



INTERIOR BOARD OF INDIAN APPEALS

White Mountain Apache Tribe v. Acting Phoenix Area Director,  
Bureau of Indian Affairs

16 IBIA 51 (03/18/1988)

Related Board case:  
13 IBIA 228



# United States Department of the Interior

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

WHITE MOUNTAIN APACHE TRIBE

v.

AREA DIRECTOR, PHOENIX AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 85-27-A

Decided March 18, 1988

Appeal from a decision of the Phoenix Area Director disapproving attorney contract No. H50C14204134, between the White Mountain Apache Tribe and William H. Veeder.

Affirmed; 9 IBIA 141 limited.

1. Administrative Procedure: Rulemaking

An interpretative rule, which is not subject to the notice and comment procedures of 25 U.S.C. § 553, is one which merely explains and sets forth with greater specificity the agency's understanding or interpretation of that which a statute already requires.

2. Administrative Procedure: Rulemaking--Indians: Attorneys: Contracts

83 IAM 7.2(E), requiring the submission of attorney vouchers to the Department of the Interior for approval before they can be paid, is merely a restatement of what is already specifically required by 25 U.S.C. § 82.

3. Administrative Procedure: Rulemaking--Indians: Attorneys: Contracts

To the extent that the fixing of fees for attorney contracts was contemplated under both 25 U.S.C. §§ 81 and 476, section 476 does not supersede section 81. Application of those requirements of section 81 relating to the fixing of fees to attorney contracts entered into under section 476 is a reasonable interpretation of the Secretary's responsibilities with respect to the "fixing of fees." The application of such requirements constitutes, at most, an interpretative rule that need not be published in the Federal Register.

APPEARANCES: Robert C. Brauchli, Esq., Whiteriver, Arizona, for appellant; Duard R. Barnes, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On March 18, 1985, the Board of Indian Appeals (Board) received a motion under 25 CFR 2.19, 1/ from the White Mountain Apache Tribe (tribe; appellant). Appellant asked the Board to assume jurisdiction over an appeal filed with the Deputy Assistant Secretary-- Indian Affairs (Operations) (Deputy Assistant Secretary) from a decision issued by the Phoenix Area Director, Bureau of Indian Affairs (BIA; appellee), concerning attorney contract No. H50C14204134, between appellant and William H. Veeder (Veeder). For the reasons discussed below, the Board affirms that decision.

Background

On October 19, 1983, pursuant to a tribal resolution, appellant negotiated a contract with Veeder to pursue tribal claims against the United States in Docket 22-H before the United States Claims Court. 2/ This attorney contract was approved by BIA, and ran from October 6, 1983, to October 5, 1985.

Appellant's tribal council chose Veeder to represent the tribe in Docket 22-H because he was already representing it in pending water rights litigation. The tribal council was informed and believed that the water rights cases and Docket 22-H were closely related and, therefore, required careful coordination.

After assuming responsibility for Docket 22-H, Veeder, according to appellant's opening brief at page 3,

orchestrated an intensive and detailed scientific investigation to prepare the necessary evidence to advance the Tribe's claims against the United States for mismanagement of the Tribe's timber, rangeland, and water resources. In addition, Mr. Veeder was also responsible for new investigations into the Tribe's accounting claims which revealed potentially viable claims against the United States, claims which had not previously been explored prior to his representation.

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1/ Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

2/ The United States Claims Court received jurisdiction over appellant's tribal claim after the abolition of the Indian Claims Commission.

Because of the apparent complexity of the litigation and the amount of time Veeder was spending representing appellant, the tribal council adopted another resolution giving him a fixed fee contract with an \$80 hourly rate of payment and a \$5,000 per month ceiling. A proposed amendment to Veeder's contract was executed by appellant and Veeder on June 28, 1984, and was presented to BIA for approval. On August 1, 1984, appellee disapproved the proposed amendment to the contract.

In response to this disapproval, tribal officials met with BIA staff in order to determine what would constitute an acceptable justification for the proposed contract. On August 16, 1984, the tribal council passed a resolution setting forth a complete summary of the litigation in Docket 22-H, from the time the former attorneys were retained until the adoption of the resolution. The resolution stated that the former attorneys had made little progress and that Veeder had diligently prepared these claims in the short period of time imposed by a court order. It concluded that because Veeder was a sole practitioner, the amount of presently uncompensated time being devoted to appellant's case jeopardized Veeder's financial situation and, consequently, his ability to continue representing appellant. The resolution clearly showed appellant considered Veeder's personal representation to be indispensable.

On September 5, 1984, appellee again disapproved the proposed amendment. <sup>3/</sup> Appellant filed an appeal from this disapproval with the Deputy Assistant Secretary. When the Deputy Assistant Secretary failed to issue a decision in the appeal within 30 days from the time the matter was ripe, appellant filed a motion with the Board asking it to assume jurisdiction. By order dated March 18, 1985, the Board made a preliminary determination that it had jurisdiction and requested that the administrative record be forwarded to it within 30 days. On August 13, 1985, after three additional requests for the record, the Board issued an order to show cause why appellant should not be granted a default judgment because of BIA's failure to provide the record. The record was finally received on August 30, 1985.

After reviewing the briefs filed on appeal, the Board issued an order on May 6, 1986, requesting appellant to respond to statements in appellee's brief which the Board construed as an offer of settlement. Appellant's response to the Board's order was received on May 27, 1986. By order dated May 27, 1986, the Board retained jurisdiction over this matter, but stayed further consideration pending settlement negotiations between the parties.

After attempting to reach an agreement, appellee informed appellant on February 19, 1987, that the proposed attorney contract would not be

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<sup>3/</sup> The reasons for the two disapprovals of the proposed amendment were thoroughly briefed in earlier proceedings before the Board. Although appellant refers to the grounds for these disapprovals in the present round of briefing, those grounds are no longer in issue substantively. The Board has, therefore, considered this prior history only in its decision with regard to appellant's motion for expedited consideration.

approved. In a follow-up letter dated June 17, 1987, appellee explained that the sole reason for this disapproval was the failure of the contract to require the submission of attorney vouchers to the Department for approval.

Appellant informed the Board on August 5, 1987, that, although most questions concerning the contract had been resolved, final accord could not be reached because of a basic disagreement between the parties on the issue of submission of attorney vouchers. Appellant requested the Board to dissolve the stay. By order dated August 6, 1987, the Board resumed active consideration of the matter and established a schedule for submission of briefs by the parties as to the present status of the appeal. Briefs were submitted by both parties. On January 11, 1988, the Board received a motion from appellant for expedited consideration. Expedited consideration is granted.

Issue on Appeal

Only one issue remains for resolution in this appeal: Can BIA require, as a precondition to approval of this contract, that appellant submit Veeder's vouchers to the Department for approval before those vouchers can be paid?

Discussion and Conclusions

Secretarial review of attorney contracts with Indian tribes is required by 25 U.S.C. §§ 81-82 and 476 (1982). <sup>4/</sup> Sections 81 and 82 <sup>5/</sup> derive from R.S. §§ 2103-2104, Acts of March 3, 1871, c. 120, § 3, 16 Stat. 570, and

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<sup>4/</sup> All further references to the United States Code are to the 1982 edition.

<sup>5/</sup> Section 81 states in pertinent part:

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claim growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

\*                    \*                    \*                    \*                    \*                    \*

"Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it.

\*                    \*                    \*                    \*                    \*                    \*

"Fourth. It shall state the amount or rate per centum of the fee in all cases \* \* \* .

\*                    \*                    \*                    \*                    \*                    \*

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by an Indian or tribe, or any one else, for or on his or their behalf, on

May 21, 1872, c. 177, §§ 1-3, 17 Stat. 136. The intent of these sections was clearly to protect the Indians against fraudulent actions by non-Indians. As stated by the Solicitor for the Department of the Interior (Solicitor) in an opinion dated January 22, 1946, 59 I.D. 189, 190; 2 Op. Sol. on Indian Affairs 1381, 1382, section 81

was enacted to protect the Indians in their contractual dealings with attorneys and agents, a field in which the Indians were not without sad experience. The Indians had previously been the victims of monstrous and shameful frauds perpetrated by agents and attorneys, and this legislation which drastically curtailed the right to contract was obviously intended as an extreme measure designed to remedy what was regarded as a great evil.

In contrast, section 476 6/ is part of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479, which was intended to revitalize Indian tribal governments and to allow more tribal autonomy over tribal matters. Section 476, which concerns, among other things, the powers of tribal governments, still requires Secretarial approval of attorney contracts with Indian tribes, but on a more restricted basis than the approval required under section 81:

Indian tribes organized under [the IRA] may employ legal counsel, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior." The purpose of this provision \* \* \* was to give the tribes a greater degree of responsibility in their dealings with attorneys than they had enjoyed under sections 2103-2106 of the Revised Statutes [25 U.S.C. §§ 81-84], with the result that organized tribes may contract with attorneys subject only to the limitations imposed

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fn. 5 (continued)

account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States \* \* \*."

Section 82 states in pertinent part:

"[N]o money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract."

6/ Section 476 states in pertinent part:

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior \* \* \*."

by section 16 of the [IRA]. The power conferred upon the Secretary by section 16 is merely a veto power over the choice of counsel and fixing of fees, \* \* \*.

59 I.D. at 191; 2 Op. Sol. on Indian Affairs at 1382.

The Solicitor has also addressed the relationship between sections 81 and 476. In a January 23, 1937, opinion concerning an attorney contract for claims to be pursued against the United States on behalf of the Minnesota Chippewa Tribe, which had organized under the IRA, the Solicitor stated:

This is the sort of contract to which section 81 applies and the requirements of that section should be observed unless they are superseded by section 16 of the Reorganization Act [25 U.S.C. § 476]. To the extent of any conflict or inconsistency, it is clear that section 16 is controlling and supersedes the prior law. Requirements of the prior law not directly inconsistent or conflicting may also be superseded as to the particular kind of contract to which section 16 applies if such was the intent of Congress. A consideration of the general background and purpose of the Indian Reorganization Act leaves no doubt that the purpose of the statutory provision in question was to increase the scope of responsibility and discretion afforded the tribe in its dealings with attorneys. \* \* \*

I am inclined to the view that in so far as contracts for the employment of legal counsel are concerned, Congress intended to empower the organized tribe to make such contracts, subject only to the limitations imposed by section 16 of the Reorganization Act. The matter is by no means free from difficulty, however, and it may be that the courts when called upon to consider the question, will hold that the two statutes should be treated as one and that the requirements of both in the absence of conflict or inconsistency must be observed.

1 Op. Sol. on Indian Affairs at 717.

In Solicitor's Opinion M-36069, June 22, 1951, 60 I.D. 484, 2 Op. Sol. on Indian Affairs 1542, the Solicitor responded to questions concerning the extent of the Secretary's authority to promulgate regulations dealing with approval of attorney contracts. The Solicitor noted that section 81 "prescribes a number of requirements which a contract of employment between an Indian tribe and an attorney must meet." 60 I.D. at 487, 2 Op. Sol. on Indian Affairs at 1544. He stated that the authority conferred on the Secretary under section 81 was very broad, and extended to issues not specifically addressed in the legislation as long as Secretarial approval was conditioned upon such other requirements as were deemed necessary for the protection of the Indians. In contrast, the Solicitor stated that:

[S]ection [476] differs materially from section 81, under [which] the contract in its entirety is subject to Secretarial approval. The considerations which may be invoked for withholding approval

under section 476 from a contract made by an organized tribe with legal counsel must, therefore, bear some reasonable relationship either to the choice of counsel or the fixing of fees. \* \* \*

Wide discretion is, however, vested in the Secretary with regard to determining what considerations ought to be taken into account under section 476 in passing upon the choice of counsel and fixing of fees. Subject to the traditional limitations against arbitrary and capricious action, I believe that the Secretary may grant approval to or withhold approval from a contract between an organized tribe and legal counsel for any reason or reasons which he deems to be properly related to the choice of counsel or fixing of fees.

60 I.D. at 489-90, 2 Op. Sol. on Indian Affairs at 1545-46.

No major changes were made in the Department's regulations concerning attorney contracts with Indian tribes following Solicitor's Opinion M-36069. Those regulations, currently found in 25 CFR Part 89, are essentially the same as regulations in force as far back as 1938. See 25 CFR Part 15 (1938). Sections 89.1-89.6 deal with tribes organized under the IRA; while sections 89.7-89.26 concern non-IRA tribes. <sup>7/</sup>

Appellee disapproved the present proposed attorney contract because it did not require the attorney's vouchers for work performed to be submitted to BIA for approval before payment. Appellee concedes that the submission of attorney vouchers was made a precondition to approval of this attorney contract on the basis of 83 IAM (Bureau of Indian Affairs Manual) 7.2(E), which states in pertinent part:

Payment of Fees and Expenses. The contract shall provide that the payment of all fees and expenses shall be made upon the submission of vouchers for approval by the Commissioner of Indian Affairs or his duly authorized representative. Vouchers for reimbursement of attorney expenses shall also be approved by the tribe \* \* \* .

Appellee states that application of this manual provision, which derives from sections 81 and 82, to attorney contracts entered into by IRA tribes under section 476 is of long standing, and BIA has customarily required the submission of attorney vouchers from IRA tribes in the exercise of the Secretary's authority under section 476 to approve the "choice of counsel and fixing of fees." This procedure has been followed at least in part, according to appellee, to avoid possible equal protection challenges that might be raised if different standards were applied to the approval of attorney contracts for IRA and non-IRA tribes.

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<sup>7/</sup> The remaining sections of Part 89 are not relevant to the present discussion.

Appellant argues that the requirement of 83 IAM 7.2(E) is not set forth in BIA regulations and its application to IRA tribes constitutes a substantive rule which was not promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. Appellant quotes Morton v. Ruiz, 415 U.S. 199, 235 (1974), for the proposition that the BIA manual is "solely an internal operations brochure," the requirements of which cannot be used against it in the absence of formal rulemaking. See also Underwood v. Assistant Secretary--Indian Affairs (Operations), 14 IBIA 3, 93 I.D. 13 (1986); Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982).

Section 553 requires publication of proposed substantive rules, with an opportunity for public comment. It also states, however, that "[e]xcept when notice or hearing is required by statute, this subsection does not apply--(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, \* \* \*."

[1] The difference between substantive (or legislative) rules and interpretative rules was extensively discussed in Chamber of Commerce of the United States v. Occupational Safety & Health Administration, 636 F.2d 464, 468-69 (D.C. Cir. 1980). The court there stated that substantive rules fill in the gaps in the legislative enactment, thereby supplementing the congressional scheme, rather than construing it. Interpretative rules, on the other hand, have been characterized as ones which merely explain and set forth with greater specificity the agency's understanding or interpretation of that which a statute already requires. Interpretative rules clarify a statute, reminding affected parties of existing duties, with respect to which Congress has "legislated and indicated its will." United States v. Grimaud, 220 U.S. 506, 517 (1911). See also General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984), cert. denied, 471 U.S. 1074 (1985); United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F. Supp. 1200 (D. Minn. 1985), appeal dismissed as premature, 789 F.2d 632 (8th Cir. 1986).<sup>8/</sup> Thus, whether the voucher submission requirement of 83 IAM 7.2(E) is a substantive rule or an interpretative rule depends upon whether it supplements the congressional scheme or merely reminds affected parties of existing duties legislated by Congress.

[2] An examination of the language of 83 IAM 7.2(E) and section 82 shows that the manual provision merely repeats what is already specifically required by the statute. Thus, section 82 requires that before payment may be made under a contract, the contractor "shall have first filed with the

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<sup>8/</sup> In the Shakopee case, the U.S. District Court for the District of Minnesota held that instructions issued by the Deputy Assistant Secretary setting out requirements for the approval of tribal bingo management contracts under 25 U.S.C. § 81 constituted an interpretative rule containing "the agency's construction of its statutory duty under § 81 to determine if submitted gambling agreements were in the best interest of the Indian tribes." The court held, therefore, that notice and comment procedures were not required. 616 F. Supp. at 1212.

Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract." The manual provision states "[t]he contract shall provide that the payment of all fees and expenses shall be made upon the submission of vouchers for approval by the Commissioner of Indian Affairs or his duly authorized representative." Therefore, as to attorney contracts entered into under section 81, 83 IAM 7.2(E) is merely a restatement of the statutory requirements.

The manual provision does not, however, similarly track language found in section 476. Instead, the application of 83 IAM 7.2(E) to contracts under section 476 represents BIA's understanding of the meaning of the phrase "fixing of fees."

[3] In enacting section 81, Congress gave the Secretary authority, *inter alia*, to approve the fixing of fees for attorney contracts, further explicating that authority in section 82. *See* note 4, *supra*. To the extent that section 476 vested the same authority in the Secretary with respect to attorney contracts entered into by IRA tribes, the two statutes are consistent. Thus although other provisions of section 81 may have been superseded by section 476 because of conflict or inconsistency, the "fixing of fees" provisions of the earlier statute were not superseded on those grounds. <sup>9/</sup>

Furthermore, because the "fixing of fees" provisions of the two statutes have the same object or purpose, they are *in pari materia*, making it appropriate to construe the later statute in light of the earlier. *E.g.*, *Haig v. Agee*, 453 U.S. 280, 300-01 (1981); 2A C. Sands, Sutherland on Statutory Construction § 51.03. *See also* Sutherland § 51.02: "Provisions in one act which are omitted in another on the same subject matter will be applied when the purposes of the two acts are consistent." *Accord United States v. Fixico*, 115 F.2d 389, 393 (10th Cir. 1940).

Thus, it was reasonable for appellee to interpret the "fixing of fees" approval requirement of section 476 in light of the related requirements of the earlier statute, including the requirement of section 82 for submission of attorney statements (termed "vouchers" in the manual provision). This statutory construction constitutes, at most, an interpretative rule that need not be published in the *Federal Register*. <sup>10/</sup>

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<sup>9/</sup> The Board mentioned the relationship between sections 81 and 476 in dicta in *Menominee Tribal Enterprises v. Acting Deputy Commissioner of Indian Affairs*, 9 IBIA 141, 144 (1981), where it stated: "The Department has previously taken the position that, in the case of IRA tribes, section 476 supersedes section 81. *Solicitor's Opinion M-36069* (June 22, 1951), 2 Op. Sol. on Indian Affairs 1542 (U.S.D.I. 1979)." As is evident from reading that Solicitor's opinion, this dicta is an overstatement of the Solicitor's position. 9 IBIA 141 is hereby limited to the extent necessary to conform with the present decision.

<sup>10/</sup> The Board also notes appellee's undisputed assertion that this interpretation is of long standing and is routinely applied to other attorney

Appellant also argues that in requiring the submission of attorney vouchers, the Department has placed itself in a conflict of interest, amounting to a breach of its fiduciary responsibilities. Appellant notes appellee is a named party in the suit Veeder is litigating against the Department, and that members of the Department's Field Solicitor's Office in Phoenix, who regularly advise appellee, are defending the Department in that suit. Because the vouchers submitted to appellant by Veeder involve litigation against the Department, appellant argues disclosure of the vouchers would reveal legal strategy, trial preparation, and witnesses, and would provide a means for predicting Veeder's future activities on its behalf. Citing specifically Rule 1.6 of the Code of Professional Responsibility of the American Bar Association, 11/ appellant argues that it has a reasonable expectation that the information relating to its litigation will not be voluntarily disclosed to the Department, and that such information can be forcibly disclosed only through judicial process in accordance with recognized exceptions to the attorney-client and attorney work-product evidentiary privileges.

Appellee notes that these conflict of interest and confidentiality issues are problems that confront BIA and all other tribes who have approved attorney contracts with the provision questioned here. Because tribes frequently enter into attorney contracts to pursue claims against the United States, appellee states that these issues frequently arise.

Although the Board does not take appellant's arguments lightly, the response is simple. Laws passed by Congress, signed by the President, and upheld in the courts take precedence over pronouncements of the American Bar Association.

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fn. 10 (continued)

contracts with IRA tribes. Although the age and consistency of an interpretation does not give it immunity if it was initially improperly adopted, it does suggest that the public, the Congress, and the courts have had an opportunity to become aware of the agency's position. "Under some circumstances, Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that this interpretation is the one intended by Congress." Zemel v. Rusk, 381 U.S. 1, 11 (1965). Cf. Chamber of Commerce, 636 F.2d at 470, in which the court noted that the alleged interpretative rule under consideration there altered prior policy directions.

11/ Rule 1.6 states in relevant part: "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation \* \* \* ."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 19, 1987, decision of the Phoenix Area Director is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

\_\_\_\_\_  
//original signed  
Anita Vogt  
Administrative Judge