SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION
v.
PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-73-A Decided September 13, 1990

Appeal from a decision concerning the distribution of FY 1990 Indian Self-Determination Act contract funds among Eastern Nevada tribes.

Vacated.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Generally

   The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

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

   A formula for the distribution of Indian Self-Determination Act contract funds among several Indian tribes must be made available for comment and discussion by the tribes prior to negotiation of the contracts for the fiscal year to which the formula applies.

APPEARANCES: James Paiva and Ellwood Thomas, appellant's Chairman and Vice-Chairman, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Shoshone-Paiute Tribes of the Duck Valley Reservation seeks review of a March 8, 1990, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the distribution of FY 1990 Indian Self-Determination Act (P.L. 93-638) contract funds among tribes served by the Eastern Nevada Agency, BIA. 1/ Among other things, the decision affirmed the formula's use of tribal population statistics obtained

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1/ These are, in addition to appellant: the Duckwater Shoshone Tribe; the Ely Indian Colony; the Confederated Tribes of the Goshute Reservation; and the Te-Moak Tribes of Western Shoshone Indians, consisting of the Battle Mountain, Elko, South Fork, and Wells Bands.

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from BIA's Integrated Records Management System (IRMS). For the reasons discussed below, the Board vacates the Area Director's decision.

Background

This is the latest in a series of appeals filed since 1987 by various Eastern Nevada tribes concerning the distribution of funds allocated to the Eastern Nevada Agency for the programs contracted by the tribes under P.L. 93-638. In 1987, appellant sought an increase in its share of the funds on the grounds that its share was not in proportion to its service population. The Area Director agreed that appellant's share should be increased but held that the increase should be phased in over a 3-year period in order to mitigate the impact on the other tribes. Appellant appealed to the Assistant Secretary -Indian Affairs, 2/ who held on December 9, 1987, inter alia, that the adjustments were to be implemented in their entirety in FY 1989. The Assistant Secretary directed the Area Director to "review the funding distribution for tribes in [the Eastern Nevada] agency jurisdiction and arrive at a more equitable distribution." Accordingly, by letter of June 13, 1988, to all Eastern Nevada tribes, the Area Director announced a new distribution formula for FY 1989. 3/ Two appeals were filed from that letter, one by the South Fork Band and the other by the Duckwater Shoshone Tribe. On August 30, 1988, the Assistant Secretary issued a decision in the South Fork Band's appeal, affirming the distribution formula developed by the Area Director. The Duckwater Shoshone Tribe's appeal was transferred to the Board under 25 CFR 2.19(b) (1988) 4/ and later dismissed at the request of the parties after a settlement was reached. Duckwater Shoshone Tribe v. Phoenix Area Director, 18 IBIA 5 (1989). As far as the Board is aware, the FY 1989 funds were distributed in accordance with the Area Director's formula.

2/ Under the appeal system in effect prior to Mar. 13, 1989, appeals were taken from Area Directors' decisions to the Commissioner of Indian Affairs. See, e.g., 25 CFR Part 2 (1988). Because the Commissioner's position has been vacant for a number of years, appeals were decided by the Assistant Secretary - Indian Affairs or a Deputy Assistant Secretary.

3/ This formula assigned base funding amounts to each tribe without regard to population and then provided for distribution of the remaining available funds according to population.

4/ The appeal was transferred at the request of the tribe. 25 CFR 2.19 (1988) provided in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

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By letter of September 27, 1989, the Chairman of the Te-Moak Tribes informed the Area Director that the membership of the Tribes was higher than shown in the population table prepared for the FY 1989 fund distribution. He requested that a new membership count of 1,923 be used in determining the Te-Moak Tribes' share of P.L. 93-638 contract funds for FY 1990. The Area Director responded on December 18, 1989, stating in part:

> The method on when, if, and how reported population changes will be utilized to change funding distributions has not yet been determined. At the present time, we are of the opinion that changes should not be made more than once every two years.
>
> After we discuss this matter with the Superintendent, information will be provided to Eastern Nevada Tribes regarding any future changes and when and how often changes may be considered. Also, if not already accomplished the Superintendent will need to implement criteria for obtaining accurate population data to assure fair treatment for all Eastern Nevada Tribes.

(Area Director's Dec. 18, 1989, Letter at 2). Copies of this letter were sent to all Eastern Nevada tribes.

By memorandum of December 19, 1989, the Superintendent advised the Area Director that he believed the most accurate population statistics would be obtained from the IRMS "People Sub-system." He stated that "[a]ll tribes with [P.L. 93-]638 Enrollment contracts are required to maintain updated records of the activities within this program." Further, he stated: "Since I.R.M.S. (people systems) will be the driving force for all records within the Bureau of Indian Affairs nationally, it is only logical that we use this document for our purposes." He submitted a proposed "Equitable Distribution Formula" table which showed, by tribe, base amounts for each program with additional amounts per program calculated from IRMS population figures.

Area Office staff apparently agreed to the Superintendent's formula in a January 9, 1990, telephone conference. 5/ By letter of January 11, 1990, the Superintendent sent copies of the formula to the tribes, announcing that a meeting would be held on January 18 to discuss it. Appellant sent representatives to the meeting but also filed a notice of appeal from the Superintendent's letter. 6/ The tribes were apparently unable to reach a consensus concerning the new formula at the January 18 meeting.

5/ This conference, which included an individual designated as Acting Area Director, is described in the record as a budget negotiation. It is not clear from the record what weight the agreement to use the Superintendent's distribution formula carried; it was not until later that the Area Director formally approved the formula.

6/ Appellant's notice of appeal indicated that it agreed to the use of IRMS data for population statistics but objected that notice of the change had not been given earlier. Appellant stated that it was conducting a tribal membership rescreening process, which apparently had resulted in its

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On January 31, 1990, the Area Director met with appellant's Chairman and the Chairmen of Ely Colony and the Duckwater Shoshone Tribe. In a February 28, 1990, letter to appellant's Chairman, announcing his approval of the new formula, the Area Director explained:

> Because you, as Chairman of [appellant], and the other two tribal chairmen, indicated proposed action to appeal the previous 1990 budget distribution and the use of the IRMS data, I agreed to allow all three of you to hold another meeting of all Eastern Nevada tribal chairmen to negotiate among yourselves on the 1990 budget. An expected result of this meeting would be 90 percent consensus among the eight tribes agreeing with the distribution results the second time. If the 90 percent consensus was not achieved, then I would approve the 1990 budget as previously submitted by [the Superintendent].
>
> Since time is a major factor, we agreed that the three of you would call this meeting at the earliest date. A tentative date of February 21, 1990, was mentioned. This was later changed to February 28, a date that appeared to be acceptable to most of the tribal participants. [The Superintendent] assured the tribal leaders the Bureau of Indian Affairs would provide information requested for the meeting.
>
> However, [the Superintendent] then received a letter from the Duckwater Tribal Chairman asking to postpone the meeting until March 20, 1990. [The Superintendent] also received a telephone request from you seeking to postpone the meeting until March 1990. It appears the tribes and bands are unable to agree on this meeting.
>
> I do not believe we can continue to dwell on how we will satisfy everyone with our method of disbursement as the new FY 1992 budget cycle is upon us. Therefore, I am approving the budget proposal of January 9, 1990 as submitted by [the Superintendent] so that we may put our contracts in place and prepare for the FY 1992 budget cycle.

(Area Director's Feb. 28, 1990, Decision at 1-2). Copies of this letter were sent to all Eastern Nevada tribes. Appellant attempted to appeal it to the Assistant Secretary - Indian Affairs, who referred the appeal to the Board. 7/

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fn. 6 (continued)
IRMS membership data having become outdated. Appellant also objected to the manner in which base figures for the contracted programs were formulated and the fact that program base amounts were allowed for tribes without contracts for those programs. Finally, appellant objected to BIA's having waited until 4 months into the fiscal year to adopt the new formula.
7/ The Feb. 28 letter did not include appeal instructions, and appellant was apparently unfamiliar with the new appeal procedures for BIA and the

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On March 8, 1990, the Area Director issued a formal decision in appellant's appeal from the Superintendent's January 11, 1990, letter. The decision stated in relevant part:

> It appears there are four parts to your present appeal outlined in your January 22, 1990, letter. Parts two, three and four have already been decided by the Assistant Secretary - Indian Affairs when answering previous appeals. * * *
>
> Therefore, I am only deciding on the part of your appeal which involves using IRMS population statistics rather than using labor force data. You state in your appeal letter that you are in agreement with using IRMS for population statistics but wish to modify the IRMS data.
>
> This same argument could be used continually by any tribe or colony under Eastern Nevada Agency in the hope of securing additional funding based on population shifts/updates. Unfortunately, a shift of funds is only possible <u>within</u> the Eastern Nevada Agency, thereby creating pluses or minuses for the Eastern Nevada tribes since the total amount of available funding is constant. It is my belief that the IRMS populations are more accurate than the outdated labor force data. I believe the Superintendent should use the most accurate data he has available at the time of decision.
>
> Therefore, I am sustaining the decision of the Superintendent in using the IRMS population statistics he had available at the decision time for distributing FY 1990 PL 93-638 contract funds among Eastern Nevada Tribes. [Emphasis in original.]

(Area Director's Mar. 8, 1990, Decision at 1-2). Appellant appealed this decision to the Board. <u>8</u>/ No briefs were filed.

<u>Discussion and Conclusions</u>

[1] This appeal is arguably moot because it concerns funding for FY 1990, which is now nearly over. While the Board normally does not consider moot appeals, it recognizes an exception to the mootness doctrine which allows consideration of moot issues where there is a potentially recurring question raised by short term orders, capable of repetition, yet evading review. <u>See, e.g.</u>, <u>Estate of Peshlakai v. Navajo Area Director</u>, 15 IBIA 24, 32-34, 93 I.D. 409, 413-14 (1986). The Board finds that this appeal raises

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fn. 7 (continued)
Board which became effective Mar. 13, 1989, 54 FR 6478, 6483 (Feb. 10, 1989).

<u>8</u>/ The Area Director apparently issued his Mar. 8 decision before receiving appellant's appeal of his Feb. 28 decision. The two appeals are hereafter considered as one appeal.

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issues which are likely to recur. It therefore invokes the exception to the mootness doctrine in order to consider this appeal.

Appellant objects to the adoption of the Superintendent's distribution formula on a number of grounds, including: (1) a new source for tribal population statistics was used without advance notice to the tribes; (2) the tribes were not consulted during development of the formula; (3) no information was provided to the tribes concerning the data on which the formula was based; (4) the redistribution was not adopted until one-third of the way into the fiscal year, after appellant's FY 1990 contracts had been negotiated and signed; (5) the base funding figures are inconsistent and improperly include funding for tribes which do not have contracts for the programs to which the funding applies; (6) the dramatic population increase shown for the Te-Moak Tribes in the IRMS figures is suspect, and no backup data has been provided; and (7) the two agency staff members who prepared the formula had possible conflicts of interest.

In his March 8, 1990, decision, the Area Director held that the Assistant Secretary had already decided the issues raised by appellant concerning the base funding figures included in the FY 1990 formula. The Assistant Secretary affirmed the FY 1989 formula in his August 30, 1988, decision. However, the FY 1990 formula contains substantially higher base amounts than did the FY 1989 formula. 9/ It is apparent that the base amounts for FY 1990 are premised on different considerations than the base amounts in the FY 1989 formula. Under these circumstances, the Assistant Secretary's affirmation of the FY 1989 formula cannot be construed as an affirmation of the FY 1990 base figures. Accordingly, the Board finds that the Area Director erred in holding that appellant's challenge to the FY 1990 base amounts had already been decided by the Assistant Secretary.

The population statistics as they appear in the FY 1989 and FY 1990 formulas are as follows:

	1989 population		1990 population	
Tribe	Total	Percent	Total	Percent
Shoshone-Paiute (Appellant)	1,759	48.83	1,674	36.90
Te-Moak	911	25.29	1,923	42.39
Goshute	371	10.30	377	8.31
Duckwater Shoshone	319	8.86	318	7.01
Ely Colony	242	6.72	244	5.38

This chart reveals a significant shift in the population balance between the tribes, particularly between appellant and the Te-Moak Tribes.

9/ For instance, under the FY 1989 formula, appellant was assigned $20,000 in base funds. Under the FY 1990 formula, appellant would apparently receive at least $225,000 in base funds. The record does not contain any explanation of the change.

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As the Board understands it, the IRMS data are based on figures furnished by the tribes. The Board does not suggest that the other Eastern Nevada tribes should have an opportunity to overrule the Te-Moak Tribes' report of its own membership; however, it does appear, in light of the potential impact that the Te-Moak Tribes' increase could have upon the funds available to the others, that the other tribes were entitled to an explanation of the increase.

The funding totals and funding percentages by tribe for FY 1990 are not included in the record so it is not possible to assess the actual funding shifts which would result from implementation of the new formula. However, because the FY 1990 formula includes higher base amounts than the FY 1989 formula, it appears that a smaller percentage of the available funds would be divided by population under the FY 1990 formula than under the FY 1989 formula.

Appellant stated in its appeal to the Area Director that it agreed to the use of IRMS population data. It argues however that advance notice should have been given to the tribes before the data source was changed. The parties are in agreement that the IRMS is a proper source for population data, and no reason appears why it should not be used as a source in the future. However, the Board agrees with appellant that the tribes should have been given advance notice of the change. The failure to give advance notice deprived them of the opportunity to correct their IRMS data if necessary. 10/

Appellant alleges that the two BIA staff members who prepared the formula have possible conflicts of interest. The Area Director has not responded to this allegation. In light of the disposition the Board makes in this matter, it refers this allegation to the Area Director, who should ensure that all employees are in compliance with Departmental regulations concerning conflicts of interest. See 43 CFR Part 20.

Appellant's remaining objections to the 1990 formula are that it was presented to the tribes too late, i.e., one-third of the way into FY 1990 and after appellant's contracts had been negotiated, and that no background information was presented to the tribes with which to assess the formula.

[2] The Board agrees with appellant that a formula so substantially different from the one in place should have been presented to the tribes in ample time for consideration prior to the beginning of the fiscal year, and prior to the time contracts for that year were to be negotiated. In addition, the proposals should have been accompanied by background data sufficient to explain the changes made.

10/ Of course, once the new data source has been established and communicated to the tribes, the tribes will have been put on notice that they should keep their IRMS data current for purposes of future fund distributions.

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For the reasons discussed, the Board vacates the Area Director's March 8, 1990, decision.

It is now too late to correct procedures for FY 1990. For any changes in the distribution formula which are proposed to be implemented in FY 1991, the Area Director shall see that the proposals, with supporting data, are furnished to the tribes immediately. 11/ For FY 1992 and following years, the Area Director shall see that any such proposals are furnished to the tribes in ample time for consideration by the tribes prior to negotiation of contracts for the fiscal year concerned.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Phoenix Area Director's March 6, 1990, decision is vacated.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

11/ Because the Area Director's approval of the FY 1990 formula is herein vacated, the FY 1990 formula, if reproposed for implementation in FY 1991, shall be furnished to the tribes in accordance with this holding.

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