



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Pascua Yaqui Tribe of Arizona v. Acting Director, Tucson Area Office,
Indian Health Service

Docket No. IBIA 98-61-A (11/23/1998)

Related Indian Self-Determination Act cases:

Interior Board of Indian Appeals decision, 32 IBIA 98
Interior Board of Indian Appeals decision, 33 IBIA 88
Health and Human Services Appeals Board decision, 01/12/1999
Health and Human Services Appeals Board decision, 02/11/1999
Administrative Law Judge decision on remand, 04/06/1999
Health and Human Services Appeals Board decision, 06/01/1999
Administrative Law Judge decision on remand, 08/18/1999
Health and Human Services Appeals Board decision, 10/12/1999



United States Department of the Interior

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November 23, 1998

ORDER

PASCUA YAQUI TRIBE OF ARIZONA,	:	IBIA 98-61-A
	:	
	:	
Appellant	:	Indian Self-Determination Act
	:	
v.	:	
	:	Appeal from a decision dated October 20,
ACTING DIRECTOR, TUCSON	:	1997, by the Acting Director, Tucson Area
AREA OFFICE, INDIAN HEALTH	:	Office, Indian Health Service, Tucson,
SERVICE,	:	Arizona
	:	
Appellee	:	

Appellee's Motion to Dismiss Granted

On October 27, 1998, Appellee filed a Motion to Dismiss the above-captioned matter on the ground that the matter is moot. On November 9, 1998, Appellant filed a response in opposition to the motion. On November 19, 1998, Appellee filed a reply to Appellant's response and the matter is now ripe for determination.

Appellee argues that the matter was rendered moot by passage of the Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999. Pub. L. No. 105-277, 144 Cong. Rec. H11044 (daily ed. October 19, 1998). Section 328 of the bill places a moratorium on contracting for new or expanded programs under the Indian Self-Determination Act (ISDA) as follows:

Notwithstanding any other provision of law, none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts, or grants. Nothing in this section precludes the continuation of those specific activities for which self-determination and self-governance contracts, compacts, and grants currently exist or the renewal of contracts, compacts, and grants for those activities * * *.

This case involves Appellee's partial declination of Appellant's ISDA proposal to contract for health care services, including a health maintenance organization (HMO) program, which have not been previously covered by an ISDA contract between the parties. Appellee asserts that the case is moot for two reasons: (1) there is no longer any controversy, see *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 670 (1993), because, under Section 328, Appellant cannot contract for services not previously covered by an ISDA contract between the parties, and (2) there is no effective remedy for the alleged injury suffered by Appellant, see *Charles Stevens v. Bureau of Indian Affairs*, 14 IBIA 154, 160 (July 10, 1986), because even if Appellee were successful in establishing that its proposal to contract for the services was improperly declined, the remedy of funding a contract for those services is prohibited by Section 328.

Appellant counters that the Section 328 prohibition on the use of funds in fiscal year (FY) 1999 is not so restrictive. Rather than prohibiting the use of funds for activities not previously covered by an ISDA contract between the contracting parties, Section 328 according to Appellant, merely prohibits the use of funds for activities not previously covered by any ISDA contract with any of the more than 500 tribal organizations nationwide.

The language of Section 328 is arguably subject to either interpretation. Given this ambiguity, it is appropriate to consider extrinsic evidence, such as legislative history, weighing for or against a particular construction. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

That history provides in pertinent part:

The conference agreement does not include statutory language mandating a pro rata distribution of contract support costs across all Service self-determination contracts and self-governance compacts. This language was included in both the House and Senate bills but has been dropped because of concerns expressed by tribal organizations and many individual tribes. **The Committees remain convinced that the current distribution methodology employed by the Service for contract support costs is inequitable and fiscally unsound. The Committees' proposal for a pro-rata distribution, in combination with a one-year moratorium on new contracts and compacts and additional funding for existing contracts and compacts, would have provided a permanent solution to the problem.**

The Committees have added more than \$35 million to the Administrations' budget request to address the inequity in the distribution of contract support cost funding in fiscal year 1999. The Committees direct the Service, in cooperation with the tribes, to remedy this inequity in the fiscal year 2000 budget request. The remedy cannot be a large infusion of additional funding

for contract support costs at the expense of either critical health programs or critical construction needs of the Service. Further, the Committees note that the one-year moratorium on new contracts and compacts cannot be extended indefinitely. The Committees believe strongly that an acceptable permanent solution to the contract support cost distribution inequity must be a part of the fiscal year 2000 budget request from the Administration.

Conf. Rep. (H. Rept. 825), Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, 144 Cong. Rec. H11044, 11382 (daily ed. Oct. 19, 1998) (emphasis added).

Thus, the moratorium on new contracts is part of a plan to address the shortfall and inequities in funding for contract support costs (CSC). When contracting with a tribe under the ISDA, the Indian Health Service (IHS) is required to fund CSC in addition to the Secretarial amount, 25 U.S.C. § 450j-1(a)(2), subject to the availability of appropriations and the qualification that the Secretary is not required to reduce funding for programs serving a tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

The hearing in this matter confirmed the existence of huge shortfalls in both recurring funding and CSC funding for new or expanded ISDA contracts (Tr. 1424, 1429, 1431, 1439-40, 1442-48, 1525; Ex. Q, pp. 23-24). In consultation with representatives of Indian tribes, IHS developed a policy for determining CSC for each ISDA contract, allocating CSC, and prioritizing tribal requests for CSC funding in light of the funding shortfalls (Tr. 1429-30, 1434-35; Ex. Q). That policy provides for funding of new or expanded programs at 100 percent of the approved amount on a first-come, first-served basis until the Indian Self-Determination Fund is exhausted (Tr. 1429-32; Ex. Q, p. 10). If funds are exhausted in any fiscal year, those tribes which do not receive funding are placed on a priority list (queue) and remain there in subsequent fiscal years and are considered in priority order when funding becomes available (Tr. 1429-32; Ex. Q, p. 10). This waiting list continues to grow with the execution of each new or expanded contract for activities not previously covered by an ISDA contract between the contracting parties.

The Committees sought to address the shortfall and inequity in the distribution of CSC funds by appropriating more money for CSC, suspending the creation of new or expanded contracts with attendant needs for additional funding to cover mandatory CSC, and allowing the IHS sufficient time to develop an equitable distribution system. Under Appellant's interpretation of the appropriations act, the tide of new or expanded contracts would not be stemmed and thus, IHS would be faced with a moving and ever more difficult target in attempting to develop an equitable funding system for CSC.

The clear implication of the legislative history is that the Committees did not intend such a result. The history supports Appellee's interpretation that the appropriation act

prohibits the use of funds for activities not previously covered by an ISDA contract between the contracting parties so as to suspend the demand for additional CSC funding.

The meaning to be ascribed to an act of Congress can only be derived from a considered weighing of every relevant aid to construction. United States v. Dickerson, 310 U.S. 554, 562 (1940). Appellant argues that Appellee's interpretation of Section 328 violates the rule of construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. See Regions Hospital v. Shalala, 118 S.Ct. 909, 920 (1998).

Appellant reasons that if Congress had intended to suspend all new ISDA contracts, it would not have added the qualifying language: "for any activities not previously covered by such contracts, compacts, or grants." According to Appellant, "If Congress had intended to halt all new self-determination contracts (thereby suspending the Tribe's right to assume a new activity under a contract and the Secretary's obligation to enter into a contract), as IHS argues, then the language 'for any activities not previously covered by such contracts, compacts, or grants' contained in the first sentence is surplusage and provides no additional meaning or guidance."

Appellant's underlying assumption is that the definition of new contract is a contract for activities not previously covered by an ISDA contract between the contracting parties. In fact, the term "new contract" may include activities previously covered, as ISDA contracts are not effective in perpetuity but expire after a term of years. After expiration of a contract, a new contract must be executed for a tribe to continue to plan, conduct, and administer the programs which were covered under the expired contract. The language pertaining to activities not previously covered is not rendered surplusage by construing Section 328 to mean that Appellant may not contract for activities not previously covered by a contract between the parties.

Appellant also argues for application of the canon of construction that statutes benefitting Native Americans should be construed liberally in their favor. See Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1988). However, this canon "does not permit disregard of the clearly expressed intent of Congress." Quinault Indian Nation v. Portland Area Director, Bureau of Indian Affairs, 33 IBIA 6, 14 (1998). Assuming, *arguendo*, that the canon supports adoption of Appellant's statutory interpretation, that interpretation is contrary to Congressional intent as expressed in the legislative history.

To the extent, if any, that some ambiguity remains, despite the legislative history, so that the canon may come into play, it is doubtful whether it applies under the circumstances. IHS is charged with providing health care services to all Indian persons. 25 U.S.C. §§ 13, 450f, 4500(1). If Appellant's statutory interpretation is adopted, resolution of the CSC funding problems may be jeopardized to the detriment of other tribes. "The canon can have

no application to a case[, such as this,] in which the rights of Tribes are in conflict with one another." Leisnoi v. Stratman, 154 F.3d 1062, 1066 (9th Cir. 1998).

Even if the canon applied and supported Appellant's interpretation, such application would conflict with application of the canon requiring that deference be shown to an agency's interpretation of its own statutes. See, e.g., Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 28 IBIA 169, 189 n. 16 (1995). There is a split in the Federal circuits as to which of these two canons takes precedent. Compare Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997) with Haynes v. United States, 891 F.2d 235, 239 (9th Cir. 1989). Giving precedent to the canon favoring deference to an agency's interpretation of its own statutes appears particular appropriate under the facts of this case: namely that the statute in question is an appropriations act rather than an operative statute for the benefit of Indians and that the language in question is designed to address a funding problem.

Appellant also argues that the Section 328 limitation on funding has no bearing upon the ability of the Interior Board of Indian Appeals (Board) to provide, and Appellant to receive, a remedy in this matter. It reasons that the issue of whether appropriations are available to fund its contract proposal is separate from and irrelevant to the issue of whether Appellee's partial declination was lawful. It concludes that this office could recommend an award of an FY 1998 ISDA contract and identify the base amount of funding to which Appellant is entitled, and then the amount of FY 1998 funds which Appellant ultimately receives would depend upon the availability of FY 1998 appropriations.

This argument makes no sense, as FY 1998 is now over. The present or future execution of a contract for Appellant to plan, conduct, and administer health care programs in the past is nonsensical. Appellant is, in effect, seeking an advisory opinion on the amount of funding to which it would be entitled if current funding were available.

Appellant acknowledges that the Board has consistently followed the doctrine of mootness and therefore generally will not reach the merits of a matter which is moot. See, e.g., Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 93 I.D. 409, 414 (1986). An exception to the mootness doctrine applies if the conduct subject to complaint is capable of repetition, yet evading review. Id. Appellant argues that this exception applies in this case.

However, Appellant has not shown that the conduct which is the subject of complaint is likely to evade review. Appellant may submit a similar contract proposal at any time and if a similar partial declination is issued, the ISDA provides for timely review of such a declination if Appellant were to appeal the declination. A remedy would be available, absent a funding restriction ala Section 328 (which would be unusual).

Appellant further contends that consideration of the merits of this matter will promote judicial economy, given the large amount of time and energy which both the parties and this office have already devoted to this matter. To the contrary, the issuance of an advisory opinion, with no effective relief to be granted, is not in the interest of judicial economy.

In another case where an appellant argued that the possibility exists that a similar dispute will occur in the future, the Interior Board of Land Appeals held:

It is the Board's duty to decide actual controversies by a decision that can be carried into effect and not to give opinions on moot questions or abstract propositions. See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp., 394 F.2d 36, 41 (6th Cir. 1968). The Board does not render advisory opinions in hypothetical cases. Edgar W. White, 85 IBLA 161 (1985). As the court stated in Alton & Southern Railway Co. v. International Association of Machinists and Aerospace Workers, 463 F.2d 872, 882 (D.C. Cir. 1972):

We do not deem it appropriate to ascertain and announce applicable legal principles, dependent as they are on the shape of specific factual contexts, before the facts have taken shape. Perhaps when and as the facts evolve, there will be no legal controversy of consequence. If there is such a controversy, it will likely be different from the one presented [in this case] . . .

State of Alaska, 85 IBLA 170, 172-73 (1985).

Likewise, if and when Appellant submits a similar contract proposal for FY 2000 or beyond, circumstances (such as funding) or opinions may have changed so that no legal controversy arises, or the controversy may be different. It would be a waste of judicial resources to issue a decision in this case when no effective remedy can be granted, when any future action on a similar contract proposal is not likely to evade review, and when a repeat of the factual context and legal controversies of this case is speculative.¹

¹ If and when appellant submits a similar contract proposal, the proposal is declined in whole or in part, and the declination is appealed, the parties may stipulate, if appropriate, to admission of all or portions of the record in this case. To facilitate subsequent review of the record, if any, I note and find that all of the witnesses appeared credible based upon my observations of their demeanor.

