



INTERIOR BOARD OF INDIAN APPEALS

Tule River Indian Reservation v. Sacramento Area Director, Bureau of Indian Affairs

17 IBIA 21 (12/07/1988)



# United States Department of the Interior

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

## THE TULE RIVER INDIAN RESERVATION

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-27-A

Decided December 7, 1988

Appeal from the failure of the Central California Agency and Sacramento Area Office, Bureau of Indian Affairs, to take action concerning a contract application filed under the Indian Self-Determination and Education Assistance Act.

Dismissed and referred in part to the Assistant Secretary--Indian Affairs.

1. Board of Indian Appeals: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

2. Board of Indian Appeals: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Under 25 CFR 271.25 and 271.82, jurisdiction to review a declination to contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), rests with the Assistant Secretary--Indian Affairs. Declination to contract issues raised in an appeal pending before the Board of Indian Appeals are properly dismissed and referred to the Assistant Secretary.

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

The remedy for a violation of the time limits set forth in 25 CFR Part 271 for action by the Bureau of Indian Affairs on a contract application filed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), as set forth in 25 CFR 271.28, is the right of an applicant to file an appeal with the next higher Bureau official as soon as the time limit has been exceeded.

APPEARANCES: Lawrence R. Stidham, Esq., Bishop, California, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On April 25, 1988, the Board of Indian Appeals (Board) received a request from the Tule River Indian Reservation (appellant) to assume jurisdiction over an appeal it had filed with the Washington Office of the Bureau of Indian Affairs (BIA). The appeal concerned appellant's fiscal year 1988 contract application under the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450f-450n (1982) (P.L. 93-638). 1/ For the reasons discussed below, the Board dismisses this appeal and refers the matter in part to the Assistant Secretary--Indian Affairs for appropriate consideration.

#### Background

Appellant has administered a P.L. 93-638 contract since 1984. On August 5, 1987, appellant submitted its fiscal year 1988 contract application to the Central California Agency (Agency), BIA. Although the Agency and the Sacramento Area Office (appellee) held a joint review of the application on August 21, 1987, the Agency did not acknowledge receipt of the application until August 31, 1987. 2/ The joint review panel found several problems with appellant's application.

When appellant received no response other than the acknowledgement of receipt from the Agency concerning its application, on December 9, 1987, it wrote appellee asking him to act on the application. By letter dated December 24, 1987, the Agency informed appellant of the problem discovered by the joint review panel's consideration of the application.

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1/ P.L. 93-638 was amended by the Act of Oct. 5, 1988, P.L. 100-472, 102 Stat. 2285, and the Act of Nov. 1, 1988, P.L. 100-581, 102 Stat. 2938. None of the amendments appear to affect the outcome in this appeal.

2/ The acknowledgement letter stated that a joint review panel would consider the application within the next 30 days.

Appellant filed a notice of appeal to the Assistant Secretary--Indian Affairs on January 28, 1988, stating that it received the Agency's application review letter on January 6, 1988, but did not consider this letter to be responsive to its December 9, 1987, letter to appellee. On February 3, 1988, 3/ while its appeal was pending before the Assistant Secretary, appellant responded to the Agency's application review letter. Also on February 3, appellant submitted a revised contract application to the Assistant Secretary, which took into account the problems addressed in the Agency's December 24, 1987, application review letter.

By letter dated March 24, 1988, the Agency responded to appellant's revised application, noting several problems which it felt had not been adequately dealt with in the revision. When the Assistant Secretary did not render a decision on its appeal within 30 days, appellant requested the Board to assume jurisdiction over the appeal pursuant to 25 CFR 2.194/ on April 19, 1988.

By order dated May 3, 1988, the Board made a preliminary determination that it had jurisdiction over the appeal based upon the failure of the BIA Washington Office to issue a decision within 30 days from the time all pleadings were filed, and requested the administrative record. The Board's order specifically provided, however, at page 1: "During the briefing period to be allowed in this matter, any party may seek to show that this preliminary jurisdictional determination is in error. If the Board agrees the appeal will be dismissed."

The Board received the administrative record on May 31, 1988. In a notice of docketing also dated May 31, the Board established a briefing schedule. On July 5, 1988, the Board received a motion for stay from appellant, who stated that the parties were seeking settlement. A stay was granted on July 5, 1988.

On September 16, 1988, the Board received an opening brief from appellant. The transmittal letter accompanying the brief stated that the parties had been unable to reach a settlement. Appellee's answer brief is essentially a challenge to the Board's jurisdiction on various grounds. Appellant filed a reply brief.

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3/ Appellant's letter to the Agency is incorrectly dated Feb. 3, 1987.

4/ 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."

### Jurisdiction

Appellee raises several challenges to the Board's jurisdiction over this matter. He first argues that the appeal should be dismissed because it involves a declination to contract, which is appealable only to the Assistant Secretary under 25 CFR 271.81-.82.

[1] As the Board indicated in Tohono O'odham Nation v. Phoenix Area Director, 15 IBIA 147, 94 I.D. 120 (1987), appeal jurisdiction under the regulations governing implementation of P.L. 93-638 is complex. The regulations at 25 CFR 271.81-.82 could arguably be interpreted as requiring any decision made by an Area Director during the contract negotiation process to be appealed to the Assistant Secretary. Alternatively, the appeals provisions of sections 271.81-.82 might apply only to the specific types of decisions identified elsewhere in Part 271; *i.e.*, decisions to decline to contract (25 CFR 271.25), to decline to amend a contract (25 CFR 271.64), to reassume a contract (25 CFR 271.74), or to cancel a contract (25 CFR 271.75).

During the pendency of Tohono O'odham Nation, the Assistant Secretary issued a decision concerning an appeal raising the same issue as was raised in Tohono O'odham Nation. He held that the issue was subject to review under the provisions of 25 CFR Part 2. This holding, which was applied by the Board, indicated that decisions made during the contract negotiation process and not elsewhere identified in Part 271 as being subject to review under the provisions of sections 271.81-.82 were to be reviewed under 25 CFR Part 2. Appellee here, represented by the Department's Office of the Solicitor, also recognizes that there are issues that may arise during the contract negotiation process that are reviewable under 25 CFR Part 2. The Board, therefore, holds it has jurisdiction over those issues raised during the contract negotiation process that are not otherwise identified within Part 271 as being appealable to the Assistant Secretary. <sup>5/</sup>

[2] Appellee states that declination issues are involved in this appeal, and that the existence of those issues triggers the application of the appeals process set forth in 25 CFR 271.81-.82. Appellee specifically argues that appellant should have sought a formal hearing under 25 CFR 271.81(c) from the Deputy to the Assistant Secretary--Indian Affairs (Tribal Services), <sup>6/</sup> with an ultimate right of appeal to the Assistant Secretary under 25 CFR 271.82.

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<sup>5/</sup> Appeals from decisions of contracting officers under executed P.L. 93-638 contracts are within the jurisdiction of the Interior Board of Contract Appeals. 43 CFR 4.1(b)(1); Papago Indian Tribe of Arizona, 22 IBCA 191, 93 I.D. 136 (1986). See also section 206 of the Act of Oct. 5, 1988, P.L. 100-472, 102 Stat. 2285, 2294.

<sup>6/</sup> The regulations place responsibility for holding this hearing with the Commissioner of Indian Affairs. Due to the vacancy in that office, appellee states that the duties assigned to the Commissioner under 25 CFR Part 271 have been delegated to the Deputy to the Assistant Secretary--Indian Affairs (Tribal Services).

As appellant notes, this characterization of the appeal is a little broad. It is true that a large portion of the appeal relates to BIA's failure to approve appellant's contract application. It is also true that appellant raises additional issues not essentially related to the issue of declination.

The Board agrees with appellee, however, that it lacks jurisdiction to review the declination issues raised in this appeal. Accordingly, those issues are dismissed and referred to the Assistant Secretary for appropriate consideration.

Appellee also argues that appellant's request for approval of a fiscal year 1988 contract is moot. Whether or not the appeal is moot is inextricably intertwined with the declination issues. Therefore, the question of whether this appeal is moot is also dismissed and referred to the Assistant Secretary for appropriate consideration.

Appellant questions BIA's assertion that appellant has an "implied agency" status and is therefore required to provide adult vocational education services to Indians living in Tulare County, California, who are not enrolled members of the Tule River Indian Tribe. Appellant contends that whether or not it has such an agency status is an on-going issue that will not be resolved until BIA is forced to make a decision. Appellant further states that until such a decision is made, Indians living in Tulare County who are not enrolled in the Tule River Indian Tribe are not receiving services.

Appellee argues that this issue is not properly before the Board because BIA has not yet made an appealable decision, but anticipates making one in the context of appellant's fiscal year 1989 contract application. Appellee, therefore, asks that this issue be dismissed as not yet ripe for decision by the Board.

Appellee is correct that no decision appealable to the Board has yet been rendered on this question. Furthermore, although the Board greatly appreciates and shares appellant's concern for the welfare of the Indians residing in Tulare County who are not Tule River tribal members, appellant lacks standing to raise the issue of non-provision of services to these individuals. See 25 CFR 2.1. Therefore, the Board grants appellee's motion to dismiss this appeal as it relates to the question of whether or not appellant has an "implied agency" status to provide services to Indians residing in Tulare County who are not tribal members. This dismissal is without prejudice to appellant's right to raise this issue in an appropriate future case.

Appellee also argues that another of the issues appellant raises is not ripe for review by the Board. That issue relates to appellant's request that it be given a written explanation of BIA's guidelines for reprogramming contract funds. Appellee argues that no request to reprogram funds has been received or considered in this matter.

It appears that appellant is seeking only a written explanation of procedures concerning the reprogramming of contract funds. <sup>Z/</sup> In his answer brief at page 8, appellee states that he "agrees with appellant that to the extent there is some confusion regarding this matter, the Tribe is entitled to a written explanation." Appellee then argues that the matter is not properly before the Board because appellant did not raise it earlier.

Appellant has asked for a written explanation of procedures. Appellee has agreed appellant is entitled to such an explanation. The Board construes appellee's statement as an agreement to provide the requested information to appellant, and thus deems this issue to have been resolved by the parties. The issue is, therefore, dismissed on the grounds that it has been settled.

Finally, appellee argues that appellant is apparently seeking money damages for fiscal year 1985 P.L. 93-638 contract funds allegedly "lost" because of incorrect information provided by BIA. Appellee cites Gillette v. Aberdeen Area Director, 14 IBIA 187, 190 (1986), for the proposition that the Board lacks jurisdiction to award money damages against BIA.

Appellant answers it is not seeking money damages, but is merely requesting that an amount equal to the amount it lost because of misinformation concerning contract modifications, reprogrammings, and carryovers be added to the money available for contracting for upcoming fiscal years. Appellant asserts that if it were seeking money damages it would have requested that no restrictions be placed on the usage of the funds received.

The essence of appellant's request is that BIA be ordered to provide it with funds as a result of BIA's alleged fault. However characterized, this request is sufficiently similar to a request for money damages that the Board lacks authority to grant the relief requested. Accordingly, the appeal is dismissed as to this issue for lack of jurisdiction to grant the relief requested.

#### Additional Discussion and Conclusions

Appellant raises two additional issues that were not directly addressed in appellee's motions to dismiss. Specifically, appellant argues that the Agency and appellee both violated the regulations in 25 CFR Part 271 by failing to issue their decisions within the time periods established there. Appellant notes violations of the time periods established in sections 271.22(a), (b), (c), and (e) by the Agency and of those in sections 271.23(c) and (d) by appellee. Appellant states at pages 6-7 of its opening brief:

Since it is clear that the Superintendent of the Central California Agency and the Sacramento Area Director are either

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<sup>Z/</sup> Appellant states that it has been given contradictory oral statements from various BIA officials as to whether or not a request to reprogram contract funds may be submitted before the submission of the contract to which reprogramming is sought.

attempting to avoid compliance with the applicable regulations or simply do not understand the regulations, the Tribe requests that the Interior Board of Indian Appeals order the Area Director to comply with all applicable laws and regulations dealing with contracting under the Indian Self-Determination Act, specifically those regulations previously discussed in this brief. It is also requested that the Area Director provide adequate training to his staff and to the Central California Agency Superintendent and his staff concerning these laws, statutes and regulations and provide evidence of this training to the Board within a reasonable amount of time.

It is further requested that the Area Director and Agency Superintendent develop a program that provides technical assistance to the tribes concerning the applicable laws and regulations. This training must be timely and designed to help the tribes understand the contracting process. The Tribe believes these requests will help facilitate a better working relationship between the parties.

The training appellant requests would undoubtedly help both BIA and tribes seeking P.L. 93-638 contracts. The Board, however, is not a court of general jurisdiction and does not have general supervisory authority over BIA or mandamus powers. It is authorized to review only certain decisions rendered by BIA officials under 25 CFR Chapter II. See 43 CFR 4.1 and 4.330. It, therefore, lacks authority to order BIA to undertake the training programs requested by appellant.

[3] In regard to appellant's request that BIA be ordered to follow the applicable regulations, the Board finds that the record indicates the time limits established in 25 CFR 271.22 and 271.23 were violated. Appellee does not address this issue. The remedy for a violation of the regulatory time limits is, however, set forth in 25 CFR 271.28, which provides:

Whenever a Bureau Agency or Area Office official fails to take action on a contract application within the time limits established in this part, the tribal organization that submitted the application, may, at its option, request action by the next higher Bureau official. In such cases, the official that failed to act shall immediately forward the application and all material pertinent thereto to the official to whom the request for action was made.

Section 271.28 thus makes the tribal entity submitting a contract application responsible for policing BIA's timely response to that application. Appellant exercised the right and remedy created in the regulations when it filed successive appeals from the Agency's and appellee's failures to act

timely on its application. 8/ Because the regulations themselves set forth the remedy for their violation, the Board is without authority to create additional remedies. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed for the several reasons set forth in this opinion and those issues identified, supra, are referred to the Assistant Secretary--Indian Affairs for appropriate consideration.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge

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8/ It would appear that section 271.28 contemplates that once an appeal has been filed with a higher BIA official because of a lower official's failure to act, the lower official loses jurisdiction over the matter. Such an expectation is inherent in the requirement that the lower official immediately forward the file to the higher official, and is in accordance with the Board's holding in Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, 13 IBIA 76, 92 I.D. 46 (1985). The Agency took action in this case after an appeal was filed with appellee, causing precisely the problem anticipated in Karok Tribe; i.e., two Departmental officials simultaneously taking action on the same matter. Although in this case, the parties may have worked out many of the original problems with the proposed contract, appellant was unreasonably forced to deal with several offices at the same time on the same issues.

9/ The Board notes as a general matter however, that BIA is always expected to abide by its own duly promulgated regulations.