



INTERIOR BOARD OF INDIAN APPEALS

Douglas Indian Association v. Juneau Area Director, Bureau of Indian Affairs

27 IBIA 292 (04/18/1995)

Reconsideration denied:
28 IBIA 40

Related Board case:
30 IBIA 48



United States Department of the Interior

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

DOUGLAS INDIAN ASSOCIATION

v.

JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-11-A

Decided April 18, 1995

Appeal from a decision concerning the service population under a P.L. 93-638 contract.

Vacated and remanded.

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

When legislation enacted during the pendency of an appeal alters the premise of a Bureau of Indian Affairs decision concerning the service population under an Indian Self-Determination Act contract, the Board of Indian Appeals will remand the matter to the Bureau for issuance of a new decision taking the new law into account.

APPEARANCES: Amos Wallace, its President, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Douglas Indian Association (appellant; DIA) seeks review of an August 25, 1994, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the service population for a contract under the Indian Self-Determination Act (P.L. 93-638). 1/ For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Background

Through December 1994, appellant received services from the Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council) under the Southeast Alaska Self-Governance Compact (self-governance compact). On May 18, 1994, appellant enacted a resolution withdrawing from

1/ 25 U.S.C. §§ 450-450n (1988 and Supps.). All further references to the United States Code are to the 1988 edition and/or its supplements.

the self-governance-compact effective December 31, 1994, and requesting BIA to enter into a P.L. 93-638 contract with appellant, pursuant to which appellant would provide services under the following programs: higher education, social services, employment assistance, housing improvement, tribal operations, credit and finance, natural resources, realty, roads construction and maintenance, tribal courts, and agriculture. 2/

On May 23, 1994, appellant wrote to the Area Director, requesting that it be credited with a service population of 770 for purposes of its P.L. 93-638 contract, based upon the 1990 census figure for Alaska Natives residing on Douglas Island. At that time, BIA records showed appellant's population to be 134. BIA apparently made no immediate written response to this request.

On August 2, 1994, appellant sought information from BIA concerning the relationship between tribal membership and service population under P.L. 93-638 contracts. The Area Director responded on August 3, 1994, stating in part:

Service population or service area in the context of a PL 93-638 contract refers to those individuals who reside within a certain geographic area that is served by such contract. Being part of a service population or service area, particularly as we have administered PL 93-638 in Alaska, does not necessarily mean or require membership in that tribe contracting or authorizing a contract.

* * * * *

[BIA], in implementing "638" in Alaska identified and prioritized who in the communities we would recognize and require supporting resolutions from, the four local entities and the order of their priority are as follows:

1. Active Indian Reorganization Act (IRA) Council.
2. In absence of an IRA, the formally established Traditional Council.
3. In absence of either of the first two, the local ANCSA [Alaska Native Claims Settlement Act] village/urban for-profit corporation.
4. In absence of all above, the ANCSA Regional for-profit Corporation.

* * * * *

2/ Appellant's Resolution No. 94-07. The resolution also requested BIA to provide direct services to appellant beginning Dec. 31, 1994, and continuing until appellant's proposed contract was approved.

It is in this context that enrollment or tribal membership may be raised as an issue. It has long been [BIA's] position and policy that in the many communities where various tribes are represented, [BIA] would rely on that entity recognized as having the aboriginal rights for the area. * * *

* * * * *

In summary, while it is true that one must be a member or eligible to become a member of a tribe to be eligible for [BIA] funded services, one does not necessarily have to be a member of the tribe who may be contracting to provide those services.

(Area Director's Aug. 3, 1994, Letter at 1-3).

Appellant attended the FY 1995 funding negotiations for the self-governance compact, which took place on August 11, 1994. At that time, appellant confirmed its decision to withdraw from the compact and requested information concerning the amount of compact funds which would be reallocated to appellant's proposed P.L. 93-638 contract. It appears that, during the negotiations, the Area Director made an informal decision concerning appellant's service population.

On August 15, 1994, appellant wrote to the Area Director, requesting a formal decision. In response, the Area Director issued the decision on appeal here.

The decision states in part:

[W]ith the DIA's determination to participate directly as a Contractor with the BIA, rather than through [the Central Council], it becomes necessary for me to determine what portion of the Juneau-Douglas Area Native population will be included in the DIA service area or service population, and what proportion will continue to receive its services from [the Central Council]. The law provides me with relatively little useful guidance with respect to this question.

On the one hand, I could stay with my original enrollment-based determination that the DIA's service population is limited to its enrolled membership as determined for voting purposes. That enrollment total was set at 134, but if you can demonstrate a higher figure, it would be subject to adjustment. You have proposed instead that I treat all of Douglas Island as the DIA Self-Governance Compact service area, and allocate Compact funding on the basis of the 1990 census count of 770 Native residents on Douglas Island as a whole. So far as I understand the situation, such a geographically-defined service area would include many, but by no means all, of your tribal members. This would also include a substantial majority of Native persons having no past affiliation with the DIA. Under the membership provisions

of your 1941 Constitution, some of these people are probably eligible to become DIA members, but it would appear that such a step would require voluntary action on their part, and a case-by-case majority vote by present Association members. Under these circumstances, I do not feel that the law requires me to define your population service area so expansively for funding allocation purposes. Moreover, from a practical standpoint, there is little difference in accessibility between the [Central Council] office location and your own. Douglas Island residents can reach the [Central Council] facility just as easily as the DIA's by means of the major highway bridge linking Douglas and Juneau.

My preference, of course, would be to have the DIA and [the Central Council] negotiate and agree upon a mutually acceptable allocation of service delivery responsibilities and funding with respect to the Juneau-Douglas Area Native population, but it is my understanding that such an agreement has thus far proven elusive. I am therefore placed in the position of dictating an allocation for Self-Governance Compact purposes. Accordingly, it is my determination that the DIA's service area population will consist of those Alaska Native and American Indian persons living in the two most southerly voting precincts on Douglas Island, known as Douglas #1 and Douglas #2. Those precincts include the Lawson Creek and Geneva Woods neighborhoods where the original DIA membership was concentrated, and where the DIA offices are likely to be located. According to the 1990 census, the Native population of these areas was 261, which represents a virtual doubling of the service population count with which your Association was previously credited. Although this geographic division does not include all the area or population which you have requested, it does represent a rough approximation of the locale with which the DIA was historically identified, and is also one which [the Central Council] has indicated willingness to accept.

In reaching this decision, I have also taken into account the fact that [the Central Council] has many years of service delivery experience, and a proven track record, and that the DIA is just starting out to build its program administration capability. My decision will minimize the disruption for most Native Douglas Island residents while at the same time allowing the DIA to participate in a PL 93-638 Contract with the BIA.

(Area Director's Aug. 25, 1994, Decision at 2-4).

Appellant appealed this decision to the Board, including a statement of reasons in its notice of appeal. No briefs were filed. 3/

3/ The Central Council has been informed of all proceedings in this appeal but has not participated.

Discussion and Conclusions

On appeal to the Board, appellant contends that the Area Director's decision disregarded the order of priority described in his August 3, 1994, letter, an order which, according to appellant, has been in place since the implementation of P.L. 93-638. Appellant further contends: "There isn't any place in the Order of Priority which allows [the Central Council] to serve our members in Juneau without our consent, nor can it serve any Natives residing in our service area without our authorizing resolution" (Notice of Appeal at 3).

Appellant submits a number of documents dating from the time of its organization in 1940-41, including the list of those eligible to vote on the adoption of its Constitution. These documents, appellant contends, provide evidence that the Department of the Interior has historically recognized all of Douglas Island as appellant's territory.

Appellant alleges that the Central Council "steered the Area Director to the 'voting precinct' population count in order to preserve its own population count for serving Juneau Natives." *Id.* at 2. Contending that the Central Council is not a Federally recognized tribe but only a tribal organization under P.L. 93-638, appellant "strongly object[s] to the action of the Area Director to side with a tribal organization against the request of a federally recognized Indian tribe." *Id.* at 2-3.

In August 1994, when the Area Director's decision was issued, the status of the Central Council was not entirely clear. It had been omitted from BIA's most recent list of entities recognized as eligible for funding and services from BIA, published on October 21, 1993, 58 FR 54364. It was, however, considered by Congress to be a "regional tribe" for purposes of the Self-Governance Demonstration Project. See Central Council of Tlingit & Haida Indian Tribes v. Chief, Branch of Judicial Services, 26 IBIA 159, 161-64 (1994).

After this appeal was filed, Congress enacted legislation clarifying the status of the Central Council. Section 203 of the Act of November 2, 1994, 108 Stat. 4791, 25 U.S.C. § 1213, provides: "The Congress reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe." In light of this legislation, the Board rejects appellant's contention that the Central Council is not a Federally recognized Indian tribe.

Another provision of the new statute has particular relevance here. Section 205, codified at 25 U.S.C. § 1215, provides:

Other federally recognized tribes in Southeast Alaska shall have precedence over the Central Council of Tlingit and Haida Indian Tribes of Alaska in the award of a Federal compact, contract or grant to the extent that their service population overlaps with that of the Central Council of Tlingit and Haida Indian tribes [sic] of Alaska. In no event shall dually enrolled members result in duplication of Federal service funding.

[1] This provision clearly alters the premise under which the Area Director made his decision, because it requires that appellant be given precedence over the Central Council where the service populations of the two entities overlap. While it does not resolve the underlying issue in this appeal--appellant's service population must be determined before the extent of overlap is known--the provision does suggest that some of the factors taken into consideration by the Area Director are no longer relevant. For instance, the track record of the Central Council in delivering services should no longer matter; nor should the relative convenience of the contractors' offices, or the willingness of the Central Council to agree to appellant's proposal. If individuals are determined to be within appellant's service population, appellant must be given precedence in the award of a contract to provide services to them.

The Board has recognized that the Area Director has some discretion in determining service areas and service populations in Alaska, where there are normally no clear boundaries between the territories of tribal governments. Kwethluk IRA Council v. Juneau Area Director, 26 IBIA 262 (1994). ^{1/} More generally, with regard to fund division under P.L. 93-638, the Board has recognized that, given the number of variables present in different contracting situations, "BIA must have leeway to balance the factors present in each situation in order to arrive at the best solution for that particular situation." Kaw Nation v. Anadarko Area Director, 24 IBIA 21, 30 (1993).

In this case, the Area Director's exercise of discretion must now take into account the legislation enacted in November 1994. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's August 25, 1994, decision is vacated, and this matter is remanded to him for reconsideration in light of 25 U.S.C. § 1215.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

^{4/} In that case, the Board affirmed the Area Director's denial of a proposal made by the Kwethluk IRA Council to provide realty services to all its members, regardless of their location.