



INTERIOR BOARD OF INDIAN APPEALS

Kwethluk IRA Council v. Juneau Area Director, Bureau of Indian Affairs

26 IBIA 262 (10/18/1994)



United States Department of the Interior

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

KWETHLUK IRA COUNCIL

v.

JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-67-A

Decided October 18, 1994

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

Affirmed.

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

The Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), preserves the trust responsibility of the United States toward the Indian people, prohibits the Secretary of the Interior from entering into any contract which would impair his ability to discharge his trust responsibility, and authorizes the Secretary to decline a contract where adequate protection of trust resources is not assured.

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

Where an Alaska Native village has contracted under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1988 and Supps.), to perform realty services, the Bureau of Indian Affairs may reject a request that the contract service area be based on village membership if the Bureau reasonably finds that adequate protection of trust resources will not be assured under a membership-based contract.

APPEARANCES: Joseph Guy, President, and John Owens, Realty Specialist, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kwethluk IRA Council seeks review of a January 11, 1994, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the contract service area for the realty portion of a contract under the Indian Self-Determination Act (P.L. 93-638). 1/ For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Prior to 1992, most BIA programs for Alaska Native villages in the Calista Region were contracted under P.L. 93-638 by the Association of Village Council Presidents (AVCP), a regional non-profit Native corporation based in Bethel, Alaska. AVCP qualified as a tribal organization under P.L. 93-638 and was authorized by resolution of the villages to enter into the contract in order to provide services to them. 2/ In the early 1990's, some of the villages began to withdraw their support for AVCP's contract and instead sought either to contract the programs themselves or to have BIA reassume the programs.

In February 1992, appellant entered into a P.L. 93-638 contract to provide services in the areas of tribal operations, social services, credit and finance, and natural resources. The contract provided that the period of performance was to be January 1, 1993, through December 31, 1996. 3/ In resolutions enacted in August and September 1992, appellant announced its intent to contract other programs, including realty. Appellant's formal proposal for a realty contract was evidently submitted to BIA in January 1993.

Three other villages in the Calista Region also sought to contract their realty programs. These were Orutsarmuit Native Council, Bethel (ONC); Akiachak Native Community; and Akiak Native Community. 4/ In response to these requests, BIA prepared a fund distribution formula for the realty program in the region. The formula, as it pertained to appellant, "was calculated on the basis of the proportion of the total number of parcels of restricted Native land in the Calista Region located closer to Kwethluk than to another village" (Area Director's Brief at 10).

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

2/ Apparently, AVCP initially provided services to all 56 villages in the region. In the 1980's, some of the villages withdrew their resolutions supporting AVCP and requested that their services be provided by another regional association, the Kuskokwim Native Association (KNA). KNA presently serves 12 villages.

3/ Other evidence in the record indicates that the contract was in effect in 1992 and that the term of the contract was three years, rather than four. For purposes of this appeal, these discrepancies are not critical.

4/ Five villages requested BIA to reassume responsibility for their realty programs. These were: Village of Atmoutkuak, Emmonak Village, Native Village of Kasigluk, Native Village of Kipnuk, and Native Village of Mekoryuk.

Appellant's P.L. 93-638 contract was modified in July 1993 to add several programs, including realty, and to provide 1993 funding. Funding in the amount of \$41,969 was provided for appellant's realty program. ONC also entered into a realty contract, although evidently Akiachak and Akiak did not. AVCP was asked to transfer the appropriate files to the two new contractors. However, on August 5, 1993, AVCP wrote to the Area Director stating that it was unable to determine which files to transfer because the boundaries for the contract service areas had not been determined.

In September 1993, a State-wide Transition Task Force met to consider various problems that were expected to arise in the transfer of contract responsibility to villages, not only in the Calista Region but throughout the State. ^{5/} At the September meeting, the task force concluded that BIA should define the contractual boundaries, with the assistance of the current contractor and the villages. It was apparently agreed that BIA would make a decision concerning appellant's boundaries by December 31, 1993, and would make a state-wide policy decision by January 31, 1994.

On January 4, 1994, BIA staff met with representatives of appellant, ONC, AVCP, and TCC. Minutes were prepared by BIA's Acting Assistant Area Director for Trust Services. The minutes state:

Generally speaking, the expectation for the meeting was to establish boundaries for the service areas of each contractor so that service could be provided to the allottees. * * *

As Kwethluk appeared to be the easiest, we addressed the situation there first. The agreement reached was that the service area would be the Kwethluk village corporation boundaries, [^{6/}] * * *. Kwethluk wanted to provide realty services to all their members and will negotiate with AVCP, etc., for those members whose allotments fall outside the corporate boundaries. As this does not appear to be a large number, it should not have a great impact on service provision as long as the number of contractors does not multiply.

On January 6, 1994, the Acting Assistant Area Director wrote to appellant's President, stating:

On January 4, I met with representatives from Kwethluk in Bethel regarding the service area for Kwethluk's Pub. L. 93-638

^{5/} The task force was organized by BIA and was comprised of three contractor representatives and two BIA employees. The contractor representatives were the Realty Officer of the Tanana Chiefs Conference (TCC), the Realty Officer of AVCP, and the Realty Officer of ONC. The BIA representatives were the Anchorage Agency Realty Officer and the Juneau Area Contract Specialist.

^{6/} These are the boundaries of the lands selected by Kwethluk, Inc., the Alaska Native Claims Settlement Act (ANCSA) village corporation for Kwethluk. See 43 U.S.C. §§ 1607, 1611.

realty contract. We agreed the service area would be the boundaries of the Kwethluk village corporation withdrawal and any tribal members regardless of the location of their allotment.

On my return to Juneau I have discovered the latter provision may not be possible and I will not move on that portion of the agreement pending resolution by the Regional Solicitor or other competent authority. The problem is two-fold; as a practical matter the people involved with contracting do not want to set a precedent with Kwethluk that will have to be followed throughout the state and could result in an administrative maze if other tribes request the same provision. Secondly, there is a question regarding the legality of this provision. Title 25 U.S.C. 468 seems to prevent an IRA [Indian Reorganization Act] tribe from exercising jurisdiction over public domain allotments and all allotments in Alaska are public domain allotments. [7/]

On January 11, 1994, the Area Director wrote to appellant's President, stating that he could not agree to the inclusion of allotments outside the Kwethluk corporate boundaries in appellant's realty service area.

Appellant appealed the Area Director's decision to the Board. Both appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant contends that it has a right under P.L. 93-638 to provide realty services to all its members regardless of whether those members' allotments are located within or without the Kwethluk corporate boundaries. It also contends that, as a tribal government, it has no boundaries and therefore its contract service area should not be limited to the corporate boundaries.

The Area Director concedes that appellant has a right under P.L. 93638 to enter into a contract for the delivery of realty services. He contends, however, that the right is not unqualified and that appellant has no statutory or regulatory right to contract for realty services to its members without regard to the location of their allotments.

The Area Director describes his decision as having been based upon practical considerations and the need to adapt a program developed for the

7/ 25 U.S.C. § 468 provides: "Nothing in [the Indian Reorganization Act] shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter."

In his brief before the Board, the Area Director concedes that the Acting Assistant Area Director's statement about section 468 may have been overly broad (Area Director's Brief at 24 n.14).

geographically defined reservations of the Lower 48 States to the very different situation in Alaska. He states:

The most obvious practical problem, of course, is that Alaska tribes do not have reservations with definite boundaries or other clearly delineated limits on the reach of their authority, for contracting purposes, or otherwise. * * * In the factual situation in Alaska, and especially in the area of the State in which this appeal arose, residents of one community frequently applied for and received title to allotment parcels in closer proximity to some other community, and at substantial distance from their own village of origin. The mixed up pattern of individual land ownership which resulted is exacerbated by patterns of individual movement and descent. People from one village move to another for marriage, schooling, work, or other personal reasons. By will or intestate succession, interests in allotments pass to persons living in another village, an urban center, or another state. Following the regrettable pattern of allotment ownership in the Lower 48, land titles in Alaska are becoming increasingly fractionated.

(Area Director's Brief at 19-20). The Area Director also notes, *inter alia*, that allotments in Alaska may consist of as many as four non-contiguous parcels, so that a single individual may own several separated tracts. 43 CFR 2561.0-8.

Appellant's position in this appeal appears to be premised, at least in part, on a theory that it has governmental jurisdiction over the allotments of its members, regardless of location, and that its contractual jurisdiction should correspond to its governmental jurisdiction. The Area Director contends that there is a question as to whether Alaska Native villages have governmental jurisdiction over allotments. Further, he contends, P.L. 93-638 does not require that contractual jurisdiction correspond to governmental jurisdiction and, in this case, contractual jurisdiction should not be patterned on the governmental jurisdiction claimed by appellant because of the practical problems it would cause.

With respect to his choice of the corporate boundary to define appellant's realty service area, the Area Director states that it was "based more on convenience and the need for certainty than on any particular legal relevance of the corporate boundary." He continues:

The fact is that service areas must be defined with certainty. * * * Kwethluk is only about 7 miles from Akiachak, and 10 or so miles from both [ONC] and Akiak. All four of these communities have expressed an interest in realty contracting. * * * Even if Kwethluk's [P.L. 93-638] realty contract service area was defined in terms of governmental jurisdiction instead of corporate land selections, its territorial expanse would still be constrained by the proximity of neighboring tribes, with claims of governmental

authority of equal dignity to Kwethluk's. Therefore, purely as a matter of practicality, some line drawing is necessary, and the ANCSA corporate boundaries provide a convenient and rational basis. [Footnote omitted.]

(Area Director's Brief at 23-24).

The Board recognizes that there are conflicting views concerning the extent of tribal governmental jurisdiction in Alaska. The Area Director notes that Solicitor's Opinion M-36975, "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers" issued on January 11, 1993, expresses grave doubts as to whether Alaska Native villages have any governmental jurisdiction over allotments. The Area Director acknowledges, however, that the opinion is "subject to review." ^{8/} Appellant submits a January 1994 paper issued by the National Indian Policy Center, which criticizes the Solicitor's Opinion.

The Board concludes that, for purposes of this decision, it is not necessary to determine whether appellant has governmental jurisdiction over the allotments of its members. Appellant has not shown that P.L. 93-638 requires that contractual jurisdiction be coextensive with governmental jurisdiction, and the Board is not aware of any such requirement. ^{9/}

[1] The Board next considers whether the practical reasons identified by the Area Director are adequate to support his decision. In addressing this question, the Board bears in mind that the Area Director has dual responsibilities here--not only is he obligated to assist appellant in its efforts at self-determination, he is also obligated to carry out the trust responsibility of the United States for the lands subject to appellant's contract. See, e.g., 25 U.S.C. § 450n ("Nothing in [P.L. 93-638] shall be construed as-- * * * (2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people"); 25 U.S.C. § 450j(g) ("[T]he Secretary shall not make any contract which would impair his ability to discharge

^{8/} A footnote to BIA's most recent Federal Register list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs" states:

"Sol. Op. M-36,975 concluded, construing general principles of Federal Indian law and ANCSA that 'notwithstanding the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over lands or nonmembers.' M-36,975 at 108. That portion of the opinion is subject to review but has not been withdrawn or modified."

58 FR 54364, 54366 n.1 (Oct. 21, 1993).

^{9/} Such a requirement could have drastic consequences if appellant were found to lack governmental jurisdiction over its members' allotments, because it might well mean that appellant could not contract to provide realty services even for allotments within the Kwethluk corporate boundaries.

his trust responsibilities to any Indian tribe or individuals"). See also 25 U.S.C. § 450f(a)(2) (A proposed contract may be declined if "adequate protection of trust resources is not assured").

[2] In this case, the lands appellant wishes to serve under its contract are not village-owned lands but lands belonging to individuals. The Area Director's trust responsibility, insofar as these lands are concerned, is toward the individual landowners, not toward appellant. Gullickson v. Aberdeen Area Director, 24 IBIA 247 (1993), and cases cited therein. Thus the Area Director must strike a balance between the trust obligation he owes to the individual landowners and his responsibility to assist appellant achieve self-determination. Pursuant to his trust responsibility, and in accordance with the provisions of P.L. 93-638 quoted above, the Area Director is authorized, indeed required, to reject appellant's request for a membership-based service area where he reasonably concludes that realty services to the landowners will not be adequate and, thus, that adequate protection of trust resources will not be assured. 10/

In evaluating appellant's request, the Area Director considered the likelihood of long-term successful contracting. He contends in this appeal that the problems of a membership-based contract will increase as time goes on. The Board agrees that problems are almost certain to multiply and are likely to become unmanageable in the long run. These problems will result from changes in membership and land ownership which will occur over the years.

Tribal membership in Alaska is more fluid than tribal membership in the Lower 48. Appellant's constitution makes membership dependent upon residence. 11/ Thus, under a membership-based contract, appellant would gain or lose authority over lands if the landowners changed their membership. Further, because appellant's constitution makes membership dependent in part upon an individual's intent, there is likely to be uncertainty as to the membership status of some individuals, i.e., those who have left the village but whose intent to return, or not, is unknown. 12/ As a result of

10/ Although no contract declination is involved here, the Board considers the statutory declination standard relevant to a decision which addresses trust-related issues.

11/ See appellant's Constitution at Art. II, sec. 3 ("Any member may willingly give up his membership, or his membership may be taken away for good reason by the Village, or if he moves away from the Village, intending not to return, he shall lose his membership"); sec. 4 ("Any person who has lost his membership and any other native person may be made a member if he sets up a home in the Village").

According to the Area Director, many Alaska Native villages have similar residence-based membership requirements.

12/ Appellant's reply brief reflects some of this uncertainty:

"If an individual was to disband from the tribe and move to another village, it would be that individual's [prerogative] to do so, just as long as he knows that he would no longer be considered a tribal member of

this uncertainty, there would also be uncertainty as to the contractual responsibility for lands belonging to those individuals.

Appellant contends that there will be few changes in membership. Even if membership remains entirely stable, however, changes in land ownership are unavoidable and will eventually affect every allotment. Lands will pass from members to non-members, or vice-versa, through sales or inheritance. Ownership of land will fractionate through inheritance. It is almost inevitable that, as a result of fractionation, the ownership of many allotments will soon be shared by members of several different villages, again raising questions as to which contractor should serve these allotments. 13/

Presumably, appellant could devise a plan for dealing with membership and ownership changes under a membership-based contract. But, unless the plan called for transfers of contract responsibility to correspond to these changes, appellant's contract would eventually lose its correlation to its membership. Where transfers of contract responsibility are made, continuity of service is affected, and uncertainties over contract responsibilities multiply. Physical transfer of records between contractors increases the likelihood of loss or damage. The integrity of these land records is critical, not only to the landowners and the villages, but to BIA which, in the exercise of its trust responsibility, has a need to know where the records are to be found and a need to be able to rely on them.

Further, appellant's contract cannot be considered in a vacuum. BIA's trust responsibility extends to all restricted Native lands in Alaska. It is expected that a number of villages will eventually contract their realty programs. If members of all these villages are to receive the best possible realty services, the Area Director must ensure compatibility between the contracts of the various villages in the Calista Region and perhaps throughout the State. If some villages contract on a geographical basis and others contract on a membership basis, conflicts will arise because some land parcels will be subject to more than one contract and others subject to none. 14/ Clearly, it is important to have a workable system

fn. 12 (continued)

Kwethluk. Our people belong to our tribe, and we have the inherent right to exercise our tribal authority over them in the best interest of the tribe whether they live in Kwethluk or moved on to another place because of personal interest." (Appellant's Reply Brief at 18-19).

13/ Barring legislation to prevent further fractionation, or a serious undertaking to promote the writing of wills, allotments in Alaska appear doomed to share the fate of allotments in the Lower 48, some of which now have hundreds of owners, often including members of a number of different tribes and/or non-Indians, who own their shares in unrestricted fee status.

14/ Statements made in the Area Director's brief suggest that the potential for conflict already exists. ONC, the only other village in the Calista

in place at the outset of village realty contracting in order to minimize the need for reorganization in the future. Just as transfers of contract responsibility on an individual basis affect the continuity of services and the reliability of records, so too would the larger transfers necessitated by reorganization. The Board concludes that the Area Director reasonably considered appellant's service area request in the context of a potential region-wide or State-wide village realty contracting system. ^{15/}

Another factor noted by the Area Director is the need to ensure efficient contract servicing. He contends that the proximity of the contractor to the lands to be served facilitates the efficient and economical provision of services. He argues that "the time and monetary costs of travel to remote Alaska allotment parcels for inspections, investigations, surveys, appraisals, and the like, can be substantial" (Area Director's Brief at 26). He recognizes that there are arguments to be made for a membership-based approach, e.g., a landowner would have more convenient access to the offices of his/her contractor, and a landowner owning several tracts could deal with only one contractor. He contends, however, that these considerations are outweighed by the disadvantages of a membership-based system.

fn. 14 (continued)

Region to have contracted its realty program so far, has a geographically based-service area which, the Area Director believes, probably includes some lands belonging to members of appellant (Area Director's Brief at 28).

Appellant states that it does not wish to provide services to non-member owned lands within its corporate boundaries. Presumably AVCP could continue to serve these lands for the time being. Eventually, however, as more villages enter into realty contracts, and therefore withdraw their contracting authorizations from AVCP, AVCP will probably lose its ability to serve these lands.

^{15/} Appellant notes that Kotzebue IRA Council, in the NANA Region, has a membership-based realty contract. Apparently, the contract was the result of negotiations between Kotzebue and the previous contractor, Maniilaq Association. The Area Director does not address the circumstances under which BIA approved the Kotzebue contract but states that there are now questions as to whether the arrangement is working satisfactorily for the service recipients.

It appears likely that the Kotzebue contract was approved before BIA recognized the overall problems of membership-based contracts. (There is no discussion of this contract in the minutes of the various task force meetings included in the record for this appeal.) The fact that BIA approved one membership-based contract does not compel it to continue approving such contracts when, after giving thorough consideration to the matter, it reasonably concludes that membership-based contracts will not result in the provision of adequate realty services. Cf. Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169 (1993) (BIA has the authority to change an administrative interpretation of law as long as it clearly sets forth the reason for the change).

