DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Seneca Nation of Indians v. Nashville Area Chief Contracting Officer,
Indian Health Service

Docket No. IBIA 12-041 (05/06/2013)

Related Indian Self-Determination Act case:
Health and Human Services Appeals Board decision, 06/30/2016

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Departmental Hearings Division
351 South West Temple, Suite 6.300
Salt Lake City, Utah 84101
TELEPHONE: (801) 524-5344
FACSIMILE (801) 524-5539

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ORDER

SENECA NATION OF INDIANS,	)	IBIA 12-041
	)	
Appellant	)	Appeal of an October 31, 2011,
	)	Decision declining the Nation's
v.	)	proposal regarding its FY 2012
	)	budget and annual funding
NASHVILLE AREA CHIEF	)	agreement.
CONTRACTING OFFICER, INDIAN	)	
HEALTH SERVICE,	)	Indian Self-Determination and
	)	Education Assistance Act
Appellee	)	(ISDEAA) 25 U.S.C. § 450j-l(a)

Recommended Summary Decision

I. Introduction

The Seneca Nation of Indians ("Seneca" or "Nation") has appealed an October 31, 2011, decision issued by the United States Department of Health and Human Services' Indian Health Service (hereinafter, the "Department") declining Seneca's request to add $3,774,392 to Seneca's health services funding for fiscal year ("FY") 2012. For the reasons discussed below, this decision recommends that the Department's October 31, 2011, decision be reversed and that the requested $3,774,392 be added to Seneca's health services funding for FY 2012.

II. Case Summary

On January 1, 2000, Seneca and the Department entered into a contract ("Contract") under provisions of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450-450n. Pursuant to that Contract, Seneca assumed responsibility for providing health care services to its members.

The Contract automatically renews each year. Prior to each FY, Seneca and the Department enter into annual funding agreements that delineate the exact dollar amount Seneca will receive from the Department to operate its health services program for the upcoming FY (hereinafter, these annual agreements are identified by the FY to which they pertain, e.g., "FY 2010 Agreement"). Funding levels for the annual agreements vary. However, for FY 2010 and FY 2011, excluding the disputed funds at issue, the Department and Seneca concluded that the Nation was entitled to roughly $11,500,000 each year to operate its health services program.

During 2011, Seneca realized that the number of patients to which it provided health care services had been undercounted. Based on a per-patient cost model the Department created for other purposes, Seneca concluded that it was entitled to an additional $3,774,392 each year to provide health services to its members. Thus, Seneca sent the Department a request to amend and add $3,774,392 to its FY 2010 and FY 2011 Agreements.

Under the ISDEAA, requests to amend contracts are automatically approved if the Department fails to respond within 90 days of receiving them. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.18. Because the Department failed to respond to Seneca's request for additional funding within 90 days, but refused to amend Seneca's FY 2010 and FY 2011 Agreements to include the additional $3,774,392, the Federal District Court for the District of Columbia ("District Court") issued an Order so amending both agreements and holding that Seneca was entitled to the additional $3,774,392 for both FY 2010 and FY 2011.

However, prior to the District Court's ruling, the Department issued the October 31, 2011, decision now under appeal denying Seneca's request to add $3,774,392 to its FY 2012 Agreement. Because the Department believes that the additional funding of $3,774,392 is not appropriate, it asks this Office to construe the law and facts in a way that absolves the Department of a continuing annual obligation to provide Seneca with the $3,774,392. The Department argues that any other result will produce an unconscionable, irreparable outcome Congress could never have intended when it enacted the ISDEAA.

However, the ISDEAA does provide a mechanism that appears capable of addressing this situation, a mechanism that the Department apparently has not attempted to employ. Under 25 U.S.C. § 450j-1(b)(2)(B), the Department could return Seneca's Contract funding levels to an amount it believes is appropriate if it

requested and received "a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution" authorizing a reduction in Seneca's funding.

III. Findings of Fact

The record shows that the following facts cannot reasonably be disputed. Pursuant to Title I of the ISDEAA, the Nation and the Department entered into the Contract titled "Contract Between the Secretary of the Department of Health & Human Services and the Seneca Nation of Indians," Contract No. 285-00-0002, dated January 1, 2000. Department's July 2, 2014, response ("DR") Tab 6 at 13-33. The Contract became effective January 1, 2000, pursuant to Section 105(c)(1) of the ISDEAA, and has an indefinite term. DR Tab 6 at 17. The Contract is administered by the Department's Nashville Area Office. DR Tab 9 at 1-2. Ralph W. Ketcher is the chief contracting officer for the Nashville office and is the Secretary's delegate responsible for contracting with Indian tribes and tribal organizations under the ISDEAA to carry out Department programs. His delegated duties include those related to negotiating, implementing, and serving as contracting officer for Title I Self-Determination Act contracts entered into pursuant to 25 U.S.C. § 450f. DR Tab 8 - Declaration of Ralph W. Ketcher; Seneca's MSJ Tab A - Declaration of Christopher Karns.

The Contract requires the Nation and the Department to establish successive annual funding agreements. Each annual funding agreement is incorporated into the Contract. The annual funding agreements specify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment under the Contract. DR Tab 6 at 22, 28.

The Nation's FY 2010 Agreement initially provided for the transfer of a total of $11,993,236 to Seneca for its health services program. DR Tab 7 (first letter) at 4. The Nation's FY 2011 Agreement initially provided for the transfer $11,496,243 to Seneca for its health services program. DR Tab 7 (second letter) at 3.

On April 29, 2011, the Nation's President sent the Department a letter stating that Seneca had recently discovered a substantial undercount of its active user population which had a dramatic negative impact on the adequacy of the Nation's Federal funding under the Contract. DR Tab 3 at 2-3. The letter proposed

amending the Nation's FY 2010 and FY 2011 Agreements by adding $3,774,392 for each FY to correct for the undercount in its user population. In the letter, the President specifically asked that the "amendment proposal be handled pursuant to 25 CFR [part] 900, Subpart D." DR Tab 3 at 2-3.

The regulations in subpart D provide procedures for establishing or amending the funding level under section 106(a) of the ISDEAA, 25 U.S.C. § 450j-1(a), commonly referred to as the "Section 106" or "Secretarial" amount. During the 90-day period following the Department's receipt of the April 29, 2011, letter, the Department did not approve or decline the Nation's proposed amendments to the FY 2010 and FY 2011 Agreements. DR Tab 4 at 1.

On September 10, 2012, the Nation filed suit in District Court challenging the Department's refusal to award the additional $3,774,392 sought for both the FY 2010 and FY 2011 Agreements. *Seneca Nation of Indians* v. *United States Department of Health and Human Services,* Civil Action No. 12-1494. Seneca's MSJ Tab B. On May 23, 2013, the District Court ruled that the Nation's proposed amendments to the FY 2010 and FY 2011 Agreements became effective when the Department failed to respond to the April 29, 2011, letter within the 90-day deadline. *Seneca Nation of Indians v. United States HHS,* 945 F. Supp. 2d 135 (D.D.C. 2013) ("District Court's May 23, 2013, Order").

The District Court explained: "The Nation's proposed amendment sought the Secretary's agreement to *increase* the amount of funds it received under 25 U.S.C. § 450j-1(a)—that is, its 'Section 106(a)' or 'Secretarial' amount." *Id.* at 150. "By ignoring her deadline, the Secretary became bound to the proposed Contract amendments." *Id.* at 152. The District Court's judgment became final on December 12, 2013, after the Department withdrew its appeal. *See* Order Dismissing Appeal of *Seneca Nation of Indians* v. *United States Department of Health and Human Services,* Civil Action No. 12-1494 (RMC) (D.D.C.). Seneca's MSJ Tab D.

By letter dated September 20, 2011, the Nation asked the Department to add $3,774,392 to its proposed FY 2012 Agreement. Seneca's MSJ Tab E. By letter dated October 31, 2011, the Department issued its decision denying Seneca's request to add $3,774,392 to Seneca's FY 2012 Agreement. DR Tab 9 at 1-3.

IV. Analysis

A. Summary Judgment Standards

Although the regulations do not specifically authorize motions for summary judgment, such motions have been accepted as an appropriate means for resolving issues without a hearing. *See, e.g., Larson v. BLM,* 129 IBLA 250, 252 (1994); *Stamatakis v. BLM,* 115 IBLA 69, 74 (1990). The civil courts recognize that a party is entitled to summary judgment if there are no genuine issues of material fact and, as a matter of law, judgment is appropriate. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986).

Once the moving party has met its burden, the burden then shifts to the non-moving party to set forth by affidavit, or other means, specific facts showing that there is a genuine issue of material fact or that legally, the moving party is not entitled to judgment. *T. W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). Legal memoranda are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). "An issue is 'genuine' only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar,* 247 F.3d 986, 992 (9th Cir. 2001). "A fact is 'material' if the fact may affect the outcome of the case." *Id.*

B. Burden of Proof and Standard of Review

The Department bears the burden of clearly demonstrating the validity of its grounds for declining to provide Seneca with the additional $3,774,392 requested as part of its proposed FY 2012 Agreement. *See* 25 U.S.C. § 450f(e)(1); *see also* 25 C.F.R. § 900.163. This Office reviews the question of whether the Department has met that burden *de novo. See Paiute Indian Tribe of Utah v. Southern Paiute Agency Superintendent, Bureau of Indian Affairs,* 46 IBIA 285, 291, 292 n. 11 (2008).[1]

[1] Noting a split of authority among Federal courts, the Department argues that this Office should review its decision using an abuse of discretion standard. However, in so arguing, the Department does not distinguish between judicial and administrative review.

In considering whether the Department has met its burden, this Office notes the special canon of statutory construction that applies to Native American law. Because of the trust relationship between the United States and Native Americans, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . . ." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). This canon has also been explained as follows:

> In deciding between two reasonable interpretations, the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes . . . . The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way.

Ramah Navajo Chapter v. Salazar, 644 F.3d 1054, 1062 (10th Cir. 2011) (internal quotations and citation omitted), *aff'd*, 132 S. Ct. 2181, 183 L. Ed. 2d 186 (2012).

C. Seneca Is Entitled to Summary Judgment in Its Favor

The facts and law entitling Seneca to judgment in its favor are relatively simple. Accordingly, it is appropriate to begin by explaining why Seneca should prevail in this proceeding and then address the Department's arguments to the contrary.

The key provisions of the ISDEAA and its implementing regulations are as follows. First, the regulations implementing the ISDEAA found at 25 C.F.R. part 900 are automatically made part of all ISDEAA contracts. 25 C.F.R. § 900.2(c).

Second, under 25 U.S.C. § 450f(a)(2), upon receipt of a proposal to amend an ISDEAA contract, the Secretary must approve the proposal and amend the contract within 90 days unless the Secretary provides written notification to the applicant that one of five reasons for declination applies. *See also* 25 C.F.R. § 900.16. "A proposal that is not declined within 90 days . . . is deemed approved and the Secretary shall award . . . any amendment . . . and add to the contract the full amount of funds pursuant to section 106(a) of the Act." 25 C.F.R. § 900.18. These provisions were the bases for the District Court's May 23, 2013, Order awarding the additional $3,774,392 for the prior years of FY 2010 and FY 2011.

Third, Section 106(b) of the ISDEAA provides that contract funding provided to an Indian tribe under Section 106(a) — the "Section 106(a)" or "Secretarial" amount — shall not be reduced by the Secretary in subsequent years except pursuant to one of five circumstances:

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

25 U.S.C. § 450j-l(b)(2). The implementing regulation provides that the Department may not decline an Indian tribe's proposed successor annual funding agreement, or portions thereof, if it is substantially the same as the prior annual funding agreement, subject to inapplicable exceptions. 25 C.F.R. § 900.32. As more fully explained below, these provisions, coupled with the Court's May 23, 2013, Order regarding the prior years of FY 2010 and FY 2011, dictate a finding that an additional $3,774,392 must also be awarded for the subsequent year of FY 2012.

The District Court's May 23, 2013, Order granted Counts I, II, and III of Seneca's Complaint for Declaratory Relief and Money Damages ("Complaint"). *See Seneca Nation of Indians*, 945 F. Supp. at 152. Count I of Seneca's Complaint states:

> 50. The Nation's proposed amendments to its FY 2010 Agreement and FY 2011 Agreement as contained in the April 29 Letter were, as a matter of law, to be deemed approved upon expiration of the Defendants' ninety (90) day review period, without lawful declination, on August 3, 2011.
>
> 51. Plaintiff is entitled to a declaration that each of the April 29 Letter proposed amendments to its FY 2010 Agreement and FY 2011 Agreement are deemed approved as of August 3, 2011.
>
> 52. WHEREFORE, Plaintiff requests that the Court enter judgment in its favor against Defendants, declaring that each of the

> April 29 Letter proposed amendments to the Nation's FY 2010 Agreement and FY 2011 Agreement are deemed approved as of August 3, 2011.

Seneca's MSJ Tab B at 11.

The District Court explained why it was appropriate to grant Count I of Seneca's Complaint as follows:

> The ISDEAA states: "Subject to the provisions of [25 U.S.C. § 450f(a)(4), governing severable portions of contract proposals], *the secretary shall, within ninety days* after receipt of the proposal, *approve the proposal and award the contract unless* the Secretary provides written notification to the applicant" that one of five reasons for declination applies. 25 U.S.C. § 450f(a)(2) (emphases added); *see also* 25 C.F.R. § 900.16. The regulatory text is equally unequivocal: "A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) *is deemed approved* and Secretary shall award ... *any amendment* ... and add to the contract the full amount of funds pursuant to section 106(a) of the Act." 25 C.F.R. § 900.18 (emphases added). As noted above, the regulatory text automatically became part of the Contract. *See* 25 C.F.R. § 900.2(c). Because the Contract and all of these provisions are clear, the Court finds that the Nation's April 29, 2011 Letter proposed amendments to the Contract for FY 2010 and FY 2011 [...] became effective when the Secretary failed to respond within 90 days.

Seneca Nation of Indians, 945 F. Supp. 2d at 145 (footnote omitted).

By letter dated September 20, 2011, Seneca asked the Department to increase its FY 2012 Agreement by $3,774,392 "per the deemed approval FY 2011 and FY 2010 amendments . . . ." Seneca's MSJ Tab E at 1. Although the District Court's May 23, 2013, Order had not been issued at that point, Seneca's conclusion that its FY 2011 Agreement included the additional $3,774,392 by operation of 25 U.S.C. § 450f(a)(2) and 25 C.F.R. § 900.18 is correct as a matter of law.

This additional funding became part of the Secretarial amount, as discussed by the District Court: "The Nation's proposed amendment sought the Secretary's

agreement to *increase* the amount of funds it received under 25 U.S.C. § 450j-1(a)—that is, its 'Section 106(a)' or 'Secretarial' amount." *Seneca Nation of Indians*, 945 F. Supp. 2d at 150. "By ignoring her deadline, the Secretary became bound to the proposed Contract amendments." *Id.* at 152.

As previously mentioned, the Secretarial amount may not be reduced by the Secretary in subsequent years, except under five circumstances. 25 U.S.C. § 450j-1(b)(2). The Department has not clearly demonstrated that any of the five circumstances was present when it declined Seneca's request, and the record does not support such a finding.

In fact, the Department cited an entirely different justification for its declination in the October 31, 2011, decision; it refused to add the requested funds based on its conclusion that they exceed the Secretarial amount. DR Tab 9 at 1-3. However, the Department's reasoning is circular and invalid because the $3,774,392 had already become part of Seneca's Secretarial amount by operation of law.

Even if the additional $3,774,392 had not become part of Seneca's Secretarial amount by operation of law, the District Court's May 23, 2013, Order clearly amended Seneca's FY 2010 and FY 2011 Agreements thereby making the additional $3,774,392 part of the Secretarial amount in Seneca's Contract. Because the Department has failed to demonstrate the presence of any of the five circumstances that would allow for a reduction in Seneca's Secretarial amount under 25 U.S.C. § 450j-l(b)(2), Seneca is entitled to summary judgment in its favor.

D. The Department's Arguments

The Department has moved for summary judgment and challenged Seneca's motion for summary judgment on various grounds. These arguments are addressed below.

1. The Department's Authority to Decline Seneca's FY 2012 Proposed Funding Agreement.

A central theme in many of the Department's arguments hinges on its characterization of the District Court's May 23, 2013, Order. The Department argues: "The District Court did not consider the merits of the case, namely, whether

the proposal submitted by the Nation could have been properly declined, and therefore, not have become part of the [§ 450j-1(a) Secretarial amount]." DR at 6.

However, the fact that Seneca's proposed amendments for FY 2010 and FY 2011 may have been "properly declined" for any number of reasons before the statutory and regulatory 90-day deadline expired is irrelevant because the Department did not decline the proposed amendments before that deadline expired. Accordingly, as the District Court concluded, Seneca's proposed amendments became effective on August 3, 2011, pursuant to 25 U.S.C. § 450f(a)(2) and 25 C.F.R. § 900.18. In reaching its May 23, 2013, ruling, the District Court applied the pertinent facts to the applicable law and therefore ruled on the merits of the case.

The Department argues that this Office should treat ISDEAA contract amendments that become effective through operation of law or court order differently than amendments the Department approves. However, neither ISDEAA nor its implementing regulations provide any support for drawing such a distinction. In fact, doing so would require this Office to expressly disregard the explicit language of the ISDEAA and its implementing regulations and disregard the canon of construction favoring the interpretation of statutes for the benefit of Native Americans. *Blackfeet Tribe*, 471 U.S. at 766.

The Department cites 25 C.F.R. § 900.32 which allows for the declination of any portion of a successor annual funding agreement that is not substantially the same as the prior annual funding agreement. The Department argues that Seneca's proposed FY 2012 Agreement is not substantially the same as its FY 2011 Agreement because the FY 2012 proposal includes the additional $3,774,392 Seneca requested in its FY 2011 Agreement that the Department attempted to decline.

However, the Department failed to decline Seneca's proposal to add $3,774,392 to its FY 2011 Agreement, and those funds were added to the FY 2011 Agreement by operation of law and the District Court's May 23, 2013, Order on August 3, 2011. Thus, Seneca's proposed FY 2012 Agreement and its FY 2011 Agreement are substantially the same. Accordingly, 25 C.F.R. § 900.32 requires the Department to approve Seneca's proposed FY 2012 Agreement.

2. The Department Does Not Have to Pay the Additional $3,774,392 Because it Exceeds the § 450j-1(a) Secretarial Amount.

Next, citing 25 U.S.C. § 450f(a)(2)(D), the Department argues it is not obligated to pay Seneca the additional $3,774,392 requested in its proposed FY 2012 Agreement because those funds exceed the amount the Department would have spent providing the same services, i.e., the Department's § 450j-1(a) Secretarial amount.

Section 450f(a)(2)(D) allows the Department to decline new funding requests, as well as proposals to initiate, amend, or renew an ISDEAA contract, where "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 . . . ." 25 U.S.C. § 450f(a)(2)(D).

The Department's argument fails because the Secretarial amount for Seneca's Contract already included the additional $3,774,392 as a matter of law before Seneca requested those funds for FY 2012 and the Department's attempt to decline Seneca's request. Section 450f(a)(2)(D) simply does not provide a tool the Department can retroactively employ to reduce the established section 450j-1(a) Secretarial amount.

Section 450j-1(a) provides a funding floor for ISDEAA contracts, not a ceiling. The statute reads in pertinent part "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof . . . ." *Id.*

In this case, Seneca is not attempting to initiate, amend, or renew an ISDEAA contract. Instead, Seneca is requesting approval of a successor annual funding agreement under an existing contract with an indefinite term pursuant to 25 C.F.R. § 900.32. Because the District Court's May 23, 2013, Order expressly confirmed that Seneca's § 450j-1(a) Secretarial amount for its FY 2010 and FY 2011 Agreements had been amended as of August 3, 2011, § 450f(a)(2)(D) is inapplicable.

Once the Secretarial amount is established, it can only be reduced where one of the five circumstances identified at 25 U.S.C. §450j-l(b)(2) is present. None were present when the Department issued its partial declination.

Conversely, the ISDEAA provides relatively lenient mechanisms through which tribes can increase their § 450j-1(a) Secretarial funding. In the District Court's May 23, 2013, Order, that Court offered the following observation about the ISDEAA. "While this system may seem imbalanced, Congress designed self-determination contracts to work in this manner for a specific remedial purpose, and the ISDEAA, its regulations and the resulting contracts between Indian tribes and the United States must be read with that remedial intent in mind." *Seneca Nation of Indians*, 945 F. Supp. 2d at 152. Given the foregoing, the Department's arguments regarding § 450j-1(a) funding restrictions are unavailing.

3. Approval of Seneca's Proposed FY 2012 Agreement Will Reduce Funds Available to Other Tribes.

The Department asserts that if it adds the $3,774,392 to Seneca's Secretarial amount, it will have to reduce funding to other tribes. The Department cites 25 U.S.C. §§ 450j-1(b) and 458aaa-18(b), noting that both provisions state that the Department is not required to take funds from one tribe in order to pay funds to another tribe. This Office agrees that the Department is not obligated to take money from one tribe to give it to another.

However, the cited language is not one of the five circumstances identified at 25 U.S.C. §450j-l(b)(2) that allow the Department to reduce a tribe's Secretarial amount. *See also* 25 C.F.R. 900.32 (Department may not decline a successor annual funding agreement that is substantially the same as its predecessor). Additionally, because section 450j-1(b)(2) is specific, it supersedes the more general provisions at sections 450j-1(b) and 458aaa-18(b). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, (1992) (discussing the well-recognized canon of statutory construction under which specific statutory provisions govern over general provisions).

Moreover, the Supreme Court has already considered and rejected similar funding deficiency arguments in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In that case, the Department claimed it should not be bound by its contractual promises under the ISDEAA because it did not have sufficient funding to meet its obligations. The Court disagreed stating, among other things, that the Secretary could reallocate funds or seek additional funding from Congress. The Court also noted that if the funds could not be procured, the contractor could pursue legal remedies for breach of contract. *Id.* at 642. Therefore, the Department's arguments regarding insufficient funds do not provide a legal justification for declining to

amend and add the disputed $3,774,392 to Seneca's proposed FY 2012 Agreement, regardless of whether the Department can meet its obligations under that agreement.

4. *Seneca Nation of Indians v. United States HHS*, 945 F. Supp. 2d 135 (D.D.C. 2013), Provided for a One-time Damage Award.

The Department argues that the District Court's May 23, 2013, Order should be treated as granting a one-time damage payment to Seneca but not amending Seneca's underlying ISDEAA contract. In its motion for summary judgment, the Department argues that Seneca's April 29, 2011, letter did not ask for an amendment to Seneca's Secretarial amount.

The Department is incorrect. As discussed above, Seneca's April 29, 2011, letter "request[s] that this amendment proposal be handled pursuant to 25 CFR [part] 900, Subpart D." DR Tab 3 at 2-3. The regulation at 25 C.F.R. § 900.19, which falls under subpart D, unequivocally states: "Upon approval the Secretary shall award the contract and add to the contract the full amount of funds to which the contractor is entitled under section 106(a) of the Act." As discussed above, Section 106(a) of the ISDEAA is codified at 25 U.S.C. § 450j-1(a) and the Section 106(a) amount is the "Secretarial" amount. Therefore, Seneca intended to request an amendment to the § 450j-1(a) Secretarial amount through its April 29, 2011, letter.

Moreover, this issue was decided by the District Court, which wrote: "The Nation's proposed amendment sought the Secretary's agreement to *increase* the amount of funds it received under 25 U.S.C. § 450j-1(a)—that is, its 'Section 106(a)' or 'Secretarial' amount." *Seneca Nation of Indians*, 945 F. Supp. 2d at 150. "By ignoring her deadline, the Secretary became bound to the proposed Contract amendments." *Id.* at 152. Given this language, this Office does not interpret the District Court's May 23, 2013, Order as providing for a one-time damage award, and this Office does not have the authority to overturn the order of a Federal District Court.

The Department urges this Office to follow *Delaware Tribe of Indians v. BIA*, Docket No. IBIA 02-65-A (July 26, 2002). Under facts similar to the case here, the presiding Administrative Law Judge ("ALJ") determined that a proposed contract amendment which became effective because the Bureau of Indian Affairs ("BIA") failed to decline the proposal within 90 days of receiving it, did not affect the tribes § 450j-1(a) Secretarial amount for purposes of successor annual funding agreements.

In *Delaware*, the ALJ wrote:

> 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 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.

Id. at 13.

The ALJ's recommended decision in *Delaware* apparently became final for the Department of the Interior because it was not appealed. *See* 25 C.F.R. § 900.166. I respectfully decline to follow *Delaware* because the ALJ based his holding on a finding that "the regulations at issue are reasonably interpreted to support" BIA's position. *Delaware,* IBIA 02-65-A at 13. As discussed above, the canon of construction requiring deference to interpretations that favor Native Americans controls over the more general rule of deference to agency interpretations. *See Ramah Navajo Chapter*, 644 F.3d at 1062.

The Secretary also cites *Mashantucket Pequot Tribal Nation v. IHS*, Docket No. A-060-60, Decision No. 2020 (May 3, 2006), for the proposition that 25 C.F.R. § 900.32 does not apply to proposed successor annual funding agreements that cannot be lawfully carried out. However, the *Mashantucket Pequot Tribal Nation* case is inapposite.

In that proceeding, the Department concluded that a tribe could not provide prescription medications at a reduced rate to casino employees who were not tribal members because alternative pharmacy programs were available to those employees. But, more to the point, the Department determined that 25 C.F.R.

§ 900.32 was inapplicable because the tribe had not requested any funding for the program in its annual successor proposal.[2]

In a case that is on point, *Susanville Indian Rancheria*, DAB No. 1813 (2002), the Department held that 25 C.F.R. § 900.32 prohibited reductions in funding for a successor annual agreement even though the funding exceeded the amount the Department would have otherwise spent providing the same service. The Department wrote:

> Section 900.32 of 25 C.F.R. prohibits IHS from declining any portion of a proposed successor AFA that is substantially the same as the AFA for the prior year . . . .
>
> Although IHS may decline some or all of a tribe's proposal to enter into or renew a contract to carry out [programs] on the grounds set out in section 102(a)(2) of the ISDA, section 106(b)(2) of the ISDA restricts IHS's authority to decline the proposed funding amount after the first year of a contract regardless of the grounds for the declination.

Susanville Indian Rancheria, DAB No. 1813 at 5 (2002).

5. Arguments Raised in the Department's Response to the Request for Additional Briefing.

This Office asked the parties to provide additional briefing addressing the relationship between 25 U.S.C. §§ 450j-1(b)(2) and 450f(a)(2)(D). In response, the Department filed supplemental briefing addressing the relationship between those provisions of the ISDEAA. Additionally, the Department's supplemental briefing raised several new arguments and re-argued several positions it advanced in its

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[2] The Department also cites *Ninilchik Traditional Council v. IHS*, Docket No. A-2000-17, Decision No. 1711 (December 7, 1999), in support of its position that a proposed successor annual funding agreements that is similar to the prior annual funding agreement can be subject to declination under 25 U.S.C. § 450f(2)(D) (i.e., the requested amount exceeds the Secretarial amount). However, the facts in *Ninilchik Traditional Council* are distinct from the facts here. *See* discussion *infra* at 17-18.

motion for summary judgment by re-phrasing or re-couching those arguments. The Department's new arguments are addressed below.[3]

a. Payments for the Proposed FY 2010 and FY 2011 Agreements Are a Completed Activity for Purposes of 25 U.S.C. § 450j-l(b)(2)(E).

The Department argues that it can reduce the funding requested in Seneca's proposed FY 2012 Agreement because the Department's funding of Seneca's FY 2010 and FY 2011 Agreements and the Department's implementation of its own adjustment for Seneca's undercounted user population (which did not result in the allocation of any additional funding for Seneca, *see* Department's December 18, 2015, Supplemental Briefing at 6-7), constitute "completion of a contracted project, activity, or program" for purposes of § 450j-l(b)(2)(E). Therefore, the Department argues that it was free to reduce the requested funding level.

This argument must be rejected for several reasons. First, because Seneca continues to provide health services to its members under the Contract, its health services program is not a completed activity within the meaning of 25 U.S.C § 450j-l(b)(2)(E). Second, if the Department's proposed interpretation of the phrase "completion of a contracted project, activity, or program" were adopted, section 106(a) funding for ISDEAA contracts would always be subject to annual recalculation. Such a reading of § 450j-l(b)(2)(E) is inconsistent with the Congressional goal of structuring the ISDEAA to provide stable funding that tribes can rely on to manage their own programs. *See* S. Rep. No. 100-274, at 30-31 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2649-50.

Finally, the Department's argument that payment of the funds owed under the FY 2010 and FY 2011 Agreements constituted completion of a contracted project must be rejected because it is a *post hoc* rationalization. In *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), the Supreme Court explained that *post hoc* rationalizations offered by counsel cannot be utilized to justify an

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[3] Because this Office considers several of the arguments raised in the Department's supplemental briefing to be variations of arguments the Department has offered elsewhere in its briefing, they are not all expressly addressed here. Accordingly, the parties are advised that all of the Department's arguments have been considered and are rejected.

agency action. Indeed, all of the following arguments are subject to rejection on the ground that they are *post hoc* rationalizations and are therefore rejected on that basis as well as the separate reasoning discussed below.

b. The Proposed FY 2012 Agreement Is Not a Successor Annual Funding Agreement Because Seneca Did Not Use the Same Rationale for Its 2012 Funding Request as the Rationale It Used For Its 2010 and 2011 Funding Requests.

The Department argues that the proposed FY 2012 Agreement is subject to declination because Seneca relied on different rationale in requesting the funds for FY 2012 than it used when it requested the same amount of money for FY 2010 and FY 2011.[4] On September 20, 2011, Seneca submitted a letter to the Department requesting that an additional $3,774,392 be added to its proposed FY 2012 Agreement "per the deemed approval FY 2011 and FY 2010 amendments and the August letter from Phil Baker-Shenk to you on our behalf." Department's Supplemental Brief Tab E at 1. Based on that language, the Department argues that Seneca's rationale for requesting the additional funds for FY 2012 differed from its rationale for requesting the same funding for FY 2010 and FY 2011.

This argument is unfounded. Seneca's brief discussion regarding the deemed approved FY 2010 and FY 2011 Agreements in its September 20, 2011, letter was obviously used for ease of reference and to remind the Department that it failed to decline its FY 2010 and FY 2011 requests within the prescribed 90-day time period. Such statements do not suggest that Seneca changed its underlying rationale (its undercounted user population) or methodology for calculating the $3,774,392 dollar figure in its proposed FY 2012 Agreement.

This is relevant because the Department attempts to analogize the facts in this case to the facts in *Ninilchik Traditional Council v. IHS*, Docket No. A-2000-17, Decision No. 1711 (1999). In *Ninilchik*, the Departmental Appeals Board ("DAB")

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[4] The Department notes that it received Seneca's proposed FY 2012 Agreement through an email transmitted on July, 25, 2011, and a letter dated September 20, 2011. This Office finds no material significance in this circumstance, particularly in view of the Department's decision to treat both submissions as a single proposal. *See* DR Tab 9 at 1 n. 1.

determined that a tribe's 1999 proposed successor funding agreement was not substantially the same as its 1998 funding agreement and therefore subject to declination.

However, the facts in *Ninilchik* distinguish it from the present case. In its holding, the DAB explained that although the dollar amounts requested by the tribe for 1999 and 1998 were similar, "the means and circumstances for determining indirect [contract support costs] differed substantially between the agreements . . . . " *Ninilchik Traditional Council*, Decision No. 1711 at 2. In the instant proceeding, the record does not indicate that Seneca used a different method to calculate its request for the additional FY 2012 funding than it used when it requested additional funds for FY 2011 and FY 2010.[5]

Ninilchik also addresses contract support costs which are subject to statutes, regulations, and precedent that are not necessarily germane to the Secretarial amount at issue in the instant proceeding. Furthermore, the holding in *Seneca Nation of Indians*, 945 F. Supp. 2d at 145, emanating from a Federal court in the D.C. Circuit, arguably constitutes precedent which is more authoritative than the holding in *Ninilchik*. Perhaps most significantly, there was no interceding order by a Federal district court in *Ninilchik* explicitly amending the tribe's § 450j-1(a) Secretarial amount as there is here. In sum, *Ninilchik* does not constitute apposite or binding precedent in this matter.

c. Seneca's Proposed FY 2012 Agreement Cannot Be Considered a Successor Annual Funding Agreement Because It Was Submitted for the Purpose of Negotiations.

The Department argues that Seneca's July 25, 2011, proposed FY 2012 Agreement cannot be considered a successor annual funding agreement because a line of text at the end of the email in which it was submitted says "Good afternoon Emily The AFA 2012 is enclosed for negotiations, thank you[.]" *See* Department's

[5] Additionally, unlike the facts in *Ninilchik*, there is no variation whatsoever in the additional dollar amount Seneca requested for 2010, 2011, and 2012. This Office recognizes that the variation of several hundred dollars between the tribe's 1998 and 1999 requests in *Ninilchik* did not appear to be a pivotal factor in the DAB's reasoning.

December 18, 2015, Supplemental Briefing Tab B at 2. Additionally, in other correspondence with the Department, Seneca also discusses negotiations regarding the proposed FY 2012 Agreement. The Department argues that annual successor funding agreements are automatically approved by the ISDEAA so there is no need to negotiate them. Based on that reasoning, the Department argues that Seneca's use of the word "negotiate" indicates that Seneca did not view the proposed FY 2012 Agreement as a successor annual funding agreement for purposes of 25 C.F.R. § 900.32.

Therefore, the Department argues this Office should not treat the proposed FY 2012 Agreement as a successor annual funding agreement. The Department's argument is unavailing, considered in context and based on the parties' course of conduct, Seneca was clearly submitting a proposed successor annual funding agreement.

This conclusion is also supported by Article III subpart 2 of the Contract which is titled "Amount of Funds." That subpart states: "The total amount of funds to be paid under this Contract, pursuant to Section 106(a) of the Act, shall be determined in an Annual Funding Agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract." DR Tab 6 at 22. Use of the word "determined" in that clause as well as the phrase "entered into between" both indicate that the Contract provides for the negotiation of Seneca's successor annual funding agreements which could provide more or less funding than the preceding year for any number of reasons. Indeed, Seneca's Secretarial amount may be reduced without any reason as long as Seneca authorizes the reduction. *See* 25 U.S.C. § 450j-l(b)(2)(C).

d. The Department May Decline a Proposed Successor Annual Funding Agreement If It Disagrees with a Tribe Regarding the Availability of Appropriations for the Proposal.

Finally, the Department argues that it can decline a proposed successor annual funding agreement if it disagrees with a tribe regarding the availability of funding based on a provision in 25 C.F.R. § 900.32 that states: "If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E." The Department's argument fails because the quoted provision is most reasonably read as only applying to

proposals that are not substantially the same as the prior annual funding agreement and contracts with Department of the Interior agencies other than the Bureau of Indian Affairs. *See id.* Interpreting the quoted provision as the Department suggests would create an exception that swallows the rule and violates the canon of construction requiring regulations to be construed "liberally in favor of the Indians for whose protection [they] were promulgated." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1331-32 (10th Cir. 1982).

Moreover, even if 25 C.F.R. § 900.32 allowed the Department to reach the declination procedure at subpart E, it could not utilize that procedure to decline Seneca's request for the additional $3,774,392. As discussed above, that funding was already part of Seneca's Secretarial amount when the Department issued its October 31, 2011, decision. The subpart E regulations cannot be interpreted as superseding 25 U.S.C. § 450j-1(b)(2), which states that the Secretarial amount "shall not be reduced by the Secretary in subsequent years except pursuant to" one of five specific circumstances (*see* discussion *supra* at 7,9) which the Department has failed to demonstrate were present when it declined Seneca's request to include the additional $3,774,392 in its FY 2012 Agreement.

V. Conclusion

Without belaboring this Recommended Summary Decision with additional references to contentions of fact and law, I hereby advise that all contentions submitted by the parties have been considered and, except to the extent they have been expressly or impliedly adopted herein, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or are immaterial. Based upon the forgoing, this Office recommends that the Department's October 31, 2011, decision partially declining Seneca's proposed FY 2012 Agreement should be reversed, and the additional $3,774,392 requested for operation of the Nation's health services program should be distributed to Seneca.

// original signed

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.166. An appeal to the Secretary under 25 CFR 900.166 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.