



## INTERIOR BOARD OF INDIAN APPEALS

Tanana Chiefs Conference, Inc. v. Acting Associate Alaska State Director,  
Bureau of Land Management

33 IBIA 51 (10/05/1998)

Related Indian Self-Determination Act case:  
Administrative Law Judge decision, 08/14/1998



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

TANANA CHIEFS CONFERENCE, INC.,	:	Order Affirming Recommended Decision
Appellant	:	as Modified
	:	
v.	:	
	:	Docket No. IBIA 98-51-A
ACTING ASSOCIATE ALASKA STATE	:	
DIRECTOR, BUREAU OF LAND	:	
MANAGEMENT,	:	
Appellee	:	October 5, 1998

On December 23, 1997, the Acting Associate State Director, Bureau of Land Management (BLM), declined to enter into a contract under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n (1994), <sup>1/</sup> with the Tanana Chiefs Conference, Inc. (TCC). TCC had proposed an ISDA contract for the purpose of recruiting, training, and operating an intertribal and interagency Type I “hotshot” firefighting crew. TCC appealed the declination decision to the Board of Indian Appeals (Board), which referred the case to the Hearings Division of the Office of Hearings and Appeals for a hearing and recommended decision. On August 14, 1998, Administrative Law Judge Nicholas T. Kuzmack issued a Recommended Decision which affirmed the BLM decision. Both TCC and BLM filed objections to Judge Kuzmack’s Recommended Decision. For the reasons discussed below, the Board affirms the Recommended Decision as modified here.

The Board does not repeat the factual background set forth in Judge Kuzmack’s Recommended Decision.

TCC objects to Judge Kuzmack’s conclusion that the operation of a hotshot crew is not a severable or contractible portion of BLM’s fire suppression program. It argues that “[t]he Hot shot crew is a portion of the fire suppression services. Thus, if a fire suppression program is contractible, the portion relating to the hotshot crew is also contractible.” TCC’s Objections at 2. TCC contends that BLM should have conducted a severability determination under 25 C.F.R. § 900.25, which provides: “The Secretary must approve any severable portion of a proposal that does not support a declination finding described in § 900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.”

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<sup>1/</sup> All further citations to the United States Code are to the 1994 edition.

The Board finds that it essentially agrees with the Judge that an Alaskan hotshot crew is not operated “for the benefit of Indians because of their status as Indians” within the meaning of 25 U.S.C. § 450f(a)(1)(E). It agrees that fire suppression on Native lands in Alaska is a program “for the benefit of Indians because of their status as Indians,” and that Alaskan hotshot crews provide services which are an aspect of fire suppression and which may, on occasion, benefit Native lands in Alaska--or even other Indian lands in the lower 48 states. However, because of the unique and extensive checkerboard pattern of land ownership throughout the entire State, the Board believes that the only logical conclusion is that Alaskan hotshot crews are operated for the benefit of all persons and valuable resources within the State, and that the identity of the persons and resources actually benefitted by the operation of a hotshot crew is largely accidental based upon the location of those fires to which the crew is deployed. The Board concludes that, even assuming the operation of a hotshot crew in Alaska was a severable portion of BLM’s fire suppression program, it is not contractible under ISDA because it is not a program operated “for the benefit of Indians because of their status as Indians.” However, the Board specifically limits the holding of this case to the operation of hotshot crews in the State of Alaska and offers no opinion concerning the operation of hotshot crews in the lower 48 states. No issue relating to hotshot crews in the lower 48 states is presently before the Board, and the Board has no relevant information concerning the actual operation of such crews.

TCC also objects to Judge Kuzmack’s holdings that it was immaterial that BLM did not provide it with technical assistance to overcome the deficiencies in its proposal and did not furnish it with the documentation supporting the declination decision in a timely manner. TCC contends that these failures prevented it from modifying its proposal to include only the severable and contractible portion of the operation of a hotshot crew.

The conclusion that the operation of an Alaskan hotshot crew is not a contractible program moots these procedural objections.

BLM objects to that part of the Recommended Decision concerning TCC’s failure to submit supporting tribal resolutions with its initial proposal. Judge Kuzmack held that this issue was not properly before him because BLM did not assert the lack of tribal resolutions as a ground for declining to contract. In a second paragraph, he cited legislative history from 1987 to the effect that the requirement for tribal resolutions was not intended to be used as an obstacle to requests to contract. BLM objects to the second paragraph, which it describes as dicta.

The essence of BLM’s argument is that the Judge based his statement on committee language which predated the 1988 and 1994 amendments to ISDA and the 1996 promulgation of the negotiated regulations in 25 C.F.R. Part 900. BLM contends that the law presently requires tribal resolutions to be included with the initial proposal. In support of this argument, BLM cites 25 U.S.C. § 450f(a)(1) (“The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts \* \* \*” (emphasis added.)); the legislative history of the 1988 ISDA amendments; and 25 C.F.R. § 900.8 (“An initial contract proposal must contain the following information: \* \* \* (d) A copy of the authorizing resolution from the Indian tribe(s) to be served”).

BLM's argument is contrary to 25 C.F.R. § 900.15, which provides: "Upon receipt of a proposal, the Secretary shall: \* \* \* (b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification." This regulation clearly puts the burden on the government to notify an applicant of any items which are required by 25 C.F.R. § 900.8, but which were not included with the initial proposal, and just as clearly gives the applicant an opportunity to cure any such deficiency.

The Board therefore agrees with Judge Kuzmack that the failure to submit tribal resolutions with the initial proposal is not fatal. However, it modifies the Recommended Decision by citing 25 C.F.R. § 900.15(b) as the authority supporting that conclusion.

Although BLM does not clearly articulate such a position, the presentation of its argument suggests the possibility that it intended to argue that 25 C.F.R. § 900.15(b) is invalid because the regulation exceeds the grant of authority in 25 U.S.C. § 450f(a)(1). BLM mentions 25 C.F.R. § 900.15(b), but then states that "the requirement that tribal resolutions be included with proposals is statutory, and there is no provision in the ISDA for waiver of this requirement." BLM's Objections at 3. It continues by asking the Board to replace the second paragraph in Judge Kuzmack's discussion of tribal resolutions with a new discussion based on 25 U.S.C. § 450f(a)(1) and 25 C.F.R. § 900.8. To the extent BLM may be arguing that 25 C.F.R. § 900.15(b) violates the statute, the Board lacks authority to declare a duly promulgated Departmental regulation invalid. See Edwards v. Portland Area Director, 29 IBIA 12, 13 (1995); Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Kuzmack's August 14, 1998, Recommended Decision is affirmed as modified in this decision.

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Kathryn A. Lynn  
Chief Administrative Judge

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Anita Vogt  
Administrative Judge