



DEPARTMENT OF HEALTH AND HUMAN RESOURCES APPEALS BOARD

Pascua Yaqui Tribe of Arizona

Docket No. A-99-20; Decision No. 1676 (IBIA Docket No. 98-61-A) (01/12/1999)

Related Indian Self-Determination Act cases:

- Interior Board of Indian Appeals decision, 32 IBIA 98
- Administrative Law Judge decision, 11/23/1998
- Interior Board of Indian Appeals decision, 33 IBIA 88
- Health and Human Services Appeals Board decision, 02/11/1999
- Administrative Law Judge decision on remand, 04/06/1999
- Health and Human Services Appeals Board decision, 06/01/1999
- Administrative Law Judge decision on remand, 08/18/1999
- Health and Human Services Appeals Board decision, 10/12/1999



Departmental Appeals Board  
Appellate Division  
Room 637-D, HHH Building  
200 Independence Avenue, SW  
Washington, D.C. 20201

SUBJECT: Pascua Yaqui Tribe of Arizona      DATE: January 12, 1999  
Docket No. A-99-20  
Decision No. 1676

FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE ORDER

The Pascua Yaqui Tribe of Arizona (Appellant) appealed the November 23, 1998 order by Administrative Law Judge (ALJ) Nicholas T. Kuzmack granting a motion filed by the Indian Health Service (IHS) to dismiss Appellant's hearing request. Appellant had requested a hearing on the October 20, 1997 decision of the Acting Director, Tucson Area Office, IHS, partially declining Appellant's proposal, submitted pursuant to the Indian Self-Determination Act (ISDA) to contract for health care programs, functions, services and activities (PFSAs). In the November 23, 1998 order, the ALJ found that Appellant's hearing request had been rendered moot by section 328 of the omnibus appropriations bill for fiscal year 1999, which prohibits the use of fiscal year 1999 funds to enter into any "new" contracts under the ISDA. The ALJ concluded that it was unnecessary to reach the merits of the issue under appeal--whether the partial declination was unlawful--since any contract approved on appeal would be a "new" contract for which no funding would be available under this appropriations bill.

As discussed in detail below, I conclude that the ALJ erred in dismissing this case as moot. Specifically, I conclude that any contract approved on appeal is not a "new" fiscal year 1999 contract for purposes of the appropriations bill but rather is a prior year contract that was illegally disapproved on October 20, 1997. The interpretation of the term "new" contract adopted here gives full force and effect to the appeals process that Congress adopted for self-determination contracts under the ISDA. It is also consistent with the legislative history of the appropriations bill and with the canon of statutory construction that statutes intended to benefit Indian tribes be construed liberally

in their favor. The contrary interpretation proposed by IHS on the other hand would be inherently unfair to tribes that had exercised their appeal rights under the ISDA. Accordingly, I remand this case to the ALJ to determine whether IHS's partial declination of Appellant's proposed contract was unlawful.

### Statutory Background

Under section 102 of the ISDA, the Secretary is directed to approve any proposal by an Indian tribe for a self-determination contract to plan, conduct, and administer programs otherwise administered by the Secretary for the benefit of Indians unless the Secretary makes one of five specific findings. As pertinent here, these findings include: "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract" (section 102(a)(2)(C)); "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) . . . ." (section 102(a)(2)(D)); and "the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities [authorized by the ISDA] because the proposal includes activities that cannot lawfully be carried out by the contractor" (section 102(a)(2)(E)).

Section 106(a) of the ISDA provides that the amount of funds provided under a self-determination contract shall not be less than the Secretary would have provided for the federal operation of the program covered by the contract. The section further provides that contract costs shall include "contract support costs," consisting of the costs of activities which must be carried on by the contractor to ensure compliance with the terms of the contract and prudent management but are not normally carried on by the Secretary in the direct operation of the program.

Under section 102(a)(4) of the ISDA, if the Secretary determines that a contract proposal proposes a level of funding that is in excess of the applicable level determined under section 106(a), the Secretary is required to "approve a level of funding authorized under section 106(a)."

Under section 102(b)(3) of the ISDA, the Secretary is required to provide a tribal organization whose contract proposal has been declined "with a hearing on the record . . . ." The implementing regulations at 25 C.F.R. Part 900 provide for an opportunity for a hearing by an ALJ

with a right to appeal the ALJ's recommended decision to the Secretary of the Department of Health and Human Services. On July 18, 1996, the Secretary delegated her authority under 25 C.F.R. § 900.165 to hear such appeals to the Appellate Division, Departmental Appeals Board.

In October 1998, Congress passed the omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, Public Law No. 105-277. Section 328 of that bill provides in pertinent part:

Notwithstanding any other provision of law, none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts, or grants. Nothing in this section precludes the continuation of those specific activities for which self-determination and self-governance contracts, compacts and grants currently exist or the renewal of contracts, compacts and grants for those activities . . . .

The conference report indicated that this "one-year moratorium on new contracts and compacts" was intended to alleviate a shortfall in contract support costs. ALJ Order at 3, citing H. R. CONF. REP. NO. 825, 144 Cong. Rec. H11044, 11382 (October 19, 1998). The report also indicated that Congress believed this shortfall was due to IHS's "inequitable and fiscally unsound" methodology for distribution of contract support costs. *Id.* at 2. The record shows that, due to the shortfall in contract support costs, Indian tribes with approved contracts had been placed on a waiting list ("Queue") to receive such costs as funds became available. *See* ALJ Order at 3, citing hearing transcript and exhibits.

#### Factual Background

On July 18, 1997, Appellant submitted a proposal for a contract to provide various health care PFSA's. The proposal stated that the "starting date shall be determined based on the availability of contract support cost funding for the proposed contract" and that Appellant "expects to negotiate mutually agreeable starting date(s) for those particular program activities which the Tribe decides to assume and implement at its own financial risk in advance of receipt of the required allocation of contract support funds." IHS Hearing Exhibit (Ex.) A at 8.

By letter dated October 20, 1997, the Acting Regional Director, Tucson Region, IHS, advised Appellant that IHS partially declined to enter into the proposed contract based on sections 102(a)(2)(C), 102(a)(2)(D) and 102(a)(2)(E) of the ISDA but that portions of the proposed contract were approved. The letter also stated that, with only a few exceptions, Appellant's request for contract support costs was reasonable and that the request "will be placed in the Queue with other FY 1998 program starts with a request date of July 21, 1997." IHS Ex. B, at 11.

Appellant requested a hearing on the contract declination pursuant to 25 C.F.R. Part 900, Subpart L. An in-person evidentiary hearing was held in June 1998 and was followed by the submission of post-hearing briefs. The fiscal year 1999 omnibus appropriations bill was passed on October 21, 1998 before the ALJ was able to issue his recommended decision. On October 28, 1998, IHS moved to dismiss Appellant's hearing request on the ground that it was rendered moot by section 328 of the appropriations bill. IHS stated:

Appellant's right to contract has been suspended by law, the Secretary's right to enter into a new contract has been suspended by law, and the Board's authority to redress Appellant's appeal has also been suspended. Thus, there is no live controversy, and Appellant lacks a remedy.

Motion to Dismiss dated 10/28/98, at 1.

By order dated November 23, 1998, ALJ Kuzmack granted IHS's motion to dismiss. The ALJ agreed with IHS that section 328 precluded any fiscal year 1999 funding for any contract that would be approved on appeal. The ALJ rejected Appellant's arguments concerning the proper interpretation of section 328. The ALJ also rejected Appellant's suggestion that any approved contract could be funded with fiscal year 1998 appropriations on the ground that there could be no contract to provide health care in fiscal year 1998 once that fiscal year was over.

Appellant appealed the ALJ's ruling to the Departmental Appeals Board, Appellate Division.<sup>1</sup> I have been

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Under section 900.167(a) of 25 C.F.R., the Secretary has 20 days from the receipt of "written objections to modify, adopt, or reverse the recommended decision" of the ALJ. As previously noted, the Secretary

(continued... )

appointed by the Acting Chair of the Board as the deciding official in this case.

### Analysis

The ALJ's ruling raises the threshold issue whether, if the ALJ were to find that IHS's declination of the proposed contract was unlawful, IHS would be precluded from entering into the contract because of appropriations restrictions, thus rendering the case moot. Section 328 of the fiscal year 1999 appropriations bill prohibits the use of any funds appropriated under that bill "to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts, or grants." The ALJ determined that this language referred to any contract for an activity for which the parties had not previously contracted and would therefore bar IHS from now entering into a contract with Appellant for the PFSA's specified in its July 18, 1997 proposal. On appeal, Appellant argued that the ALJ erred in his interpretation of the fiscal year 1999 appropriations bill, that funding was available under other appropriations authorities as well, and that, in any event, the ALJ should have reached the merits of its appeal regardless of the availability of appropriated funds.

I conclude that the ALJ erred in ruling that the request for hearing is moot based on my determination that the fiscal year 1999 appropriations bill does not bar the use of fiscal year 1999 appropriations to fund Appellant's proposed contract if it is approved on appeal. As noted Above, IHS made its decision to partially decline the proposed contract on October 20, 1997. I conclude that any contract approved on appeal should not be viewed as a new fiscal year 1999 contract within the meaning of the appropriations bill but rather as a prior year

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<sup>1</sup> ( ... continued)

delegated her authority to review recommended decisions to the Appellate Division, Departmental Appeals Board. However, the ALJ failed to instruct Appellant to file its appeal directly with the Board. Thus, the Board did not receive Appellant's December 22, 1998 appeal until December 31, 1998. Nevertheless, since the Appellant alleged that its appeal was delivered to the Secretary's office on December 23, 1998, I am issuing my decision within 20 days of that date in order to assure compliance with the regulatory deadline.

contract that was unlawfully declined on October 20, 1997. The appeals process authorized by Congress for self-determination contracts would be undercut if an appellant could not receive an approval of its contract proposal that relates back to the declination that is under appeal.<sup>2</sup> If Appellant prevails on appeal on the merits of its proposed contract, it should therefore be entitled to the same contract as if IHS had properly approved its contract in the first instance. Accordingly, I conclude that any contract approved on appeal should not be treated as a new contract for purposes of the appropriations bill but should be treated in precisely the same way as any other contract that was approved in fiscal year 1998.

In response to a question from the deciding official, counsel for IHS was unable to identify any statutory or regulatory authority that would preclude this result or that would even have a bearing on the proper result. See tape recording of 1/8/99 telephone conference. In any event, IHS's own actions in this case reinforce this result. IHS's October 20, 1997 partial declination approved much of the substance of Appellant's proposed contract (although IHS declined to approve the level of funding requested by Appellant for the approved portions). Even if Appellant lost its appeal, it presumably could still decide to implement the proposed contract to the extent approved by IHS on October 20, 1997 (subject to adjustment of costs pursuant to section 105(c)(2) of the ISDA, which provides that contract amounts "may be renegotiated annually to reflect changed circumstances . . ."). In addition, treating the contract as relating back to the date of the partial declination is consistent with IHS's commitment in the partial declination letter to place Appellant's proposal in the Queue for contract support costs with other fiscal year 1998 program starts with a request date of July 21, 1997.<sup>3</sup>

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Indeed, the applicable legal authorities bearing on the lawfulness of the contract proposal would presumably be those in effect as of the time of the proposal.

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Although Appellant's place in the Queue arguably supports an effective date of July 21, 1997, I see no reason to find that the effective date of any contract approved on appeal could be earlier than the October 20, 1997 effective date argued for by Appellant. I also note that it is unnecessary for purposes of this decision to

(continued...)

The foregoing conclusions are also supported by the following points.

\* IHS's reading of section 328 does not advance the purpose of that provision as stated in the legislative history when applied to the facts of this case. As noted previously, Congress enacted section 328 in order to temporarily halt the increase in contract support costs for which IHS was responsible. In this case, however, IHS has already obligated itself to provide contract support costs for Appellant's proposed contract along with other fiscal year 1998 program starts, placing it in the Queue as of July 21, 1997. (It appears that the amount of the contract support costs would remain the same regardless of the level of contract funding. Even if this is not the case, however, IHS has clearly committed to providing some contract support costs for this contract.)

\* Contrary to what IHS argued, there need not have been a "meeting of the minds" regarding the contract terms on October 20, 1997. The issue raised by the request for hearing is whether IHS's October 20, 1997 partial declination of Appellant's proposed contract was unlawful. It is clearly within the scope of the ALJ's authority to find that IHS should have approved the contract regardless of whether there was a full meeting of the minds at that time.

\* Contrary to IHS's argument, the fiscal year 1999 appropriations bill would not deprive IHS of funding for the administrative costs it would incur to enter into a contract in fiscal year 1999 if Appellant's proposed contract is approved on appeal. See IHS submission dated 1/5/99, at 6; Tape recording of 1/8/99 telephone conference. In view of my finding that such a contract would not be a new contract within the meaning of the fiscal year 1999 appropriations bill, the bill would not

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<sup>3</sup> (...continued)

conclusively determine the effective date of any contract approved on appeal or the ramifications of the effective date on the funding allowed under the contract. Appellant here argued that it would be entitled to receive funding under the contract (with deductions for costs incurred by IHS in administering the PFSAs) retroactive to October 20, 1997 regardless of whether Appellant had in fact assumed responsibility for the PFSAs. I expressly make no finding on the validity of this argument.

preclude the use of fiscal year 1999 funds to enter into the contract.

\* Treating any contract approved on appeal as not covered by the prohibition in the appropriations bill is consistent with the canon of construction that statutes benefitting Indian tribes should be construed liberally in their favor. (The ALJ's Order cites Tvonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1988), as recognizing that canon.) This canon is clearly applicable in construing the provisions for appeal in the ISDA, a statute designed specifically for the benefit of Native American tribes. Moreover, application of this canon in construing the fiscal year 1999 appropriations bill would not jeopardize resolution of the contract support costs funding problem, to the detriment of other tribes, as the ALJ suggested, since, as noted above, IHS was already committed to providing contract support costs to Appellant based on the approved portions of the proposed contract.

\* Notwithstanding his determination that section 328 barred the use of fiscal year 1999 appropriations for any contract approved on appeal, the ALJ should not have dismissed the request for hearing as moot without determining whether any other funds were available to fund such a contract. Appellant argued that fiscal year 1998 appropriations, to the extent available, could be used to fund such a contract because the funds appropriated to IHS in fiscal year 1998 for contract health care services (the major services under Appellant's proposed contract) are available for obligation for a two-year period under the fiscal year 1998 appropriations bill or, alternatively, because all IHS appropriations are available for two years under section 8 of the ISDA (a theory IHS disputed). In addition, Appellant argued that fiscal year 1999 funds appropriated pursuant to a continuing resolution prior to passage of the omnibus appropriations bill were not subject to section 328 and could therefore be used to fund such a contract. IHS did not establish conclusively before me that no funds other than those appropriated in the fiscal year 1999 omnibus appropriations bill were available. However, in view of my finding that section 328 does not bar the use of fiscal year 1999 appropriations for any contract approved on appeal, I need not determine whether any other funds are available, or where the burden of establishing whether any other funds are available lies, in order to conclude that

section 328 does not render Appellant's request for hearing moot.<sup>4</sup>

Conclusion

For the foregoing reasons, I modify the ALJ's findings of fact and conclusions of law as follows:<sup>5</sup>

1. The use of funds appropriated under the fiscal year 1999 omnibus appropriations bill to enter into any contract with Appellant approved on appeal is not barred by section 328 of that appropriations bill.
2. Appellant's request for hearing is not moot.

Accordingly, I remand the case to the ALJ for further proceedings consistent with this decision. This is the final decision of the Department of Health and Human Services on this threshold matter.

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//original signed

Donald F. Garrett  
Member, Departmental  
Appeals Board

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In finding that section 328 does not bar the use of fiscal year 1999 appropriations here, I do not conclude that IHS must use such appropriations to fund any contract approved on appeal.

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Additional modifications of the ALJ's findings of fact and conclusions of law are included in the text of this decision.