



INTERIOR BOARD OF INDIAN APPEALS

Hannahville Indian Community v. Minneapolis Area Education Officer
and Area Supervisory Contract Specialist, Bureau of Indian Affairs

37 IBIA 35 (11/13/2001)

Related Board cases:

34 IBIA 4

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United States Department of the Interior

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

HANNAHVILLE INDIAN COMMUNITY

v.

MINNEAPOLIS AREA EDUCATION OFFICER and
AREA SUPERVISORY CONTRACT SPECIALIST,
BUREAU OF INDIAN AFFAIRS

IBIA 97-143-A

Decided November 13, 2001

Appeal from an Administrative Law Judge's Second Recommended Decision in an Indian Self-Determination Act matter.

Second Recommended Decision vacated; Decision issued.

1. Indians: Education and Training: Tribally Controlled Schools--
Indians: Indian Self-Determination and Education Assistance Act:
Generally

A grantee operating an Indian educational program under the Tribally Controlled Schools Act, 25 U.S.C. §§ 2501 et seq., cannot enter into a contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450 et seq., to lease the facility used to operate the educational program.

APPEARANCES: Dawn S. Duncan, Esq., Wilson, Michigan, for the Hannahville Indian Community; Dori Richards, Esq., Office of the Solicitor, Albuquerque, New Mexico, and Kara Pfister, Esq., Office of the Solicitor, Ft. Snelling, Minnesota, for the Minneapolis Area Education Officer and the Area Supervisory Contract Specialist.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Minneapolis Area Education Officer and the Area Supervisory Contract Specialist, Bureau of Indian Affairs (BIA), seek review of a September 21, 2001, Second Recommended Decision issued by Administrative Law Judge William S. Herbert in a matter arising under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n. The Board of Indian Appeals (Board) vacates Judge Herbert's September 21, 2001, Second Recommended Decision and issues this decision in its place.

Findings of Fact

1. Prior to 1976, Hannahville Indian School was a private school.
2. ISDA was originally enacted on January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203. ISDA has been amended several times.
3. In 1976, BIA awarded the Hannahville Indian Community (Community) an ISDA contract to operate the Hannahville Indian School.
4. The Tribally Controlled Schools Act of 1988 (TCSA) became law on April 28, 1988. Pub. L. No. 100-297, 102 Stat. 385, 25 U.S.C. §§ 2501 et seq. TCSA specifically incorporated several provisions of ISDA as set forth in 25 U.S.C. § 2508(a), quoted below.
5. In 1988, the Community applied to BIA to convert its ISDA education contract to a TCSA grant for its Kindergarten through Grade 12 basic program of education. The application was approved, and the Community has since received an annual TCSA grant for the operation of the school.
6. In 1990-91, BIA awarded the Community an ISDA contract to administer the acquisition and installation of portable units to provide additional classroom space for the Community's school.
7. In or after 1990, BIA awarded the Community an ISDA contract to construct a new school facility. The new building was constructed and was occupied in February 1993.
8. Following construction and occupancy of the new school facility, the Community's School Administrator listed the portables as excess even though he indicated that the school still had space needs. BIA subsequently removed the portables and relocated them to another school.
9. ISDA was amended by the Act of October 25, 1994, Pub. L. No. 103-413, 108 Stat. 4250. As relevant to this case, the 1994 amendments added authorization for an ISDA contractor to lease the facilities used to carry out an ISDA program. 108 Stat. 4255-56. This subsection is presently codified as 25 U.S.C. § 450j(l) and is quoted below.
10. The Community held a Tribal Council meeting on March 13, 1996. The School Administrator made a presentation at that Council meeting concerning options for funding an estimated \$1.8 million addition to the new school.

11. Preliminary site work for an addition to the new school began in May 1996.

12. On September 11, 1996, the Assistant Secretary - Indian Affairs (Assistant Secretary) and the Director of BIA's Office of Indian Education Programs (OIEP) met in Washington, D.C., with officials of the Lac Courte Oreilles Tribe. The Lac Courte Oreilles Tribe presented an ISDA proposal which was similar to the proposal under consideration in this case.

13. The Community's School Administrator and a Tribal Council Member also attended the September 11, 1996, meeting. Following the Lac Courte Oreilles Tribe's presentation, the Community's School Administrator handed the Assistant Secretary another document, stating: "Ms. Deer we have one identical to submit on behalf of the Hannahville Indian Community." (Testimony of Thomas Miller at Jan. 25, 2000, Hearing; p. 139).

14. The transmittal letter accompanying the Community's proposal was signed by the Tribal Council Member attending the meeting on behalf of the Council Chairman.

15. The introductory information in the Community's proposal stated:

The Hannahville Indian School must expand its facilities and programs in order to continue to respond to the growing needs of the Hannahville Potawatomi Indian Community. However, current Bureau of Indian Affairs procedures and Congressional funding are inadequate to address the demonstrated educational needs in Indian Country. Thus alternative procedures and funding for addressing the needs of the Hannahville Indian School must be found. The leasing mechanism described in 25 CFR Part 900, [ISDA] Amendments, Subpart H - Lease of Tribally-Owned Buildings by the Secretary provides this alternative.

Community's Proposal, Section 1, Project Background, at unnumbered 3.

16. The proposal continued:

Based upon discussions with individual members of the workgroup responsible for the development of this Sub-part [i.e., 25 C.F.R. Part 900, Subpart H], tribally controlled grant schools would be eligible to enter into a lease agreement with the Secretary. The [TCSA] was promulgated to enhance the concepts made manifest in the [ISDA].

* * * * *

The provisions of [TCSA] are either an amendment to [ISDA] or they independently add additional rights to those available to Tribes under [ISDA]. In either case, the Tribally Controlled Grant School can utilize the lease provisions found in [TCSA (sic)]. An Act independent and original in form is considered an amendment when it references a prior Act. It is not necessary that an act use the word “amend”, rather if words of similar import are used such as “supplement”, “enhance,” etc., the act in most instances will be declared amendatory.

* * * * *

It is clear that [TCSA] is an amendment to [ISDA]. It augments and rearticulates the principles and programs found in [ISDA]. First, [ISDA] is referenced in [TCSA] and Congress found that [TCSA] was necessary to “enhance” [ISDA]. * * * Second, [TCSA] cannot be understood to be existing apart from the statutory provisions of [ISDA]. * * * More importantly, [TCSA] states that certain provisions, including those provisions which allow the Secretary to enter into a lease with a Tribe, are specifically incorporated into [TCSA 1].

If [TCSA] is considered not to be an amendment but a separate act, the rights found there cannot be understood as precluding the Tribally Controlled Grant School from entering into a lease. In this case, [TCSA] supplements the provision of [ISDA] without repealing any provisions unless they are specifically mentioned. A supplemental act is an act not purporting to amend but makes an addition to a prior statute without impairing an existing provision.

Community’s Proposal, Section 2, Legislative Analysis of 25 C.F.R. Part 900, Subpart H, at unnumbered 3-5.

17. The proposal described the facilities which the Community sought to lease as:

The facilities at the Hannahville Indian School which house the elementary (K-5) and middle school (6-8) educational areas. These facilities consist of 27,628 square feet of classrooms, support facilities, and common areas.

Community’s Proposal, Section 3, Lease Agreement, at unnumbered 1.

1/ The Community did not provide a citation for this alleged incorporation of the leasing provision.

18. The amount of rent under the proposed lease was \$414,420 per year. The term of the proposed lease was 20 years, running from October 1, 1997, through September 30, 2017, for a total rental payment of slightly less than \$8.3 million.

19. The Assistant Secretary took no action in regard to the document which she received from the Community. In particular, she did not address it herself as an ISDA proposal, she did not assign the matter to another official in the BIA's Central Office, and she did not forward the document to the Minneapolis Area Office, BIA (Area Office).

20. On January 13, 1997, the Community's Tribal Chairman wrote to the Education Programs Administrator at the Area Office noting that it had been 124 days since the Community submitted its proposal to the Assistant Secretary and the OIEP Director. The Chairman stated: "According to the [ISDA] rules and regulations, the project is approved. There are adequate monies unobligated in the Facilities Management & Construction Center (FMCC) system to easily fund this lease." He requested that BIA "proceed with the issuance of a lease contract."

21. The Area Office informed the Community that it had no knowledge of a submission to the Assistant Secretary.

22. Representatives of the Community and BIA met on January 27, 1997. The Community's representatives included its School Administrator. At this meeting, the Community presented Area Office officials with a "duplicate original" of the proposal given to the Assistant Secretary.

23. BIA's Area Supervisory Contract Specialist examined the proposal as soon as he received it, and determined that it was lacking an authorizing tribal resolution. He immediately asked the Community's School Administrator to provide a tribal resolution.

24. On March 3, 1997, the Community's Tribal Council adopted Resolution No. 030397-F, which states: "That the Hannahville Indian Community hereby approves this Lease contract application for funding from the Bureau of Indian Affairs and authorizes [its] Tribal Chairman to negotiate and execute the said contract."

25. The School Administrator faxed the tribal resolution to the Area Education Office on March 24, 1997.

26. On April 7, 1997, the Minneapolis Area Education Officer and the Area Supervisory Contract Specialist declined the Community's proposal. At page 1, their letter stated the grounds for declination to be those contained in 25 C.F.R. § 900.22(e):

The program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of the programs, functions, services, or activities covered under [25 U.S.C. § 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor, see attached letter from Field Solicitor dated March 20, 1997.

27. After noting that the proposal delivered to the Assistant Secretary had still not been located, the April 7, 1997, declination letter continued at page 2:

[The copy of the proposal submitted to the Area Office] did not contain an authorizing Tribal Resolution as required by [25 U.S.C. § 450f(a)(1)]. It may be determined that the original proposal also did not contain an authorizing Tribal Resolution. If so, the Secretary, in accordance with the Act is not authorized to act upon, or enter into contracts without an authorizing Tribal Resolution.

28. The April 7, 1997, declination letter included as an attachment a March 20, 1997, opinion from the Department's Field Solicitor concerning the proposal.

29. At page 2, the April 7, 1997, declination letter offered "to work on a Government to Government basis with the * * * Community * * * to mutually develop a proposal that would meet the needs of the Tribe and also be lawfully contracted for."

30. Pursuant to the Community's request, an informal conference was held on June 3, 1997.

31. The minutes of the informal conference show that the Community and its School Administrator believed that BIA had approximately \$93 million of unobligated funding since 1993 and about \$3-4 million of completely "unattached" funds. Minutes of June 3, 1997, informal conference at unnumbered 5.

32. On June 13, 1997, the informal conference Facilitator issued a report in which she concluded that the Community's proposal was properly declined.

33. The Community appealed to the Board. After determining that the appeal raised issues under 25 C.F.R. § 900.150(a)-(g) and that the Community had not waived its right to a hearing, the Board referred the appeal to the Hearings Division for assignment to an administrative law judge. On July 16, 1997, this matter was assigned to Administrative Law Judge Vernon J. Rausch.

34. With the agreement of the parties, Judge Rausch did not hold an evidentiary hearing. Instead, the matter was submitted on the basis of a stipulation of facts and an agreed-upon administrative record.

35. Judge Rausch retired on August 30, 1997.

36. This matter was reassigned to Judge Herbert after he entered on duty in April 1998. The parties continued to agree that no evidentiary hearing was necessary.

37. Judge Herbert issued a Recommended Decision on April 23, 1999. The Recommended Decision upheld the declination “due solely to the lack of a legally sufficient tribal resolution as a *statutorily necessary antecedent part* of the Appellant’s application for lease at any time while the application was under Secretarial consideration.” Apr. 23, 1999, Recommended Decision at 2.

38. The Community appealed to the Board. On June 8, 1999, the Board declined to accept Judge Herbert’s Recommended Decision. It held that the transmittal letter submitted with the proposal package on September 11, 1996, and signed by a Tribal Council Member for the Tribal Council Chairman, did not constitute an authorizing tribal resolution. Hannahville Indian Community v. Minneapolis Area Education Officer and Area Supervisory Contract Specialist, 34 IBIA 4, 7-8 (1999) (Hannahville I).

39. The Board also held:

25 C.F.R. § 900.15(b) grants an applicant for an ISDA contract a substantive right to be notified if any of the information required by 25 C.F.R. § 900.8 is missing from its application, and gives it an opportunity to cure any such deficiency. The statutory requirement for an authorizing tribal resolution is one of the pieces of information which is included under section 900.8. Thus, section 900.15(b) imposes an obligation on the agency receiving an ISDA contract proposal to inform the applicant if the proposal is lacking a tribal resolution.

34 IBIA at 11.

40. However, the Board further held that the Community had in fact submitted an authorizing tribal resolution in March 1997, while the proposal was still under consideration by BIA.

41. The Board returned the matter to Judge Herbert for a decision on the merits.

42. The Community requested an evidentiary hearing. Judge Herbert held a hearing on January 25-28, 2000, and April 4-5, 2000. The parties filed post-hearing briefs and responses.

43. In his Second Recommended Decision, issued on September 21, 2001, Judge Herbert held that BIA timely declined the Community's proposal, but rejected BIA's reason for declination.

44. The Board received BIA's appeal from Judge Herbert's Second Recommended Decision on October 23, 2001.

45. The Board issued an order on October 24, 2001, establishing a response period for the Community and requesting position statements from the parties on whether this case was moot.

46. A telephonic conference call was held between the Board's Chief Administrative Judge and counsel for the parties on October 29, 2001. During that conference call, the Community presented its position that this appeal is not moot, and BIA presented its position that it is moot. These positions were supported by affidavits. During the conference call, the parties were also given an opportunity to provide the Board with a list of the filings they had made in this matter in order to ensure the completeness of the administrative record. BIA filed a statement of its filings; the Community did not.

47. The Community filed a response to BIA's appeal on November 5, 2001.

48. November 12, 2001, the twentieth day after the Board's receipt of BIA's appeal, is a Federal holiday. Therefore, the Board is required to issue a decision in this matter on or before November 13, 2001.

Mootness

In its October 24, 2001, order, the Board noted that it had been unable to determine from the administrative record whether there was still a live case in controversy between the parties. Specifically, it stated that it could not determine whether the Community had continued in more recent years to seek ISDA funds for the purpose set out in the proposal at issue here. The Board noted that it was not inclined to issue decisions in moot cases, and asked the parties for their positions as to whether or not this case was moot.

This issue was addressed in the telephonic conference call held on October 29, 2001, among the Chief Administrative Judge and counsel for the two parties. As noted above,

counsel for the Community argued that the case was not moot. She stated that the Community had not filed additional requests for ISDA funds for this purpose because it believed that each such application would be treated the same as this application; that the Community had not sought other sources of funding for the purpose set out in its proposal; and that other tribes were awaiting a decision in this case before filing their own similar proposals. Counsel for BIA contended that the case was moot because the Community had not filed any other ISDA proposals and had not taken any other actions toward receiving funding. Counsel for BIA admitted, however, that any further ISDA applications would have been declined for the same reason given in this case. The Community filed a written statement of its position.

The Community's proposal was not written in terms of a request for fiscal year funding. Instead, it sought funding for 20 years, giving a start and end date. Although the start date has obviously long passed, the Board finds that the issue raised in this case is still a live controversy between the parties. It therefore concludes that the appeal is not moot.

Timeliness of Declination Decision

In Hannahville I, the Board found that the Community's initial proposal lacked a valid authorizing tribal resolution. Despite this holding, the Community continued to argue during the hearing and in its post-hearing briefs that its initial proposal included a tribal resolution; i.e., the transmittal letter which was signed by a Tribal Council Member for the Tribal Council Chairman. 2/

The question of whether or not the transmittal letter constituted a tribal resolution was decided against the Community in Hannahville I. That holding is res judicata.

The Board is aware that the Department did not take action in regard to the document which the Community submitted to the Assistant Secretary on September 11, 1996. It does not condone the fact that the Assistant Secretary did not act upon that document. It notes that the Assistant Secretary did transmit a similar proposal submitted by the Lac Courte Oreilles Tribe to the Minneapolis Area Office, which declined the proposal on December 9, 1996. The Board will not speculate as to why or how the Community's document went astray. However, the fact remains that BIA lacks authority to enter into an ISDA contract that is not authorized

2/ The Community also raised this issue in its response to BIA's present appeal. This issue, like several others which the Community raised in its response, are actually objections to the Second Recommended Decision. The Community did not file a timely appeal from the Second Recommended Decision. Raising these issues in its response constitutes an attempt to file an untimely appeal--an attempt which the Board rejects.

by a tribal resolution. The Board also holds in this decision that BIA could not lawfully enter into a contract based on the Community's proposal. It declines to hold that BIA was required to enter into an unlawful contract because no declination was made within 90 days of the submission of the Community's document to the Assistant Secretary.

BIA's April 7, 1997, declination decision was issued within 90 days of both the Community's January 27, 1997, submission of its proposal to the Area Office and the March 24, 1997, submission of an authorizing Tribal Council resolution. The Board concludes that the Community's proposal was timely declined.

Conclusions of Law

The Community's arguments appear to suggest that the question in this case is whether a tribe or tribal organization can receive funds under both TCSA and ISDA. The Board rejects this characterization of the issue. It finds no dispute that, in broad generality, TCSA and ISDA are both available to a tribe or tribal organization in furtherance of its total educational program. Instead, it finds that the issue here is a narrow question of law: *i.e.*, whether there is statutory authority for a tribe or tribal organization to enter into an ISDA contract under 25 U.S.C. § 450j(1) to lease facilities used to perform an educational function operated by the tribe or tribal organization under a TCSA grant.

The Supreme Court has often stated that "the starting point in statutory interpretation is 'the language [of the statute] itself.'" United States v. James, 478 U.S. 597, 604 (1986), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). See also Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); and cases cited therein; Johns-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988). If the statutory language is clear and unambiguous, there are only "rare and exceptional circumstances" under which it is appropriate to inquire further. Crooks v. Harrelson, 282 U.S. 55, 60 (1930). See also Connecticut National Bank v. Germain, 503 U.S. 249, 253 (1992); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989); Rubin v. United States, 449 U.S. 424, 430 (1981); Aaron v. Securities and Exchange Commission, 446 U.S. 680, 695 (1980); Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 n.33 (1978); United States v. Goldenberg, 168 U.S. 95, 18 S.Ct. 3, 4 (1897).

The courts have held that rare and exceptional circumstances exist when the plain language of the statute is grossly at odds with stated legislative intent or leads to an absurd result. See, e.g., Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); Crooks v. Harrelson, *supra*, 282 U.S. at 60; Treat v. White, 181 U.S. 264, 21 S.Ct. 611, 613 (1901); Trailer Train Co. v. State Board of Equalization, 697 F.2d 860, 866 (9th Cir.), cert. denied, 464 U.S. 846 (1983).

The Board's starting point in this analysis is the language of TCSA. It finds nothing in TCSA which authorizes the leasing of facilities used to perform the functions for which a tribe has received a TCSA grant. There is nothing ambiguous or unclear in TCSA's lack of statutory authorization of such leasing. Ordinarily, this lack of statutory authorization would end the inquiry.

However, the Community contends that such authority is found in 25 U.S.C. § 450j(1), part of ISDA. 25 U.S.C. § 450j(1), entitled "Lease of facility used for administration and delivery of services," provides:

(1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this subchapter [i.e., ISDA].

(2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of a facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

On its face, 25 U.S.C. § 450j(1) authorizes the leasing of facilities used for the administration and delivery of services under ISDA. The subsection says nothing about the leasing of facilities used for the administration and delivery of services under any other statute, including TCSA. 3/

3/ Much of the testimony and arguments in this case were directed to the nature of and source for funding of the programs being housed, or that could be housed, in the facility which the Community constructed and now seeks to lease. The proposal at issue here sought an ISDA lease for a building housing programs funded through a TCSA grant, i.e., the Community's Kindergarten through Grade 8 basic educational program. The Board reviews this declination decision under the proposal as submitted.

Throughout this proceeding, the Community has offered other scenarios under which it apparently believes it might have been authorized to lease the facility, even if BIA's interpretation of the statute were to be accepted. Many of these scenarios are raised in the context of allegations that BIA failed to provide the Community with technical assistance to overcome deficiencies in the proposal. Given its holding in this case, the Board agrees with BIA that no amount of technical assistance would have overcome the basic illegality of the Community's proposal. However, changes in the use of the facility, as well as other possible changes to the

25 U.S.C. § 2508(a), part of TCSA, specifically incorporates certain provisions of ISDA into TCSA. Subsection 2508(a) provides: “All provisions of sections 5, 6, 7, 104, 105(f), 106(f), 109, and 111 of [ISDA], except those provisions relating to indirect costs and length of contract, shall apply to grants provided under [TCSA].” These ISDA sections are presently codified as 25 U.S.C. §§ 450c, 450d, 450e, 450i, 450j(f), 450j-1(f), 450m, and 450n. The sections deal primarily with procedural matters, including reporting and audit requirements for recipients of Federal financial assistance (§ 450c); criminal activities involving grants, contracts, etc., and penalties (§ 450d); wage and labor standards (§ 450e); retention of Federal employee coverage, rights and benefits by employees of tribal organizations (§ 450i); limitation on remedies relating to cost disallowances (§ 450j-1(f)); contract or grant rescission (§ 450m) and sovereign immunity and trusteeship rights (§ 450n). Although 25 U.S.C. § 450j(f) deals with facilities, 4/ it does not contain, or even mention, the leasing provision found in 25 U.S.C.

fn. 3 (continued)

Community’s proposal, would have been appropriate topics for discussion if the Community had accepted BIA’s offer in its Apr. 7, 1997, declination letter “to work on a Government to Government basis with the * * * Community * * * to mutually develop a proposal that would meet the needs of the Tribe and also be lawfully contracted for.” Apr. 7, 1997, Letter at unnumbered 2. It would also have been an appropriate topic of discussion if this case had been addressed through mediation, an alternative that was not available to the Board at the time this appeal was originally received. However, throughout this entire proceeding, the Community, its counsel and other representatives, and its witnesses have appeared to be most interested in vindicating their legal position.

4/ Section 450j(f) provides:

“In connection with any self-determination contract or grant made pursuant to section 450f or 450h of this title, the appropriate Secretary may—

“(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary’s jurisdiction under such terms and conditions as may be agreed upon for their mutual use and maintenance;

“(2) donate to an Indian tribe or tribal organization title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, except that—

“(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the contract or purchased with funds under any self-determination contract or grant agreement shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization;

“(B) if property described in subparagraph (A) has a value in excess of \$5,000 at the time of the retrocession, rescission, or termination of the self-determination contract or grant

§ 450j(1). The Board thus concludes that 25 U.S.C. § 2508(a) does not incorporate the leasing provisions of 25 U.S.C. § 450j(1) into TCSA.

The Community argues that it is not necessary for ISDA provisions to be specifically incorporated into TCSA in order for a TCSA grantee to access ISDA funds. Although the Board does not accept the Community's legal analysis on this point, it does agree with the bottom line that there is nothing in either ISDA or TCSA that prevents a tribe or tribal organization from receiving an ISDA contract while operating its educational program under a TCSA grant as long as the particular ISDA provision under which a contract is sought is not incompatible with TCSA or is not otherwise limited in its application.

The Community, however, takes its argument a step further. It presents the testimony of an individual who worked as a legislative staffer during consideration of ISDA and TCSA in an attempt to show that 25 U.S.C. § 450j(1) does not mean what it says; *i.e.*, in an attempt to create an ambiguity in an otherwise clear statute. ^{5/} This witness testified generally that,

fn. 4 (continued)

agreement, at the option of the Secretary, upon the retrocession, rescission, or termination, title to such property and equipment shall revert to the Department of the Interior or the Department of Health and Human Services, as appropriate; and

“(C) all property referred to in subparagraph (A) shall remain eligible for replacement on the same basis as if title to such property were vested in the United States; and

“(3) acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act.”

^{5/} The parties have extensively addressed the question of whether two witnesses, a legislative staffer and an attorney involved in the practice of law under ISDA, were properly accepted as “legal expert witnesses” for the Community. BIA contends that the testimony of these witnesses consisted of legal opinions, rather than proper testimony. Further, BIA contends, those legal opinions were not confined to the application of an area of law in which the witnesses were “experts” to a particular factual scenario but, rather, impermissibly included personal opinions as to the correct interpretation of statutes. BIA cites a number of Federal court decisions in support of its objection to this testimony. The Community argues that such testimony is only objectionable in the presence of a jury.

During the proceedings before Judge Herbert, BIA filed a motion to exclude this testimony. When the motion was denied, it filed an interlocutory appeal with the Board. In Hannahville Indian Community v. Minneapolis Area Education Officer and Area Supervisory Contract Specialist, 34 IBIA 252 (2000) (Hannahville II), the Board declined to accept the appeal, holding that there was no authority in the ISDA regulations for interlocutory appeals.

although 25 U.S.C. § 450j(1) is not incorporated into TCSA either by 25 U.S.C. § 2508(a) or in any other way, that is because 25 U.S.C. § 450j(1) was added to ISDA in 1994, after enactment of TCSA, and Congress was not aware of TCSA when it enacted the 1994 ISDA amendments. The witness additionally suggested that, if Congress had been cognizant of TCSA at that time, it would have incorporated additional provisions of ISDA into TCSA, including those in 25 U.S.C. § 450j(1). The witness opined that congressional intent could only be carried out by commingling TCSA and ISDA, including the 1994 amendments, so as to read the two pieces of legislation as part of one whole.

The Board finds three major problems with the testimony of this witness and his legal argument. First, the Community has cited no case in which the oral testimony of an employee of the Legislative Branch has been accepted in order to create an ambiguity in a legislative enactment or, in essence, to call into question the actions and integrity of members of Congress in the exercise of their legislative responsibilities. The Board is not independently aware of any such case. It declines to accept the opinion of this witness as to what Congress was or was not cognizant of when it enacted the ISDA amendments.

Second, Congress is presumed to be aware of its own prior enactments. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990). The Board declines to accept the opinion of this witness that Congress was unaware of its prior enactment of TCSA when it amended ISDA in 1994.

Third, the testimony imparts to Congress an ignorance which the Board is unwilling to accept, particularly in view of legislation contemporaneous with the 1994 ISDA amendments. 25 U.S.C. § 2508(a) was amended by the Improving America's Schools Act of October 20, 1994, Pub. L. No. 103-382, Title III, sec. 382(d), 108 Stat. 4017. Prior to amendment, subsection 2508(a) read: "All provisions of sections 5, 6, 7, 104, 109, and 110 of the Indian Self-Determination and Education Assistance Act [25 U.S.C. 450c, 450d, 450e, 450i, 450m, 450n] except those provisions pertaining to indirect costs and length of contract, shall apply to grants provided under this chapter." 25 U.S.C. § 2508(a) (1988). The amendment added to the list of ISDA sections incorporated into TCSA. The 1994 ISDA amendments were enacted on October 25, 1994. The Board declines to accept the suggestion that Congress was unaware of

fn. 5 (continued)

The Board finds that the testimony of these two individuals did, in fact, include their personal opinions on the correct interpretation of the law. At this point, the Board is the final Departmental arbiter of the law. Regardless of how close these individuals may have been to the power centers, the Board views their opinions on the correct interpretation of the law as precisely that--opinions. In fact, the Board agrees with BIA that these opinions would have been better presented through appearances as amicus curiae than through testimony as witnesses.

the existence of TCSA when it was considering the ISDA amendments in light of the demonstrated fact that it was fully aware of both statutes and their interaction when it was contemporaneously considering an amendment to 25 U.S.C. § 2508(a).

In addition, the Board finds that the specific issue of leasing of facilities for use by Indian schools was before Congress when it was considering the 1994 ISDA amendments. On July 1, 1994, the Department of the Interior presented to Congress a report entitled "A Report on Alternative Funding for Construction of Indian Schools." The Department's report was requested in the Congressional reports accompanying the Fiscal Year 1994 Interior and Related Agencies Appropriations Act, Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379. As quoted in the Department's report, H.R. Rep. No. 103-158 (1993) stated:

In recent years, several tribes have asked that authority be provided to enter into a lease arrangement with the Bureau under which the tribe would construct a facility with a guaranteed annual lease payment for the Bureau to pay back the costs of construction. [6/] The Committee requests the Bureau and the Department to conduct a study of how such a program could be accomplished, and what legislative and administrative changes would have to be implemented prior to undertaking such a program. The study should be submitted to the appropriate authorizing and the Appropriations Committees by April 1, 1994.

The Department's report continues, quoting from H.R. Conf. Rep. No. 103-299 (1993):

The study requested in the House report on the possibility of establishing a construction/lease program and related legislative and administrative changes that would be required, should also address how the number of such facilities and related funding would be controlled were such a program to be implemented.

The Department's report specifically defined both ISDA and TCSA schools, as well as BIA-operated schools. It found several legislative changes that would be necessary before BIA could enter into such lease arrangements, including but not limited to the removal of limitations on the Department's authority to enter into long-term leases and the withdrawal of the application to such leases of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) and (B).

The testimony of witnesses for BIA showed that this report was before both the congressional authorizing and appropriations committees when the 1994 ISDA amendments were

6/ The type of arrangement sought by the Community in this case fits this description except for the fact that the lease payments sought would greatly exceed the costs of construction.

considered and ultimately enacted on October 25, 1994. As previously mentioned, those amendments included the leasing provision now codified at 25 U.S.C. § 450j(l). However, even though Congress chose to authorize leasing for programs contracted under ISDA, extensive testimony at the hearing revealed that it has never appropriated funds for this purpose.

The Board rejects the Community's attempt to create an ambiguity in the statutes. It therefore also rejects each of the Community's corollary arguments that numerous canons of statutory construction, developed in order to assist in the interpretation of ambiguous statutes, have any application here.

[1] The Board thus finds itself back at its starting point: the clear and unambiguous language of ISDA and TCSA. It finds that neither of these statutes authorizes a TCSA grantee to receive an ISDA contract to lease a facility used to perform the TCSA program. This literal interpretation of the language of the statutes does not thwart congressional intent or lead to an absurd result. 7/

In the absence of statutory authority for the ISDA contract which the Community seeks, the Board finds that BIA has clearly demonstrated that it properly declined the Community's proposal under 25 C.F.R. § 900.22(e). Therefore, the Board finds that BIA's April 7, 1997, declination decision was properly issued. 8/

7/ The Community and its witnesses have consistently argued that a literal reading of the statutes thwarts the congressional policy of maximum tribal self-determination set forth in both ISDA and TCSA. Their solution to this perceived problem is for the Department to rewrite the statutes in order to authorize an ISDA lease contract in support of a TCSA program.

The Department does not have authority to rewrite legislation. If the Community believes that a literal reading of the statutes thwarts congressional policy, it should bring this belief to the attention of Congress, which does have the authority to rewrite legislation.

8/ The Board feels constrained to comment on one argument raised by BIA, even though the argument does not affect the outcome of this decision. BIA contends that the Board must defer to its interpretation of the two statutes. In support of this contention, it cites cases in which the Federal courts have deferred to an implementing Executive Branch agency's reasonable interpretation of a statute. See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); Haynes v. United States, 891 F.2d 235, 238 (9th Cir. 1989).

The Board has previously rejected this identical argument, noting that it is not a Federal court reviewing the actions of an Executive Branch agency, but rather is a part of the Executive Branch agency making the initial determination of the agency's interpretation of the statute. As such, the Board's authority is established by Departmental regulations, not by statutes limiting

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Herbert's September 21, 2001, Second Recommended Decision is vacated, and this opinion, holding that BIA properly declined to enter into the ISDA contract sought by the Community, is substituted in its place. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

fn. 8 (continued)

the review authority of Federal courts. See, e.g., Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24, 27 (1991); Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 80, 90, 90 I.D. 521, 526-27 (1983). Under 43 C.F.R. § 4.318, the Board has been granted authority in any case before it to exercise the full authority of the Secretary of the Interior to correct a manifest injustice or error.

9/ Any motions not previously addressed are denied.