



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Mechoopda Indian Tribe of Chico Rancheria, California
v. Education Programs Administrator, Sacramento Area Office,
Bureau of Indian Affairs

Docket Nos. IBIA 97-9-A and 97-102-A (03/01/2001)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
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MECHOOPDA INDIAN TRIBE OF)
CHICO RANCHERIA, CALIFORNIA)
)
Appellant,)
)
v.) Docket No. IBIA 97-9-A
) IBIA 97-102-A
EDUCATION PROGRAMS ADMINISTRATOR) Consolidated Appeals
SACRAMENTO AREA OFFICE,)
BUREAU OF INDIAN AFFAIRS)
) RECOMMENDED DECISION
Appellee.)
)

INTRODUCTION

This case involves two appeals which were consolidated for purposes of this recommended decision by the consent of the parties. The first appeal, IBIA 97-9-A, was filed by Appellant Mechoopda Indian Tribe of Chico Rancheria, California, with the Interior Board of Indian Appeals (Board), appealing a partial declination by the Education Programs Administrator, Sacramento Area Office, Bureau of Indian Affairs (Bureau), of Appellant's proposal under the Indian Self-Determination and Education Assistance Act (ISDA). The second appeal, IBIA 97-102-A, similarly was filed by Appellant challenging the Bureau's partial declination of another ISDA proposal submitted by Appellant. Both ISDA proposals involved the allocation of Johnson-O'Malley (JOM) funds for education assistance to be provided to Appellant's eligible student population. The cases were referred to this office for the issuance of a recommended decision in accordance with Departmental regulations.

STATEMENT OF FACTS

The Appellant is a federally recognized but landless tribe, whose last reservation land base was located within the city limits of Chico, in Butte County, California. (Appellant's Brief of 10/7/99, hereafter App. 2d Br., p. 2). On August 23, 1995, the Tribe's acting Education Director, Rodney Clements, met with Fayette Babby, Education Line Officer, BIA Sacramento Area Office, to discuss technical assistance that BIA might provide in establishing a contract under the provisions of the Indian Self-Determination Act, using funds provided under the Johnson-O'Malley Act of April 16, 1934. (Id., p. 4; Knight Decl. p. 2).

At this meeting, Ms. Babby provided Mr. Clements with a copy of an August 3, 1995, Federal Register notification by BIA, entitled "Tribal Consultation of Indian Education Topics." In this notice, BIA indicated that it was

continuing its consultation effort to obtain written comments concerning proposed methods of determining Johnson O'Malley (JOM) contract funding amounts to be transferred to the Tribal Priority Allocation (TPA) category or the Special Programs and pooled overhead category of the Tribal Budget System. (Gov. Brief of 2/7/97, hereafter Gov. 1st Br., Exh. 3A).

According to the notice, there were two methods which were being considered for determining each tribe's share of the JOM program funds for allocation to the TPA budget category: Method A, under which JOM funds would be distributed to tribes under the TPA according to tribal membership; and Method B, where JOM funds would be distributed to tribes and non-tribal JOM contractors, according to service population. (Id., Exh. 3A).

On August 25, 1995, Appellant faxed a request to BIA's Central Office for the inclusion of 103 children of the Mechoopda Tribe. These children were located nationwide, and not solely within Butte County, California. (App. 2d Br., Exh. 3).

On September 11, 1995, Appellant forwarded an application for a JOM contract to the BIA Sacramento Area Office, identifying 103 children nationwide of Mechoopda ancestry for inclusion in the JOM contract, requesting funding at a level not to exceed \$9,729.00. (Id., pp. 4-5; App. Ltr. of 9/11/95).

On October 18, 1995, BIA published another notice in the Federal Register, "Tribal Consultation of Indian Education Topics." BIA indicated that Method B had been chosen as the method which would be used to distribute JOM funds. The notice provided:

Beginning in FY 1996, Method B will include the following steps:

1. Identification of the number of JOM students served by all JOM contractors in FY 1995.
2. Using the FY 1995 distribution method, identify the amount of JOM funds each prime tribal JOM contractor receives to establish a base for each tribe.
3. Identification of the amount of JOM funds each prime non-tribal contractor (States, public school districts and tribal organizations) receives.
4. Add another line item in budget, Special Programs and Pooled Overhead category, entitled "Non-tribal JOM Contractors."
5. Place the proportionate share of JOM funds that are provided to tribes, as prime tribal JOM contractors, for all JOM students served into each Tribes' line item under the TPA.
6. Place the proportionate share of JOM funds that are provided to States, public school districts and tribal organizations, as prime JOM Contractors,

for all JOM students served into the non-Tribal JOM contractor line item under the Special Projects and Pooled Overhead category. (Gov. 1st Br., Exh. 3B).

On October 23, 1995, BIA contracting officer Carolyn Edwards-Johnson, awarded a contract to Appellant in an amount not to exceed \$9,729.00, consistent with the Appellant's request regarding a student population of 103 individuals, with an effective date for the contract of September 15, 1995. Fiscal year '94 funds were used to fund this contract. (App. 2d Br., Exh. 4; Transcript (TR) p. 93). In implementing the provisions contained in the Federal Register notices of August 3, 1995, and October 18, 1995, BIA established a national student base in order to determine each tribe's share of JOM funding. (Tr., pp. 86-87) BIA did not count the 103 students identified by Appellant to establish a recurring base for Appellant. (App. 2d Br., Exhs. 8, 10, and 12).

Appellant sought written confirmation from BIA in October and December of 1995 as to how many of its students would be included in its base. (*Id.*, Exh. 6). The Acting Director, Office of Indian Education Programs, responded on March 29, 1996, but did not inform Appellant that its request had been denied, nor did the Acting Director specifically state how many students Appellant would have in the database. (*Id.*, Exh. 7).

On April 16, 1996, Ms. Babby wrote to Appellant that:

The approved count of Indian students for the Mechoopda Indian Tribe is forty-two (42), of which 42 are eligible under 25 CFR 273.12, (on or near a reservation)...Please submit a budget in the amount of \$3,575.00 which is based on 42 students X \$85.11. (*Id.*, Exh. 8).

On June 7, 1996, Appellant submitted its contract proposal pertaining to Johnson-O'Malley and the Tribe's Adult Education program. The JOM TPA proposed by Appellant was \$10,367.00, derived from a student count of 109 students X \$85.11. (*Id.*, Exh. 9).

On July 24, 1996, Ms. Babby wrote to Appellant that:

The number of students for your Johnson O'Malley program remains at 42 . . . It was explained that your Tribe could take students from the Butte County Schools that [were] in your service area and add them to your count, but you could not count students well out of your service area, i.e., Georgia, Florida, Fresno, etc...Therefore, the budget for 1996 will be \$3,575.00 (42 X \$85.11). (*Id.*, Exh. 10).

On August 29, 1996, Appellant reiterated its position that the contract, as submitted, met "all the criteria of Title I of P.L. 103-413," and requested that the contract be awarded in an amount to cover 109 students. (*Id.*, Exh. 11).

On September 4, 1996, Ms. Babby wrote to the Appellant that:

Unfortunately, this office cannot approve the 109 students proposed as only 42 are eligible. Please refer to letters dated 3/29/96 from our Central Office in Washington as well as our letter dated 4/16/96. Therefore, this office is **declining** the funding of 67 students listed within your proposal. (Emphasis in original). (App. 2d Br., Exhs. 8, 10, and 12).

As her basis for the declination, Ms. Babby wrote:

Based upon the Federal Register, 25 CFR Part 900.22(d) of the August 23, 1996 regulations, **“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) of the ACT”**. (emphasis in original) (*Id.*, Exh. 12).

Appellant appealed this determination on October 1, 1996, which forms the basis for Appeal Number IBIA 97-9-A. (Gov. 1st Br., Exh. 2).

On December 7, 1996, Appellant filed its 1997 Annual Funding Agreement, adding the JOM program to Appellant’s P.L. 93-638 model contract. The JOM budget proposal once again identified 109 students as its base number. (Gov. Ans. to Interrogatories 97-102-A, Exh. 11).

In a letter to Appellant dated February 19, 1997, Ms. Babby stated that:

Unfortunately, this office cannot approve of the requested dollar amount in your proposal due to the determinations made by our Central Office in Washington, D.C. The Central Office has identified only nine, (9) students as being eligible for your program and has transferred to this office the funds for only nine, (9) students to be used in your program. This office will, therefore approve funding for nine, (9) students only. The amount of funding approved is in the amount of \$765.00.

Therefore this office is declining to fund that portion of your Johnson O’Malley contract which exceeds the funding allowable for nine, (9) students for FY 97. This declination is made pursuant to 25 CFR Section 900.22(a), (c) and (d), which states as follows:

- 900.22(a) The services to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
- 900.22(c) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.
- 900.22(d) 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) of the Act. (App. 2d Br., Exh. 13).

The Appellant appealed this declination on March 12, 1997, and that appeal forms the basis for Appeal Number IBIA 97-102-A. (App. Ltr. of 3/12/97).

DISCUSSION AND ANALYSIS

IBIA 97-9-A

Under the ISDA and its implementing regulations, the Secretary is directed, upon the request of any Indian tribe to enter into a self-determination contract with the tribe “for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students...” 25 CFR §273.1(a). The Secretary must approve a contract proposal and award the contract within 90 days after receipt of the proposal unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one or more of five specific reasons for declination exist, together with a detailed explanation of the reason(s) for the declination, and within 20 days, provides any documents relied on in making the decision. 25 CFR §§900.21, 900.22, 900.29. The Secretary may decline to contract only if she makes a specific finding that one or more of the five reasons delineated in the regulations exists.

If, as in this case, the decision is made to decline award of a self-determination contract or a portion thereof, under Section 102 of the ISDA, the tribe has the right to appeal that decision to the Interior Board of Indian Appeals. With respect to any such appeal, “the Secretary has the burden of proof...to establish by clearly demonstrating the validity of the grounds for declining the contract proposal.” 25 CFR §900.163.

The Government contends that its partial declination of Appellant’s June 7, 1996, JOM proposal was appropriate because Appellant did not have a permanent student base consistent with the 109 students proposed for funding by Appellant. Only 42 were considered to meet the eligibility criteria as defined under 25 CFR §273.12.¹ Accordingly, because Appellant did not have a student count in the national database to support a request of 109 students, and only 42 students were considered by BIA to be “eligible” under the regulation, the applicable funding level for this contract was capped at 42 students; funding the remaining 67 proposed students

¹ Section 273.12 provides: 1

Indian students, from age 3 years through grade(s) 12,...shall be eligible for benefits provided by a contract pursuant to this part if they are 1/4 or more degree Indian blood and recognized by the Secretary as being eligible for Bureau services. Priority shall be given to contracts (a) which would serve Indian students on or near reservations and (b) where a majority of such Indian students will be members of the tribe(s) of such reservations. . .

would have exceeded the applicable funding level for the contract.

“Perplexed by the ambiguity in determinations of how the Bureau arrived at the approved student count, the Tribe believed [its] only alternative to obtain [a] specific ruling would be through a contract appeals process.” (App. 2d Br., p. 8). The Appellant challenges the manner in which BIA implemented the procedures governing the establishment of the funding distribution mechanism, asserting that the adoption of Method B by BIA was contrary to Congressional intent. Appellant disagrees with BIA’s interpretation of 25 CFR §273.12, asserting that BIA has disregarded Congressional intent concerning JOM funding, as well as imposing an additional student eligibility requirement without legal or statutory authority. (*Id.*, pp. 10-20). Appellant also asserts that BIA had funding which could have been made available to Appellant, without increasing the national base student count. (*Id.*, pp. 20-23). Appellant also argues that it was a FY95 JOM contractor who served 103 students—accordingly, Appellant should have been given 103 slots in the national base student count. (*Id.*, pp. 23-26).

At the outset, it is important to distinguish what elements of the decision are properly before this forum and what are not. The decision at issue was made by Ms. Babby to partially decline Appellant’s JOM proposal on the basis that the proposal exceeded the applicable funding level for the contract. Although her decision was necessarily based in large measure upon the fact that Appellant did not have a permanent student count in the database to support their request for funding 109 students, it is not disputed that Ms. Babby did not have ultimate authority to make final determinations as to the numbers of students any JOM contractor would receive in their base distribution. (Tr., p. 108). Accordingly, BIA’s determination that Appellant was not entitled to a permanent database student count of 103 students is not at issue before this forum.

To the extent that Appellant has challenged the validity of the Method B procedure of distribution—a procedure that was apparently duly promulgated under accepted notice and comment procedures and thereafter signed by the Assistant Secretary, Indian Affairs—this forum lacks jurisdiction to entertain such a challenge. Three Affiliated Tribes of the Fort Berthold Reservation v. Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs), 18 IBIA 295 (1990); Board may decide an appeal if the appeal is from a decision “made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs other than the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).”

The central issue in this case is whether the Government has clearly demonstrated the validity of the basis for its partial declination. Ms. Babby’s partial declination dated September 5, 1996, cited 25 CFR §900.22(d) as the basis for her decision, and made reference to the Acting Director, Office of Indian Education Programs letter of March 29, 1996, to the tribe, and her own letter of April 16, 1996.

The March 29, 1996 letter stated the following in pertinent part:

As you recall the Bureau’s methodology concerning the distribution of Johnson

O'Malley funds was announced in the Federal Register. The Notice instructed the Bureau to distribute JOM program funds beginning FY 96. A base student count was established utilizing the FY 95 official student count. It is possible to transfer counted students between a Prime Tribal Contractor and a Prime Non-Tribal Contractor, however, it is not possible to increase a student base. (emphasis added) (App. 2d Br., Exh. 7).

Ms. Babby's April 16, 1996 letter provided that "[t]he approved count of Indian students for the Mechoopda Indian Tribe is forty-two (42), of which 42 are eligible under 25 CFR 273.12, (on or near a reservation)." (Id., Exh. 8).

Taken together, the Government is alleging that Appellant's student base, coupled with the requirements of 25 CFR §273.12, authorized the funding of 42 students instead of the 109 requested by Appellant.

As noted above, this forum lacks jurisdiction to question the validity of Method B's procedures. Similarly, this forum lacks jurisdiction to overturn the statements of the Acting Director in his March 29, 1996 letter. Accordingly, I find that his pronouncements concerning what is possible and not possible must be taken at face value. The Acting Director's statements also define the scope of the Government's burden in this case. Specifically, the Government must clearly demonstrate that it was not possible in the case of Appellant's June 7, 1996, JOM request, to have transferred counted students from non-tribal contractors to Appellant, on a one-time basis. Further, the Government must also clearly demonstrate that its use of the "on or near reservations" criterion of 25 CFR §273.12 was appropriately applied to Appellant's request.

In her written declaration, Ms. Gwen Knight stated that in her position as JOM coordinator, she advises the tribes concerning the JOM program, that she has been the main contact between the Bureau of Indian Affairs and the Chico Band of Mechoopda Indians, and that she coordinates her actions with the Sacramento Area Director of Indian Education and the Bureau's Washington Office of Indian Education. (Gov. Ans. to Interrogatories 97-102-A, Knight Decl., p. 1). Ms. Knight stated that:

BIA determined that only nine out of the 109 children that the Band wanted to include in the program were eligible to be in the Band's JOM program. The nine children came from Butte County School District. This determination was made on the basis that only those children within Butte County were on or near their historical land base....In discussions with the BIA Central Office, it was further determined that the Tribe would find it difficult to sustain a JOM program with the funds provided for only nine students. In an attempt to aid the Band, the BIA Central Office and the Sacramento Area Educational Office stretched the rules in order to allow the Band to have a viable JOM program and allowed a count of 42 for the Band in FY 95-96. The 42 children count came from Butte County School District and counties surrounding Butte County. (emphases added) (Id., p. 4).

At hearing, Ms. Knight was questioned at length as to how she made her determination that only nine children within Butte County were on or near Appellant's historical land base. Ms. Knight cited to 25 CFR §273.12, stating that because there were limited JOM funds available each year, she used the "on or near reservations" preference criterion essentially as an eligibility requirement. (Tr., pp. 76-77). In explaining how she applied that criterion to Appellant's circumstances, Ms. Knight testified at hearing as follows:

Q: What happened between '94 and '95, and '95 and '96, where it fell from 109² to 42?

A: They send an application for the next year for the Johnson O'Malley program, and in that student list, they did a geographical area of the children, and they had students listed that were in Florida, Georgia, New Jersey, and I did not consider those to be on or near the reservation. (Tr., p. 31).

...

Q: Is it your recollection that the discrepancy between 42 and 109 students between those two years came about because the—most of those students were outside of California?

A: I recall omitting students that were not on or near a reservation. I don't have the numbers. (Id., pp. 31-32).

...

Q: I'm asking what process you went through to eliminate students that you deem to not be eligible.

A: I called the Mechoopda tribal office and got the information that I needed to know, what surrounding counties would be in their area because I don't know that area, and I—

Q: You don't recall who you spoke with?

A: On, no, I don't. I know it was a young woman.

Q: I gathered you didn't know whether the tribe had a reservation or not, so you didn't ask anything about that?

A: That's correct.

Q: Let me ask you again. If the tribe had no reservation because they had no land base, how would you determine what was at or near the reservation with regard to the Mechoopda Tribe.

A: I don't know.

Q: It would be pretty difficult, wouldn't it?

A: I don't know. (Id., p. 33).

...

Q: Did something happen...to change how you determined eligible students between '94, '95 and '95, '96?

A: When—when the tribe sent the proposal for Johnson O'Malley, they also sent a

² The figure of 109 students should actually be 103 students; only 103 students were approved for funding in the Appellant's one-time JOM contract for FY95.

student list of the geographical area of where each student resided. Going back to the regulations under the 273.12, it says, on or near a reservation.

Q: But I believe I asked you in regards to that earlier whether that didn't just talk about priority. It didn't say that—didn't get the money if you were at or near it. You said priority would be given, presumably you were still entitled, even if you weren't in a priority situation; is that correct?

A: That's correct.

Q: So then why would you omit students who weren't in a priority?

A: I know what you're asking, but I don't know how to answer. (Tr., pp. 41-42).

...

Q: The last statement in that paragraph 10, on page 4, says, this determination was made on the basis that only those children within Butte County were on or near their historical land base.

A: Okay.

Q: How did you make that determination?

A: That the nine were going to come from Butte County?

Q: Yes. That those were the only ones on or near the tribe's historical land base.

A: We requested a list from Butte County, the JOM contractor. I asked for the students that belonged to the Mechoopda Tribe, and I was given the nine students' names.

Q: But how did you determine what the tribes' historical land base was?

A: I don't understand.

Q: Your statement says, this determination of the nine children that were taken from Butte County prime non-tribal contractor and given to the tribe was made on the basis that only those children within Butte County were on or near the historical land base.

A: Okay.

Q: How did you know what the historical land base for the Mechoopda Tribe was?

A: I think I would have to refer back to the conversation that I had with the tribal office.

Q: So is that conversation with that person whose name you don't know that you spoke with when Rod Clements was not available?

A: That is the same person.

Q: Did you ask, where was your historical land base?

A: I don't recall.

Q: Does the term, historical land base, have any significance to you?

A: In a sense.

Q: You put it in your declaration. Why did you put it in your declaration? (Id., pp. 51-52).

...

Q: So my question was: You used the term, on or near their historical land base?

A: Yes, I did.

Q: Did you come up with the term historical land base?

A: No, I did not.

Q: Where does that come from?

A: I don't recall.

Q: Why did you place it in your declaration?

A: I can say that I—I can't exactly recall where I got that information, but it was either from Washington, or something that I had read in regards to the regulations.

Q: Do you have any personal knowledge yourself of—where the tribe's historical land base is?

A: I have not been to their historical land base, no.

Q: Do you have any knowledge of how one would determine a historical land base?

A: No. I do not. (Tr., pp. 53-54).

...

Q: I'm going to ask you again if it's a landless tribe, how would you go about determining which eligible students are on or near the reservation?

A: I don't know.

Government Counsel: I think she answered that...She said that she would contact others for instruction, as I recall.

Appellant's Counsel: Did you say that?

A: Earlier in the day I did.

Q: Who is it that you would contact?

A: Washington.

Q: But you didn't contact them though, as I recall?

A: No, I did not.

Q: Because you didn't know this was a landless tribe?

A: That's true. (Id., pp. 66-67).

Ms. Babby testified she was Ms. Knight's supervisor, and offered the following testimony concerning Appellant's student count:

Q: (By Government counsel) As I recall Gwen's testimony, she indicated that you were no longer using geographical location as a criteria in giving out the funds. You just—

A: We are only using the base count.

Q: Does this mean that those tribal contractors who are on the base roll have to follow geographical location, or can they just service any of their students wherever they have—

A: No. They have a specific amount—Their base has been established; it was established in 1995, and that's their base. They can't change it. They don't have to deal with geographic location, I guess. But if they have ten students, they can serve ten students. (Id., pp. 103-104).

Based on the foregoing, Ms. Knight limited her funding consideration to 42 students because in her opinion that was what 25 CFR §273.12 required. She was unable to explain, however, how she applied that criterion to Appellant's circumstances. Specifically, she said in writing that she used the Appellant's historical land base in her determination, but at hearing she testified that she had not even known that Appellant was a landless tribe and could not ascribe

any meaning to the term “historical land base.” The Government’s failure to adequately explain how the regulation was actually applied to a landless tribe, and its failure to articulate the meaning or significance of the term “historical land base” lends strong support to the conclusion that the Government has failed to meet its burden in this case.

Contrary to Ms. Knight’s interpretation of 25 CFR §273.12, I find that nothing in the Federal Register notice of October 18, 1995 or the Acting Director’s letter of March 29, 1996, required that she apply an “on or near reservations” criterion to Appellant’s request to have 109 of its students funded. Consistent with Ms. Babby’s testimony, the “on or near reservations” language became of questionable viability under the new procedures. Thus, after BIA implemented the October 18, 1995 procedures and the national database had been established, there was no reason for Ms. Knight to consider geography any longer.

The central issue for Ms. Knight and BIA to have considered was whether there were any non-tribal student slots anywhere which could have been transferred, consistent with the Acting Director’s directive, to Appellant on a one-time basis, i.e., without increasing the Appellant’s base of nine students.³ Insofar as the Government has failed to demonstrate that there were no other non-tribal contractor slots nationwide which could have been provided to Appellant on a one-time basis, I find that the Government has failed to clearly demonstrate the validity of its partial declination. Moreover, I find that the Government’s use of 25 CFR §273.12 in limiting funding to only 42 students was not mandated by controlling legal authority since geography no longer plays a role for tribal JOM funding distribution issues. Accordingly, this forum recommends that the Government’s partial declination be reversed.

Although I have determined that the number of slots Appellant is entitled to in the permanent database is not at issue here, this forum offers the following observations in the hope that the Board, as it deems appropriate, would urge the parties to revisit this issue with the goal of establishing a permanent database count of at least 103 students for Appellant.

Specifically, the record indicates that the Federal Register notice concerning Method B, dated August 3, 1995, specified that any written comments pertaining to BIA’s proposed selection of Method A or B “should be mailed, to be received, on or before August 25, 1995.” (Gov. 1st Br., Exh. 3A). An informational point of contact is identified as Mr. Charles Geboe. Appellant faxed a letter to Mr. Geboe on August 25, 1995 stating, “We are submitting a list of

³ The Government’s observation that Appellant failed to forward its application to each of the Area Offices where its non-California students were serviced does not change my analysis. It still remains the Government’s burden to clearly demonstrate the validity of its actions. I also note that §273.26 does not specifically place the burden on Appellant to have forwarded its application to each Area Office; certainly, there is nothing in the regulation which would have prohibited the Sacramento Area Office from taking the initiative to contact the Tribe and ask whether the Tribe had any objections to the Sacramento Area Office forwarding Appellant’s application to the appropriate area offices.

our eligible JOM students to be included in your allocations for JOM funds.” (App. 2d Br., Exh. 3).

On October 30, 1995, Appellant wrote to Mr. Geboe once again, in which Appellant stated:

In my [Rodney Clements’] follow up phone call made to you on October 2, 1995, you indicated to me that our request to have our children included in the base funding for JOM would be denied. In our conversation I requested from you a letter stating your formal decision. As you can understand, this news is very disconcerting. If indeed your policies restrict you from including us in the base funding, this information will be taken to the Tribal Council to determine their options for an appeal to this decision. . .

Enclosed is the list of 103 children for which we were awarded a one time contract and a copy of our letter petitioning their inclusion faxed to you on August 25, 1995. Please include this list in your base allocations for JOM funding. It is vital that this be allowed to continue in future years.

If this request is denied, we respectfully request a formal letter of response stating the reasons for denial. Also, as I... mentioned in our phone conversation, we are requesting documents (i.e., FR notices, letters etc.) that notified tribes of this one time deadline to submit a JOM contract for all future JOM allocations. (Id., Exh. 5).

Mr. Geboe did not respond in writing as requested by Appellant, but evidently spoke with Appellant by phone on December 6, 1995. In a letter to Mr. Geboe dated December 7, 1995, Appellant wrote:

I was pleased to hear we have been included in the base funding for JOM allocations under TPA. I am writing to confirm our phone conversation on December 6, 1995, regarding this great news.

In our phone conversation you informed me you spoke with Gwen Knight at the Sacramento Area Office regarding our situation and that arrangements had been made with her to include us in the annual JOM funding under TPA.

Finally, in order to confirm this, you stated you would contact Ms. Knight and request a letter of confirmation be sent to our Tribal Council. (Id., Exh. 6).

Approximately four months later on March 29, 1996, the Acting Director, Office of Indian Education Programs wrote back to Appellant in response to its December 7, 1995 letter. The Acting Director’s letter did not confirm what Mr. Geboe had apparently relayed to Appellant, but neither did the letter clearly state that Appellant’s request had been denied. (Id., Exh. 7).

Although it is clear from the Appellant's letters and discussions with BIA that it was keenly interested in ascertaining how many student slots had been allotted to the Tribe in the national database, BIA's responses, whether by phone or in writing, failed to directly answer Appellant's simple questions—how many students do we have in the national database, and how were those figures arrived at?

Even Ms. Babby's apparently straightforward assertion that the number of students approved was 42, later turned out to be illusory. Forty-two students had indeed been approved, but 33 of those students were approved on a one-time basis, and only nine students slots were given to Appellant permanently in the national database. This only became apparent for the first time in documented form on February 17, 1997, when Ms. Babby issued a partial declination forming the basis for the second appeal in this matter. (App. 2d Br., Exh. 13).

Notwithstanding the Acting Director's assertion to Appellant in March 1996 to "be assured that your tribe is able to develop and administer a JOM program," (Id., Exh. 7) BIA's February 1997 confirmation that Appellant was only entitled to nine students in the national database effectively placed the Appellant in the untenable position of administering a JOM program with no certainty from year to year as to what funding in excess of nine students would be available.

The Government in its brief contended that:

The student count of the Mechoopda Tribe was not included in [the fiscal year JOM student list submitted by the Area] because the FY95 student count closed on July 30, 1994. The Mechoopda Tribe had not submitted its JOM proposal by that date. Therefore, any funds for Mechoopda students had to be taken from funds which were based upon other tribes or non-tribal contractor students. Indeed, in fiscal year 94-95, [⁴] the Bureau funded the tribe for 103 students, not based upon a 4 student base count for the Tribe (because no base count had been established), but based upon excess funds that had not been utilized by other non-tribal contractors. This did not establish a base count of 103 students for the Tribe. (Emphasis added; citations to the record omitted) (Government's Second Brief of 11/19/99, p. 3).

It is hard to reconcile the Government's comment on this issue with basic concepts of fairness to Appellant. Essentially, the Government is contending that the database issue was a dead issue as of July 30, 1994, a full year prior to publication of the Federal Register notice on August 3, 1995, which informed interested parties that BIA was in the process of choosing between Method A and Method B. The method had not even been chosen, but according to the Government, Appellant's fate had already been sealed because the cutoff date for data had been

⁴ This forum notes that the contract's effective date of September 15, 1995 through September 15, 1996, makes the contract at issue an FY 95 contract; it is, however, apparently undisputed that fiscal year 94-95, i.e., FY 94, funds were used to fund the contract in FY 95.

sealed as of July 30, 1994. Nothing in the Federal Register notices of August 3, 1995, and October 6, 1995, however, made specific mention of the fact that BIA would be requiring all tribes wishing to receive a proportionate share of JOM funding under Method B, as a prerequisite to being included in the database, to have already submitted JOM proposals by July 30, 1994.

Based on the record, the following observations are noted:

1. The Appellant made a request for the inclusion of 103 students to BIA, Washington, D.C., on August 25, 1995, by fax. (App. 2d Br., p. 4; Exh. 3).

2. The August 3, 1995, Federal Register notice did not specify a deadline for requests to be included in the national database for purposes of JOM funding, and neither did it specify a date, beyond which, it would be impossible to receive a base for purposes of JOM funding. (Gov. 1st Br., Exh. 3A).

3. BIA representatives failed to provide Appellant with a written explanation as to why its 103 students were not being included in the database immediately after August 25, 1995 and in October 1995; failed to provide the Appellant with a written confirmation that the 103 students were included in the database in December 1995; and failed to provide the Appellant with a clear, written explanation on how many students had been included by BIA in the national database in its letters of March 29, 1996, and April 16, 1996. The March 29 letter made no mention of any specific number of Mechoopda students that had been included in the national database, and the April 16 letter specified 42 students as having been approved by BIA's Central Office. The 42 student figure did not, however, represent the number of students that had been approved by BIA for permanent inclusion into the national database—that figure was nine students, and there is no correspondence from BIA mentioning nine students as a base until BIA partially declined Appellant's second JOM proposal in its letter dated February 17, 1997, "due to the determinations made by our Central Office in Washington, D.C." (App. 2d Br., Exh. 13).

4. It was never established precisely when the national database had in fact been finalized. Presumably, however, it should not have been finalized until some time after August 25, 1995, because that date was the final date that BIA had provided for parties to submit comments in response to the Federal Register notice of August 3, 1995. In order to meaningfully assess and evaluate any comments received prior to the notice's deadline of August 25, 1995, it stands to reason that BIA could not, and should not have finalized the database count before, on or immediately after August 25, 1995. Ms. Babby's testimony supports this conclusion as well, insofar as she testified:

A: . . . I told him [Rodney Clements] that we were already developing a national database; I told him at that time [August 1995]. I explained to him that we were developing a database, and all that information had been requested by central office, and that I had to turn that in; that it was out of my control. (emphases

added) (Tr., p. 94).

5. The underlying problem of this case is that no one, either at the Sacramento OIEP or in Washington D.C., assumed the responsibility of squarely addressing the Appellant's request to have 103 students included in the database. The August 3, 1995, Federal Register notice stated that the first step under Method B was to "[i]dentify the number of JOM students served by all JOM contractors." (Gov. 1st Br., Exh. 3A). There is no limitation expressed as to when the JOM students had to be served, or whether an entity had to be a JOM contractor as of a particular fiscal year in order to receive JOM funding under the new method. Thus, when Appellant made its request on August 25, 1995, there was nothing in the proposed procedure for Method B which would have precluded either OIEP Washington D.C. or Sacramento OIEP from including the 103 students in the national database.⁵

Given the foregoing circumstances, this forum recommends that the Board, as it deems appropriate, would urge the parties to revisit the database issue with the goal of establishing a permanent database count of at least 103 students for Appellant.

IBIA 97-102-A

This forum recommends that the Board reverse BIA's partial declination in Appeal Number IBIA 97-102-A for the following reasons. Pursuant to 25 CFR §900.29,

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required: (a) to advise the Indian Tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in §900.22 exist, together with a detailed explanation of the reason for the decision to decline the proposal . . .

BIA's letter of February 19, 1997, did not include any specific findings that clearly demonstrate that one of the conditions set forth in §900.22 exists, nor did it offer any explanation, detailed or otherwise, of its reason(s) for its decision to partially decline Appellant's

⁵ Under the final procedures adopted in the October 18, 1995, Federal Register notice, the relevant inquiry regarding the first step was to ascertain the number of JOM students served by JOM contractors "in FY 1995"—a change in language from the notice published on August 3, 1995. (Gov. 1st Br., Exh. 3B). The Appellant's argument that it was a FY95 contractor that served 103 students in FY95 is not supported by the facts insofar as Appellant did not actually serve 103 students in FY95—even though the contract had an effective date within FY95, i.e., September 15, 1995, it is not disputed that the contract was actually awarded on October 23, 1995, and therefore actual service to the 103 students necessarily began in FY 96 rather than FY95.

JOM proposal. The letter merely recited §§900.22(a), (c), and (d). I find that merely citing to specific portions of §900.22 does not satisfy the requirements of §900.29, and therefore BIA's letter of February 19, 1997 did not serve as a declination under the regulations. Pursuant to 25 CFR §900.18, a proposal that is not declined within 90 days is deemed approved and the Secretary shall award the contract. There is no indication in the record that BIA supplemented their February 19, 1997, letter within the relevant 90 day period. Accordingly, this forum recommends that the Board reverse BIA's partial declination on the basis that BIA's failure to decline Appellant's proposal within 90 days is a deemed approval by the Secretary.

If for any reason it should be determined that the Government's partial declination was sufficient to toll the 90 day period, this forum finds, in accordance with the analysis and discussion of IBIA 97-9-A, that the Government failed to clearly demonstrate the validity of its decision. Specifically, the Government asserted during discovery that §900.22(a)–services to be rendered will not be satisfactory–was supported because of 1) the limited amount of funding that Appellant would be receiving from BIA; 2) students residing outside of the Band's historical land base; and 3) the Appellant's failure to provide a method of servicing students outside of their historical land base service area. The Government also asserted that §900.22(c)–contract cannot be properly completed or maintained–was supported because there were no funds to support 109 students, only the nine students that had been approved. (Gov. Ans. to Interrogatories 97-102-A, Exh. 13, pp. 3-4).

I find that the record does not support the Government's contentions. Although citing to §§900.22(a), (c) and (d), the Government is essentially relying on §900.22(d)–lack of funding. As discussed in IBIA 97-9-A, the Government argued that its partial declination was required under its particular interpretation of 25 CFR §273.12. I rejected those arguments with respect to IBIA 97-9-A, and similarly reject those arguments to the extent necessary in IBIA 97-102-A.

On a final note, the Government offered no specific evidence that Appellant could not satisfactorily provide services supporting over 100 students in a nationwide contract, or could not successfully complete such a contract. This is not surprising insofar as the Appellant had actually been awarded a nationwide contract to service 103 of its students in 1995 (App. 2d. Br., Exh. 4), and the Government has nowhere asserted that that particular contract did not provide satisfactory services, or that the contract had not been successfully completed. Indeed, the only basis for declination cited for the follow-on contract to Appellant's 1995 nationwide contract was lack of funding, and not unsatisfactory performance or unsuccessful completion. (Id., Exh. 12).

CONCLUSION

Based on the foregoing discussion and analyses, this forum recommends that the Board reverse BIA's partial declinations under the two appeals at issue. This forum also recommends

that the Board, as it deems appropriate, urge the parties revisit the database issue towards the goal of establishing a permanent student count of at least 103 students for Appellant.

APPEAL INFORMATION

Within 30 days of the receipt of this Recommended Decision, either party may file an objection to the Recommended Decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR §900.165(c). An appeal to the IBIA under 25 CFR §900.165(c) shall be filed at the following address:

Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the Recommended Decision within 30 days, the Recommended Decision will become final.

//original signed
WILLIAM E. HAMMETT
Administrative Law Judge

Dated at Sacramento, California March 1, 2001.