



INTERIOR BOARD OF INDIAN APPEALS

Skokomish Indian Tribe v. Portland Area Director, Bureau of Indian Affairs

31 IBIA 156 (09/12/1997)

Related Indian Self-Determination Act case:
Administrative Law Judge decision, 08/14/1997



United States Department of the Interior

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

SKOKOMISH INDIAN TRIBE

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-90-A

Decided September 12, 1997

Appeal from the failure either to decline or to treat as approved a contract proposal under the Indian Self-Determination Act.

Affirmed in part, reversed in part.

1. Administrative Procedure: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Indians: Indian Self-Determination and Education Assistance Act: Generally

In a hearing or appeal from a decision declining to contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), the Secretary has the burden of "clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 450f(e)(1); 25 C.F.R. § 900.163. This is not the same standard of proof as "clear and convincing."

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

Under 25 U.S.C. § 450j(g) (1994), the Secretary shall not make any contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), which would impair his ability to discharge his trust responsibilities to any Indian tribes or individuals.

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

There are significant differences between a contract under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n (1994), and a procurement contract. One difference is that an ISDA contract transfers control and direction over the contracted program to the tribal contractor, while the Department remains

in control of work performed under a procurement contract.

APPEARANCES: Thomas P. Schlosser, Esq., and K. Allison McGaw, Esq., Seattle, Washington, for the Tribe; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Skokomish Indian Tribe (Tribe) sought review of the alleged failure of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), either to decline or to treat as approved a contract proposal under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n (1994). ^{1/} In accordance with regulations in 25 C.F.R. Part 900, the Board of Indian Appeals (Board) referred the Tribe's appeal to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge (ALJ; Judge). The matter was assigned to Judge William E. Hammett, who issued a Recommended Decision on August 14, 1997. Both the Tribe and the Area Director appealed from that Recommended Decision. For the reasons discussed below, the Board affirms the Recommended Decision in part, and reverses it in part.

Background

The background facts of this matter are not in dispute. The proposed contract deals with a licensing proceeding before the Federal Energy Regulatory Commission (FERC) in regard to the Cushman Hydroelectric Project, which is operated by the City of Tacoma, Washington (City). In 1923, the City obtained a license from the Federal Power Commission (FPC), predecessor to FERC, to flood 8.8 acres of Federal land in connection with the operation of a hydroelectric facility on the North Fork of the Skokomish River. In 1924, the FPC granted the City a 50-year license for part of the project. The first dam was completed in 1926 and has generating facilities in the streambed. The second, lower, dam was completed in 1930 and diverts water out of the Skokomish River and watershed to a power plant located on the Hood Canal. The lower dam is apparently capable of diverting 100 percent of the stream flow. The Project's main power plant and transmission lines are located within the Skokomish Indian Reservation.

The Tribe states that in 1963, FERC acknowledged that neither in 1924 nor at any time since then had it properly authorized the construction, maintenance, or operation of the Cushman Project's dams, reservoirs, power plants, or power lines, and admitted the need to bring the Cushman Project under license and regulation in the public interest. At the expiration of the 1924 license, the City applied for a FERC license. This licensing proceeding is still ongoing.

^{1/} Unless otherwise indicated, all further citations to the United States Code are to the 1994 edition.

Under sections 4(e) and 10(e) of the Federal Power Act (FPA), 16 U.S.C. §§ 797(e) and 803(e), respectively, the Secretary of the Interior is authorized to participate in FERC licensing proceedings that affect Indian reservations. Section 4(e), which authorizes FERC to license power projects, also provides

[t]hat licenses shall be issued within any reservation [of the United States] only after a finding by [FERC] that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

Section 10(e), which authorizes the setting of annual charges payable by licensees, contains the following proviso:

That when licenses are issued involving the use of * * * tribal lands embraced within Indian reservations [FERC] shall, subject to the approval of the Secretary of the Interior * * * and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in [25 U.S.C. § 476], fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by [FERC] at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing.

For fiscal year (FY) 1994, the Tribe received a special appropriation of \$450,000 for participating in FERC's licensing proceedings for the Cushman Project. It received the same amount for FY 1995, again through a special appropriation. In FY 1996, the Tribe began to participate in the Self-Governance Program under 25 U.S.C. §§ 458aa-458hh. The Tribe did not receive a special appropriation for FY 1996, and sought funding from BIA under its Self-Governance compact. Funding in the amount of \$250,000 was ultimately provided under a settlement agreement.

For FY 1997, the Tribe sought \$480,000 through an ISDA contract rather than under its Self-Governance compact. By letter of January 31, 1997, the Area Director advised the Tribe that he was returning the proposal because there were no funds available for the FERC program.

The Tribe appealed this action and, on referral by the Board, the matter was assigned to Judge Hammett. In the proceedings before Judge Hammett, the Area Director admitted that 25 U.S.C. § 450f(a)(2) requires BIA to act on an ISDA contract proposal within 90 days of BIA's receipt of the proposal, and that his January 31, 1997, letter was issued on the 91st day. The Area Director conceded that the Tribe was entitled to a contract under 25 C.F.R. § 900.18, which provides:

A proposal that is not declined within 90 days * * * is deemed approved and the Secretary shall award the contract or

any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to Section 106(a) of the Act [25 U.S.C. § 450j-1(a)].

The Area Director argued, however, that the Tribe was only entitled to receive \$50,000. The Tribe argued that it was entitled to \$300,000. ^{2/}

The Tribe waived its right to an evidentiary hearing. Because FY 1997 was almost concluded, the parties agreed to expedited procedures before the Judge, including shortening of the time for the Judge to issue his decision and of the time for filing objections to the Recommended Decision. Judge Hammett approved the expedited procedures.

On August 14, 1997, Judge Hammett issued a Recommended Decision which concluded that the Tribe was entitled to \$50,000, plus that amount between \$50,000 and \$300,000 which it could "establish will be devoted to Cushman Project activities during the balance of the contract year." Recommended Decision at 5. The Judge instructed the Tribe to prepare a report showing how it would use any funds between \$50,000 and \$300,000 during the remainder of the contract year and to present that report to the Board for a final decision.

Both the Tribe and the Area Director appealed from the Judge's Recommended Decision within the 10 days which were established for appeals under the expedited procedures. Under protest, the Tribe provided information concerning its expenditures during FY 1997 in regard to the Cushman Project.

Procedural Considerations

The Board finds it necessary to comment upon the expedited procedures established by the parties in this case. The ISDA regulations in 25 C.F.R. Part 900, Subpart L, establish very short time periods for the various procedural aspects of an ISDA hearing and appeal. The parties here agreed to even shorter time periods, including asking the ALJ for an expedited decision. In accordance with the parties' request, Judge Hammett issued his decision 13 days after the case was ready for decision.

The regulations refer to an ALJ's decision as a "recommended" decision (25 C.F.R. § 900.165), and allow the parties to file "objections to the recommended decision" (25 C.F.R. § 900.166). However, it is clear that the regulations actually contemplate that the ALJ's decision will be final for the Department unless appealed. Compare 25 C.F.R. § 900.166 with 43 C.F.R. §§ 4.338-4.339 (establishing procedures for a recommended decision).

Apparently because of the parties' agreement on expedited procedures, the substance of his decision, and his expectation that one or both parties would appeal his decision, Judge Hammett did not issue a decision that could become final for the Department, but rather issued one which left the matter open for final resolution by the Board.

^{2/} The Tribe has indicated that it now seeks \$300,000 rather than \$480,000.

Under 25 C.F.R. § 900.167, the Board has only 20 days to issue a decision in an ISDA appeal. As the Board has learned, appeals from an ALJ's recommended decision in an ISDA matter can lack full adversarial development, even though they have been through the hearing process. In part this lack of development results from the fact that the appeal addresses the recommended decision, which may or may not closely track the arguments raised by the parties. Even if an opposing party were able to respond to an appeal filed with the Board within the 20-day period for a Board decision, the Board would have little time to consider the response. The Board may therefore be faced with the prospect of issuing a decision which may have far-reaching implications on a record that can lack basic and necessary information--information which, in a non-ISDA appeal, the Board would require the parties to provide through additional briefing or the submission of further evidence.

Although it understands that the Tribe wanted a final decision in this appeal before the end of FY 1997, the Board finds that the expedited procedures agreed to by the parties, when combined with the already expedited procedures established in the regulations, have hampered thorough development and consideration of the issues before both the ALJ and the Board.

Discussion and Conclusions

In several places, the Tribe refers to this contract as being "mature." "Mature contract" is defined at 25 U.S.C. § 450b(h) to mean

a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization; Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, [a] contract of the tribal organization which meets this definition shall be considered to be a mature contract.

The Tribe has presented nothing showing that it has requested "mature contract" status for the FERC program. It has also not shown that BIA has granted such status or that the Tribe has appealed under 25 C.F.R. § 900.150(h) from the denial of "mature contract" status. Rosebud Sioux Tribe v. Acting Aberdeen Area Director, 26 IBIA 272, 273 (1994); Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, 25 IBIA 259, 264-65 (1994). The Board concludes that the Tribe has failed to show it has a "mature contract" as to the FERC program.

The Tribe objects to the standard of proof which Judge Hammett applied, arguing that the Judge used a "preponderance of the evidence" standard when he should have used a "clear and convincing" standard.

Under 25 U.S.C. § 450f(e)(1), "[w]ith respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)."

See also 25 C.F.R. § 900.163. Judge Hammett concluded that the statutory standard was "a vague standard of proof and it could certainly be argued that it was intended that the standard of proof be 'clear and convincing,' however, this forum accepts a 'preponderance of the evidence' as being the rule to apply in this appeal." Recommended Decision at 3.

In commenting on the standard of proof in footnote 4, pages 11-12, of his Objections to the Recommended Decision, the Area Director contends that the statute "creates a unique standard" of proof.

[1] The standard of proof was discussed in the preamble to the publication of the ISDA regulations at 61 Fed. Reg. 32,482, 32,497 (June 24, 1996): "Several comments suggested that § 900.163 be amended to impose a clear and convincing evidence burden of proof on the Secretary. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act."

Based on its disposition of this matter, the Board finds that it need not determine here precisely what the standard of proof is. It concludes, however, that the Department has considered and rejected the contention that "clearly demonstrating" is the same standard of proof as "clear and convincing." The Board therefore rejects the Tribe's argument that the standard of proof in an ISDA declination proceeding is "clear and convincing."

Because the Area Director had money with which to fund the Tribe's contract proposal by the time this matter was assigned to Judge Hammett, the major substantive issue as framed by both parties was the amount of funds to which the Tribe was entitled. The contentions of the parties remain the same on appeal as they were before Judge Hammett. The Board bases its discussion on arguments raised at both levels of this proceeding.

At pages 2-4 of his Objections to the Recommended Decision, the Area Director describes the FERC licensing process and participation in that process by both the Department and tribes:

Under the FPA, the Secretary sets mandatory license conditions (known as "4(e)" conditions) to protect the land, water, natural resources and cultural resources of an Indian reservation used by a hydroelectric project licensed under the [FPA], and recommends annual charges (known as "10(e)" charges) for any use of reservation land by the project.

The Secretary's mandatory conditions and recommended charges are presented to [FERC] during its process of licensing or relicensing a hydroelectric project. The [FERC] must adopt the Secretary's conditions. Thereafter, interested parties who have intervened in the process may litigate the validity of the Secretary's conditions directly before the Court of Appeals. 16 U.S.C. § 8251(b). The Secretary must defend the conditions on the basis of "substantial evidence." Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 777 n.18, 778 (1984); Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659, 663 (D.C. Cir.

1996). The Secretary's participation in the FERC process is as trustee discharging his trust and statutory responsibilities for the natural resources held in trust for the affected reservation. The conditions he requires to be included in the license are of vital importance to the reservation because the licenses often last for as many as 50 years. The Secretary's failure to impose adequate and sustainable conditions on the license may expose Indian trust resources to substantial risk.

Congress appropriates funds to the BIA to use in its FERC program to enable the Secretary to discharge his trust and statutory duties under the [FPA]. The most critical function of the program is to discharge the Secretary's trust and statutory responsibilities under the FPA by establishing mandatory 4(e) conditions and recommending 10(e) charges for those licenses that will use Indian reservations. A secondary function, resources permitting, is to provide funding to tribes to supplement their own expenditures for participation in the FERC process. The BIA tries to provide some funds for this function because it believes it is important for the tribes to have an opportunity to be independent participants in the FERC process. The tribes' participation could include hiring their own experts, monitoring the process, and providing FERC with comments concerning the Secretary's mandatory conditions and recommended charges.

The Area Director thus contends that there are two components to the FERC program: (1) the Secretary's trust responsibilities under sections 4(e) and 10(e), and (2) tribal participation. At pages 5-8 of his Response to the Tribe's Notice of Appeal, the Area Director argues that the description of the work to be performed under the Tribe's proposed contract corresponds with the tribal participation component of the program, and states that BIA will provide \$50,000 for this function because this is the amount of money BIA would have otherwise provided for tribal participation.

The Area Director argues, however, that even if the Tribe intended to contract all or part of the Secretary's responsibilities under sections 4(e) and 10(e), BIA would not provide additional funding because these are trust functions which are not contractible under ISDA. The Area Director bases this argument on the proviso in 25 U.S.C. § 450j(g) which states that "the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals." At pages 10-12 of his Response to the Tribe's Notice of Appeal, filed with Judge Hammett, the Area Director sets out reasons for his belief that the Secretary's duties under sections 4(e) and 10(e) are not contractible under ISDA:

In order to formulate section 4(e) conditions, based on substantial evidence, the Secretary must first determine the legal theory and parameters upon which his conditioning authority is predicated in the circumstances of the particular case. He must also be able to direct and control the collection and

development of the data and evidence, and thus the expert witnesses who present the evidence on behalf of the Secretary.

* * * In order to arrive at [a section 10(e)] recommendation, the Secretary again relies on expert witnesses and evidence to substantiate the recommendation. For both 4(e) conditions and 10(e) charges, if the necessary talent is not employed by the Department, the Secretary contracts with outside entities for that work to be performed.

In order to rely on the work product of the contractors, the Secretary must have complete control over the approach, development, and product of the contractors. This type of control involves regular and close contact between the agency and the contractor. Normally, the contractor must submit regular reports detailing the work accomplished and the remaining work to be performed. Strict and detailed timelines are imposed upon the contractor.

This significant control over the contractor is not a part of [an ISDA] contract, and is, in fact, the antithesis of [an ISDA] contract. Contracting under [ISDA] is intended to assure maximum Indian participation in the direction, planning, conduct and administration of the contracted program. 25 C.F.R. §§ 900.3(a)(1), 900.3(b)(1). Thus, one of the primary goals of the 1994 amendments to [ISDA] was to minimize the reporting requirements applicable to tribal contractors. 25 C.F.R. § 900.3(a)(6). Another goal of [an ISDA] contract is to afford the tribe the flexibility and discretion to redesign the programs to meet its needs. 25 C.F.R. § 900.3(b)(3). But such flexibility and discretion [are] inconsistent with the close control necessary to assist the Secretary in preparing for the adversarial FERC process. Finally, the Secretary has indicated that he recognizes that with [an ISDA] contract there is a transfer of responsibility and accountability to manage the day-to-day operations of the program. 25 C.F.R. § 900.3(b)(4). But transferring management responsibility to a tribe inevitably results in a lack of Secretarial control and direction over the work of that program. When the work to be performed is the collection and development of data, analysis, and evidence to be presented by the Secretary in a FERC proceeding, the lack of direction and control impairs the Secretary's ability to discharge his trust responsibility. Therefore, such work cannot be contracted to a tribe pursuant to [an ISDA] contract.

Another possible impairment of the Secretary's trust responsibility results from potential conflicts between [an ISDA] contractor and the Secretary. To provide the Secretary with the necessary work product to present his position to FERC, the contractor must not have any other interests in mind. The Tribe who is a beneficiary of the conditions and charges obviously has a critical interest in the outcome of the decision. Therefore,

there is a possibility that the Secretary's position as to the appropriate course of action will conflict with the tribal beneficiary's position. To have such an entity performing the work under [an ISDA] contract, and redesigning or refocusing the work in a direction that is inconsistent with or even contrary to the Secretary['s] position, could impair the Secretary's responsibilities. An example of this possibility has, unfortunately, surfaced in the Cushman Dam FERC proceedings, where the Tribe has disagreed strongly with action taken by the Secretary.

In support of this argument, the Area Director relies on a May 31, 1984, Memorandum (1984 Memorandum) from the Associate Solicitor, Indian Affairs, to the Assistant Secretary - Indian Affairs. The subject of the 1984 Memorandum is "Contracting for Collection of Evidence to Support Water Rights Quantifications." The Memorandum advised the Assistant Secretary

that studies for the collection of evidence to be used for quantifying Indian reserved water rights, whether by adjudication or negotiation, should be conducted by [BIA] under the supervision of attorneys in the Solicitor's Office and the Department of Justice. Those studies, however, should be conducted in consultation with the affected Indian tribes and their attorneys since the water rights at stake are of fundamental importance to the preservation and development of Indian reservations as permanent tribal homelands.

* * * * *

That the United States has a trust responsibility to protect Indian reserved water rights in a quantification proceeding does not preclude tribes from participating as well by developing and presenting evidence either in consultation with the United States or independently of those efforts by the Federal Government on their behalf. However, we can find no authority that allows the United States to delegate to Indian tribes its trust responsibility to protect Indian reserved water rights, including the responsibility to collect evidence for expert testimony to be used in a reserved water rights adjudication. A trustee has a duty not to delegate those acts which the trustee can reasonably be expected to perform personally. A.W. Scott, Abridgement of the Law of Trusts § 171 (1960); Restatement of Trusts 2d § 171 (1959). Examples in this context are decisions regarding case strategy, the scope and intensity of evidence preparation, and the evaluation of the quality of the work performed. Moreover, the courts have held that the United States as trustee for Indian tribes has a duty to exercise independent judgment, Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 512 F.2d 1390, 1396 (Ct.Cl. 1975), and ultimately may be liable for failure to protect Indian trust resources. United States v. Mitchell, [463 U.S. 206] (1983); Nevada v. United States, [463 U.S. 110 (1983)] (Brennan J., concurring).

* * * * *

In formulating our response to your question, we have carefully reviewed [ISDA] and the Department's regulations implementing that act, 25 C.F.R. Part 271 et seq. [3/] Generally, requests by tribes for funds to prepare for water rights quantifications are made pursuant to the [ISDA] contracting process. In pursuing the goal of self-determination for Indians, Congress has made it explicitly clear that nothing in [ISDA] shall be construed as "authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. § 450n(2) [(1982) and (1994)]. The act also provides that "the Secretary shall not make any contract that would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals." 25 U.S.C. § 450j(f) [(1982); 25 U.S.C. § 450j(g) (1994)]. The act further specifies that the Secretary shall decline to contract if he finds that "adequate protection of trust resources is not assured." 25 U.S.C. § 450f(a)(2) [(1982) and (1994)].

* * * * *

Among the functions or programs that may be contracted for in 25 C.F.R. § 271.32 are numerous activities related to the inventory, assessment, and management of Indian land and water resources. It is true that many of the management programs described in that section cover activities that are conducted in the course of negotiation or litigation preparation for the quantification of Indian reserved water rights. However, the preparation for and conduct of water rights negotiation and litigation on behalf of Indians is a trust responsibility vested in the Secretary by law that cannot be delegated. The United States has responsibility for the direct supervision of evidence collection, witness preparation and legal analyses either through its own resources or through the procurement process. Providing tribes the means to do that work through [ISDA] would not relieve the United States of its responsibility. Therefore, when the functions or programs listed in section 271.32 are required to be done to develop evidence for the assertion and protection of Indian reserved water rights, the United States may not contract those activities out to the tribes. x/ When such rights are not in issue, as when they have been secured through a quantification and the judicial or negotiation process is completed, activities under 25 C.F.R. § 271.32 could be contracted to Indian tribes for the purpose of management and development of the reservation as a permanent tribal homeland.

x/ Note that the language of 25 C.F.R. § 271.32(h) authorizing contracting for "[w]ater inventories and other appropriate programs for protection of water rights" must be read in a manner

3/ The ISDA regulations in Parts 271 and 272 were removed by notice published at 61 Fed. Reg. 49,059 (Sept. 18, 1996). Parts 271 and 272 were replaced by new Part 900, which took effect on Aug. 23, 1996. 61 Fed. Reg. 32,482 (June 24, 1996).

consistent with the statutory and regulatory provisions mentioned above. Thus when programs or activities for the protection of water rights are conducted pursuant to Indian reserved water rights negotiation or litigation preparation, they may not be delegated to the tribe through [an ISDA] contract.

1984 Memorandum at 1-5.

The Area Director acknowledges that FERC licensing proceedings are not identical to water rights quantification proceedings, but contends "that the underlying legal rationale as to why the Secretary may not contract under the ISDA the water rights program does apply equally to the FERC process." Area Director's Objections to Recommended Decision at 6.

The Tribe contends that it proposed to contract all FERC licensing proceeding functions, including the development of section 4(e) conditions and section 10(e) recommendations. At page 5 of its Notice of Appeal from the Area Director's letter, the Tribe states that it proposed to contract "all programs, functions, services, and activities that the Secretary is authorized to perform for the benefit of the Skokomish Indians and the Skokomish Indian Reservation that may be affected by the Cushman Project." It argues: "Conducting investigation and research concerning the Cushman Project is not merely within the scope of the Tribe's [ISDA] contract--these activities are the essence of the contract. Since the contract's inception in 1993, the Tribe has been performing this function, using its own contractors." Id. at 6. At page 6 of its Reply and Cross-Motion, filed with Judge Hammett, the Tribe states: "Subsequent amendments to the Tribe's contract expressly include work to develop 4(e) conditions and 10(e) recommendations. * * * From the outset, then, the Tribe's contract contemplated that the Tribe, not [BIA], would be conducting these trust-related functions."

The Tribe argues that the Area Director's reliance on the 1984 Memorandum is misplaced because that document was written prior to the 1988 and 1994 amendments to ISDA and therefore does not consider Congress' concern about the Department's recalcitrance in entering into ISDA contracts. It contends that 25 U.S.C. § 450j-1(a)(1) requires BIA to provide it with all funds that "would have otherwise been provided" for BIA's operation of the FERC licensing program, including \$250,000 which it alleges was illegally diverted to a nontribal contractor to perform the same work that it proposes to perform under an ISDA contract. Section 450j-1(a)(1) provides:

The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior * * * at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

The Tribe argues that Congress has specifically stated that trust-related functions are contractible under ISDA. In support of this position, the Tribe quotes S. Rep. No. 274, 100th Cong., 1st Sess. (1987), reprinted in 1988 U.S.C.C.A.N. 2620 (Senate Report). The Senate Report states at page 25, 1988 U.S.C.C.A.N. at 2644:

The [Senate Select] Committee [on Indian Affairs] intends for Section 102(a)(2) as amended [25 U.S.C. § 450f(a)(2)] to authorize tribes to enter into contracts with the Secretary to carry out trust related functions. Clearly, the Secretary of the Interior continues to maintain a trust responsibility for tribal resources when the tribe operates a program under a self-determination contract. Section 102(a)(2) allows tribes to contract for trust functions including but not limited to real estate appraisals, soils inventories, water resources studies, lease permits, land use zoning studies, forestry management and fire suppression, minerals inventories, environmental quality assessments, archeological resource studies, fish and game studies, cadastral surveys, land title and records management, lease compliance, trust fund investment and accounting services, facilities maintenance and repair. The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to the trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources.

Under the Committee's amendment, the Secretary of the Interior remains responsible for the protection of Indian trust resources. The quality of that trust responsibility, however, is dependent upon the quality of the supportive documentation, research and analysis, options and recommendations. Indian tribes are most often the "front line of defense" in protecting tribal trust assets. Consequently, tribes often are in the best position to provide the technical services that will afford the best possible protection of trust resources by the Secretary.

The protection and management of tribal trust resources should be viewed as a joint effort of the tribe and the Secretary. If tribal contracting of trust-related functions is to be declined, the Secretary's burden of proof is to demonstrate that a tribal organization's operation of those functions will lead to inadequate protection of trust resources.

The Tribe argues at page 7 of its Notice of Appeal from the Area Director's letter:

Given Congress' concern with the Secretaries' aversion to carrying out Congress' self-determination mandate, the applicable acts and regulations must be construed in the manner that promotes the contracting of programs, functions, services, and activities that are

for the benefit of Indians. Those policies require that "ambiguities ... be construed in favor of the Indian tribe" so as to "facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act." 25 C.F.R. § 900.3(11). Here, the Secretary has ignored that policy statement and disregarded the plain language of §§ 102 and 106 of [ISDA], as amended.

Judge Hammett found that the 1984 Memorandum was the only support for the Area Director's position that the Secretary's duties under the FPA were not contractible. Without further explanation, he stated that he was not convinced that the position set forth in that Memorandum in regard to water rights quantifications should apply in FERC proceedings. He further stated:

[T]he arguments advanced in the memorandum * * * are seriously, if not fatally, flawed by the fact that the Area Director has effectively delegated his trust responsibility by contracting with a non-tribal contractor to perform 4(e) and 10(e) activities. Standing alone, Exhibits H and I [the 1984 Memorandum and a letter dated March 10, 1997, from the Tribal Chairman to the Secretary] leave this forum unconvinced that, if the Tribe had the requisite personnel, expertise, and experience to perform such activities, the Secretary would impair his trust responsibilities by entering into a contract with the Tribe to perform these activities rather than contracting with a non-Tribal contractor to perform them.

Recommended Decision at 4.

This case illustrates a problem inherent in the dual responsibilities and obligations placed on the Department of the Interior. On one hand, the Department is a trustee responsible for ensuring that Indian trust resources are protected and preserved. On the other hand, the Department is obligated to respect, encourage, and assist tribal sovereignty and self-determination through, inter alia, the ISDA contracting process.

[2] Congress addressed the dichotomy between the two roles it has assigned to the Department in the proviso now found in 25 U.S.C. § 450j(g), which states: "Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals." This language, although relocated, has appeared in ISDA from its initial enactment. See 25 U.S.C. § 450j(f) (Supp. V 1975).

The general dichotomy in the Department's responsibilities and obligations is exacerbated here because the Tribe disagrees with the Department as to the best course of action in regard to the establishment of section 4(e) conditions and section 10(e) recommendations for the Cushman Project. Thus a situation exists in which the beneficiary disagrees with actions taken or proposed to be taken by the trustee in the performance of the trustee's trust responsibilities. Based on the filings in this case, the Tribe obviously believes that it can perform the Secretary's trust responsibilities

under the FPA better than can the Department, while the Department believes that it has a trust responsibility to provide an independent analysis of the situation created by the existence and operation of the Cushman Project, even if its assessment of the situation differs from the Tribe's.

In implementing its dual roles under ISDA, the Department was required to address the parameters of what constituted a non-contractible trust function. The 1984 Memorandum was part of the decisionmaking process as to what functions could or could not be contracted under ISDA.

The Board agrees that the Senate Select Committee believed the Department was not implementing ISDA as rapidly as the Committee thought appropriate. The Senate Report reflects the Committee's belief that the Department had taken too conservative a stance in regard to what "trust-related" functions could be contracted under ISDA. Thus, the Senate Report listed a number of "trust-related" functions which the Committee believed could be contracted under ISDA.

The 1984 Memorandum was in effect prior to the 1988 amendments to ISDA, and prior to the writing of the Senate Report. The Memorandum clearly set forth the Department's position that studies and collection of data and evidence to be used in the negotiation or litigation of Indian reserved water rights was a non-contractible trust function. However, in its listing of contractible "trust-related" functions, the Senate Report did not explicitly include studies and collection of data and evidence to be used in the negotiation or litigation of Indian claims, the determination of negotiation and litigation strategy, or the exercise of a trust responsibility assigned to the Secretary under another law.

The Board has previously held that, when a Departmental interpretation of a statute predates Congressional amendments to that statute, and the amendments do not reverse or revise the Department's interpretation, there is a possibility that Congress was aware of, and agreed with, the Department's interpretation. See, e.g., Estate of Jacob William Nicholai, 29 IBIA 157, 167 (1996); White Mountain Apache Tribe v. Phoenix Area Director, 16 IBIA 51, 60 n.10 (1988). See also Zemel v. Rusk, 381 U.S. 1, 11 (1965) ("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"); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years"); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight"); United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915), and cases cited therein.

The Board acknowledges that there were at most four years between the writing of the 1984 Memorandum and the enactment of the 1988 amendments to

ISDA. However, those were four years in which the Senate Select Committee and Indian tribes were very concerned with the Department's implementation of ISDA. This concern for, and awareness of, various positions which the Department had taken are clearly evidenced in the Senate Report.

The Board further acknowledges that Indian water rights quantifications are not identical to FERC licensing proceedings. However, the similarities between the two types of proceedings, as described in the Area Director's filings, are greater than their dissimilarities.

Based on these considerations, the Board disagrees with Judge Hammett's conclusion that the 1984 Memorandum is unpersuasive, and rejects the Tribe's arguments against the continuing applicability of the principles discussed there. It concludes that the 1984 Memorandum is well-reasoned and persuasive precedent supporting the Area Director's position that functions undertaken in order to allow the Secretary to exercise his trust responsibilities under sections 4(e) and 10(e) of the FPA, as well as the ultimate exercise of those responsibilities, are trust functions which cannot be contracted under ISDA without impairing the Secretary's "ability to discharge his trust responsibilities to any Indian tribe or individuals." The Board thus rejects the Tribe's argument that the Secretary's FPA responsibilities are "trust-related" functions in the nature of the functions listed in the Senate Report.

It appears that the Judge's decision was based at least in part on a misunderstanding of the nature of the contract entered into with the non-tribal contractor and of the contract which the Tribe proposed. On appeal, both the Tribe and the Area Director object to what they perceive to be confusion between an ISDA contract and a procurement contract.

The Tribe objects to the Judge's requirement that it provide evidence concerning the funds it would spend on Cushman Project matters during the remainder of the contract year, in order to prevent the Tribe from "receiv[ing] a large amount of money for work it has not performed." Recommended Decision at 4. It contends that the Judge incorrectly viewed its ISDA contract proposal as a services, or procurement, contract. It argues:

[An ISDA] contract is not a services contract. Rather, [an ISDA] contract is the mechanism by which responsibility for performance of federal functions to benefit Indian tribes is transferred from the [BIA] * * * to an Indian tribe. * * *

The Recommended Decision inaccurately views the Tribe's request for funding as a request for payment of services performed or to be performed for [BIA] * * *.

Tribe's Objections to the Recommended Decision at 8.

The Area Director objects to the Judge's conclusion that the Area Director had "effectively delegated his trust responsibility by contracting with a non-tribal contractor to perform 4(e) and 10(e) activities."

Recommended Decision at 4. As does the Tribe, the Area Director suggests that the Judge viewed the Tribe's proposed ISDA contract as a procurement contract:

The second error [in the Recommended Decision] is a failure to recognize the significant differences between contracting with private experts under the general procurement process, and contracting with an Indian tribe under the ISDA. The Recommended Decision ignored the crucial differences and assumed that if the BIA contracted with private entities under standard Federal procurement procedures to be expert witnesses, it could contract with a tribe under the ISDA.

Although the federal government is contracting for the performance of tasks necessary to fulfill its trust and statutory responsibilities in both situations, the tasks being contracted are different. The BIA contracts with non-tribal entities for the technical expertise to collect and develop evidence necessary for the Secretary to set conditions and recommend charges. Under these contracts the Secretary remains fully in control of data collection to ensure that it is done consistent with direction from his policy and legal staff. The conditions and recommendations are thus a result of the Secretary's actions and the exercise of his trust responsibility.

In contrast, under the ISDA, the BIA would be contracting its responsibility to select experts and to supervise and direct the collection of evidence by those experts to the tribe. The tribe steps into the shoes of the federal government, in effect taking on the decision making role of the trustee. * * * Thus, under an ISDA contract the Tribe--not the Secretary--would be controlling the data collection and directing policy and legal choices. This is not +acceptable in the context of gathering evidence necessary to support the Secretary's trust and statutory obligations in a FERC licensing process.

There is also the possibility that a tribe would seek to redesign the program. See 25 U.S.C. § 450j(j). A redesign could easily change the scope of work to be performed in a direction opposite to the legal and policy positions chosen by the Secretary for his conditions and charges. Private experts under contract with the Secretary could not, and would not have any reason to, change the scope of work unless directed to make changes by the Secretary.

Area Director's Objections at 8-10.

[3] As both the Tribe and the Area Director note, there are significant differences between an ISDA contract and a procurement contract. The most significant difference in the context of this case is that an ISDA contract transfers control and direction over the contracted program to the tribal contractor, while the Department remains in control of work performed

under a procurement contract. It appears that the Judge may not have understood that the Tribe intended and expected to perform all of the Secretary's FPA functions, including exercising the Secretary's ultimate decisionmaking authority, but may instead have thought that the Tribe was interested in performing essentially in the role of a procurement contractor.

Based on the above discussion, the Board agrees with the Area Director that entering into an ISDA contract for BIA's entire FERC function would impair the Secretary's "ability to discharge his trust responsibilities to" the Tribe (25 U.S.C. § 450j(g)) both because it would transfer control and direction over the contracted program to the Tribe, thereby eliminating BIA's ability to determine whether the information provided was accurate, reliable, and supportable in a FERC proceeding, and because the Tribe proposed to contract the entire trust function, including the ultimate decisionmaking responsibility vested in the Secretary as trustee.

The Board concludes that the Area Director has demonstrated under any standard of proof that, except for the tribal participation component of BIA's FERC program, the functions for which the Tribe states it proposed to contract may not be contracted under 25 U.S.C. § 450j(g). It therefore affirms that part of Judge Hammett's decision which held that the Tribe was entitled to \$50,000 for its participation in the FERC licensing proceeding, but reverses that part which held that the Tribe was entitled to the amount between \$50,000 and \$300,000 which it could show would be devoted to Cushman Project matters during the remainder of the contract year.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Hammett's August 14, 1997, Recommended Decision is affirmed in part and reversed in part as set forth in this opinion. 4/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

4/ Any arguments not specifically discussed were considered and rejected or were found not relevant based on this disposition of the appeal.