



INTERIOR BOARD OF INDIAN APPEALS

Office of Justice Services, Bureau of Indian Affairs v.  
Designated Representative of the Secretary

51 IBIA 81 (01/15/2010)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

OFFICE OF JUSTICE SERVICES,	)	Order Dismissing Appeal
BUREAU OF INDIAN AFFAIRS,	)	
Appellant,	)	
	)	
v.	)	Docket No. IBIA 10-020
	)	
DESIGNATED REPRESENTATIVE	)	
OF THE SECRETARY,	)	
Appellee.	)	January 15, 2010

The Office of Justice Services (OJS) of the Bureau of Indian Affairs filed an appeal with the Board of Indian Appeals (Board) seeking review of a Written Report and Recommended Decision (Recommended Decision) issued by an individual who was designated as the representative of the Secretary of the Interior (Designated Representative) for conducting an informal conference to resolve a dispute between OJS and the Los Coyotes Band of Cahuilla and Cupeno Indians of the Los Coyotes Reservation (Tribe), California.<sup>1</sup> The informal conference was held at the request of the Tribe, pursuant to the regulations implementing the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 25 U.S.C. § 450 *et seq.*, *see* 25 C.F.R. §§ 900.153-.157, after OJS declined the Tribe’s proposal to enter into an ISDA contract for \$746,110 for law enforcement services.

This appeal raises an issue of first impression: Does OJS have a right to appeal to the Board from the Recommended Decision issued by the Designated Representative? We conclude that the ISDA regulations provide no such right of appeal to the Board, and therefore we dismiss this appeal.

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<sup>1</sup> In the present case, the individual who was retained (apparently by OJS) to serve as the Designated Representative, was Steven Haberfeld, Executive Director of Indian Dispute Resolution Services, Inc.

OJS captioned its notice of appeal as OJS versus the Tribe. Although the Tribe is the real party in interest to the underlying dispute, OJS’s appeal seeks to challenge and to have set aside action (i.e., the Recommended Decision) by the designated representative, and therefore the Board has captioned this case accordingly.

## Background<sup>2</sup>

The Tribe submitted an ISDA contract proposal to OJS for law enforcement services, in the amount of \$746,110 annually.<sup>3</sup> OJS declined the proposal on the ground that the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, which is a permissible ground for declining an ISDA contract proposal in whole or in part, if it is supported by the evidence. *See* 25 U.S.C. § 450f(a)(2)(D) and (a)(4); *id.* § 450j-1(a).<sup>4</sup> Apparently, BIA does not provide law enforcement services in California because of jurisdiction conferred on the State by Public Law No. 83-280;<sup>5</sup> thus, BIA's budget is "zero" for providing such services in California; and OJS relied on that zero budget to conclude that the Tribe's proposal was in excess of the applicable funding level.

When an agency declines a tribe's proposal for an ISDA contract, the ISDA regulations provide the tribe with a right to request an informal conference, or to appeal

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<sup>2</sup> The record before the Board is limited to OJS's notice of appeal, to which the Recommended Decision is attached, and additional briefs filed by the Tribe and OJS addressing whether OJS may appeal the Recommended Decision to the Board. Thus, although the relevant facts appear to be undisputed, our recitation is based solely on the facts as represented in the Recommended Decision and the pleadings filed with the Board.

<sup>3</sup> The request apparently was dated March 19, 2009, and was received by OJS on May 4, 2009.

<sup>4</sup> Subsection 450f(a)(2)(D) allows the Secretary to decline a contract proposal based on a finding that clearly demonstrates that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of [25 U.S.C.]." Subsection 450j-1(a)(1) provides:

[t]he amount of funds provided under the terms of [ISDA] contracts entered into . . . shall not be less than the . . . Secretary [of the Interior] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior . . . at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

<sup>5</sup> Act of Aug. 15, 1953, 67 Stat. 588, *codified as amended at* 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360, note.

directly to the Board. *See* 25 C.F.R. §§ 900.152-.153, 900.158.<sup>6</sup> The purpose of an informal conference is to resolve issues as quickly as possible and without the need for a formal hearing. *Id.* § 900.153. The informal conference between the parties is conducted by a designated representative of the Secretary. *Id.* § 900.155(c).<sup>7</sup> Within 10 days of the informal conference, the person who conducted the informal conference must “prepare and mail to the Indian tribe or tribal organization a written report summarizing what happened at the informal conference and a recommended decision.” *Id.* § 900.156(a).

In the present case, although the Designated Representative did not find that OJS’s decision failed to satisfy the declination criterion relied upon, 25 U.S.C. § 450f(a)(2)(D), he nonetheless recommended that OJS’s declination decision should be rescinded. In so doing, the Designated Representative found fault with BIA’s underlying policy of not providing law enforcement services to tribes in California. The Designated Representative stated that it was his “recommendation . . . that the BIA-OJS respond to current realities;” and that OJS “must make the proper adjustments in its approach, and meet its current legal responsibilities by finally abandoning its outdated policy of excluding Tribes in [Public Law No. 83-]280 states from receiving [ISDA contract] funds” for law enforcement services. Recommended Decision at 23. The Designated Representative concluded by stating that OJS “should begin this process by rescinding its declination decision,” *id.* at 23-24, and that “the Assistant Secretary of Indian Affairs should seek additional funding from Congress, if it is needed, to provide more [ISDA] funds for law enforcement services on a non-discriminatory basis,” *id.* at 24.

Subsection 900.156(b) of 25 C.F.R. provides that the report mailed to a tribe following an informal conference must contain the following language: “Within 30 days of the receipt of this recommended decision, *you* may file an appeal of the *initial decision* . . . with the Board . . .” (emphasis added). The heading for the following section asks whether a recommended decision is “always final,” and answers the question: “No. If the *Indian tribe or tribal organization is dissatisfied* with the recommended decision, *it* may still appeal the *initial decision* within 30 days of receiving the recommended decision . . .” 25 C.F.R. § 900.157 (emphasis added). The regulations do not contain any language

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<sup>6</sup> A tribe may also go directly to court. *See* 25 U.S.C. §§ 450f(b)(3) and 450m-1(a); 25 C.F.R. § 900.153.

<sup>7</sup> The regulations do not define the term “designated representative of the Secretary,” nor do they provide a procedure for selecting the representative. As evidenced by the present case, it appears that the individual who conducts the informal conference as the designated representative of the Secretary is not necessarily a Federal employee.

addressing what happens if the agency that issued the initial decision is dissatisfied with a recommended decision.

The Recommended Decision in this case is not signed or dated, nor did it include the above appeal rights language. According to OJS, the Designated Representative did not send OJS a copy of his Recommended Decision, and OJS first received a copy from the Tribe approximately 3 months after the informal conference. OJS then filed an appeal to the Board within 30 days of receipt of the Recommended Decision. OJS candidly acknowledged that it was filing a protective appeal and was uncertain whether the ISDA regulations actually grant OJS a right to appeal from the Recommended Decision.<sup>8</sup> The Board ordered briefing on whether OJS has a right to appeal the Recommended Decision to the Board.

The Tribe argues that OJS does not have any such right. The Tribe contends that the regulations are unambiguous, pointing to (1) the specificity of the regulatory language that gives a tribe the right to appeal an *initial* decision if it is dissatisfied with a recommended decision, (2) the absence of any regulatory language authorizing the agency to appeal from a recommended decision following an informal conference, and (3) the contrast between the absence of a right to appeal from a recommended decision issued by a designated representative of the Secretary after an informal conference, and the express right of appeal afforded to both a tribe and the agency to appeal from a recommended decision issued by an administrative law judge (ALJ) *after* a tribe has appealed an *initial* agency decision to the Board, and the matter has been referred to an ALJ for a hearing and recommended decision. *See* 25 C.F.R. § 900.166 (“[a]ny party” may file objections to the Board from an ALJ’s recommended decision). The Tribe also argues that because it did not file an appeal, the Recommended Decision became final after the 30-day appeal period expired, and it is binding on OJS.<sup>9</sup>

OJS responds by contending that the absence of language in the regulations addressing the present situation — what happens when an agency is dissatisfied with a recommended decision? — creates an ambiguity in the regulations. OJS suggests that the appeal rights statement required by the regulation that “you may file an appeal,” 25 C.F.R.

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<sup>8</sup> The Tribe, apparently not “dissatisfied” with the Recommended Decision, *see* 25 C.F.R. § 900.157, did not file an appeal from OJS’s initial decision.

<sup>9</sup> Section 900.157 states that if a tribe or tribal organization “does not file a notice of appeal within 30 days, or [within the time granted for an extension], the recommended decision becomes final.”

§ 156(b), might serve as a basis for finding that OJS has a right of appeal to the Board. Much of OJS's response is devoted to discussing the implications if, in the absence of an appeal by a tribe, a recommendation decision becomes final and whether it is binding on the agency. According to OJS, the absence of a right of an agency to appeal under such circumstances raises due process and equal protection issues. OJS also argues that if the Recommended Decision is binding on OJS, the Secretary clearly has been adversely affected and satisfies the elements of standing under the 25 C.F.R. Part 2 appeal regulations.

### Discussion

We conclude that the provisions in the ISDA appeal regulations are clear and unambiguous: there is no right (of anyone) to appeal to the Board from a recommended decision. If a tribe is dissatisfied with a recommended decision, it has a right to appeal the *initial* decision to the Board, but it cannot appeal the recommended decision directly. *See* 25 C.F.R. §§ 900.156(b) and 900.157. And there simply is no language in the regulations that authorizes an agency to file an appeal with the Board from a recommended decision.

The appeal rights language that must be included in a recommended decision — that “you” may file an appeal, 25 C.F.R. § 900.156(b) — does not create the ambiguity suggested by OJS. The complete phrase is: “you may file an appeal of the *initial* decision” (emphasis added). In that context, “you” necessarily refers to the tribe or tribal organization, and not to the agency that issued the initial decision. Moreover, the regulations only require that a recommended decision be mailed to the tribe, reinforcing the conclusion that the intended recipient of the appeal rights language is the tribe.

As the Tribe correctly points out, the absence of language giving the agency (or a tribe, for that matter) a right to appeal to the Board from a recommended decision issued by a designated representative of the Secretary, following an informal conference, stands in stark contrast to a section in the ISDA regulations that expressly authorizes “any party” to file objections with the Board (or the Secretary of Health and Human Services, as appropriate) from a recommended decision issued by an ALJ. *See* 25 C.F.R. § 900.166. This language clearly includes both tribes and agencies, but only applies to ALJ recommended decisions, which arise in a wholly different procedural context and only after the Board has already established its jurisdiction over an appeal.<sup>10</sup>

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<sup>10</sup> An ALJ's recommended decision is issued only after the Board has already determined that it has jurisdiction over an appeal filed by a tribe, and has referred the matter to the ALJ because the tribe is entitled to a hearing. *See* 25 C.F.R. §§ 900.160-.167.

We conclude, based on the language of the ISDA regulations, that OJS does not have a right to appeal the Recommended Decision to the Board.<sup>11</sup>

In deciding that OJS does not have a right of appeal to the Board from the Recommended Decision, we emphasize that the issue to be decided by the Board is narrower than what is suggested by the parties in their briefs. The only issue is whether OJS has a right of appeal to the Board from the Recommended Decision. The parties address the meaning of the “finality” language contained in section 900.157 (when a tribe does not appeal), and whether a recommended decision is binding on the agency, when a tribe does not file an appeal. We need not address either of those issues because our conclusion does not rest on their resolution. Instead, an examination of the regulatory language is all that is necessary to support our conclusion that OJS does not have a right to appeal the Recommended Decision to the Board.

### 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, the Board dismisses this appeal.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

\*Interior Board of Land Appeals, sitting by designation.

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<sup>11</sup> In its brief, OJS discusses the principles of standing that the Board applies to appeals brought under the default BIA appeals regulations, 25 C.F.R. Part 2. OJS does not contend, however, that Part 2 actually applies to this appeal, and we find no basis to conclude that it does. *See* 25 C.F.R. § 2.3 (Applicability).