



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

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

Docket No. IBIA 98-51-A (08/14/1998)

Related Indian Self-Determination Act case:

Interior Board of Indian Appeals decision, 33 IBIA 51



# United States Department of the Interior

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August 14, 1998

TANANA CHIEFS CONFERENCE, INC.,	:	IBIA 98-51-A
	:	
Appellant	:	Appeal of a December 23, 1997, decision
v.	:	issued by the Acting Associate Alaska State
	:	Director, Bureau of Land Management
ACTING ASSOCIATE ALASKA STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, Appellee	:	Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450n

Appearances: Michael J. Walleri Esq., Fairbanks, Alaska, for the Tanana Chiefs Conference, Inc.,

Joseph D. Darnell, Esq., Anchorage, Alaska, for the Bureau of Land Management.

Before: Administrative Law Judge Nicholas T. Kuzmack

## **RECOMMENDED DECISION**

This case arises under the Indian Self-Determination and Educational Assistance Act Pub. L. No. 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended, codified at 25 U.S.C. §§ 450-450n (1994), (hereinafter referred to as the "ISDEA" or "P.L. 93-638"). This case was initiated by the submission of a proposal to contract, under Title I of the ISDEA, for the operation of an intertribal, inter-agency Type I "Hotshot" firefighting crew by the Tanana Chiefs Conference (TCC) (Ex. 3b). The Bureau of Land Management (BLM) reviewed the proposal and in a letter to TCC dated December 12, 1997, declined the proposal and raised the possibilities of non-ISDEA contracts (Ex. 4). A second letter, dated December 23, 1997, was denominated by BLM as their "formal declination of TCC's proposal as an ISDA Title I contract proposal." (Ex. 8) On January 26, 1998, TCC filed a Notice of Appeal of the decision of the Area Director of BLM with the Interior Board of Indian Appeals (the Board). Because TCC did not identify the decision from which it was appealing, the Board requested a copy of the decision. TCC telefaxed a copy of the December 23, 1997, letter to the Board on

January 27, 1998. On January 29, 1998, the Board issued an Order requiring a hearing and transmitted the file to this office.

A hearing was held in Fairbanks, Alaska, on May 4-6, 1998. The record contains exhibits that are extensive in number and length. I have had ample time and opportunity to observe the nine witnesses who testified at the hearing. I observed nothing that called into question the credibility of any witness.

The parties filed concurrent pre-hearing briefs and post-hearing opening and reply briefs in which they included legal arguments, but did not include proposed findings of fact. Having reviewed and considered all evidence and briefs, and for the reasons set forth below, I must conclude that BLM met its burden of proof and demonstrated that TCC did not submit a proposal to take over and operate all or part of BLM's wildland fire management and suppression on Native lands in Alaska, but rather, made a specific proposal to operate a type I "Hotshot" crew and that program or portion of a program was not contractible under P.L. 93-638.

## **FACTUAL BACKGROUND**

### **Alaska Fire Service**

The Secretary of Interior issued Secretarial Order No. 3077 in 1982. In it he designated BLM as the Department of the Interior (Department) agency responsible for wildland fire suppression in Alaska (Tr. 21). This order was subsequently incorporated in to the Departmental Manual at 910 DM 3 (Tr. 22).

BLM established the Alaska Fire Service (AFS) to carry out its fire suppression responsibilities in Alaska (Tr. 23). AFS is responsible for wildland fire suppression on over 235,000,000 acres, including all Departmental and Native lands, in Alaska (Tr. 9-10; Ex. 39). Responsibility for all fire management activities remains within the various Bureaus of the Department (Ex. 19).

The Department's policy on wildland fire suppression in 910 DM 3 provides for entering into cooperative agreements with the State of Alaska or other wildland fire suppression organizations to provide suppression services when economically and operationally beneficial for the protection of Departmental and Native lands (Ex. 9; 910 DM 3.6A). As a result, AFS, the State of Alaska and the U.S. Forest Service have divided the State into three protection areas irrespective of ownership (Tr. 23-24; Exs. 31 & D). The State of Alaska is responsible for fire suppression on lands in the southern part of Alaska. The U.S. Forest Service is responsible for the Tongass National Forest in southeast Alaska and the Chugach National Forest in south central Alaska. The geographic area for which the AFS is

responsible is the northern portion of the state (Tr. 23-24; Exs. 31 & D). The State of Alaska and AFS have entered into a cooperative agreement under which each is responsible for the fire suppression in its respective protection area. The cooperative agreement also provides for a sharing of resources (Tr. 90; Exs. 3 & 14).

Under their cooperative agreement, the State and BLM are each responsible for maintaining a basic fire fighting organization, referred to as "preparedness" (Tr. 90-91). The cooperative agreement provides that the State charges BLM for actual fire suppression on Federal and Native lands in the State's protection area and BLM, in turn, charges the State for actual fire suppression on State lands in BLM's protection area (Tr. 35-36). The agreement provides for reimbursement of actual suppression costs but not of preparedness costs (Tr. 90, 94). The agreement between the State and AFS is augmented each year with an Annual Operating Agreement which sets out in greater detail the day-to-day operations procedures (Tr. 89; Ex. 14).

AFS preparedness resources include smoke jumpers (used for initial attack on fires), the Hotshot crews (used for extended attack on fires), the fire suppression specialists (FSS) (also used in extended attack on fires), a warehouse and cache system, training, various aircraft, and a dispatch system (Tr. 90-91). Either party to the agreement may request assistance from the other for additional resources on an as-needed basis if the party with the resources has them available (Tr. 34-35). BLM also makes these resources available for use on fires in the Lower 48 states, if not needed in Alaska (Tr. 36).

### **Type I Hotshot Crews**

The primary operational role of hotshot crews within AFS is to work on extended attack fires. The AFS Type I Hotshot crews are composed of 20 individuals (Tr. 184). The person in charge is called the superintendent. The second in command is the assistant superintendent. There are three squad leaders and the remaining fifteen individuals are crew members (Tr. 186-187; Ex. 15). The Hotshot crews serve as a source of personnel for three activities: smokejumping, National Interagency Fire Program efforts and extended fire suppression (Tr. 185).

To qualify as a Type I Hotshot crew, the members must meet training and experience requirements and the crew may have no more than four rookies with no experience or training (Tr. 187; Ex. 15). The crew must be sponsored by a recognized fire suppression agency, such as AFS (Tr. 197), and must be recommended by their local geographic coordinating group to the National Interagency Fire Center, and then the crew is identified for national purposes as a Type I interagency Hotshot crew (Tr. 197). Once designated a Type I interagency Hotshot crew, the sponsoring agency for the crew must verify each year that the crew meets the hiring, training, experience and equipment requirements (Tr. 198).

### **Fire Management Plans**

During the 1980's the three Alaska wildland fire suppression agencies, AFS, U.S. Forest Service and the State of Alaska, worked with the land managers and owners to develop fire management plans for 13 zones used by the suppression agencies as planning units (Tr. 24; Ex. A). The first plan that was completed was the Tanana-Minchumina Plan (Tr. 24-25; Ex. 18). That plan was used as a template for the other 12 plans (Tr. 25; Exs. 19-30).

Each fire management plan was developed by bringing the affected land managers and owners together to discuss fire suppression in their zone using the basic concept of the four fire management options (Tr. 26).<sup>1</sup> The four fire management options are:

1. "Critical" - Highest priority, created to focus suppression action on wildland fires that threaten human life, inhabited property, physical developments, structural resources, etc. Suppression involves immediate and continued aggressive actions.
2. "Full" - Designed for the protection of cultural and historic sites, uninhabited private property, and high-value natural resources. Suppression includes aggressive initial attack dependant on availability of suppression resources.
3. "Modified" - Designed to provide a relatively high level of protection during periods of high fire danger, and a lower level of protection when conditions are less severe. Standardized dates for shifting protection levels are predetermined by each fire plan.
4. "Limited" - Designed for areas where suppression costs may exceed the value of resources being protected. Fires are allowed to burn, while protecting human life and higher-level, site-specific values (Exs. B, C, 16 & 35; Tr. 26).

The fire management options are used to determine the proper level of response and set priorities for responses when suppression resources are limited (Tr. 29-30). These levels of response are set by the land owners and managers in the plans (Tr. 30).

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<sup>1</sup> Exhibits B and 35 both list five zones. The fifth zone, not referred to by the manager of the AFS in his testimony, is the "hot zone", which consists of military lands and therefore would not be part of any discussion with the land owners and managers.

### **Fire Management Activity Plan**

The AFS budget process is called the "Fire Management Activity Plan" (FMAP). It is composed of two parts: the cost of initial attack on lands within the AFS fire protection area and the cost of administration of AFS (Tr. 96).

The cost of initial attack takes into account the type of foliage on the land, the fire management options selected by the land manager or owners over a ten-year period and the weather (Tr. 96-97). Using computer simulations, AFS determines the most efficient level (MEL) of utilizing its resources to fight fires (Tr. 97-98). Through this process, AFS determines a budget for the cost of initial attacks on fires.

The cost of the administration of AFS includes the monies needed for personnel salaries, warehousing of equipment, transportation, dispatch, communications maintenance, aircraft not part of the initial attack plan, and other similar support functions (Tr. 100).

The budget for the initial attack on fires and the budget for the administration of AFS are combined and submitted to the BLM office, which in turn submits it to the Department budget office. The Department budgets for fire suppression are combined with other fire suppression budgets from other agencies and this single number is then submitted to Congress (Tr. 98-99). After Congress appropriates money for the budget, the funds are then distributed to the agencies (Tr. 99). AFS is given a block appropriation, which is then allocated internally to its composite programs (Tr. 119).

### **TCC Proposal and BLM Declination**

TCC notified BLM by letter dated November 19, 1997, that TCC intended to submit a P.L. 93-638 proposal to operate an "Intertribal Type I fire crew." (Ex. 3a.) TCC included the information that they had an agreement to merge with the Tazlina Hotshots, a certified Type I team (Tr. 450; Ex. 3a). On November 26, 1997, TCC submitted a proposal to contract, under the terms of Title I of the ISDEA for "the recruitment, training and operation of an intertribal, inter-agency Type I crew" under the "Department of Interior's (DOI) FY-98 Wildland Fire Management budget", specifying \$700,000.00 for startup and base funding. (Tr. 453; Ex. 3b). The proposal also states that "TCC proposes to utilize P.L. 93-638 or other suitable contracting methods to secure the funds for this project." (Ex. 3b) (emphasis added). The proposal was submitted to BLM at a meeting between BLM and TCC representatives on November 26, 1997 (Tr. 38). At that time the representatives discussed contracting under P.L. 93-638 and other possible methods of contracting for a Type I crew (Tr. 39).

BLM sent two letters dated December 12, 1997, to TCC. In one letter BLM stated that they did not think that the Type I crew was contractible under P.L. 93-638, but that BLM would be able to discuss "other options" at a meeting on December 16, 1997 (Ex. 4). In the other letter BLM stated that, although it would not be able to contract for a Type I crew under P.L. 93-638, it would consider a contract for a Type I crew under a "cooperative agreement" or a "recruiting contract" (Ex. 4).

Apparently, TCC's proposal was limited to a P.L. 93-638 proposal as the result of a meeting between representatives of BLM and TCC on December 16, 1997, when TCC requested that BLM respond to the proposal as if it were only a proposal under P.L. 93-638 (Tr. 48). TCC also sent a letter dated December 16, 1997, stating that it felt the December 12, 1997, letter of declination was deficient and requesting issuance of a second declination letter which would correct those deficiencies (Tr. 48-49, 471; Ex. 7).

BLM sent a letter dated December 23, 1997, expanding on the reasons for declination, referring to the letter as a "supplement to our two prior letters of December 12, 1997" (Tr. 49; Ex. 8). The grounds for declination were summed up in the December 23, 1997, declination letter:

Because the basic purpose of the establishment and operation of a hotshot fire crew is to provide a fire suppression capability for any and all lands as to which the BLM has protection responsibility, we do not believe that it can fairly be said that the program is one "for the benefit of Indians because of their status as Indians." While it is true that a modest proportion of the total acreage for which the BLM has wildland fire protection responsibility are Indian lands, which are entitled to such protection because they are Indian lands, it cannot be convincingly argued that the crew exists or will be utilized solely or even predominantly for the benefit of Indians. There is no plan, intention or direction from Congress to utilize the crew exclusively for fire suppression work on Native Lands. (Ex. 8)

In response to a request from the Regional Solicitor, BLM sent a letter, dated February 28, 1998, to TCC enclosing the documents upon which BLM relied in its declination of TCC's P.L. 93-638 proposal (Tr. 472-473; Ex. AO). This was the first time BLM provided these documents to TCC (Tr. 473).

Mr. Billing, the manager of the AFS, stated unequivocally that BLM offered no technical assistance to TCC for its P.L. 93-638 proposal (Tr. 72). It was BLM's position that, since the Type I Hotshot crew was not contractible under P.L. 93-638, no technical assistance to help TCC to overcome the objections as stated in the declination was possible (Tr. 72). However, Mr. Billing stated that BLM did provide aid to TCC by discussing other contracting

methods in the two December 12, 1997, letters, the December 23, 1997, letter, and the December 16, 1997, meeting and by offering a Request for Application (RFA) to develop a cooperative agreement for a Type I Hotshot crew pursuant to section 316 of the National Indian Forest Resources Management Act, Pub L. No. 101-630, 104 Stat 4532 (1990), 25 U.S.C. § 3115 (Tr. 47, 72-73)).

**Request for Application - Cooperative Agreement**

On January 20, 1998, subsequent to the declination of TCC's P.L. 93-638 proposal, BLM offered the RFA to develop a cooperative agreement for the "recruitment, selection, hiring, payroll [sic], and all other administrative support of an intertribal, interagency Type I Hotshot crew" (Tr. 49, 459; Ex. Q). TCC and Chugachmuit, Inc., both submitted timely proposals and the Chugachmuit, Inc., proposal was selected (Tr. 49-50, 73).

The TCC proposal relied on the Tazlina Hotshots as its Type I crew. The Tazlina Hotshots had successfully operated as a Type I crew and were certified in 1997 and listed in the National Interagency Mobilization Guide for 1998 (Mob. Guide) (Tr. 423-424; Exs. S, T, U, V, X). The significance of being listed in the Mob. Guide is that the crew is recognized as being qualified and available for mobilization anywhere in the United States to fight wildland fires (Tr. 427). The Chugachmuit Type I crew was not certified or listed in the Mob. Guide (Tr. 428).

**DISCUSSION**

**Indian Self-Determination and Education Assistance Act**

The current policy of Indian self-determination codified in the ISDEA was first formally articulated by President Nixon during his initial term in office. President Nixon voiced concern that, while on the one hand tribes were encouraged to take over certain programs in the exercise of "self-determination," on the other hand tribes were threatened with the prospect of termination with respect to certain aspects of the Government's trust responsibilities and the concomitant necessity of taking over those functions. President Nixon observed that:

\* \* \* when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative

responsibility for a service program which is presently administered by a Federal agency.

"Special Message to Congress on Indian Affairs." [1970] Pub. Papers 564, 567 (President Richard M. Nixon). Clearly, the exercise of self-determination cuts both ways and an eligible tribe or Indian organization exercises self-determination both by what programs it asks to take over and also by what programs it does not ask to take over.

In all cases, however, the subject of the Indian Self-Determination and Education Act is programs and services for Indians and Indian communities. The original legislation, Act of January 4, 1975, Public Law No. 93-638 was entitled "An Act to provide \* \* \* for the full participation of Indian tribes in programs and services conducted by the Federal government for Indians \* \* \*." The policy of the Act, set forth at Section 3, focused on "Federal services for Indian communities" and on "programs and services to Indians."

Subsequent amendments to the Act, principally in 1988 and 1994, served to enlarge the number and kinds of programs that may be contracted under the Act, but the Act does not serve to provide Indians with any special preference for the operation of Government programs qua Government programs. It serves rather as a mechanism for them to choose to do for themselves what the Federal government would otherwise do for them.

### **Fire Suppression Services are Contractible**

The first issue is whether fire suppression services for Native lands in Alaska can be contracted under the ISDEA Act? Clearly the answer is yes. Two separate laws (The Alaska Native Claims Settlement Act and The National Indian Forest Resources Management Act) obligate the Federal government to provide such services. See 43 U.S.C. § 1620(e) and 25 U.S.C. § 3 101 et seq. In fact, services under the latter law are specifically made subject to contracting under the ISDEA by 25 U.S.C. § 3104(a), and the legislative history to the ISDEA amendments in 1988 make clear that, at least from that time forward, Section 102(a)(2) of the ISDEA "allows tribes to contract for trust functions including but not limited to \* \* \* forestry management and fire suppression \* \* \*." S. Rept. No. 100-274, December 21, 1987 (emphasis added).

### **Type I Hotshot Crew is Not Contractible Under P.L. 93-638**

The inquiry must proceed further because TCC did not limit its proposal to providing fire suppression services for Native lands in Alaska. Instead, TCC specifically asked to contract for the "recruitment, training and operation of an intertribal and interagency type I fire crew." (Ex. 3b) (emphasis added). It went on to identify the program as the one specified

in "the Department of the Interior's FY 98 Wildland Fire Management budget" for which the sum of \$700,000 had been provided for start-up and base funding (id.). After acknowledging its understanding of the current cooperative arrangement between BLM and the State of Alaska to provide fire suppression on both Federal and State lands by geographic region regardless of ownership, TCC went on to assert the following intention: "The TCC will be the organization which administers the intertribal and interagency Hotshot crew which the Alaska Fire Service was directed to manage through the appropriations process." (Id., p. 2).

The question then becomes whether a "type I Hotshot crew in Alaska to be managed by the Alaska Fire Service as an interagency, intertribal Hotshot crew" that was the subject of specific funding authorization in the 1998 Department of Interior and Related Agencies Appropriation Act can be contracted under the ISDEA? The answer is no, because the operation of this Hotshot crew is a Governmental program intended to serve both Federal and State lands rather than a program for Indians.

The initial Committee Report on this new authorization indicated that "[t]his crew, the Tazlina Hotshots, is to be managed by the Alaska Fire Service as an intertribal, interagency Hotshot crew." (Ex. AP) The final committee report explaining the amendment adding this new authorization omitted mention of any specific Hotshot crew and stated simply that "[w]ithin the funds provided for preparedness, \$700,000 is to fund the startup and first year of operating costs for a type I Hotshot crew in Alaska to be managed by the Alaska Fire Service as an intertribal, interagency hotshot crew \* \* \*." (Ex. 2)

This new Hotshot crew, whether staffed by the Tazlina Hotshots or not, is part of a Government program to provide fire suppression services in the State of Alaska as a whole. While it is true that a significant part of the lands to be served by the new Hotshot crew are Alaska Native lands that are "Indian lands" for purposes of ISDEA, there are two critical elements that preclude BLM from approving TCC's proposal.

First, at no time during the application and appeal process did TCC indicate that its purpose was to do for itself what the Government was otherwise obligated to do for it. Rather, it continues to assert that it is entitled to be "the organization which administers the intertribal and interagency Hotshot crew which the Alaska Fire Service was directed to manage through the appropriations process." It is not so entitled. Nothing in the ISDEA entitles an Indian organization to assume the administration of programs for non-Indians.

Second, even if TCC's proposal could be interpreted to indicate an intention to take over fire suppression responsibility on "Indian lands," it appears that the operation of a Hotshot crew is not a severable function because of a crew's composition and mode of operation. In sum, BLM properly declined TCC's proposal because a Type I Hotshot crew is not a contractible function under the ISDEA.

**Alleged Lack of Tribal Resolutions is Irrelevant**

The parties dispute whether the declination of TCC's P.L. 93-638 proposal was justified by the lack of tribal resolutions in support of the proposal. This issue is not properly before me because BLM's letter of declination to contract clearly stated that the apparent lack of tribal resolutions in support of TCC's proposal was not asserted as a ground for the declination to contract.

Furthermore, the lack of resolutions at the application stage is not fatal. Congress made clear in enacting the 1988 amendments to the Act that the purpose of such resolutions is to strengthen "the control of tribes over the decision to contract or not to contract." S. Rept. No. 100-247, December 21, 1987. The requirement for such resolutions, however, "is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts." Id.

**Failure of BLM to Render Technical Assistance to TCC is Not Material**

TCC argues that BLM had an obligation to provide TCC with technical assistance to overcome BLM's reason for declination. See 25 C.F.R. § 900.30. Because TCC's proposal to operate a Type I Hotshot crew was not contractible under P.L. 93-638, there was no technical assistance that could be offered by BLM to assist TCC in overcoming BLM's reason for declination. Therefore, BLM was not required to provide technical assistance under 25 C.F.R. § 900.30 .<sup>2</sup>

**Failure of BLM to Provide Declination Documentation in a Timely Manner is Not Material**

Finally, TCC argues that BLM failed to timely provide TCC with the documentation supporting the declination. Because TCC's proposal was not contractible under P.L. 93-638, the delay in providing the supporting documentation is not material.

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//original signed  
Nicholas T. Kuzmack  
Administrative Law Judge

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<sup>2</sup> To its credit, BLM did suggest that TCC could submit an application for a procurement contract which would enable TCC to operate a Type I Hotshot crew under the direction and management of AFS (Tr. 47, 73; Exs. 5, 8, & Q).