funds from the ATG line item for the Tribe to other line items for the Tribe." The letter then sets forth specific requirements for approval.
15. Michael Smith's detail as Acting Director of the EORO ended October 12, 2001.
16. Subsequent EORO Acting Regional Director Dan Deerinwater wrote an October 24, 2001 followup technical assistance letter that requested the Tribe also provide a "certified list of the Delaware tribal members who are not also enrolled in any other federally recognized tribe."
17. The Midwest Regional Director made a determination that he could not authorize a consolidated contract for the Delaware Tribe. He declined the Tribe's proposed contract as beyond the scope of programs, functions, services, or activities covered under Section 102(a)(1) of the Act because the proposal included activities that could not lawfully be carried out by the contractor.
18. Before FY 2002, the Delaware Tribe had not operated contracts for the Higher Education program, the Adult Education program, the Job Placement & Training program or the Economic Development program for three years. Rather, the Tribe had operated those programs (pursuant to a contract that was deemed approved by operation of law) for only one year.
19. In 1996, the Bureau of Indian Affairs recognized the Delaware Tribe to be eligible for funding and services from the BIA by virtue of its status as an Indian tribe.
20. All persons eligible for membership in the Delaware Tribe of Indians are also eligible for membership in the Cherokee Nation of Oklahoma. Neither the Constitution of the Delaware Tribe nor the Constitution of the Cherokee Nation prohibits dual enrollment. As a result, some members are enrolled in both tribes.
21. The Tahlequah Agency was established to provide services to individual Indians residing in the former Cherokee Nation reservation area. The jurisdictional service area of the Tahlequah

Agency included, but was not limited to, Washington, Nowata, Craig, Rogers and northern Tulsa counties, the proposed Delaware Tribe service area for Delaware members.

22. In 1990, the United States, entered into a Compact of Self-Governance with the Cherokee Nation under the Indian Self-Determination and Education Assistance Act, P.L. 93-638 et seq., as amended, 25 U.S.C. §450 *et seq*.

23. Through its Compact of Self-Governance, the Cherokee Nation contracted all direct-service programs that had been administered by the Tahlequah Agency, received all the direct-service program funding for the Tahlequah Agency and assumed administration of those programs within the jurisdictional service area of the Tahlequah Agency. When the Cherokee Nation compacted under the ISDA, the Tahlequah Agency closed.

24. The ISDA prohibits the Secretary from revising or amending the Cherokee Nation's Compact without the consent of the Cherokee Nation. Moreover, funds provided under its Compact may not be reduced except pursuant to law. See 25 U.S.C. §450m-1(b) and 25 U.S.C. §450j-1(b), incorporated into the Cherokee Compact through its Annual Funding Agreements as authorized by 25 U.S.C. §458cc(*l*).

25. In its FY 2002 contract proposal, for the Adult Education, Job Placement & Training and Economic Development programs, the Delaware Tribe proposed to serve individual Delaware tribal members residing in Washington, Nowata, Craig, Rogers and northern Tulsa counties. For the Higher Education Program, the Tribe proposed to serve any eligible Delaware tribal member regardless of residence. The Tribe's proposed service population is limited to 553 individuals who selected the Delaware Tribe as service provider during a 1999 selection process.

26. Delaware tribal members residing in the service area of the Cherokee Nation are eligible for BIA programs and services through the Cherokee Nation; except, for the Higher Education program only, the Delaware tribal members would also have to be (or become) a member of the CNO.

27. The service population identified by the Delaware Tribe in its FY 2002 proposal is part of the service population of the Cherokee Nation.

DISCUSSION

25 U.S.C. § 450f(a)(2) directs the Secretary to approve and award a proposed ISDA contract unless there is a very good reason not to do so. The reasons are enumerated as declination criteria, specifically: (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (B) adequate protection of trust resources is not assured; (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract; (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450J-1(a) of this title; or (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot be lawfully carried out by the contractor. The declination criteria are repeated at 25 C.F.R. § 900.22.

If the government declines to approve and award a proposed ISDA contract, and the tribe appeals, the government is charged with the burden of clearly establishing the validity of its reasons for declining to do so. 25 U.S.C. §450f(e)(1). This is not the same standard of proof as "clear and convincing." Skokomish Indian Tribe v. Portland Area Director, 31 IBIA 156 (1997).

Proposal Review - Use of Declination Criteria

In this case, the parties agree that the Tribe's FY2002 proposal was timely submitted and timely declined. They disagree about the fundamental nature of this proposal. The Tribe maintains that it was for a successor annual funding agreement or renewal contract. The government urges that, because the Tribe's FY2001 proposal was deemed approved by operation of law rather than by affirmative action of a BIA line officer, the FY2002 proposal was something other than a renewal contract.

The fundamental nature of the proposal is important because of the operation of two regulations. 25 C.F.R. §900.32 says that the Secretary cannot decline an Indian tribe's proposed successor annual funding agreement if the proposal is substantially the same as the prior annual funding agreement. Further, 25 C.F.R. § 900.33 provides that the BIA will not review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, functions, services or activities has been proposed by the Indian tribe. In the instant case, the Tribe's FY 2002 proposal was substantially the same as its FY 2001 proposal.

The government's position is that 25 C.F.R. §§900.32 and 900.33 are not applicable to the Tribe's FY 2002 proposal because the Tribe's FY2001 proposal was deemed approved by operation of law as the result of a mistake for which a BIA employee was disciplined. The government maintains that the Regional Director properly reviewed the Tribe's FY 2002 proposal using declination criteria. The Tribe maintains that BIA was prohibited from using declination criteria because the proposal was a successor annual funding agreement or a renewal contract.

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

Partial Approval

The ISDA requires that any severable portion of a contract that does not support a declination finding be approved. 25 U.S.C. §450f(a)(4). Subsequent to the BIA's initial FY2002 declination, the Delaware Tribe overcame the Regional Director's objections to the portion of the proposal in which the Tribe sought to contract the Aid to Tribal Government program. A contract for that program has since been approved and awarded.

Declination

In declining to approve the remaining parts of the Delaware contract proposal, the Midwest Regional Director stated:

> As you know, the Cherokee Nation of Oklahoma has a Compact of Self-Governance with the Secretary of the Interior to provide certain Bureau programs including, but not limited to, Higher Education Scholarships, Adult Education, Job Placement and Training, and Economic Development (or substantially similar redesigned programs), to all Indians living in the former Tahlequah Agency's service area. The Resolution of the Delaware Tribal Council attached to the Delaware Tribe's proposed CTGP contract identifies the Tribe's proposed service population for the Adult Education, Job Placement and Training, and Economic Development programs as select Delaware tribal members residing in the five Oklahoma counties of Washington, Nowata, Craig, Rogers and the northern part of Tulsa. The area in which the Delaware Tribe proposes to provide services overlaps the Cherokee Nation's approved service area. In fact, all the funding for these programs for the area that the Delaware Tribe seeks to serve is now in the Cherokee Nation Compact. Additionally, the Cherokee Nation and the Delaware Tribe have an overlapping membership. Although neither Tribe has a superior right to serve dually-enrolled members, the Cherokee Nation entered into its Compact of Self-Governance prior to the Delaware Tribe's inclusion on the list of federally recognized tribes and there is no authority for the Secretary to now alter that contract. Any contract with the Delaware Tribe to serve individual Indians residing within the Cherokee Nation's service area, without a corresponding change in the Cherokee Nation's Compact forbidding the Cherokee Nation from serving the same people, would result in a duplication of service funding and could result in a duplication of services.
>
> The Delaware Tribe has attempted to address this issue by proposing to serve only those Delaware Tribal members residing in the said five-county area who have selected the Delaware Tribe to administer Bureau of Indian Affairs programs. The Tribe's proposed contract incorporates a document entitled "Procedures for Verifying No Duplication of Federal Services to Tribal Members," wherein the Tribe states that the Delaware tribal members to be served will be required to sign an

agreement when they receive services from the Delaware Tribe stating that the Tribal member will not accept duplicative services from any other Tribe. However, similar procedures are not included in the Cherokee Nation's Compact and the Bureau is not in a legal position to require the Cherokee Nation to agree to such provisions. Thus, even under this plan, the potential is still present for a duplication of services.

The Bureau is cognizant of its obligation to enter into a self-determination contract upon the request of any federally-recognized tribe. However, in this case the Tribe is proposing to serve a population already served by another tribe. As discussed above, the Cherokee Nation has an existing Compact with the Secretary to provide programs to all Indians within its service area. That service area includes the five-counties specified in the Delaware's proposed contract. The Bureau could award the requested contract to the Delaware Tribe, ignoring the potential for a duplication of federal service funding. However, we decline to set such a precedence. (sic) The Delaware Tribe's right to contract must be balanced with the interests of the individual Indians to whom the Bureau also owes a responsibility.

For the foregoing reasons, even if considered as separate contracts, the Delaware Tribe would not be awarded contracts for the Bureau's Job Placement and Training, Higher Education Scholarships, Adult Education and "Credit and Finance" (a/k/a) Economic Development programs. The Bureau cannot be adequately assured that contracts for these programs would not result in a duplication of federal service funding and a duplication of federal services.

Balancing Interests

Regarding the next to last paragraph, above, I do not see how this matter involves balancing the Delaware Tribe's right to contract against the interests of individual Indians. Rather, it seems to involve evaluating the Delaware Tribe's statutory rights to self determination in light of already established compact rights of the Cherokee Nation, the Necessary Expense Doctrine and the ISDA. When the Midwest Regional Officer evaluated the respective factors, his analysis came down on the side of the pre-existing CNO compact.

Consolidated Proposal

The government says this proposal cannot be approved because it consolidates several Bureau programs (Higher Education, Adult Education, Job Placement and Training and Economic Development) under a single CTGP contract with a single, lump sum appropriation. As noted above, the ATG proposal was approved after the initial declination. The BIA relies on 25 U.S.C. §450f(a)(3) to for its position that

only proposals from tribal organizations that have operated two or more mature (See 25 U.S.C. 450b(h)) self-determination contracts may be consolidated into a single contract.

The Delaware Tribe points out that this statute does not prohibit tribal organizations from combining line items, as CO Curtis Wilson suggested, in their *proposals*. Although the evidence showed that the Tribe was eligible for mature contract status for its Aid to Tribal Government contract, it was not eligible for mature contract status for the other four programs at issue. In this case, the Delaware Tribe had not continuously operated specific programs for three or more years without significant and material audit exceptions. Thus, the government was not authorized to approve a Delaware CTGP, consolidating contracts, for FY 2002.

Testimony shows that, after technical assistance meetings, the Tribe agreed to separate its proposals into individual line items. That agreement was withdrawn in the Tribe's letter dated October 30, 2001, so it did not submit individual line item proposals for each program. The BIA was required, however, to assist the Tribe overcome objections in this area. The ". . . even if considered as separate contracts" language in the last paragraph, above seems to admit that the government was capable of considering the proposals individually even though they were not submitted that way. It did, in fact, consider the ATG element separately.

Especially where the proposal's formatting is consistent with suggestions given by the Contracting Officer, that formatting should not disqualify its individual elements from consideration, even though those elements could not be approved and awarded as a single line item.

Duplication of Federal Service Spending

The Delaware Tribe presented evidence that, in order to overcome issues related to duplication of federal government spending, it had worked long and hard to identify a unique subset of individuals who were members of the Tribe and who elected to have the Tribe deliver services to them in a five county area. It worked closely with the government's designated contract / contact officer, Curtis Wilson. It went above and beyond all government suggestions or requirements made during negotiation and technical assistance meetings with a long series of EORO Acting Directors. It designed and carried out a member election process. It amended its enrollment law. It experienced what Chief Ketchum described as the indignity of having been required to allow a BIA employee oversee the process of having members actually re-confirm that they had actually elected to have the Delaware Tribe deliver the services in question. It found that, after one set of BIA officers said that they found the Tribe had adequately addressed the outstanding issues, a new Acting Director would be detailed to the EORO and he would make newer and higher requirements.

The Tribe points out the fact that Curtis Wilson said he was satisfied that the Tribe's FY 2001 proposal was complete with everything that had been required. (Tr. 276) It also relied on Acting Director Jim Field's oral statements that he anticipated approving the Tribe's proposals. The Tribe's submittals,

however, do not mention the Solicitor's Office's consistent position that work done to eliminate the overlapping service population issue had not adequately overcome the duplication problem.

Midwest Regional Director Larry Morrin was ultimately charged with the responsibility for either approving or declining the Tribe's FY2002 proposal. Consistent with the testimony of Mr. Mani, Director Morrin would have either known or been told that decisions regarding a tribe's service area/service population and regarding fund allocation under the ISDA are matters within the discretion of the Bureau. Douglas Indian Association v. Juneau Area Director, 30 IBIA 48 (1996) and Kaw Nation v. Anadarko Area Director, 24 IBIA 21 (1993). Consistent with the position of the Solicitor's Office, Mr. Morrin determined that the duplication of service/spending issue had not been fully resolved and that approving the Delaware Tribe's remaining proposals at issue would result in unlawful federal spending. Thus, he believed that he was not authorized to approve the proposals. He cited 25 U.S.C. §450f(a)(2)(C) and 25 C.F.R. §900.22(c) (proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract) and 25 U.S.C. §450f(a)(2)(E) and 25 C.F.R. §900.22(e) (the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under Section 102(a)(1) of the Act because the proposal includes activities that cannot lawfully be carried out by the contractor).

Duplication of federal service funding is prohibited by law and BIA policy. See Thlopthlocco Tribal Town v. Babbitt, Case No. 97-306-P (E. D. Okla. 2002), citing 25 C.F.R. §900.8(d)(1) and (h)(1) as well as 25 U.S.C. §450j-1(a)(3)(A), 450j-1(b) and 450k(a)(1) (Exhibit J). See also, United Indians of All Tribes Foundation v. Acting Deputy Assistant Secretary–Indian Affairs (Operations), IBIA 83-32-A (Reconsideration), 11 IBIA 276 (August 15, 1983); Native Americans for Community Action v. Deputy Assistant Secretary–Indian Affairs (Operations), IBIA83-11-A, 11 IBIA 214 (July 1, 1983); and Navajo Tribe v. Commissioner of Indian Affairs, IBIA 81-37-A, 10 IBIA 78 (August 30, 1982) and 25 U.S.C. §1215 (applicable to specified Alaska tribes). And see, U.S. General Accounting Office, Principles of Federal Appropriations Law, Vol. I, Ch. 4, Part B(1)(c) (2d ed. 1991) (describing the Necessary Expense Doctrine, and more particularly the third test thereof, Expense Otherwise Provided for); 31 U.S.C. §§1301(a); and relevant Bureau of Indian Affairs policy is reflected in the November 30, 1989, Memorandum from Assistant Secretary–Indian Affairs to Muskogee Area Director (a/k/a the Eddie Brown memo) (Exhibit I).

The Tribe maintains that the ISDA contracts in issue " . . . are contracts for sovereign Indian nations to provide basic welfare services to their needy individuals. In the Tribe's case, we are talking about contracts to provide reading lessons to the illiterate and pittance scholarships to allow impoverished Indians to go to college." This position is weakened by the fact that delivery of these basic welfare services is already being accomplished by virtue of a compact with the CNO. Individuals eligible for membership in the Delaware Tribe are also eligible for membership in the CNO. Individual Delaware members are currently eligible for and receiving these services. The Delaware Tribe's complaint, therefore, is only that it has not yet been selected as an entity authorized to deliver them.

The Tribe also says that Congress has clearly defined a policy to foster and support the self-determination of sovereign Indian tribes and asserts, "The ISDEAA and the regulations explicitly calls

(sic) for a self-determination contract to be awarded whether or not it is consistent with the declination criteria - including the potential for activities that can not be otherwise lawfully carried out." Generally, I cannot agree with an argument that suggests proposals inconsistent with declination criteria be awarded.

The Tribe further suggests that, where implementation of a contract such as that in Delaware Tribe's FY 2002 proposal might present a serious public policy consideration, the contract must be issued and the government can then follow recission procedures found at 25 U.S.C. § 450m. In this case the serious public policy question is whether there is an ISDA exception to the prohibition of government officers authorizing expenditure of public funds in violation of the Necessary Expense Doctrine, 30 U.S.C. § 1301. The Tribe has not cited any authority favoring that position.

The government established that the services proposed for delivery by the Delaware Tribe are already being delivered to the target population by the Cherokee Nation. Since amendment of the Delaware Tribe's Enrollment Act, so long as the 553 Delaware members who the Tribe proposes to serve have agreed in writing not to accept these services from the CNO, and so long as these members are known to both the BIA and to the CNO, problems attendant to overlap and duplication of service might be minimized. They have not, however, been completely eliminated. The government maintained that the Tribe's proposals can be approved only when issues of duplication of federal service funding and duplication of federal services have been adequately addressed. It also said that additional work is necessary to identify a truly non-duplicative service population for the Delaware Tribe and to determine the share of program funds for the Delaware contracts. The evidence supports these positions.

§ 450f(b)(2) - Assistance to Tribe

Evidence showed that (1) the Tribe was recognized as eligible for federal funding in 1996, (2) the Tribe received New Tribe Funding for three years, beginning in FY 1997; (3) problems attendant to CNO-Delaware overlapping service area and population were known even before the Tribe's recognition and (4) the Tribe has diligently worked in good faith to overcome each of these barriers. Clearly, the government is charged with responsibility for *providing assistance* to overcome such problems. (25 U.S.C. § 450f(b)(2))

The government submitted evidence showing that additional work needs to be done to identify a non-duplicative service population for the Delaware Tribe and avoid proscriptions against duplicate federal spending. Its evidence also showed that the Tribe had done excellent work to identify a non-duplicative service population, and submitted results of the Tribe's efforts exceeded that which was required of many other new tribes. Mr. Mani was impressed by the Tribe's work relating to duplication of service population, and Michael Smith said that the Tribe's work in this area exceeded that which had been required of new tribes in the Pacific Region.

Some evidence also suggests that the government did not provide adequate assistance to help the Tribe overcome the duplicate federal spending issue which had been identified for at least five years. Rather, this evidence shows that the BIA's actions appear to have been incremental steps to consistently

"raise the bar," initially providing advice to the effect of, "If you meet conditions A and B, that will be sufficient." Then, after the Tribe met those conditions, when new personnel were detailed to the EORO, advising, "Accomplishing conditions A and B was not sufficient, after all, but if you will now meet condition C, that will be sufficient." Then, when the Tribe satisfied requirement C, the bar was raised again. Mr. Smith said that requirements for the Delaware Tribe were, ultimately, set higher than for new tribes in another part of the country. New Acting Directors came and went, and ultimately an outside reviewing official was given responsibility for review of the Tribe's proposals. This process suffered from an absence of continuity to the Tribe's disadvantage. A fair reading of the statute entitles tribes to expect palpable assistance rather than just ongoing technical advice and a process that seems to construct barriers that stand in the way of their self determination.

Evidence shows that, during this contracting process, the Cherokee Nation was involved in active litigation opposing the Delaware Tribe's recognition, and the CNO actively opposed award of any ISDA contract to the Tribe. It also shows that the BIA resisted these CNO efforts. Inferences drawn from the evidence show, however, that the BIA – even though it was long aware of an allocation of federal spending problem – went forward and awarded full FY2002 funding to the CNO and then declined funding for the Delaware proposals at issue. Only because the government awarded full funding to the CNO could it argue that it was prohibited from making a later award to the Delaware Tribe because of duplication of federal spending issues. Of course, under 25 U.S.C. § 450j-1(b)(3), the BIA is not required to reduce funding for programs, projects or activities serving one tribe to make funds available to another tribe, and these decisions were within the BIA's discretion.

RECOMMENDED FINDING

The government clearly showed that – *on November 26, 2001* – approving the Delaware contract proposal at issue would result in a violation of proscriptions against duplicate government spending. It showed that the proposed programs included activities that could not lawfully be carried out by this contractor because they were already being carried out by the CNO. As Mr. Mani said, ". . . it is against federal appropriation law for them to use funding that they may have received for some other purpose, and then put it to the same purpose as those funds which are already provided for in the Cherokee Compact."

Although duplicate government spending problems remained due to the overlapping service population issue, evidence does not show that the government provided the Tribe *assistance* it had a legal duty to give. According to Curtis Wilson, Robert Impson and Mike Smith, the Tribe was either very close to satisfying or had actually satisfied the formatting requirements and overlap issues. A fair inference to be drawn from the evidence in its totality is that the duplication/overlap hurdle could have been overcome before November 26, 2001 with adequate government assistance and good faith negotiation from the CNO. Moreover, both the CNO's proposed FY2002 Annual Funding Agreement and the Delaware Tribe's FY 2002 proposal were included as parts of the EORO's FY 2002 budget consideration process. That is, the proposals could have been considered simultaneously. The government knew in advance that it could not award funding for duplicative services. Early during the

review process, Delaware funding was not prohibited because the CNO AFA had not yet been approved. Only after the government made the FY 2002 CNO award could it say the Delaware allocation was prohibited.

It is true that allocation of finite assets for these programs is within the government's reasonable discretion. It appears that, when enacting 25 U.S.C. §§ 450, et seq., Congress did not anticipate relationships such as that between the Cherokee Nation and the Delaware Tribe. The BIA showed that there is presently no known mechanism for unilaterally carving allocation funds out of one Tribe's AFA to make money available for a new Tribe to serve its own (but also duplicate) members. In fact any decision that might be made regarding reduction of federal funds or BIA program services from the CNO's compact to fund Delaware services could not be made without consulting the Cherokee Nation. The Secretary is bound by the terms of its compact with the CNO. In consequence, the BIA faced a dilemma. There were sound reasons for the Acting Regional Director to approve the CNO FY 2002 AFA. There were also good reasons to defer, to consider the larger picture and to make a decision after consultation with the tribes.

The FY 2002 CNO and Delaware award considerations were, however, split out and made at different times by different deciding officials. On November 4, 2001 the Deputy Commissioner-Indian Affairs assigned responsibility for review of the Delaware FY 2002 proposal to Midwest Regional Director Larry Morrin. Mr. Morrin did not testify. No evidence was presented to show whether he was involved in the CNO FY 2002 AFA allocation decision. No evidence was presented to show whether he was aware of either the CNO-Delaware history, the continuity-adequate assistance history or the history of 638 contract proposal guidance given by CO Curtis Wilson. It may be inferred that he was not aware of these histories.

Evidence does show that, although attempts were made, the Delaware Tribe has been unable to work with the Cherokee Nation to resolve overlapping service population and allocation of funding issues. The EORO was aware of the CNO's refusal to negotiate funding issues. The Delaware Tribe's proposal could have been considered alongside the CNO funding proposal and in consultation with both tribes. The BIA's award of full funding for the FY 2002 CNO AFA was, in the absence of consultation, not fair to the Delaware Tribe. The Delaware Tribe should not be penalized because of the Cherokee Nation's refusal to negotiate, the absence of consultation and the government's failure to provide statutorily required assistance.

Testimony received during the hearing showed that the Tribe worked long and hard to obtain approval for its FY 2002 proposal. Ultimately, however, it made its own decision that enough had been done and determined that its only relief must come through the administrative appeal process. In spite of all the things it did well, some requirements were not met. The Tribe did not separate its proposals as it agreed to do. As discussed above, the proposal could, nevertheless, be considered as individual program line items. While the Tribe did overcome overlapping service population to the satisfaction of some BIA witnesses, questions remained, and it was not completely successful in this area. The Midwest Regional Director determined that the potential for a duplication of services remained, and such a duplication would result in prohibited federal service funding.

I recommend finding that the Tribe could have successfully and timely met these requirements with adequate assistance from the BIA and good faith negotiation from the Cherokee Nation. The Midwest Regional Director's decision could have taken these factors into account if he had been aware of them. I am not able to say that consideration of these factors would have resulted in a different decision. The Tribe has not established that there should be a different result. In this circumstance, the Midwest Regional Director's determination should be upheld. For this reason, I recommend that the BIA's decision be upheld.

NOTICE OF RIGHT TO OBJECT

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA under 25 CFR 900.165 shall be filed at the following address: Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

//original signed
Richard L. Reeh
Administrative Law Judge