UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION Plaintiff, v. UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, et al. Defendants.	)	Civil Action 08-1601 (JDB)

MEMORANDUM OF PLAINTIFF THREE AFFILIATED TRIBE OF THE FORT BERTHOLD RESERVATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Michael L. Roy, DC Bar #411841
S. Bobo Dean, DC Bar #145219
Marmaduke D. McCloud, DC Bar #497105
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W., Suite 700
Washington, DC 20037

Attorneys for the Three Affiliated Tribes of the Fort Berthold Reservation

DATED: January 30, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

In this case, Plaintiff Three Affiliated Tribes of the Fort Berthold Reservation ("the Tribes") challenges a decision by the Defendants declining two provisions that the Tribes proposed to include in their contract under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450 *et seq*. with Defendant Indian Health Service ("IHS"). The IHS's declination decision stated, as required by IHS regulations, that the Tribes could challenge the decision in federal court pursuant to 25 U.S.C. § 450m-1. Pl. Ex. 1 at 15. That section provides, in part "The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under [the ISDEAA] . . ." 25 U.S.C. § 450m-1(a). *See also* 25 U.S.C. § 450f (b) ("Whenever the Secretary declines to enter into a self-determination contract or contracts," the tribal contractor may "initiate an action in Federal district court . . . pursuant to [25 U.S.C. § 450m-1(a)].").

Notwithstanding the "perfectly clear" language in the ISDEAA providing for appeals of all declination decisions under the ISDEAA, *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C.Cir. 1996) ("*Ramah"*), Defendants move to dismiss both Counts of the complaint. Defendants' motion would deprive the Tribes of their clear appeal rights under the ISDEAA, and provide the IHS with unfettered discretion to decline contract provisions like those at issue here, contrary to the ISDEAA, and to the detriment of every other tribal contractor who seeks to include similar provisions in their contracts.

A. Count I

Count I concerns the IHS's denial of the Tribe's proposal to include funds for contract support costs ("CSC") in the amount of $531,553.50. Although the ISDEAA provides for the

inclusion of such funds in an ISDEAA contract, and Congress appropriated $5 million for "new and expanded" contracts in fiscal year ("FY") 2008, the IHS declined to provide any such funds.

IHS moves to dismiss this claim on the grounds that other ongoing tribal contractors are necessary parties who cannot be joined, because any award of CSC funds to the Tribes would result in a reduction of CSC funds to the absent ongoing contractors. Defendants have not shown that this would be the case, however. Any recovery to the Tribes for FY 2008 (the year of the declination) would be made either from unobligated FY 2008 appropriations for CSC or, if no such funds remain available, from the Judgment Fund, 31 U.S.C. § 1304.

It is unclear whether the IHS, and the region of the IHS where the Tribes operate their contracted program, will have an increase or decrease in funding for CSC for FY 2009 and later years, as Congress has not made a final appropriation for FY 2009, and has not acted on appropriations for later years. In any event, under this Circuit's decision in *Ramah*, the absent ongoing contractors have no legally protected interest that would be impaired were this action to go forward. Under *Ramah*, an absent contractor has a legally protected interest "only to the amount of [CSC] it would have received under a legal allocation plan." *Ramah* at 1346. *Ramah* rejected a Rule 19 motion by the Bureau of Indian Affairs to dismiss a claim by an ISDEAA contractor challenging its CSC funding for failure to join absent tribal contractors, on the grounds that the absent contractors did not have a "legally protected interest" in the CSF funding at issue in that case. *Ramah* at 1351.

Even if the absent tribal contractors were determined to be required parties under Rule 19(a), the action should nonetheless be allowed to proceed "in equity and good conscience." Rule 19(b). First, there is no prejudice to the FY 2008 CSC funding of the absent contractors, for the reasons set out above. Second, relief may be shaped to avoid any prejudice to the absent

contractors with regard to the FY 2008 funds sought by the Tribe. Third, a judgment rendered in the absence of the other contractors would be adequate to overturn the declination decision at issue, and to fully compensate the Tribes for the damages they suffered by reason of the declination.

Most importantly, the case should be allowed to proceed to provide a remedy to these Tribes, and to other tribes who may seek to challenge their CSC funding. If the case were dismissed for non-joinder of the absent contractors, Plaintiff Tribes would have no remedy for the declination, and no relief for IHS's refusal to award the CSC to which the Tribes are entitled. Dismissing the case would make IHS's CSC allocation decisions unreviewable, contrary to the decision of this Circuit that such allocations are reviewable, *Ramah*, 87 F.3d at 1352, contrary to the declination and appeals provisions of the ISDEAA, 25 U.S.C. §§ 450(f)(a)(2), 450f(b), 450m-1, and to the detriment of all tribal contractors under the ISDEAA, including the very contractors whose rights the Defendants assert in their motion.

B. Count II

Count II concerns the Tribe's proposal to provide services under its ISDEAA contract to non-Indians, subject to the requirements of a provision of the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1680c(b)(1)(B), which authorizes a tribe providing health services under an ISDEAA contract "to determine whether health services should be provided under such contract to individuals who are not [otherwise] eligible for such health services." Defendants' argument that the IHS's decision is unreviewable is contrary to the clear language and structure of the IHCIA and the ISDEAA, and to IHS's own regulations and the declination decision itself, which stated that the proposal has been declined under the statutory declination criteria, and that the declination was subject to review in federal court under 25 U.S.C. § 450m-1.

The IHCIA authorizes the Tribes to determine whether or not to provide services to persons who are not otherwise eligible for IHS services under the Tribe's ISDEAA contract, 25 U.S.C. § 1680c(b)(1)(B). The Tribes therefore proposed to include language to this effect in their ISDEAA contract proposal, making the declination of that proposal subject to the declination and appeal provisions of the ISDEAA.

The ISDEAA provides that the Secretary may disapprove a contract proposal based only on one of five "declination" grounds set out therein. 25 U.S.C. § 450f(a)(2). The ISDEAA further provides that the Secretary "*shall approve* any severable portion of a contract proposal that does not support a declination finding described in [25 U.S.C. § 450f(a)(2)]." 25 U.S.C. § 450f(a)(4)(emphasis added). *See* S. Rep. No. 100-274, at 3 ("Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by [the] Secretary."). The declination criteria of the ISDEAA apply to all ISDEAA contract provisions included in the Tribe's contract proposal, and not just to those mandated by the Model Agreement provisions of the ISDEAA. *See* 25 C.F.R. § 900.32 ("*[a]ny portion of an [AFA] proposal*. . . is subject to the declination criteria and procedures")(emphasis added). The IHS declined the proposal using the fifth declination criterion — "the proposal includes activities that cannot lawfully be carried out by the contractor." 25 U.S.C. § 450f(a)(2)(E).

As the Court noted in *Ramah*, the ISDEAA contains a broad waiver of suit against the United States for violations of the statute: "Section 450m-1(a) of the [ISDEAA] expressly declares that the United States district courts shall have original jurisdiction over '*any* civil action or claim against the appropriate Secretary *arising under [the ISDEAA*].'" *Ramah* at 1344 (quoting 25 U.S.C. § 450m-1(a)) (emphasis added). The waiver clearly encompasses the Tribes' claims asserted in Count II.

II. STATUTORY BACKGROUND

A. The Indian Self-Determination and Education Assistance Act

The ISDEAA "directs" the Secretary to enter into contracts with Indian tribes and Tribal organizations to assume responsibility for administering programs, functions, services, and activities ("PFSAs") that the IHS would otherwise be obligated to provide under Federal law to American Indians and Alaska Natives. 25 U.S.C. § 450f(a)(1). Title I of the ISDEAA contains a mandatory model contract. 25 U.S.C. § 450*l*. The model contract contains a provision requiring the parties to enter into annual funding agreements ("AFAs"), as attachments to the contract, identifying among other things the PFSAs to be performed or administered and the funds to be provided. Section 1(f) of the model contract at 25 U.S.C. § 450*l* (c).

The ISDEAA provides for two categories of contract funding. The first category (hereafter "program funding" or "section 106(a)(1) amount"), is the amount of funds that the IHS "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1). The second category of contract funding is CSC, which the ISDEAA requires "shall be added" to the program funding or section 106(a)(1) amount. 25 U.S.C. § 450j-1(a)(2).

CSC is described in the ISDEAA as:

> an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

25 U.S.C. § 450j-1(a)(2).

CSC funding shall include both indirect costs and certain direct costs, as well as one-time startup costs in the first year a PFSA is contracted. 25 U.S.C. § 450j-1(a)(3), (5).

The model contract set out in section 108 of the ISDEAA provides that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the [AFA]" and that "[s]uch amount shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA] (25 U.S.C. § 450j-1(a)." 25 U.S.C. § 450*l*(c) (Section 1(b)(4) of the model contract).

The ISDEAA provides that:

> [t]he 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 contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—
>
> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
> (B) adequate protection of trust resources is not assured;
> (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 lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2).

Regulations adopted by the Secretary of Health and Human Services ("HHS") implementing the ISDEAA add that the declination letter must contain a specific finding "together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days of declining a proposal, the Secretary must provide to the tribe any documents

relied on in making the decision." 25 C.F.R. § 900.29(a). The Secretary may not decline a tribal proposal on any ground other than one or more of the five declination criteria. 25 C.F.R. § 900.22.

Non-compliance with the requirement that the declination letter contain a "specific finding that clearly demonstrates" the reason for declination under one or more of the declination criteria is cause for a court to disallow the declination with the result that the proposal is approved as a matter of law. 25 C.F.R. § 900.18; *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1068 (D.S.D. 2007). Furthermore, a reviewing court must consider only the reasons contained in the agency's declination letter, not other reasons that the agency may later bring before the court to justify its declination decision on appeal. *See e.g., Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-GEB-DAD, (E.D. Cal. Jan. 3, 2008) (2008 WL 58951 at *5).

B. Funding for ISDEAA Contract Support Costs

For several years, the appropriation for contract support costs for ISDEAA contracts has been insufficient to cover all of the CSC actually incurred by tribal contractors contracting with the IHS. In recent years, Congress has placed a cap on amounts that can be obligated for CSC costs, and has made $5 million of the amounts appropriated for CSC costs available for new and expanded contracts such as the contract at issue here. The appropriation for FY 2008 provides:

> *Provided further*, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $271,636,000 shall be for payment to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts, or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 2008, *of which not to exceed $5,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements.*

Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, §437, 121 Stat. 2135 (italics added). Because of a 1.56% rescission, the $271,636,000 amount was reduced to $267,398,478. *Id.* at section 437, 121 Stat. 2153.[1]

The language quoted above making $5 million available for CSC for new and expanded contracts was first contained in the FY 2006 appropriation for the IHS, Department of Interior, Environment, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-54, 119 Stat. 499, 540, and was also contained in the FY 2007 appropriation. Revised Continuing Appropriations Resolution of 2007, Department of Interior, Environment, and Related Agencies, Pub. L. No. 110-5, § 101(a)(4), 121 Stat. 8, 27. Notwithstanding that Congress began in 2006 to provide funds specifically targeted to new and expanded contracts, the IHS has pursued a policy of not providing funds for such contracts. The IHS policy was announced in a "Dear Tribal Leader" letter from IHS Director Charles Grim. Pl. Ex. 2. In that letter, Dr. Grim announced that the entire CSC appropriation increase in FY 2006 would be targeted "to address existing CSC shortfalls." "The effect of this is, regrettably, that there will be no Indian Self-Determination (ISD) Fund in FY 2006 from which to fund CSC associated with new or expanded contracts or compacts." *Id.* Although the Dear Tribal Leader letter dealt

[1] Defendants seek to contradict the clear language of the FY 2008 appropriation making up to $5 million available for new and expanded contracts by citing to legislative history of earlier appropriations acts that did not contain that language. Defs. Mem. in Support of Motion to Dismiss at 15. Of course, legislative history cannot vary the plain language of the appropriations act, especially where the legislative history is of an earlier statute that does not contain the statutory language at issue. See *U. S. v. Young,* 376 A.2d 809, 813 (D.C.D.C., 1977) ("If the meaning of a statute is plain on its face, resort to legislative history or other extrinsic aids to assist in its interpretation is not necessary.")

specifically with the FY 2006 appropriation, IHS has continued to follow the policy expressed therein. Pl. Ex. 1 at 4.

C. Services to Non-Beneficiaries Under ISDEAA Contracts

Section 813 of the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1680c, addresses the circumstances under which persons who are not Indians eligible for IHS services may be provided health care by the IHS, or by Indian tribes contracting with the IHS pursuant to the ISDA. Section 813 (a) provides that the minor children (including adopted and foster children) of eligible Indians may be served, and that the spouses of eligible Indians may be served if authorized by the tribe's governing body. 25 U.S.C. § 1680c(a). Section 813(c) provides that IHS or tribes may serve otherwise ineligible individuals may be served to achieve stability in a medical emergency, to prevent the spread of a communicable disease or otherwise deal with a health hazard, to care for a women pregnant with an eligible Indian's child, and to serve the family of an eligible Indian if the care is directly related to the care of the Indian. 25 U.S.C. § 1680c(c). *See also* 42 C.F.R. § 136.12.

In addition, Section 813(b) — which is at issue in this case — provides additional authority under which the IHS or a tribe contracting with the IHS may provide health services to persons who are not eligible for such services under any other part of Section 813. Section 813(b)(1)(B), which applies to tribally-operated facilities, expressly states that a tribe "providing health services under [an ISDEAA] contract is authorized to determine whether health services should be provided under such contract to individuals who are not [otherwise] eligible for such health services." 25 U.S.C. § 1680c(b)(1)(B). In doing so the governing body must "take into

account" whether such services would result in a denial or diminution of services to Indians, and whether reasonable alternative facilities are available.[2]

III. FACTUAL BACKGROUND

The IHS has been contracting with the Plaintiff for a number of years under the ISDEAA to carry out some but not all of the programs, functions, services, and activities (PFSAs) of the Fort Berthold Service Unit. Complaint ¶ 17. Plaintiff submitted a proposal to IHS on December 20, 2007 to assume all the remaining Service Unit PFSAs not already contracted by the Tribes. Plaintiff requested program funding for the first year of the new contract for the additional PFSAs and also $1,000,063 for CSC funding for that first year. Complaint ¶ 18.

The IHS responded to the Tribes' proposal by issuing an ultimatum with respect to CSC funding: "The Tribe and the IHS must agree to add the following three paragraphs to the funding agreement of any subsequent award of new and expanded programs, functions, services, or

---

[2] Section 813(b)(1)(B) reads as follows:

> In the case of health facilities operated under a contract entered into under the Indian Self-Determination Act … the governing body of the Indian tribe or tribal organization providing health services under such contract is authorized to determine whether health services should be provided under such contract to individuals who are not eligible for such health services under any other subsection of this Act or under any other provision of law. In making such determinations, the governing body of the Indian tribe or tribal organization shall take into account the considerations described in subparagraph (A)(ii).

25 U.S.C. § 1680c(b)(1)(B) (emphasis added). The "considerations described in subparagraph A(ii)" are:

> that—
>
> (I) the provision of such health services will not result in a denial or diminution of health services to eligible Indians, and
>
> (II) there is no reasonable alternative health facility or services, within or without the service area of such service unit, available to meet the health needs of such individuals.

25 U.S.C. § 1680c(b)(1)(A)(ii)(emphasis added).

activities (PFSAs) or the IHS must decline the entire contract proposal."[3] The three paragraphs would have waived the Tribes' rights to CSC funding for FY 2008. This ultimatum implemented the IHS policy decision to re-allocate and distribute the $5,000,000 appropriation for CSC for new or expanded contracts as shortfall for existing (ongoing) contracts.

The Tribes rejected this IHS ultimatum, informing IHS that they would not agree to IHS's waiver language because the IHS appropriation for FY 2008 provided that "not to exceed $5,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements." Pl. Ex. 4 at 2. The Tribal Chairman's letter asserted that this appropriation language made $5,000,000 available for CSC for new or expanded contracts for FY 2008. *Id.* The letter also asserted that IHS's reallocation and distribution of this available appropriation for new or expanded contracts as shortfall for existing contracts violated the ISDEA. *Id.*

Representatives of the Tribes and the IHS met in Rockville, Maryland on February 6, 2008, to discuss the CSC issue and IHS's position that IHS must decline the entire proposal if the Tribes would not agree to the IHS language regarding CSC. Complaint ¶ 22. The Tribes urged the IHS to negotiate and award the contract and AFA with respect to the transfer of the new and expanded PFSAs, and the program funding for those PFSAs, and sever the CSC funding issue for declination as authorized by the ISDEAA at 25 U.S.C. § 450f(a)(4). *Id.*

After negotiations in which the Tribes refused to agree to IHS' language waiving their rights to CSC funding for FY 2008, the IHS agreed to sever the CSC funding issue for declination. Complaint ¶ 23. On March 31, 2008 the parties entered into a three-year contract and an annual funding agreement (AFA) for the remaining half of FY 2008, from March 31,

[3] Pl's Ex. 3 at 1-2.

2008 through September 30, 2008.[4] Complaint ¶ 24. The disputed amount for CSC funding for this six month AFA period is $531,553.50. Complaint ¶ 33. The AFA included the following language:

> The IHS and the Tribe have agreed to program funding under Subsection 106(a)(1) of the ISDEAA. Pursuant to Subsection 102(a)(4) of the ISDEAA, the IHS will sever and decline the portion of the Tribe's proposal for Subsection 106(a)(2) contract support costs.

The IHS described the reasons for its change of policy to contract for the underlying PFSAs and to sever and decline CSC in its declination letter. Pl. Ex. 1 at 5-6. The letter explains that after adopting its allocation policy in 2006, IHS gave the same ultimatum to all tribes proposing new or expanded contracts. *Id.* If a tribe agreed, the IHS entered into a contract for the new or expanded program but the parties included the waiver language in the contract. *Id.* If a tribe refused to agree to the waiver language, "IHS has chosen in the past to issue a full declination of the contract proposal, which did not afford Tribes the opportunity to operate the PFSAs while the parties litigated their disagreement regarding CSC funding." *Id.*

The declination letter goes on to explain that in Plaintiff's case, IHS decided to change its tactics and issue a partial declination because: (1) some Federal courts have considered and rejected full declination,[5] (2) IHS wishes to expand tribes' contracting activities, and (3) the IHS has determined that because Congress capped its CSC appropriation and made contract funding

---

[4] Defendants argue that under IHS policy, the Secretary has the right to determine a "reasonable amount" for CSC and no amount has been negotiated with the Plaintiff. Defs. Mem. at 17, n. 8. However, the IHS in its declination letter did not challenge the $1,000,063 proposed by the Plaintiff for it annualized CSC need. The Tribe's position is that the Secretary has waived any right to contest this amount now before this court. *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059 (D.S.D. 2007). The Court need not resolve this issue on this motion, however.

[5] *See e.g., Southern Ute Indian Tribe v. Leavitt,* 497 F.Supp.2d 1245 (D.N.M. 2007), a*ppeal docketed,* No. 07-2274 (10th Cir. Nov. 21, 2007).

subject to the availability of appropriations, "the ISDEAA does not create a statutory entitlement to any CSC funding." Pl. Ex. 1 at 5-6.

The IHS declined the requested amount for CSC funding for FY 2008 based upon the fourth declination criterion—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 the ISDEAA. 25 U.S.C. § 450f(a)(2)(D). *Id.* The declination letter determined that contract funding is "subject to the availability of appropriations," under 25 U.S.C. § 450j-1(b), and that "all the money for contract support costs has been or will be used to pay CSC related to existing contracts and compacts." *Id.*

The Tribe proposed "to provide services on a fee for service basis to non-Indians as may be authorized by Section 813 of the Indian Health Care Improvement Act." Pl. Ex. 1 at 8. This proposal was later modified to read as follows:

> The Tribe will provide the services described in this Scope of Work to eligible Indians, and on a fee for service basis, to non-Indians as authorized by Section 813 of the Indian Health Care Improvement Act after making the determination authorized by Subsection 813(b)(1)(B).

Id.

The IHS declined such proposal using the fifth declination criterion—"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 lawfully be carried out by the contractor." 25 U.S.C. § 450f(a)(2)(E). Pl. Ex. 1 at 9. Instead of making the requisite specific finding under the fifth declination criterion, the declination letter explains that IHS will approve contract language authorizing the Tribes to provide services to non-eligible individuals only at facilities where IHS can agree that the two considerations referenced in § 813(b)(1)(B) apply. *Id.* at 8. The letter

asserts that IHS will approve contract language authorizing the Tribes to serve non-eligible individuals at the Mandaree, Twin Buttes, and White Shield health stations "[b]ecause IHS recognizes that each of these facilities is in a remote location where no other reasonable medical services can be provided." *Id.* IHS states that it cannot agree to include other facilities in contract language because "IHS lacks any documentation to review and ascertain whether the TAT has met the statutory requirements." *Id.* at 9.

The Tribes filed this action to appeal IHS's declination pursuant to their right to appeal provided in the ISDEAA at 25 U.S.C. § 450f(b)(3), which authorizes tribes appealing an IHS declination to "initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1 of this title."

IV. ARGUMENT

A. Rules 12(b)(7) and 19 Do Not require Dismissal of Count I Because Other ISDEAA Contractors are Not Required Parties, and if They Were, Equity and Good Conscience Would Require the Court to Proceed in Their Absence

In considering a motion to dismiss under Rules 12(b)(7) and 19, the court must engage in a two-part analysis: first, it must determine if an absent party is "required to be joined if feasible" under Rule 19(a); if the absent party is "required," then the court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). *See Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1350-51 (D.C. Cir. 1996); *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990). The moving party has the burden of persuasion on the motion. *Makah Indian Tribe,* 910 F.2d at 558.

1. The Absent ISDEAA Contractors Do Not Have Legally-Protected Interests that Would Be Impaired By a Decision in This Case

Under Rule 19(a)(1), a "required party" is:

> (1) A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > (B) that person claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The court's analysis of whether a non-party is a "required party" under Rule 19 must begin with an assessment of whether the ongoing tribal contractors have a "legally protected interest" in the $531,553.50 in FY 2008 CSC funding at issue in this case. *Ramah* at 1351. *See Makah*, 910 F.3d at 558 ("the court must determine whether the absent party has a *legally protected interest* in the suit.") (emphasis in original; citations omitted).

Congress appropriated funding for CSC for FY 2008 using the following language in the IHS's appropriation:

> *Provided further*, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $271,636,000 shall be for payment to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts, or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 2008, *of which not to exceed $5,000,000 may be used for contract support costs associated with new or expanded self-determination contracts, grants, self-governance compacts, or annual funding agreements.*

See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, §437, 121 Stat. 2135 (italics added). Because of a 1.56% rescission, the $271,636,000 amount was reduced to $267,398,478. *Id.* at section 437, 121 Stat. 2153.

In this case, the Tribes sought CSC funding for its FY 2008 contract, arguing that the appropriation made up to $5 million available for CSC for new and expanded contracts. Pl. Ex. 4 at 2. The Tribes claim that the appropriation for FY 2008 made up to $5 million legally available for new or expanded contracts. That amount was more than enough to pay the Tribe's requested $531,553.50 in CSC funding for Plaintiff's AFA for the latter half of FY 2008 (March 31 through September 30). IHS refused to agree to provide any CSC funds to the Tribes, however.

Nevertheless the Defendants argue that other ISDEAA contractors may claim an interest in the CSC funding at issue in Count I, the $531,553.50, because they have an interest in maintaining the level of CSC funding in their ISDEAA contracts. According to the Defendants, the absent ISDEAA contractors have an interest in this case "because Three Affiliated's request for CSC funding for their new and expanded contract for FYs 2008 and 2009 would, if granted, result in a decrease to the Ongoing Contractors' CSC funding." Defs. Mem. at 24.[6]

The absent ongoing contractors have no legally protected interest in the amounts claimed by the Tribes on their new and expanded contract, however, and Defendants have not shown and cannot show that the relief requested by the Tribes would impair any legally protected interest of the absent ongoing contractors.

---

[6] Defendants claim that "an award of CSC funding to Three Affiliated would be paid from the CSC allotment to the [IHS Aberdeen Area], and therefore, would require a reduction in the CSC funding to the other ISDEAA contractors in [that area]." Defs. Mem. at 22. There is no explanation of why the up to $5 million appropriated for new and expanded contracts would be allocated in such manner, given the congressional set-aside of these funds. Moreover, given that one contractor in that area recently discontinued (retroceded) its contract, Def. Ex. 1 ¶ 11, Defendants have not shown that there are no unexpended or unobligated CSC funds in that area.

First, Defendants argue that the absent ongoing contractors may claim an interest in maintaining the level of CSC funding in their ongoing contracts after it is provided by IHS because the ISDEAA provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." § 450j-1(b). Defs. Mem. at 25-26. The court in *Ramah* dismissed this interpretation of the no reduction proviso in § 450j-1(b) by observing that "from the start, each Tribe had a right only to the amount of CSF it would have received under a legal allocation plan." *Ramah* at 1345-46. In a footnote the court explains: "the dissent turns to the provision at some date *after* the Secretary has already made his arguably illegal allocation, and then concludes that the Act does not require him to fix that mistake. We do not find this to be a credible reading of the provision." *Id.* Defendants make the same argument here, that because IHS allocated the entire CSC appropriation for FY 2008 to absent ongoing contractors, the no reduction proviso in § 450j-1(b) gives them a legally protected interest in the $531,553.50 at issue in Count I for the Tribes' new and expanded contract. However, "from the start" ongoing contractors had no interest in CSC funds appropriated for new or expanded contracts.

Second, the award of $ 531,533.50 to the Tribes for FY 2008 funding would not come from the pockets of the absent contractors. Any award to the Tribes would be paid either from unexpended and unobligated balances in the FY 2008 CSC appropriation, or from the Judgment Fund. Defendants have not shown that all amounts appropriated for CSC in FY 2008 have been expended or obligated. The Declaration of Ronald Demaray submitted in support of the Defendants' motion, Def. Ex. 1, does not state that all CSC funding has been expended or

obligated, or that the amounts already paid to or obligated to the absent contractors for FY 2008 would in any way be impaired or reduced by an award to the Tribes in this case.[7]

If all CSC funds appropriated for FY 2008 have been expended, then the award would be paid out of the Judgment Fund. Subsection 450m-1(a) is a grant of original jurisdiction to this court under which the court may award compensatory damages as a remedy in declination appeals. Subsection 450m-1(a) provides:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this [Act] . . . . In an action brought under this paragraph, the district courts may order appropriate relief *including money damages*, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a) (emphasis added).

An award of damages from the permanent Judgment Fund, 31 U.S.C. § 1304, is an appropriate remedy for an action filed under 25 U.S.C. § 450m-1 when the relevant appropriation has lapsed or is otherwise unavailable to fund the contract.[8] *Thompson v.*

---

[7] The declaration states that one contractor in the Aberdeen Region retroceded its program back to IHS (i.e., discontinued operation of the program under an ISDEAA contract) in 2008. Def. Ex. 1 ¶ 11. Therefore, no CSC funds would have been paid or obligated to that particular contractor in FY 2008, and no CSC funds will be paid or obligated to that contractor in FY 2009. The declaration does not state how the CSC funds that would have gone to that contractor were spent, or if they were spent at all.

[8] That statute provides, in pertinent part, as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
> (1) payment is not otherwise provided for;
> (2) payment is certified by the Secretary of the Treasury; and

Cherokee Nation of Oklahoma, 334 F.3d 1075, 1092 (Fed. Cir. 2003) (claim under Contract Disputes Act), *aff'd Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Shoshone Bannock Tribes of the Fort Hall Reservation v. Shalala*, 58 F.Supp.2d 1191, 1201-1204 (D.Or.1999) (declination appeal), *rev'd on other grounds, Shoshone Bannock Tribes of the Fort Hall Reservation v. Secretary – Department of Health and Human Services,* 279 F.3d 660 (9th Cir. 2002). *See also Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA P 33253, IBCA No. 4711, 2006 WL 1009210 (2006) (Judgment Fund available to pay award of CSC funding in administrative appeal under Contract Disputes Act). As the Federal Circuit explained in *Thompson v. Cherokee Nation of Oklahoma*, the issue under the "subject to the availability of appropriations" clause in § 450j-1(b) of the ISDEAA is whether funds *were* available for the Secretary to meet his obligations, not whether those funds *remain available* now." 334 F.3d at 1092.

As we have shown, up to $5 million was legally available for CSC for new or expanded contracts for FY 2008, which was more than enough to pay the $532,553.50 requested by Plaintiff. The Secretary has not proved that there are no funds remaining and available from the FY 2008 appropriation to pay the other tribal contractors. If there are not funds available, then damages may be awarded out of the Judgment Fund. Such an award would not require reduction of any ongoing contract for FY 2008.

Although Count I involves only FY 2008 funding, the parties agree that should the Tribes succeed in their claim for FY 2008 funding, the Tribes would then claim CSC funding in future

---

(3) the judgment, award, or settlement is payable—
(A) under section 2414 . . . of title 28 . . . .

31 U.S.C. § 1304(a). See 28 U.S.C. § 2414 (providing for use of Judgment Fund to pay final judgments rendered by United States district courts).

years.[9] CSC funding for FY 2009 and future years is not known at this time.[10] Defendants have not shown, and cannot show, that an award of FY 2008 funding to the Tribes would impair the absent contractors' legally protected interest in future CSC funding.[11] *See Makah*, 910 F.3d at 558 ("the court must determine whether the absent party has a *legally protected interest* in the suit. This interest must be more than a financial stake, and more than speculation about a future event.")

Cases cited by the Defendants in support of their argument are distinguishable. Defendants rely on *Citizen Potawatomi Nation v. Norton,* 248 F.3d 993 (10th Cir. 2001), for the proposition that "an interest based on an allocation of funding . . . is transformed 'from a mere expectation, which is unprotected, into an interest which is protected' once the funding is incorporated into a contract," Defs. Mem. at 25, but that case does not so hold. There, five tribes agreed among themselves to a funding formula to be used by the BIA to determine the amount of funding awarded to the tribes in their Annual Funding Agreements under the ISDEAA. *Citizen Potawatomi Nation*, 248 F.3d at 995. In that case, the BIA simply followed the funding formula agreed to by the five tribes. *Id.* The Citizen Potawatomi Nation filed suit against the Secretary of the Interior to change the funding formula to the detriment of the other tribes that had agreed

---

[9] In its Prayer for relief, the Tribes request "Injunctive relief ordering Defendants to add CSC funding to Plaintiff's successor AFAs as a recurring obligation at an annualized funding level of not less than $1,063,107.00, subject only to adjustments as may be authorized by 25 U.S.C. §450j-1(b)." Complaint ¶ 19.

[10] Although the Declaration of Ronald Demaray states that the CSC appropriation for FY 2009 is the same as that for FY 2008, Def. Ex. 1 ¶ 7, in fact, Congress has not yet enacted the final appropriation for the IHS for FY 2009. The IHS is presently operating under a Continuing Resolution ("CR") through March 6, 2009. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, 122 Stat. 3574 (September 30, 2008). Under the CR, CSC is funded at the same level as for 2008, on a pro rata basis through March 9, 2009. The final amount appropriated for CSC for FY 2009 may change after the appropriation is taken up by the Congress. In fact, the Administration requested $271,636,000 for FY 2009, an increase of $ 4.2 million over the FY 2008 appropriation. Pl. Ex. 5 at CJ-154 – CJ-157.

[11] By now, most tribal contractors will have entered into binding AFAs with the IHS setting their CSC amounts for FY 2009, subject to the availability of appropriations.

to it. *Id*. The court held that the other tribes had a legally protected interest in the funding formula that they had agreed to and consequently were necessary parties to the suit. *Id*. at 999. This case differs from *Citizen Potawatomi Nation* in that it does not involve any agreement among tribes as to funding, and that it involves an award for a past year.

This is also not a situation like that in *Makah Indian Tribe,* 910 F.2d 555, also cited by the Defendants. Defs. Mem. at 27-28. That case concerned ocean fishing quotas developed under the Fishery Conservation and Management Act of 1976. 910 F.2d at 556. That Act established a Pacific Management Council composed of Federal, State and Tribal representatives to develop fishing quotas consistent with applicable case law and Indian treaty rights. *Id*. at 557. The Act provided for the Secretary to promulgate regulations based upon the recommendations of the Pacific Management Council detailing ocean fishing allotments. *Id*.

The Makah Indian Tribe and three other ocean treaty tribes proposed higher quotas than were adopted by the Pacific Management Council and the Secretary's regulations. The Makah filed suit challenging the quotas and the regulatory process. *Id*. at 557. The court viewed the 1987 fish harvest as trust property of the ocean treaty tribes held in trust by the Federal government. *Id*. at 559. The court held that the other ocean treaty tribes were required parties because of their interest in the 1987 harvest as trust beneficiaries. *Id*. The court did, however, allow plaintiff's suit for injunctive relief — challenging the process used to arrive at the quotas — to go forward, even though that claim could result in changes to the quotas, and notwithstanding the absence of parties with interests in those quotas: "The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful." *Id*.

Like *Citizen Potawatomi Nation*, *Makah* involved agreements to allocate limited resources between numerous parties not named in the lawsuit. Moreover, similar to *Makah*, all tribes that contract with IHS have an interest in a lawful process to arrive at the allocation of resources.

2. Continuing This Action Will Not Subject the IHS to Risk of Inconsistent Obligations

There is no risk of the IHS being subjected to inconsistent obligations from an award in this case. As explained, *supra* at page 19, any award for FY 2008 will be paid from unobligated FY 2008 CSC appropriations, or from the Judgment Fund. In future years, if CSC funding continues to be insufficient to meet the need, IHS may avoid liability by allocating the appropriated funds by "follow[ing] as closely as possible the allocation plan Congress designed in anticipation of *full* funding." *Ramah,* 87 F.3d at 1348 (emphasis in original). *See also id*. at 1345 ("the Secretary is not required to distribute money if Congress does not allocate the money to him under the Act").

3. Equity and Good Conscience Would Require the Court to Proceed in the Absence of the Other Contractors

If the absent party is "required," then the court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b). *See Ramah*, 87 F.3d at 1350-51; *Makah Indian Tribe*, 910 F.2d at 558. Rule 19(b) provides:

> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be made a joined, the court must determine whether, in equity and good conscience, the action should proceed among the parties or should be dismissed. The factors for the court to consider include:
>
> (1) first, the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:

(A) protective measures in the judgment;
(B) shaping the relief; or
(C) other measures;
(3) whether a judgment rendered in the person's absence would be adequate;
(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

These four factors are not exclusive: "The considerations set forth in subdivision (b) are nonexclusive, as made clear by the introductory statement that '[t]he factors for the court to consider include.' Fed. R. Civ. P. 19(b). The general direction is whether 'in equity and good conscience, the action should proceed among the existing parties or should be dismissed'." *Republic of the Phillipines v. Pimentel,* 128 S. Ct. 2180, 2188 (2008). These factors all weigh in the Tribes' interest.

First, there is no prejudice to the FY 2008 CSC funding of the absent contractors, for reasons set out above.

Second, relief may be shaped to avoid any prejudice to the absent contractors by providing explicitly that an award of CSC to the Tribes for FY 2008 shall not result in any reduction in FY 2008 funding to any absent contractor. As noted above, an award may be paid out of the Judgment Fund, or out of unobligated CSC funds.

Third, a judgment rendered in the absence of the other contractors would be adequate to overturn the declination decision at issue, and to fully compensate the tribes for the damages it suffered by reason of the declination.

Fourth, if the case were dismissed for nonjoinder of the absent contractors, Plaintiff Tribes would have no remedy for the declination, and no relief for IHS's refusal to award the CSC to which the Tribes are entitled. This weighs heavily in favor of proceeding with the case.

Fifth, dismissing the case would make IHS's CSC allocation decisions unreviewable, contrary to the decision of this Circuit that such allocations are reviewable, *Ramah*, 87 F.3d

1344, and to the express provisions of the ISDEAA. Section 450f(b)(3) expressly provides the Tribes with a right to appeal IHS's declination:

> Whenever the Secretary declines to enter into self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—
> (3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1 of this title.

25 U.S.C. § 450f(b)(3).

The ISDEAA declares that United States district courts shall have original jurisdiction over "*any* civil action or claim against the appropriate Secretary *arising under the Act*." 25 U.S.C. § 450m-1 (emphasis added). The D. C. Circuit in *Ramah* noted that: "This provision does not contain any exception for allocation decisions made pursuant to insufficient congressional appropriations, and it is not this court's prerogative to read such an exception into the statute." *Ramah,* 87 F.3d at 1344. In discussing this broad waiver, the Court in *Ramah* recognized that "[a]lthough the language of the statute's announcement of the availability of judicial review is perfectly clear and needs no illumination from the legislative history," legislative history further "leaves no doubt that Congress intended exactly what it wrote . . . ." *Id.* The Court quoted the following language from the legislative history:

> The amendments made by [§ 450m-1(a)] are necessary to give self-determination contractors [Tribes] viable remedies for compelling BIA and IHS compliance with the [ISDEAA]. The strong remedies provided in these amendments are required because of *those agencies' consistent failures over the past decade* to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated . . . .

Ramah, 87 F.3d at 1344 (quoting Senate. Rep. No. 100-247 (1987), reprinted in 1988 U.S.C.C.A.N. at 2620, 2656 (emphasis added)).

Defendants through their motion to dismiss seek to rescind that right of appeal expressly provided by statute. Rule 19 is not absolute. Even if a non-party is determined to be a required party that cannot be joined, then the court must decide whether that party is "indispensable," i.e., whether in "equity and good conscience" the action can continue in the party's absence. The Defendants' motion, if granted, would amount to a sweeping rewrite of the ISDEAA to shield the Secretary's funding decisions from judicial review.[12] The Tribes would be foreclosed from appealing the Defendants' declination of CSC funding for their new and expanded contract to this Court even though the ISDEAA provides for that appeal.

The express statutory remedies are very relevant to the Court's consideration of this motion. In *Ramah*, IHS sought to dismiss a suit for CSC funding on the grounds that its decision in allocating CSC funding was unreviewable because it was a decision "committed to agency discretion." In rejecting this argument, the Court relied heavily on the statutory appeal, and its legislative history discussed above. *Ramah*, 87 F.3d at 1344. The Court explained the relevance of the statutory provision to its decision as follows:

> The dissent implies that jurisdiction and reviewability are unrelated, and that our reliance on § 450m-1(a) confuses the two. Dissent at 1. Of course it is true that a statutory grant of jurisdiction cannot overcome a

[12] Indeed, in numerous cases, past and pending, in which a Tribe sues the IHS or the Department of the Interior or its agency, the Bureau of Indian Affairs ("BIA") to recover unpaid CSC funds, defendants have never, to our knowledge, made this argument. A ruling dismissing this case will no doubt be used as precedent by federal defendants to move for the dismissal of numerous pending cases, and to dismiss future cases as well. In the following cases, tribal contractors have challenged their CSC payments or allocations, and the United States has not raised the Rule 19 argument: *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999) (Contract Disputes Act (CDA) claims challenging BIA allocation of CSC under capped appropriation); *Ramah Navajo Chapter v. Lujan*, Civ. No. 90-00957 (D.N.M.), *on appeal* No. 08-2262 (10th Cir.) (long-running CDA class action against BIA including CSC claims for cap years); *Menominee Indian Tribe of Wisconsin v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) (CDA claims against IHS); *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007) (denying class certification); *Southern Ute Tribe v. Leavitt*, 497 F. Supp. 2d 1245 (D.N.M. 2007), *on appeal* No. 07-2274 (10th Cir.) (IHS declination appeal); *Ramah Navajo School Bd. v. Leavitt*, Civ. No. 07-289 (D.N.M.) (ongoing case challenging IHS declination).

> constitutional bar to judicial review (such as standing or mootness), but it seems quite a stretch to conclude from this that a statutory grant of jurisdiction is irrelevant on the question of congressional intent to provide judicial review. If Congress intended to make a certain kind of claim unreviewable, as the dissent suggests it intended in the case of insufficient appropriations, it would certainly make no sense to provide jurisdiction in a particular court over that unreviewable claim. Rather, one might have expected Congress to signal such an exception instead of describing jurisdiction in the unequivocally broad terms it used here. This is true particularly in a context where Congress amended the ISDA to provide legal remedies against the BIA specifically in the area of funding indirect costs. The ISDA gives the district court jurisdiction over "any civil action ... arising under the Act," not over "any civil action arising under the Act in a year during which Congress appropriated full funding." We will not, without more, assume that Congress intended for that jurisdiction to be meaningless.

Id. at 1344 n.6.

If the Court agrees with Defendants' arguments and dismisses Count I, Defendants will then have unfettered, unreviewable discretion in allocating CSC appropriations, contrary to the decision of the D.C. Circuit Court in *Ramah*, and contrary to the interests of all tribal contractors, including the absent contractors whose interests the Defendants assert in seeking to escape their own liability. A decision dismissing Count I in order to protect the absent contractors will actually result to their detriment.

B. The Court Has Jurisdiction Over Count II Under 25 U.S.C. § 450m-1

1. The ISDEAA Provides a Broad Waiver for Suits Challenging Violations of the Act

As the Court noted in *Ramah*, that the ISDEAA contains a broad waiver of suit against the United States for violations of the statute: "Section 450m-1(a) of the [ISDEAA] expressly declares that the United States district courts shall have original jurisdiction over '*any* civil action or claim against the appropriate Secretary *arising under [the ISDEAA*].'" *Ramah*, 87 F.3d at 1344 (quoting 25 U.S.C. 450m-1(a)) (emphasis added). Under that provision, this Court is authorized

to provide appropriate relief in any case arising under the ISDEAA, including injunctive relief against any action by a federal officer or agency contrary to the ISDEAA, and "injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. 450m-1(a)). As noted above, and confirmed by *Ramah*, the legislative history confirms that Congress intended to provide self-determination contractors broad appeal rights. *See supra* at 24-25. [13] IHS's own regulations also recognize that all self-determination contract declinations are subject to judicial review. 25 C.F.R. § 900.31.

In this action, the Tribes challenge a denial of a proposal to include in its self-determination contract a provision regarding services to non-beneficiaries. The Tribes allege that such denial is in violation of the ISDEAA. Complaint ¶ 3. The Court clearly has jurisdiction over Count II.

Defendants' argument that the statutory grant of jurisdiction contained in the ISDEAA must be construed narrowly, Defs. Mem. at 36-37, must be rejected. The language itself is very broad, and cannot be narrowed based on a judicial doctrine narrowly reading ambiguous waivers. *See City of Tacoma v. Richardson*, 163 F.3d 1337, 1340-41 (Fed. Cir. 1998) ("We also recognize that a waiver of sovereign immunity must be unequivocal and 'strictly construed, in terms of its scope, in favor of the sovereign.' *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). Here, the waiver is far from ambiguous. Indeed, the clarity of the waiver and its

---

[13] Additional legislative history, not cited in *Ramah*, states as follows:

> It is contrary to the intent of the [ISDEAA] for a Federal agency simply to fail to enter into a contract without providing to the tribal organization a formal notice of declination that states the grounds for declination and provides an opportunity and procedures for an appeal hearing within sixty days of receipt of a proposal to contract.

Sen. Rep. 100-247, at 24, reprinted in 1988 U.S.C.C.A.N. at 2656.

breadth is the problem. But we cannot limit its scope just because the statute apparently provides an extremely broad waiver of immunity."). Moreover, the ISDEAA rejects reading the statute narrowly, instead directing that "[e]ach provision of the [ISDEAA] . . . shall be liberally construed for the benefit of the Contractor . . .", 25 U.S.C. § 450*l*(c) (Section (a)(2) of model agreement); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997), rather than the narrow construction urged by Defendants.

2. Count II Challenges an Action of the Defendants Contrary to the ISDEAA

There is no dispute that the Tribes propose to include a provision in their self-determination contract that would allow them to provide services to non-Indians under the contract (for a fee) in the event that the Tribes complied with certain provisions of the Indian Health Care Improvement Act. Complaint. ¶¶ 28-30; Pl. Ex. 1 at 7-10. It is undisputed that the IHS declined the proposal based on one of the declination reasons provided in the ISDEAA: the proposal was "beyond the scope of the programs covered under [25 U.S.C. § 450f(a)(1)]" and "includes activities that cannot lawfully be carried out by the contractor," Pl. Ex. 1 at 9, a reference to 25 U.S.C. § 450f(a)(2)(E). Moreover, in its declination letter, the IHS complied with provisions of the ISDEAA and of its regulations governing declinations, and stated that the declination was subject to administrative appeal or judicial review, at the Tribe's option. Pl. Ex. 1 at 15-16. *See* 25 U.S.C. § 450f(b)[14]; 25 C.F.R. § 900.29 (requiring declination decision to inform contractor of right to file administrative appeal or to file suit in federal court).

[14] 25 U.S.C. § 450f(b) provides:

> Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall: (1) state any objections in writing to the tribal organization, (2) provide assistance to the tribal organization to overcome the stated objections and (3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under rules and regulations

Defendants now argue, however, that the proposal need not have been declined under the ISDEAA, and that the declination is unreviewable because it was not for services to Indians, and was not for a provision in the Model Agreement contained in the ISDEAA. Defendants are wrong on both counts.

Defendants' argument ignores that the IHCIA expressly provides for a Tribe to provide services to non-beneficiaries in certain circumstances under its ISDEAA contract. The IHCIA provides, in relevant part:

> In the case of health facilities operated under a contract entered into under the [ISDEAA] … the governing body of the Indian tribe or tribal organization providing health services under such contract is authorized to determine whether health services should be provided under such contract to individuals who are not eligible for such health services under any other subsection of this Act or under any other provision of law.

25 U.S.C. § 1680c(b)(1)(B) (emphasis added), *see supra* at note 2 (setting out complete provision). Congress has plainly spoken to the issue, and has decided that a particular class of services to non-IHS beneficiaries may be included in a tribe's ISDEAA contract.

Section 813(b)(1)(B), however, provides no procedures for ISDEAA contract proposals or declinations. Those provisions are included in the ISDEAA. Clearly, the Congressional plan is that a tribe may propose to include language consistent with Section 813(b)(1)(B) of the IHCIA in its ISDEAA contract proposal, and to make such proposal subject to the declination procedures of the ISDEAA. Reading the ISDEAA narrowly to exclude such proposal would make it impossible for tribes to pursue their rights under Section 813(b)(1)(B), and would violate settled rules of statutory construction requiring a court to give effect to every provision of a statute, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510, fn. 22 (1986), to construe

---

> as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in Federal district court and proceed directly to such court pursuant to section 110 (a).

the ISDEAA "liberally . . . for the benefit of the [Tribal] Contractor," 25 U.S.C. § 450*l*(c) (Section (a)(2) of the model agreement), and to read related statutes *in pari materia*. *See* Norman Singer, Sutherland Statutory Construction §§ 51.02-51.03 (6th ed. 2002).

Defendants' attempt to claim broad discretion to reject any contract provision not required by the model contract clashes violently with the statute. As the D.C. Circuit remarked in *Ramah Navajo*, "Congress has clearly expressed in the ISD[EA]A both its intent to circumscribe as tightly as possible the discretion of the Secretary … and its intent to make available judicial review of all agency action…." 87 F.3d at 1344. Yet the Defendants argue that their decision to reject a contract provision authorized by Section 813 of the IHCIA was "a matter of agency discretion" that not only did not trigger the declination criteria but "is beyond this Court's review." Defs. Mem. at 39; *cf. id*. at 42 (agency decision "was purely an act of agency discretion"). This is precisely the kind of high-handed "threshold" determination that the declination procedures were designed to prevent. *See* 25 C.F.R. § 900.3(a)(7) ("Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.") If IHS believes a Tribe's proposal is inconsistent with the definition of "self-determination contract," then it must decline under subparagraph (E), as in fact the IHS did here, but the agency cannot ignore the declination procedures and criteria altogether. *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1, 11-12 (D.D.C. 2008) (rejecting as arbitrary and capricious BIA's decision not to apply declination criteria and "essentially relieve[] itself of the burden of providing a proper justification for its actions").

Defendants' reliance on *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005), Defs. Mem. at 39-40, is misplaced. That case involved the Hoopa Valley Tribe's attempt to enter

into an ISDEAA contract to provide a program that was "not specifically targeted to the Hoopa Valley Tribe, but rather collaterally benefit[ed] Indians as a part of the broader population." *Hoopa Valley Indian Tribe*, 415 F.3d at 992 (citations and quotation marks omitted); *see also id.* at 991 ("the Trinity River restoration program is not 'specifically targeted' to Indians . . . "). The Court acknowledged, however, that "a statutory scheme as a whole need not be *exclusively* targeted to Indians in order to create eligibility for mandatory self-determination contracts." Id. at 992 n. 4 (emphasis in original). Here, unlike the situation in *Hoopa Valley Indian Tribe*, the IHCIA expressly provides authority for inclusion in a self-determination contract of the services proposed. It is also worth noting that that case was decided on the merits, and not on a motion to dismiss for lack of jurisdiction.

The Defendants argue that the only contract terms which may be included in a contract under the ISDA are those included in the model agreement set forth in section 108 of the ISDA and other provisions which both parties have approved. Defs. Mem. at 38. Defendants' argument is expressly rejected by the language of the ISDEAA. Section 450f(a)(2) provides that the Secretary may disapprove a contract proposal based only on one of five grounds set out therein. 25 U.S.C. § 450f(a)(2). Section 450f(a)(4) provides that the Secretary "*shall approve* any severable portion of a contract proposal that does not support a declination finding described in [Section 450f(a)(2)]." 25 U.S.C. § 450f(a)(4)(emphasis added). "Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by [the] Secretary." S. Rep. No. 100-274, at 3 (1988).

Clearly, the declination provisions of the ISDEAA do not distinguish between proposed terms that are required by the Model Agreement and those that are not, and subjects all proposed terms to the declination criteria in Section 450f(a)(2). The statute further provides that

"Whenever the Secretary declines to enter into a self-determination contract or contracts," the tribal contractor has various rights, including the right "to initiate an action in Federal district court . . . pursuant to [25 U.S.C. § 450m-1]." 25 U.S.C. § 450f(b). Again, the statutory right to challenge the declination does not distinguish between clauses included in the Model Agreement and those not included.

It is impossible to square Defendants' argument with the language and structure of the statute. In particular, the fifth declination criterion provides that a contract proposal may be declined where "the proposal includes activities that cannot lawfully be carried out." 25 U.S.C. § 450f(a)(2)(E). The statute clearly provides for an appeal where, as here, the IHS asserts that the fifth declination criterion is met. 25 U.S.C. §450m-1. Defendants' argument must be rejected because, *inter alia*, it fails to give effect to the declination provisions of the ISDEAA. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 510 n. 22 ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires.").

Defendants' position is also contrary to IHS's own regulations, which provide that "*[a]ny portion of an [AFA] proposal* which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity) . . . is subject to the declination criteria and procedures . . . ." 25 C.F.R. § 900.32 (emphasis added). These regulations are binding on the Secretary. *See Service v. Dulles*, 354 U. S. 363, 379 (1957); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Defendants' argument also runs contrary to its Internal Agency Procedures *Handbook for Non-Construction Contracting Under Title I of the Indian Self-Determination and Education Assistance Act* ("I.A.P. Handbook"), which makes clear that all contract proposals are subject to

the declination procedures (*id*. Chap. 5), and that the declination procedures apply to all provisions of the AFA. (*Id.* Chap. 5 at § III. F(1)(b)). [15]

Southern Ute Indian Tribe v. Leavitt, 497 F. Supp. 2d 1245 (D.N.M. 2007), relied on by Defendants, Defs. Mem. at 39-40, provides no support for their arguments. As Defendants acknowledge, *id*., that case involved an attempt by the IHS to require a tribe to agree to certain contract language, *see Southern Ute Indian Tribe*, 497 F. Supp. 2d at 1250-51, and not — as here — a contract provision proposed by the tribe and subject to the statutory declination and appeal provisions. Moreover, while *Southern Ute Indian Tribe* held that the IHS could not require the tribe to agree to the provision at issue, it did assert jurisdiction and decide the case on the merits. That case provides no support for Defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully Submitted,

/s/

Michael L. Roy, DC Bar #411841
S. Bobo Dean, DC Bar #145219
Marmaduke D. McCloud, DC Bar #497105
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W., Suite 700
Washington, DC 20037

Attorneys for the Three Affiliated Tribes of
the Fort Berthold Reservation

DATED: January 30, 2009

[15] The relevant portions of the I.A.P. Handbook are submitted as Pl. Ex. 6. The I.A.P. Handbook "sets out the procedures to guide the actions of all agencies of the Department of the Interior (DOI) and the [HHS] to facilitate and enhance contracting with T/TOs under Title I of the ISDA . . ." (*Id.* at Chap. 2 at § I). The Handbook was promulgated jointly by Departments of Interior and Health and Human Services, in consultation with tribes.