



INTERIOR BOARD OF INDIAN APPEALS

The Paiute Indian Tribe of Utah v. Southern Paiute Agency Superintendent,
Bureau of Indian Affairs

46 IBIA 285 (03/12/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| THE PAIUTE INDIAN TRIBE OF |) | Order Reversing Decision in Part |
| UTAH, |) | |
| Appellant, |) | |
| |) | |
| v. |) | Docket No. IBIA 07-92-A |
| |) | |
| SOUTHERN PAIUTE AGENCY |) | |
| SUPERINTENDENT, BUREAU OF |) | |
| INDIAN AFFAIRS, |) | |
| Appellee. |) | March 12, 2008 |

The Bureau of Indian Affairs (BIA) appeals to the Board of Indian Appeals (Board) from the Recommended Decision issued on January 22, 2008, by Administrative Law Judge (ALJ) Andrew S. Pearlstein. The ALJ decided the challenge brought by the Paiute Indian Tribe of Utah (PITU) to the March 6, 2007, decision by the Southern Paiute Agency Superintendent, BIA (Agency; Superintendent). The Superintendent's decision partially declined, pursuant to 25 U.S.C. § 450f of the Indian Self-Determination and Education Assistance Act (ISDA), PITU's proposed contract for realty services. The Superintendent's decision declined on the grounds that the funds proposed by PITU for the contract exceeded available funding from the Agency's Realty Services budget. *See* 25 C.F.R. § 900.22(d).

The ALJ concluded that BIA had only partially met its burden of clearly demonstrating the grounds for the declination. In particular, the ALJ found that BIA had offered insufficient evidence of its need to retain any Realty Services funds for the performance of inherently Federal functions at the Agency level and concluded that BIA's acreage formula for allocating the remaining funds available for contracting was arbitrary and unreasonable. For the reasons discussed below, the Board reverses the Recommended Decision as to the acreage formula. We decline, however, to reverse or modify the ALJ's decision that BIA's evidence fell short, in this case, of clearly demonstrating that the Agency's Realty Services funds are used to perform noncontractible functions, and therefore we allow this portion of the ALJ's decision to become final.

Facts

1. Background

The Agency is located in St. George, Utah, and is responsible for providing services to five tribes dispersed over a wide geographic area that includes southern Nevada, southern Utah, and a portion of northern Arizona. For purposes of this decision, it is undisputed that the total acreage of Indian trust lands for which the Agency has administrative responsibility is 241,802 acres. The ALJ determined that the five tribes served by the Agency — and the approximate acreage of trust lands held for each — are (1) the Kaibab Band of Paiute Indians located in or near Fredonia, Arizona, with 120,798 acres; (2) the Moapa Band of Paiute Indians located in Moapa, Nevada, with 70,587 acres; (3) the Las Vegas Paiute Tribe located in Las Vegas, Nevada, with 3,853 acres; (4) the Southern San Juan Paiute Tribe located in Tuba City, Arizona, with no trust land at present;¹ and (5) PITU, with 5 constituent bands and their reservations in 4 counties in southwestern Utah with an approximate total acreage of 46,564.² Recommended Decision at 3.

2. PITU's Contract Proposal and BIA's Response

On December 7, 2006, the Tribe submitted a proposal to BIA to enter into an ISDA contract for fiscal year 2007 to provide realty services to itself and its five constituent bands. PITU did not propose to provide realty services to any other tribe in the Agency's service area. Pursuant to that application and relevant to this appeal, the Tribe sought funding for the contract in the amount of \$75,000 from the Agency's Realty Services budget to fund its contract.³

¹ The Southern San Juan Paiute Tribe has a treaty with the Navajo Nation to acquire 5,200 acres of trust land from the Navajo Nation. According to BIA, the treaty is awaiting approval from the U.S. Congress before becoming final at which time it is anticipated that the land transfer will become effective.

² The five bands and their respective trust land interests are: the Shivwits Band has 31,335 acres; the Indian Peaks Band has 9,385 acres; and the Cedar, Koosharem, and Kanosh Bands each have about 2,000 acres each. In addition, PITU itself owns a 48-acre parcel. Recommended Decision at 4.

³ The Tribe also sought \$50,000 from the Regional Office budget share and \$25,000 from the Central Office ("National") budget share. The ALJ found that BIA had met its burden of clearly demonstrating the nonavailability of such funds for the Tribe's proposed contract. PITU has not appealed from the ALJ's decision.

On March 6, 2007, and pursuant to 25 C.F.R. §§ 900.16 and 900.21, the Agency formally notified the Tribe of its decision to partially decline the funding sought by PITU.⁴ Citing 25 C.F.R. § 900.22(d) as the basis for the partial declination, the Agency explained that it calculated the total amount of funds available from the Agency's Realty Services budget by (1) subtracting the funding for a Realty Specialist position, which was necessary to perform certain realty functions that were Federal responsibilities and noncontractible; and (2) apportioning the remaining amount (funding for a Realty Assistant position) according to an acreage formula, i.e., PITU was entitled to the percentage of available funding commensurate with its percentage of the total amount of trust lands within the Agency's service area. The Agency explained that a portion of the remaining, available funds were required to be retained to enable it to provide realty services to the noncontracting tribes (Kaibab, Moapa, and Las Vegas Paiute tribes). The Agency determined it would be able to provide PITU with \$8,863 for direct costs for fiscal year 2007.

3. PITU's Appeal and ALJ's Decision

PITU timely appealed to the Board and asserted its right to a hearing on the record. In its appeal, PITU challenged the acreage formula and the retention of funds for the Realty Specialist position. On April 6, 2007, and pursuant to 25 C.F.R. § 900.160, the Board referred the matter for a hearing on the record, which was held August 14-15, 2007. Following the hearing, the ALJ issued his Recommended Decision on January 22, 2008, in which he determined that BIA had not met its burden of clearly demonstrating the validity of the bases for its declination, i.e., the retention of funds for the Realty Specialist position or the acreage formula as the means of allocating the remaining, available funds.

The ALJ concluded that, as a matter of law, BIA was entitled to retain funds for the performance of inherently Federal functions. However, the ALJ concluded that BIA had not met its burden of clearly demonstrating that the Realty Specialist position, for which position BIA retained \$83,330 from the Agency's Realty Services budget, performed any inherently Federal functions. The ALJ stated that BIA had provided evidence that was "informative" on the issue of inherent Federal functions. Recommended Decision at 13. He concluded, however, that the evidence "fell short . . . in applying [the inherent Federal functions] to the facts of the realty program and the specific duties of the realty specialist." *Id.* In particular, the ALJ found that "BIA did not provide any *specific examples* of residual functions at the Agency level that could only be performed by [F]ederal employees, other than the final approval of realty transactions." *Id.* at 15 (emphasis added). Therefore, the

⁴ In all other respects, the contract proposal was accepted by BIA.

ALJ determined that the Agency's entire Realty Services budget was available for ISDA contracting.

Finally, the ALJ concluded that BIA's acreage formula was arbitrary and unreasonable as applied to PITU. He determined that because more pieces of the Agency's realty correspondence were related to PITU's land matters than to the other tribes' land matters, BIA had failed to clearly demonstrate the validity of its formula. The ALJ determined instead that BIA should apply a weighted formula for determining the amount of PITU's share of available funding. Under this formula, which had been used at one point by the Western Regional Office in the mid-1990's, PITU's share of the funding would be calculated according to a "60/40 formula" where the percentage of the Agency's workload attributable to PITU would constitute 60% of the formula and the remaining 40% would be based on the percentage of trust land within the Agency's service area that was owned by PITU.

The ALJ determined that the total acreage of trust lands within the Agency's service area was 241,802, of which PITU owned 46,564 acres. The ALJ then utilized these figures in applying the 60/40 formula and calculated that PITU was entitled to \$72,660 of the Agency's \$145,319 budget for realty services.⁵

BIA timely submitted objections to the Board from the ALJ's recommended decision, which were received by the Board on February 21, 2008. PITU has not appealed any portions of the ALJ's decision, but has submitted a response to BIA's objections, which was received by the Board on March 6, 2008.

4. Supplemental Findings by the Board with Respect to the Allocation Formula

Pursuant to 25 C.F.R. § 900.167(c), the Board makes the following, specific findings of fact relating to its decision to reverse in part the decision of the ALJ:

As set forth in BIA's declination letter, BIA applied an acreage-based formula to determine PITU's tribal share of the available realty funding. Under this formula, PITU's

⁵ Based solely on the correspondence, the ALJ determined that between 2001 and 2007, 70% of the Agency's workload was attributable to PITU and PITU owned 19% of the trust land within the area serviced by the Agency. Therefore, the ALJ concluded that PITU was eligible for 49.6% of the Agency's budget for Fiscal Year 2007, which came to \$72,660 ((19 x .40) + (70 x .60) = 49.6%, rounded up to 50%; \$145,319 x 50% = \$72,659.50, rounded up to \$72,660).

tribal share of available funds would be commensurate with its percentage of trust land within the Agency's service area, i.e., PITU would be entitled to 19.26% of the Agency's available funding.⁶

During the negotiations between PITU and the Agency concerning the funding for PITU's proposed contract, PITU opined that "[a]n accurate basis for determining [t]ribal shares of realty services funding available from the . . . Agency would be the actual realty services workload." Letter from PITU to Superintendent, Mar. 6, 2007, at 2. However, PITU acknowledged that "the workload does fluctuate from year to year and from Tribe to Tribe." *Id.* PITU then proposed in lieu of the acreage formula or a workload-based formula that funding be evenly divided among the land area codes in the Agency's service area. *Id.*⁷ Under PITU's proposed formula, PITU would qualify for 2/3 of the Agency's available realty funding because PITU and each of its five constituent bands have six of the nine land area codes within the Agency's jurisdiction. The Superintendent consulted with the other tribes within the Agency's service area concerning the two proposed allocation formulas, the acreage formula and the land area code formula. Three of the four tribes responded with support for the acreage formula and rejected the land area code formula.⁸ As a result, BIA utilized the acreage formula to determine PITU's tribal share of the Agency's available realty funds.

At the hearing before the ALJ, PITU introduced evidence of the use of the 60/40 formula by the Western Regional Office to allocate its available realty funds among the tribes in 1996. No evidence was offered concerning how the workload portion of the formula was calculated. The Western Regional Realty Officer testified that the 60/40 formula is no longer used because BIA found that the "[realty] workload is extremely variable from year to year . . . and [the] complexity [of work] is not taken into account." Transcript, Aug. 14, 2007, at 179. He explained that some realty matters might take 15 minutes while others might utilize 100 man hours. For these reasons, the Realty Officer said the Region moved to the acreage formula, which was "simpler and easier to

⁶ $46,564$ (PITU's trust acreage) / $241,802$ (total acreage in Agency's service area) = $.1926$.

⁷ Apparently, each reservation held in trust by the United States is assigned a "land area code."

⁸ The three tribes that responded were the Kaibab, Las Vegas, and Moapa Bands of Paiute Indians. The Southern San Juan Paiute Tribe, which does not yet have land in trust, was contacted but did not respond.

administer.” *Id.* In addition, he testified that the Western Region had found the acreage formula to be the best indicator of the realty work generated by a tribe. *Id.*

In support of its contention that the 60/40 formula more appropriately describes the funding that BIA would expend on contractible realty services to PITU, PITU offered evidence at the hearing in the form of the Agency’s Realty Services correspondence files from January 2001 through June 2007 to show that PITU had generated the majority of the Agency’s workload during this time. According to the testimony of PITU’s witness, he counted each piece of correspondence, determined whether the document related to PITU or a different tribe, and calculated the percentage of correspondence attributable to PITU and its constituent bands vis-a-vis correspondence attributable to the other tribes in the Agency’s service area. Using this count, the witness testified that 81% of the Agency’s correspondence in 2001 related to PITU, 63% in the first half of 2007, and 70% overall for the total, 6½ year period. No evidence was offered to explain the type of work reflected in the correspondence, much less the amount of work that might be reflected by the subject of the correspondence (i.e., a fee-to-trust application, billboard lease, utility right-of-way, etc.).

Discussion

1. Summary

The issue in this appeal is not whether PITU may contract certain realty functions nor is there any disagreement concerning the scope of work to be performed by PITU. The sole issue concerns the amount of funding available to PITU for its contract proposal directly from the Agency’s Realty Services budget for fiscal year 2007. In particular, BIA objects to the ALJ’s determination that BIA had failed to clearly demonstrate its need to retain any Agency Realty Services funds to perform inherently Federal functions, i.e., to fund the position of Realty Specialist. In addition, BIA appeals from the ALJ’s determination that the validity of applying the acreage formula for allocating available funding had not been clearly demonstrated. BIA also suggests that this appeal may be moot because fiscal year 2007 has ended without an executed contract between the parties and because PITU has not submitted a contract for the current fiscal year. PITU opposes each of BIA’s arguments.

First, we agree with PITU that this appeal is not moot, based on ongoing discussions between BIA and PITU to resolve this dispute and to lay the groundwork for contracting following the Board’s decision. Second, after consideration of BIA’s arguments concerning its need to retain any funds for the purpose of filling the position of Realty Specialist, we decline to modify or reverse the ALJ’s decision and therefore we allow it to

become final for the Department. *See* 25 C.F.R. § 900.167(a). Finally, after a *de novo* review of the record, we conclude that the ALJ's recommended decision as to the acreage formula must be reversed. We conclude that BIA clearly demonstrated the validity of the acreage formula for determining PITU's tribal share of the Agency's available realty funds for PITU's contract proposal.⁹

2. Mootness

BIA suggested in its brief that this appeal could be moot because fiscal year 2007 has now ended, those funds no longer are available, and PITU has not submitted a contract proposal for the current fiscal year. The Board asked PITU to respond to this argument and we are satisfied by PITU's response that negotiations have remained ongoing with BIA and that PITU fully intends to pursue a contract for realty services. Therefore, to the extent that BIA moves for dismissal of this appeal on mootness grounds, that motion is denied.

3. BIA's Partial Declination

A. Burden of Proof

Congress set forth a statutory scheme in ISDA not only entitling tribal organizations to a hearing on the record for any declinations of ISDA contract proposals but also prescribing the scope of and burden in any such hearings. The hearing is to be "on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised [by BIA to the contract proposal]." 25 U.S.C. § 450f(b)(3).¹⁰ At any such hearing, BIA "shall have the burden of proof to establish by *clearly demonstrating* the validity of the grounds for declining the contract

⁹ PITU suggests in its response brief that BIA's Objections to the ALJ's Recommended Decision must be deemed untimely unless they were received by the Board by February 21, 2008, which is 30 days after the date of the Recommended Decision. *See* 25 C.F.R. § 900.166. PITU apparently contends that the date of filing for an appeal is the date of receipt. *But cf.* 25 C.F.R. § 900.158(b) (where a tribe or tribal organization appeals to the Board from a declination decision, the date of mailing is considered to be the date of filing). The Board received BIA's objections on February 21, 2008. Therefore, even under PITU's interpretation of the date of filing, BIA's Objections were timely filed.

¹⁰ Congress also authorized the promulgation of regulations to further define the conduct of hearings pursuant to subsection 450f(b)(3), which led to the adoption of 25 C.F.R. Part 900, including Subpart L, which governs appeals from declinations of contract proposals.

proposal (or portion thereof).” 25 U.S.C. § 450f(e)(1) (emphasis added).¹¹ Thus, ISDA provides the appropriate evidentiary burden. See *Shoshone-Bannock Tribes of Fort Hall v. Shalala*, 988 F. Supp. 1306, 1314-1318 (D.Or. 1997).¹²

B. Realty Specialist Position

BIA contends that the performance of inherently Federal functions at the Agency level require it to retain \$83,300 to cover the salary of a Realty Specialist, GS-11/5. The ALJ concluded that BIA had not met its burden of clearly demonstrating that any inherently Federal functions would be performed by the Realty Specialist position. Therefore, he deemed these funds, \$83,330, available for contracting purposes, subject to the allocation formula, discussed below. We agree with the ALJ.

¹¹ This burden of proof was deemed by one district court to be something more than a preponderance of the evidence, *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1318 (D.Or. 1997), and by two other district courts as equivalent to clear and convincing, *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp. 2d 1245, 1252 (D.N.M. 2007), *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1068 (D.S.D. 2007). By even the stricter standard, we find that BIA met its burden as to the acreage formula.

We note, however, that the original amendments to ISDA proposed by the Senate included a “clear and convincing” standard of proof for subsection 450f(e)(1). See S. 2036, 103rd Congress, § 2(9) (1994). However, prior to its enactment, Senate Bill 2036 was amended to delete the “clear and convincing” evidentiary standard in favor of the “clearly demonstrating” standard, which was described as “an intermediate standard higher than a ‘preponderance of the evidence.’” 140 Congressional Record S28325, S28464 (1994); compare 25 U.S.C. § 458aaa-6(d) (in any hearing, appeal, or civil action challenging the rejection of final offers of Indian health services compacts and funding agreements, the government “shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds” for its rejection).

¹² The district court in *Shoshone-Bannock Tribes* also opined that where the tribal organization elects to pursue its remedy through the agency’s appeal procedures, any subsequent judicial review would be governed by the Administrative Procedures Act (APA), 5 U.S.C. § 702. 988 F. Supp. at 1316. We express no opinion concerning the interplay between ISDA’s “clearly demonstrating” standard and the APA’s “substantial evidence” standard.

The Board has considered the parties' arguments and has reviewed the entire record with respect to the Realty Specialist position. BIA's evidence gave no specific examples of how, if at all, the Superintendent relies on her staff to accomplish her trustee duties. Moreover, BIA has failed to convince us that the ALJ's finding in this regard was erroneous and that BIA had, in fact, met its burden of clearly demonstrating its need for the Realty Specialist position.¹³ As a result, the practical effect of PITU's contract proposal and the ALJ's decision apparently means that there will no longer be any local Agency staff support available to PITU or to the Superintendent for PITU-related realty functions. Any analysis, from a Federal policy perspective as well as the perspective of a trustee, of PITU's realty transactions will need to be shouldered entirely — at the Agency level — by the Superintendent. Such a result may well seem counterintuitive, and it is possible that the Superintendent ordinarily would rely on a member of her staff for technical and policy assistance in analyzing realty transactions from the unique Federal trustee perspective. However, we are constrained to conclude, as the ALJ did, that the evidence is lacking from which we may decide that BIA has *clearly* demonstrated that the Superintendent requires *any* realty staff support to carry out her trust responsibilities.

Therefore, we decline to disturb the ALJ's decision with respect to the amount of funding available for contractible Agency realty functions.¹⁴

¹³ In its Objections to the Recommended Decision, BIA argues that “the ALJ rejected the notion that the [Superintendent] is reasonably entitled to the staff support of a BIA Realty Specialist in the performance of inherent [F]ederal functions to help [her] discharge her trust responsibilities to all of the [t]ribes [in the Agency's service area].” Objections at 11-12. BIA mischaracterizes the ALJ's decision. Under 25 U.S.C. 450f(e)(1), BIA has the burden of going forward at the hearing and presenting evidence that *clearly demonstrates* the validity of the grounds for its declination of PITU's contract proposal. The ALJ concluded that BIA did not provide the evidence to enable him to find that the Superintendent needed or relied on staff support to carry out the trust functions assigned to her. On appeal to the Board, we agree that the evidentiary support is lacking.

¹⁴ Because the Superintendent — as the officer in charge of a multi-tribe agency that provides a number of discrete services — has other equally significant duties and responsibilities in addition to her realty duties, the practical result of PITU contracting *all* PITU-related realty functions from the Agency may well result in delay for those land transactions that PITU submits to the Superintendent for approval, as the burden will now fall exclusively upon the Superintendent to perform the final trustee evaluation prior to decision.

C. Allocation Formula

The ALJ concluded that BIA had failed to clearly demonstrate the validity of its decision to apply an acreage-based formula to determine PITU's share of the available funding from the Agency's Realty Services budget. The ALJ further concluded that PITU established, by the preponderance of the evidence, that a different allocation formula should be used. We disagree with the ALJ and conclude that BIA met its burden of clearly demonstrating the validity of the acreage formula.

Funding for ISDA contracts is determined in accordance with 25 U.S.C. § 450j-1(a)(1), which requires BIA to fund a contract in an amount equal to the amount that would otherwise have been provided for the operation of the particular programs or portions thereof being contracted by the tribe. Necessarily, then, where services to several tribes have been consolidated in a single agency, BIA must not only determine the total amount of available funding for *all* tribes within its service area, but must also devise a means of determining how to apportion the available funding to the tribe that is seeking to contract for services to itself, such as PITU. ISDA mandates, however, that where a particular office serves multiple tribes, BIA "shall take such action as may be necessary to ensure that services are provided to the tribes not served by a[n ISDA] contract, including program redesign[,] in consultation with the tribal organization and all affected tribes." 25 U.S.C. § 450j(i)(1); *see also id.* § 450j-1(b) ("the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe [proposing to contract for services]"). In other words, BIA has an obligation to provide the appropriate amount to a contracting tribe, but also has an equal obligation to ensure that it does not provide a greater-than-appropriate amount to the detriment of the remaining tribes that continue to rely on BIA's services.

It is undisputed in this appeal that PITU proposed to contract for realty services on its own behalf and not on behalf of the remaining tribes within the Agency's service area. It is further undisputed that none of the remaining tribes have ISDA contracts for realty services and, thus, the Agency must continue to serve the realty needs of these tribes. BIA proposed to allocate the available funds according to an acreage formula: PITU would be entitled to a percentage of the available funding equal to its percentage of total trust land within the Agency's service area. BIA explained that, in BIA's experience, the acreage formula proved generally, across the Region, to be the best indicator of the realty work generated by a tribe. It is a simple means for both BIA and the tribes to determine a tribe's share of available funds for contracting realty services. The Superintendent consulted with PITU concerning the allocation formula. PITU disagreed with the Superintendent's proposed acreage formula and proposed instead its land area code formula. The Superintendent then consulted with the tribes located within her geographic jurisdiction,

and each of the tribes with trust land responded with support for BIA's formula and expressing disagreement with PITU's land area code formula.¹⁵

We conclude that BIA clearly demonstrated that the acreage formula is a reasonable, objective allocation formula to determine workload. We find that it is not unreasonable to expect that the more acreage a tribe owns, the greater the number of land transactions it may generate that require BIA action, e.g., business and residential leases, rights-of-way, easements, conveyances, etc. *See, e.g.*, 25 C.F.R. Chapter I, Subchapter H. It has been a stable predictor of workload. The formula is a simple mathematical calculation to apply by BIA and the tribes, once the available funding and the relative amounts of acreage are known. It has been endorsed by the other reservation tribes in the Agency's service area.

PITU objects to this formula on two grounds: (1) the Agency did not know the precise extent of PITU's trust acreage, which resulted in an incorrect and lower calculation of PITU's tribal share under the acreage formula; and (2) the funding standard in ISDA is "an operation based standard," which the acreage formula is not. PITU's Response, Part Two, at 6. We reject these arguments.

With respect to the imprecise acreage used by the Agency to calculate PITU's tribal share, we note that the appeal process is available to challenge such factual errors, as PITU has successfully done.¹⁶ Moreover, to the extent that PITU argues that the Agency's workload, as purportedly measured by the number of pieces of correspondence, is somehow a more precise measurement, we reject this argument. The correspondence does not reflect the complexity of any given transaction, including telephone calls, meetings, and preparation of reports and realty documents. Thus, one realty transaction may take a negligible amount of time to complete while another could require a significant amount of time, none of which is necessarily reflected in a letter. In addition, as PITU itself concedes, workload is subject to yearly fluctuations as well as fluctuations from tribe to tribe, for which reason PITU did not argue for such a formula during its pre-decision negotiations

¹⁵ There is no evidence showing that the tribes were consulted concerning a return to the 60/40 formula as ordered by the ALJ.

¹⁶ As a result of its appeal of the Agency's erroneous acreage determination, the ALJ concluded that PITU had 46,564 acres of trust land instead of 33,732 acres the Agency utilized in its declination letter. Letter from Agency to PITU, Mar. 6, 2007, at 2.

with the Agency. These and like considerations render a formula based on the volume of correspondence more subjective than the acreage-based formula.¹⁷

Second, PITU contends that 25 U.S.C. § 450j-1(a)(1) requires “the actual realty operations funded and carried out by [the Agency to] be used to determine the available funding for a tribe to assume these same realty operations.” PITU’s Response, Part Two, at 6. The acreage formula is a reasonable means of determining the amount of funding that would have been set aside for the operation of realty services for PITU, given the number and reservation acreage of the remaining tribes in the Agency’s service area. PITU has not shown that its formula — based solely on the volume of correspondence — should be substituted for BIA’s acreage formula. We note that PITU did not establish that counting pieces of correspondence was the means by which BIA determined its annual budget allocations nor did PITU establish how BIA calculated the workload factor when it used the 60/40 formula in 1996. The fact that there may be other methods by which tribal shares of the realty budget may be determined does not undercut the clear demonstration made by BIA for the validity of the acreage formula.¹⁸

For the reasons discussed above, we conclude that BIA clearly demonstrated the validity of the acreage formula as a basis for declining the full funding requested by PITU

¹⁷ For these reasons, we are unconvinced that PITU’s workload analysis, based on individual pieces of correspondence in the correspondence file from the Agency’s Realty Services section, undercuts the clear demonstration BIA has made for using an acreage based formula.

¹⁸ PITU also argues that it consists of “six [F]ederally recognized [t]ribes” with six non-contiguous land bases located throughout southwestern Utah, which impacts BIA’s administrative burden and costs. PITU’s Response, Part Two, at 3. We reject these contentions. First, only the singular entity, the Paiute Indian Tribe of Utah, is federally-recognized albeit as consisting collectively of five bands of Paiutes: the Cedar City Band, Kanosh Band, Koosharem Bands, Indian Peaks Band, and Shivwits Band. *See* 72 Fed. Reg. 13,648, 13,650 (Mar. 22, 2007). However, the individual bands are not recognized separately from or independent of PITU. *Id.* Second, we reject the argument that PITU’s geographic dispersity somehow “impacts” BIA’s burden and costs because no facts appear in the record concerning this alleged impact and because BIA’s declination, on its face, does not appear to extend to contract support or other costs.

from the Agency's available realty funds. Therefore, the total amount available for PITU for fiscal year 2007 is 19.26% of the Agency's available funding or \$27,988.¹⁹

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we reverse in part the ALJ's January 22, 2008, Recommended Decision and we affirm in part the Regional Director's declination decision with respect to the acreage formula for allocating available funding from the Agency's Realty Services budget. Except as reversed herein, we allow the ALJ's decision to become final pursuant to 25 C.F.R. § 900.167(a). The Board's decision is final for the Department of the Interior.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁹ PITU's trust acreage (46,564) / total trust acreage in the Agency's service area (241,802) = 19.26%; total amount of funds available from the Agency's Realty Services budget (\$145,319) x 19.26% = \$27,988.