

Editor's note: On reconsideration of IBIA decision the Director OHA set aside this decision in its entirety; the BLM decision was modified; and case referred for a hearing and decision by an Administrative Law Judge. see Absentee Shawnee Tribe of Oklahoma, 10 OHA 193 (decided March 17, 1994).

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA

IBLA 90-442

Decided November 3, 1992

Appeal from a decision of the Director, Bureau of Land Management, declining a contract application to provide oil and gas inspection and enforcement services to Absentee Shawnee allotted lands filed under the Indian Self-Determination and Education Assistance Act.

Set aside and referred for a hearing.

1. Contracts: Indian Self-Determination and Education Assistance Act:
Generally -- Indians: Indian Self-Determination and Education Assistance Act: Generally

Under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. § 450f(b)(3) (1988), whenever the Secretary declines to enter into a self-determination contract, he must provide the tribal organization with a hearing on the record. A BLM decision declining a self-determination contract application will be set aside if BLM has not afforded the tribe an opportunity for a hearing, and the case will be assigned to an Administrative Law Judge to conduct the statutorily mandated hearing. The record of the hearing shall then be forwarded to the Director, BLM, for review and issuance of a decision with appeal rights to the Assistant Secretary, Land and Minerals Management.

APPEARANCES: Jess Green, Esq., Ada, Oklahoma, for the Absentee Shawnee Tribe of Oklahoma; M. Dennis Daugherty, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Absentee Shawnee Tribe of Oklahoma (Tribe) has appealed from a June 5, 1990, decision of the Director, Bureau of Land Management (BLM), declining its contract application to provide oil and gas inspection and enforcement services to Absentee Shawnee allotted lands.

On April 6, 1990, pursuant to the provisions of the Indian Self-Determination and Education Assistance Act (Indian Self-Determination

Act), as amended, 25 U.S.C. §§ 450-450n (1988), the Tribe filed its contract application with the Tulsa District Office, BLM, seeking to assume that portion of BLM's oil and gas inspection and enforcement program serving tribal and allotted lands. The Tribe proposed to hire a qualified lease inspector whose functions would include assuring that Absentee Shawnee lease production was accurately measured, properly handled, and appropriately reported, and ensuring that all oil and gas activities on Absentee Shawnee lands were performed in an environmentally sound manner. Under the proposal, the inspector would conduct one complete on-site inspection of each producing lease every 15 working days (or more often if necessary) which would conform to BLM's optimum inspection requirements, and would inform BLM of the inspection results. Since the Tribe did not currently employ such an inspector, it provided a position description outlining the duties and qualifications of a tribal lease inspector. The Tribe also explicitly stated that it was not requesting that any of BLM's trust responsibility be delegated to the Tribe.

The Tribe sought funding for the contract equal to 2.6 percent of the oil and gas line item of the Tulsa District Office's fiscal year 1990 budget. The Tribe reasoned that since its calculations indicated that active Absentee Shawnee tribal and allotted leases comprised 2.6 percent of the Tulsa District Office's oil and gas inspection and enforcement responsibilities, the award of the contract would reduce BLM's inspection and enforcement duties by that proportionate share. The Tribe submitted a 2-month budget of \$ 10,297.70 which included both direct and indirect program costs, with indirect costs calculated as 60.51 percent of direct salaries and fringe benefits.

By letter dated June 5, 1990, the Director, BLM, responded to the Tribe's contract application, stating in toto:

This letter is in response to your application of April 6, 1990, to contract with [BLM] for the oil and gas inspection program on Absentee Shawnee allotted lands.

We regret that we must decline your contract application. Entering into the proposed contract would have an adverse effect on the BLM's ability to carry out its trust responsibility to other tribes and allottees. The proposed funding for the contract far exceeds the amount available for inspection and enforcement on Absentee Shawnee allotted leases and would result in a decrease in funding and manpower available for inspection and enforcement for other tribes and allottees. In addition, the Tribe has not indicated that it has in its employ an inspector who is certifiable under BLM's standards for oil and gas inspectors. As such, the service to be rendered to the Indian beneficiaries of the program to be contracted will not be satisfactory, adequate protection of trust resources is not assured, and, the proposed program to be contracted for cannot properly be completed or maintained by the proposed contract. Therefore,

your application is declined pursuant to Section 102(a)(2) of the Indian Self-Determination Act, 25 U.S.C. Section 450f(a)(2).

There are several other items in the contract application that need correction or clarification. The Tulsa District Office would be pleased to meet with you to review your contract application and assist with any adjustments prior to resubmission.

Again, we regret that we are unable to accept your contract as proposed. If you are interested in discussing alternatives to the proposed contract, please contact our Tulsa District Office.

[1] This is a case of first impression for this Board. In the 1988 amendments to the Indian Self-Determination Act, Congress expanded the Act's coverage by directing the Secretary,

upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs --

* * * * *

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of * * * the Department of the Interior within which it is performed.

25 U.S.C. § 450f(a)(1) (1988). Thus, BLM programs serving Indians now fall within the parameters of the Act.

The Act further provides:

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that --

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

25 U.S.C. § 450f(a)(2) (1988).

In this case, the Director specifically found in his declination letter that under the proposed contract, the service to be rendered to the Absentee Shawnee allottees would not be satisfactory, trust resources would not be adequately protected, and the oil and gas inspection and enforcement services to be contracted for would not be properly completed or maintained. He grounded these findings on two factors: (1) the proposed funding level for the contract was so excessive it would inevitably have resulted in an unacceptable reduction in inspection and enforcement of the leases of other tribes and allottees; and (2) there was no evidence that the Tribe had qualified personnel to perform functions critical to BLM's trust responsibility.

The Act establishes the procedures to be followed upon refusal to enter into a self-determination contract:

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall --

- (1) state any objections in writing to the tribal organization,
- (2) provide assistance to the tribal organization to overcome the stated objections, and
- (3) provide the tribal organization with a hearing on the record and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate. [Emphasis supplied.]

25 U.S.C. § 450f(b) (1988).

In his June 5, 1990, letter, the Director stated his objections to the proposed contract and offered the assistance of the Tulsa District Office in reviewing and adjusting the contract application prior to resubmission. The Director did not, however, notify the Tribe in writing of the opportunity for a hearing on the record to contest the stated objections. BLM's failure to provide the Tribe with the statutorily mandated hearing on the record compels the Board to set aside the Director's declination determination and refer the case to the Hearings Division for a hearing by an Administrative Law Judge.

We recognize that the Department has yet to promulgate regulations implementing the 1988 amendments to the Indian Self-Determination Act and establishing the rules governing hearings under that Act. Recently, the Director of the Office of Hearings and Appeals (OHA) issued a decision which dictates the procedure for this Board to follow with respect to "Self Determination Act" cases where an agency declines a contract application. Thus, in Tohono O'odham Nation v. Bureau of Reclamation, 9 OHA 185 (1992), attached herein as Attachment A, the Director stated at page 187:

Therefore, Self-Determination Act cases of the present type coming to OHA will be assigned to an Administrative Law Judge for hearing. The Administrative Law Judge will not issue a decision in the matter, but will transmit the administrative record, including the hearing transcript, to the official within the division from which the appeal arose who is the nearest organizational equivalent of the Commissioner of Indian Affairs. Appeals from that official's decision should be taken to the Assistant Secretary over the division from which the appeal arose. This appeal procedure remains subject to the Secretary's reserved authority, set forth in 43 CFR 4.5(a) "to take jurisdiction at any stage of any case before any employee or employees of the Department * * * and render the final decision in the matter after holding such hearing as may be required by law."

The BLM official who is the nearest organizational equivalent of the Commissioner of Indian Affairs is the Director, BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division, OHA, for a hearing by an Administrative Law Judge. Thus, the Administrative Law Judge in accordance with Attachment A of this decision shall conduct a hearing and forward the record to the Director, BLM, for review and issuance of a decision which shall be appealable to the Assistant Secretary, Land and Minerals Management. 1/

Gail M. Frazier

Administrative Judge

I concur:

David L. Hughes
Administrative Judge

1/ BLM should have the burden of going forward and the ultimate burden of persuasion to demonstrate that one of the statutory grounds for contract declination exists.

ATTACHMENTS:

September 17, 1992

TOHONO O'ODHAM NATION	:	Docket No. D 92-26
:		
Appellant	:	Indian Self-Determination Act
:		
v.	:	Notice of Docketing and
		Order Vacating Decision
BUREAU OF RECLAMATION	:	
:		
Appellee	:	

NOTICE AND ORDER

On September 14, 1992, appellant Tohono O'odham Nation filed a notice of appeal and statement of reasons in the above-described matter with the Director, Office of Hearings and Appeals. Appellant seeks review of an August 13, 1992, order issued by District Chief Administrative Law Judge John R. Rampton granting a motion to dismiss filed by the Bureau of Reclamation (BOR). The case involves a question arising under the Indian Self-Determination Act, as amended, 25 U.S.C. §§ 450-450n (Supp. II 1990) (Self-Determination Act). Appellant indicated that it had also filed an appeal with the Assistant Secretary -- Water and Science because of the lack of clear regulatory direction concerning the proper appellate process.

The case is hereby docketed under the above name and number, which should be cited in all future inquiries or correspondence. For the reasons discussed below, Judge Rampton's order is vacated with instructions.

From the materials presently before me, the Southern Arizona Water Rights Settlement Act, P.L. 97-293, 96 Stat. 1274 (Settlement Act), was enacted, inter alia, to settle the water rights claims of appellant and its members. BOR was the designated agency within the Department of the Interior (Department) responsible for performing certain functions to implement the Settlement Act. Those functions included the design, rehabilitation, and construction of appellant's farm projects. Section 310 of the Settlement Act specifically provided that appellant could contract with BOR under the Self-Determination Act to perform functions required by the Settlement Act. Pursuant to this authority, appellant entered into two contracts with BOR: Contract No. 8-CS-30-04830 provided for the design of the San Xavier Cooperative Farm rehabilitation project, and was originally awarded to appellant on February 12, 1988 (Contract 04830); Contract No. 8-CS-32-00380 provided for the redesign of the Schuk Toak Farm, and was originally awarded to appellant on April 22, 1988 (Contract 00380).

Both contracts were due to expire on September 30, 1991. By letters dated June 20, 1991, appellant sought to extend both contracts for a period

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of one year. Appellant states that BOR received the letters on June 24, 1991. BOR responded to appellant's letter concerning Contract 00380 by letter dated September 13, 1991.

Appellant argued that BOR's failure to take action within the 60-day period established in 25 U.S.C. § 450f(a)(2) constituted a declination to contract in accordance with the provisions of that section. Appellant filed a notice of appeal with BOR pursuant to 25 U.S.C. § 450f(b)(3) and 25 CFR 271.81, requesting an informal conference as provided for in the regulation. In a joint decision rendered on January 3, 1992, the contracting officer and the Director, Arizona Project Office, denied appellant's request for contract extensions.

Appellant requested a formal hearing pursuant to 25 CFR 271.81. The matter was assigned to Judge Rampton, who issued the order under review.

The present appeal presents difficult questions concerning the proper administrative review procedures to be followed. The Self-Determination Act was originally enacted on January 4, 1975. Regulations implementing the Self-Determination Act were promulgated on November 4, 1975. These regulations, which appear in 25 CFR Part 271, were promulgated by and apply to the Bureau of Indian Affairs (BIA). The Self-Determination Act has been significantly amended in several areas since the promulgation of 25 CFR Part 271, and now clearly applies to all divisions within the Department which provide services to Indians (25 U.S.C. §§ 450b(a), 450b(j)); requires a hearing on the record with an opportunity for appeal when there is a declination to contract (25 U.S.C. § 450f(b)(3)); and requires the promulgation of new regulations (25 U.S.C. § 450k). Congress has made its intent clear that "[t]here are no programmatic reasons for having separate regulations for self-determination contracts * * *. Therefore, a uniform and consistent set of regulations for all Indian self-determination contracts * * * should be contained in Title 25 of the Code of Federal Regulations" (S. Rep. 100-274, 100th Cong., 1st Sess. 38 (1987)).

Although the Department and the Indian Health Service, in consultation with Indian tribes, have been working on new regulations for a considerable period of time, none have yet been proposed, and it appears that none will be proposed in the immediate future. Consequently, the Department is faced with a situation in which it must enforce specific statutory requirements, but has no current implementing regulations. In particular, as the regulations in 25 CFR Part 271 apply to hearings and appeals, they do not apply to all Departmental divisions, and are not entirely in harmony with subsequent amendments to the Self-Determination Act. However, the Department has a responsibility to carry out the letter and the spirit of those amendments. See 25 U.S.C. § 450a(b).

The hearings and appeals sections of Part 271 are contained in 25 CFR 271.81-.82. It appears that appellant attempted to conform its appeals to these sections, and that Judge Rampton also attempted, in at least some instances, to follow them. The materials before me do not show whether BOR acquiesced in this use of regulations promulgated by BIA.

The only role for OHA contemplated in these sections is the conduct of a hearing. There is no provision for a decision to be entered by the Administrative Law Judge or for an appeal to any OHA official. Instead, the regulations establish a procedure under which OHA will conduct a hearing and forward the administrative record, including the hearing transcript, to the Commissioner of Indian Affairs. There is then a right of appeal to the Assistant Secretary -- Indian Affairs. Because of this procedure, no appeals from actions or decisions of Administrative Law Judges have previously been filed with OHA. In addition, most of the cases which have been referred to the OHA arose within BIA.

I am cognizant of several factors, including but not limited to, Congress' expressed desire for uniform regulations in this area, the failure of the Department to promulgate uniform regulations subsequent to amendments of the Self-Determination Act, the existence of regulations applying specifically to BIA's decisions under the Self-Determination Act, and the need to implement Congress' requirement that there be a hearing before an Administrative Law Judge with a right of appeal from a decision of any Departmental division declining to contract. Based upon consideration of these factors, I have determined that, when the provisions of 25 CFR 271.81-.82 would apply to a decision rendered by BIA, OHA will apply those regulations in handling any case arising under the Self-Determination Act, without regard to the Departmental division from which the appeal arises. This procedure will be followed until such time as uniform regulations applying to all Departmental divisions are promulgated, and to the extent the regulations are not inconsistent with subsequent legislation.

Therefore, Self-Determination Act cases of the present type coming to OHA will be assigned to an Administrative Law Judge for hearing. The Administrative Law Judge will not issue a decision in the matter, but will transmit the administrative record, including the hearing transcript, to the official within the division from which the appeal arose who is the nearest organizational equivalent of the Commissioner of Indian Affairs. Appeals from that official's decision should be taken to the Assistant Secretary over the division from which the appeal arose. This appeal procedure remains subject to the Secretary's reserved authority, set forth in 43 CFR 4.5(a) "to take jurisdiction at any stage of any case before any employee or employees of the Department * * * and render the final decision in the matter after holding such hearing as may be required by law."

Accordingly, I hereby vacate Judge Rampton's August 13, 1992, order granting BOR's motion to dismiss. Judge Rampton should prepare the administrative record for transmittal to the Commissioner of the Bureau of Reclamation, the official who is the nearest organizational equivalent to the Commissioner of Indian Affairs. Any appeal from the decision of the Commissioner of Reclamation should be taken to the Assistant Secretary -- Water and Science.

Roger E. Middleton, Director

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