



INTERIOR BOARD OF INDIAN APPEALS

United Indians of All Tribes Foundation v. Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

11 IBIA 226 (07/05/1983)

Reversed on reconsideration:
11 IBIA 276



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UNITED INDIANS OF ALL TRIBES FOUNDATION

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-32-A

Decided July 5, 1983

Appeal from denial of fiscal year 1983 funding under the Indian Child Welfare Act.

Vacated and remanded.

1. Administrative Procedure: Generally--Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

So long as a departure from prior practice is clearly explained and shown to be neither arbitrary nor capricious, the Department has full authority to correct prior erroneous interpretations of law.

2. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

The Board of Indian Appeals will not permit a collateral attack on the designation of an area as "near reservation" in the context of an appeal from the denial of a grant application.

3. Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

4. Indian Child Welfare Act of 1978: Financial Grant Applications:
Generally

Regulations requiring the use of "near reservation" designations for funding under the Indian Child Welfare Act establish reasonable procedures through which the limited funds under the Act can be allocated to organizations operating on or near reservations and those operating off the reservations to ensure non-duplication of coverage.

5. Regulations: Publication

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

6. Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

Duly promulgate regulations have the force and effect of law and are binding upon the Department.

7. Indian Child Welfare Act of 1978: Financial Grant Applications:
Disapproval

The failure of an Indian organization providing Indian Child Welfare Act services in an area designated "near reservation" to seek funding through the governing body of the tribe making the designation constitutes a "special problem or impediment" to approval of the application within the meaning of 25 CFR 23.29(b)(4).

APPEARANCES: Esther Crawford, Director, Assistance to Families in Conflict Program, United Indians of All Tribes Foundation, East Seattle, Washington, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On May 16, 1983, the Board of Indian Appeals (Board) received a notice of appeal from the United Indians of All Tribes Foundation (appellant) seeking review of a denial of grant funding for fiscal year 1983 under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (Supp. II 1978). For the reasons discussed below, the Board vacates that decision and remands the case to the Bureau of Indian Affairs (BIA) for further action.

Background

On January 28, 1983, appellant submitted a proposal to the Portland Area Office, BIA, for program funding under ICWA. The proposal was reviewed by the area office and received a rating of 98 out of a possible 100. Despite this rating, the application was denied on February 18, 1983, by the Area Director on the grounds that appellant was located in an area designated "near reservation" by three tribes, the Muckleshoot, Puyallup, and Suquamish. The Area Director stated that under 25 CFR 23.26(b), Indian organizations providing ICWA services that are located in areas designated "near reservation" must seek funding through the governing body of the tribe making the designation. The letter concluded that this decision was being made at the direction of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) and that it was "a Secretarial level decision."

Appellant appealed this decision to appellee in accordance with 25 CFR 23.63. On May 16, 1983, appellant filed a notice of appeal with the Board,

stating that appellee had received its appeal on April 7, 1983, and that no decision had yet been rendered in violation of 25 CFR 2.19. Appellant consequently asked the Board to assume jurisdiction over the appeal.

The Board issued an order on May 16, 1983, requesting clarification of the status of the appeal. The Board noted that the Area Director's decision was confusing in that it stated it was based on the instructions of appellee. Under 25 CFR Part 2, decisions of the Deputy Assistant Secretary are normally appealable to the Board. Furthermore, the Board did not understand the characterization of this as "a Secretarial level decision."

On May 18, 1983, the Board received a copy of a May 16, 1983, decision in this case by appellee. The decision affirmed the denial of funding to appellant on the grounds that appellant's service area, Seattle/King County, had been designated a "near reservation" area by the Puyallup Tribe. See 44 FR 2693 (Jan. 12, 1979). Although similar designations of the Seattle/King County area by the Muckleshoot and Suquamish Tribes had been tentatively approved, appellee stated that the designations had not yet been published in the Federal Register. Appellee also clarified that the initial decision "was an area level decision based on regulation, and not a secretarial level decision." The decision noted that it was appealable to the Board.

On May 31, 1983, appellee responded to the Board's order, showing, among other things, that the appeal was now properly before the Board. Therefore, the Board issued an order on June 1, 1983, in which it treated appellant's request for Board assumption of jurisdiction as an appeal from appellee's decision.

Pursuant to an expedited briefing schedule, ^{1/} appellant informed the Board on June 3, 1983, that it would rely on its brief submitted to appellee. Appellee did not receive notification of this fact until June 14, 1983. Appellee filed an answer brief on June 29, 1983.

Discussion and Conclusions

The Board has recently issued an opinion upholding BIA's denial of funding under ICWA to an Indian organization located in Flagstaff, Arizona, an area designated "near reservation" by three Indian tribes. The organization had not sought funding through the governing body or bodies of one or all of the tribes and had not alleged that it was seeking funding only for Indians not members of any of the three tribes. See Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983). This opinion was based upon an interpretation of the regulations in 25 CFR Part 23 and an earlier Board opinion in Navajo Tribe v. Commissioner of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982).

The BIA developed "near reservation" designations in response to the Supreme Court's decision in Morton v. Ruiz, 415 U.S. 199 (1974), to ensure provision of Federal services enacted for Indians living "on or near" reservations. The designations constitute recognition by a tribe that tribal members living in these areas have maintained close personal and cultural

^{1/} This case has been expedited at appellant's request because of the assertion that funding for its ICWA programs expired on June 30, 1983.

ties with the reservation and that it is administratively feasible for the tribe to provide services to these individuals.

The use of "near reservation" designations under ICWA is required by 25 CFR 23.25(b), .26(a), and .28(a). Under these regulations, a tribe designating an area as "near reservation" is responsible for providing ICWA services to its members within that area. 2/ Services may be provided directly

2/ Appellee argues that "[t]hrough there are many more King County resident Indians not affiliated with the three reservations, they are still eligible to receive services from the tribal service programs. 25 CFR 23.2(d)(2)." Appellee's answer brief at page 6. Appellant contends that only about 1,300 of the 12,437 Indians residing in the Seattle/King County area are members of the Puyallup Tribe. An additional 610 Indians are members of the Muckleshoot Tribe and 570 are members of the Suquamish Tribe. Thus approximately 10,000 Indians living in the Seattle/King County area are not members of a tribe or tribes who have designated or proposed the area as "near reservation. "

Section 23.2(d)(2), cited by appellee, defines "Indian" for the purpose of receiving ICWA benefits under a "near reservation" program. This section must be read together with section 23.2(d)(3), regarding eligibility for off-reservation programs. The Board finds that the two sections merely specify the type of proof of Indian ancestry necessary to qualify for receipt of services funded under ICWA. A person meeting those definitions may seek assistance through the appropriate program or programs. The definitions do not purport to define the client population of "near" or off-reservation programs.

If BIA intends to use this definition of "Indian" to also define the client population for "near reservation" programs, it must make this fact known through rulemaking or other proper publication. It must also show that those Indians not members of the tribe making the designation, but who may reasonably be expected to seek services from the program, were included in an appropriate manner in the calculation of the tribe's service population for purposes of determining ICWA maximum funding levels. Alternatively, BIA could choose to follow the scheme contemplated by Congress and fund programs servicing Indians not members of the tribe designating an area as "near reservation" through section 202 of ICWA, 25 U.S.C. § 1932 (Supp. II 1978), regarding off-reservation programs. The BIA must ensure that all Indians receive the services Congress has provided for them. (The Board notes in this regard that the record in this case shows a possible discrepancy in BIA's use of population figures in determining tribal membership for ICWA maximum funding purposes. See Mar. 31, 1983, letter from Director, Muckleshoot Youth Home, Auburn, Washington, to Executive Director, United Indians of All Tribes Foundation. In order to avoid a charge of being arbitrary and capricious, BIA should remedy such discrepancies or explain why an apparent discrepancy either does not exist or is legally permissible.)

by the tribe or through subgrant to a separate organization. 25 CFR 23.26; Navajo Tribe, *supra*.

According to appellant, despite the fact that its service area had been designated "near reservation," it nevertheless received ICWA funding for the past 4 years without being required to seek funding through a tribal governing body. Appellant apparently previously complied with the regulatory requirements of 25 CFR 23.25(c), .26(b), and .28(b), regarding off-reservation programs, rather than those of 25 CFR 23.25(b), .26(a), and .28(a), applying to on or "near reservation" programs.

Appellee acknowledges that appellant has previously received ICWA funding as an independent grant applicant. He maintains, however, that such funding was in violation of Departmental regulations and that he is attempting to correct an illegal practice as it has been applied to appellant and to other similarly situated Indian organizations providing ICWA services.

[1] The Board has held that prior error is not a bar to the correction of that error. So long as a departure from prior practice is clearly explained and shown to be neither arbitrary nor capricious, the Department has full authority to correct prior erroneous interpretations of law. See Native Americans, *supra*; Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981); Howell v. United States, 9 IBIA 70, 88 I.D. 822 (1981), and cases cited therein. If appellant was not a proper independent applicant, the Department can deny future funding, regardless of past practice.

Appellant attempts to avoid the restrictions of the "near reservation" designation by arguing that the designation of its service area as "near reservation" by the three tribes does not comport with the regulatory criteria for determining such areas as set forth in 25 CFR 20.1(r). Under that regulation, areas are designated "near reservation" by "the Commissioner [of Indian Affairs] upon recommendation of the local Bureau Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations." Criteria for determining appropriate "near reservation" areas are then listed.

[2] Assuming, arguendo, that the Board has jurisdiction to review the designation of an area as "near reservation" under 25 CFR Part 2, and that appellant has standing to challenge such a designation, there is no indication that appellant has properly taken an appeal from the designations. Appellant does not allege that it questioned the final designation of its service area as a "near reservation" area by the Puyallup Tribe in 1979, or the proposed designation by the Muckleshoot Tribe in 1980 or the Suquamish Tribe in 1981. The Board will not permit a collateral attack on these designations in the context of the present appeal.

[3] Appellant next argues that the decision to deny funding violates the congressional intent to fund off-reservation programs under ICWA. To the extent that this argument seeks a determination that the regulations in 25 CFR Part 23 exceed statutory authority by limiting otherwise eligible beneficiaries, the Board does not have authority to declare a duly promulgated Departmental regulation invalid. See Native Americans, *supra*; Zarr v. Acting

Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).

[4] To the extent that the Board has jurisdiction to address the substance of this argument, it finds that funding of off-reservation programs is provided in 25 CFR 23.25(c). The regulations merely establish a reasonable procedure through which the limited funds available under ICWA can be allocated to organizations operating on or near reservations (25 CFR 23.25(b)) and those operating off the reservations (25 CFR 23.25(c)) to ensure non-duplication of coverage. See Native Americans, supra. Therefore, the Board rejects appellant's argument that the decision does not allow funding of off-reservation programs.

Appellant's two remaining arguments are related in that they both question the future provision of ICWA services to Indians within the Seattle/King County service area. Appellant states that it was aware during the fall of 1982 of rumors that BIA would not accept grant applications from off-reservation programs. However, on January 4, 1983, it received a Request For Proposal (RFP) from the Portland Area Office. The RFP had a January 28, 1983, deadline for submission of proposals. Appellant alleges and appellee does not deny that at no time prior to the denial of the application was appellant informed that because its service area was designated "near reservation," its proposal should have been made through a tribal governing body in accordance with section 23.26(a). ^{3/} Appellant thus argues that if it

^{3/} This failure to inform appellant of the possible denial of its application distinguishes the present case from Native Americans, supra. In Native Americans, the appellant was specifically informed that its application might be denied on the grounds that it was located within a "near reservation" area, but had not sought funding through a tribal governing body.

had been informed of this ground for potential denial, it could have modified its proposal to meet the requirement, and so continue to provide ICWA services to its client population.

[5, 6] It is true that all persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations. Estate of Eugene Patrick Dupuis, 11 IBIA 11 (1982). It is equally true that such duly promulgated regulations have the force and effect of law and are binding upon the Department. Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983); Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

In this case, BIA was required by 25 CFR 23.28(a) to review a grant application of a "near reservation" program according to section 23.29. Section 23.29(b)(4) requires BIA to "[i]nform the applicant, in writing and before any final recommendation, of any special problems or impediments which [might] result in a recommendation for disapproval." The Board has previously held that, although this regulation does not appear to be required by ICWA, its promulgation was within the Secretary's authority in implementing the statute. "Once this regulation was adopted, and so long as it remains extant, the Secretary and his representatives are bound by it." Aleutian/Pribilof, *supra*, 9 IBIA at 260, 89 I.D. at 199. See also United States v. Nixon, 418 U.S. 683, 694-96 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957).

[7] The BIA failed to inform appellant that classification of its application as that of a "near reservation" program might result in

disapproval on the grounds that it had not complied with section 23.26(a) because it had not requested funding through the governing body of the tribe designating Seattle/King County as a "near reservation" area. Even though this requirement is embodied in regulation, appellant's failure to present its proposal in accordance with that regulation constitutes a special impediment to approval of the application which section 23.29(b) (4) required BIA to bring to appellant's attention.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 16, 1983, decision denying appellant's grant application must be vacated. The case is remanded to BIA so that it may follow its regulations in considering appellant's application. This decision does not require that BIA ultimately approve appellant's application, a decision which is within BIA's discretion. 4/

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

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Franklin D. Arness
Administrative Judge

4/ See Aleutian/Pribilof, supra.