DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Aleutian Pribilof Islands Association v. Northwest Representative, Office of Self-Governance, Bureau of Indian Affairs

Docket No. IBIA 06-50-A (08/31/2006)

Related Indian Self-Determination Act case:
Interior Board of Indian Appeals decision, 44 IBIA 11

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August 31, 2006

ALEUTIAN PRIBILOF ISLANDS ASSOCIATION (APIA),	:	IBIA 06-50-A
	:	Appeal of a decision issued by the Bureau of
Appellant	:	Indian Affairs, declining APIA's proposal in
	:	its 2006 annual funding agreement for funding
v.	:	to perform activities under 43 U.S.C.
	:	§ 1613(h)(1)
NORTHWEST REPRESENTATIVE, OFFICE OF SELF-GOVERNANCE, BUREAU OF INDIAN AFFAIRS,	:	Indian Self Determination and Educational
	:	Assistance Act (ISDEAA), 25 U.S.C.
	:	§§ 450-450n
Appellee	:	

RECOMMENDED DECISION

Appearances: Geoffrey D. Strommer, Esq., Portland, Oregon, for Appellant

Roger L. Hudson, Esq., Anchorage, Alaska, for Appellee

Before: Administrative Law Judge Sweitzer

Background

The Aleutian Pribilof Islands Association (APIA) has appealed a determination by the Bureau of Indian Affairs (BIA) to partially reject APIA's proposed fiscal year (FY) 2006 Tribal Self-Governance Annual Funding Agreement (AFA). BIA rejected that portion of the AFA that proposed funding for performing activities under Section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(1).

Since the late 1990's, APIA has compacted with BIA under Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 458 et seq., to carry out various programs, functions, services and activities (PFSAs), including those authorized by § 14(h)(1) of ANCSA. On May 20, 2005, the ANCSA Regional Corporation for the Aleutian region, the Aleutian Corporation (TAC), passed a resolution specifically stating that it did not want APIA to carry out ANCSA-related work on the corporation's behalf, but wanted to itself contract with BIA to receive the ANCSA funding. BIA accordingly partially rejected APIA's proposed FY 2006 AFA on the basis that the requested ANCSA § 14(h)(1) funds were to be transferred to TAC pursuant to its May 20, 2005, resolution.

In an attempt to resolve this issue, APIA requested an informal conference pursuant to 25 CFR 1000.422(c) and 25 CFR 900.154. Following the January 6, 2006, informal conference, BIA's Deputy Regional Director Charles F. Bunch, who had been designated to conduct the conference as the Secretary's representative under 25 CFR 900.155(c), issued a Recommended Decision upholding BIA's initial decision to transfer the ANCSA § 14(h)(1) funding from APIA to TAC. Dissatisfied with the Recommended Decision, APIA filed on March 16, 2006, pursuant to 25 CFR 900.158 and 1000.432(a), a Notice of Appeal of BIA's initial decision to partially reject APIA's proposed FY 2006 AFA.

By Order dated March 27, 2006, the Interior Board of Indian Appeals (IBIA) referred APIA's appeal to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge (ALJ). This appeal was thereafter assigned to the undersigned for adjudication. A telephonic pre-hearing conference was held on April 6, 2006, during which the parties agreed to waive their right to an evidentiary hearing.[1/] Accordingly, the following Recommended Decision is based solely upon the undersigned's consideration of the evidence in the record, applicable law, and the arguments set forth in the parties' briefs.

Statement of Facts

ANCSA was implemented by Congress in 1971 for the purpose of effecting "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). To achieve this goal, Congress created two types of private corporate entities to receive the land and money provided to Alaska Natives under the Act: Regional Corporations and Village Corporations. 43 U.S.C. §§ 1606, 1607. Section 1606 of ANCSA divided the State of Alaska into twelve regions and provided that a for-profit corporation, or Regional Corporation, was to be incorporated under the laws of Alaska for each of the twelve regions. A thirteenth Regional Corporation was also provided for Alaska Natives who did not reside in Alaska. 43 U.S.C. § 1606(c).

To determine enrollment in the Regional Corporations, ANCSA required that the Secretary of the Interior create within two years from the enactment of ANCSA a roll of all Natives "born on or before, and who are living on, December 18, 1971." 43 U.S.C.§ 1604(a). This roll was to show for each Native, among other things, "the region and the village or other place in which he resided on the date of the 1970 census enumeration * * *." 43 U.S.C. § 1604(b). All living Alaska Natives were then enrolled in the Regional Corporation in which they resided at the time the roll was taken. Id. If an Alaska Native was not a permanent resident within the area encompassed by one of the twelve corporations, he or she would be

[1/] APIA also agreed orally, in conjunction with a request to file a surreply brief (which brief was filed on July 11, 2006), that the 30-day regulatory deadline for issuance of a recommended decision could be extended to August 31, 2006.

allocated to one of the corporations based on a list of prioritized factors. Id. This ensured that all living Alaska Natives were enrolled in one of the Regional Corporations.

In addition to Regional Corporations, ANCSA also provides for the formation of Village Corporations. Section 1607(a) provides that the "Native residents of each Native village entitled to receive lands and benefits under this Act shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this Act * * *." Section 1610 of ANCSA provides a list of over 200 villages, as well as established criteria by which villages can be added or removed from the list by the Secretary of the Interior.

Unlike universal Native enrollment in Regional Corporations, not all Alaska Natives were enrolled in a Village Corporation. 43 U.S.C. § 1604(b). If, at the time of the 1970 census, an Alaska Native was not a resident of a particular village, that person would be enrolled in a Regional Corporation only. Id. Accordingly, although all Village Corporation shareholders were also Regional Corporation shareholders, not all Regional Corporation shareholders were also Village Corporation shareholders.

Section 14(h)(1) of ANCSA provides that the Secretary of the Interior "may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." 43 U.S.C. § 1613(h)(1). The Departmental regulations issued to govern this process are found at 43 CFR 2653.5. Pursuant to this regulation, Regional Corporations were required to file applications for the conveyance of such sites with the Bureau of Land Management (BLM) by December 31, 1976. 43 CFR 2653.5(a), (f). Sites determined by the BLM to be located on available and unappropriated Federal lands at the time of application were then forwarded to the BIA. 43 CFR 2653.5(f), (g). The BIA is then responsible for investigating the cemetery sites or historical places requested to be conveyed. At the completion of its investigation, the BIA must report on its findings and certify whether the intended property does or does not meet the criteria for eligibility as a Native historical place or cemetery site. 43 CFR 2653.5(h)-(k). Relying on BIA's report and certification, the BLM issues a decision whether to convey the site to the applicant Regional Corporation. 43 CFR 2653.5(k).

TAC, the Regional Corporation for the Aleut region[2/], timely filed ANCSA § 14(h)(1) applications with BLM by December 31, 1976. These applications were then processed by the Department of the Interior in accordance with 43 CFR 2653.5, and the BIA began performing the investigative tasks assigned to it in the regulations. In the late 1990's, APIA, a Native non-profit organization sanctioned to do business on behalf of thirteen federally recognized tribal governments in the Aleut region, entered into a Tribal Self-Governance Compact (Compact) with BIA pursuant to Title IV of the ISDEAA. Under this Compact,

[2/] This geographic region covers the Aleutian Islands, Pribilof Islands, and that part of the Alaska Peninsula which is in the Aleut League. 43 U.S.C. § 1606(a)(8).

APIA compacted to carry out a broad range of PFSAs for beneficiaries in the region, including BIA-assigned tasks relating to ANCSA §14(h)(1), and the funds allocated by Congress for implementing the ANCSA § 14(h)(1) program were transferred to APIA.

TAC was not consulted about, or even given notice of, BIA's transfer of the ANCSA § 14(h)(1)-related PFSAs and funds to APIA. However, on August 7, 1998, APIA agreed to carry out the ANCSA § 14(h)(1) PFSAs in conjunction with a Memorandum of Agreement ("MOA") with the TAC that spelled out how the parties would "jointly conduct * * * activities related to completing the ANCSA 14(h)(1) process." (BIA Ex. 5, § 1) Pursuant to the MOA, it was agreed that "[a]ll funds appropriated to A[PIA] for ANCSA 14(h)(1) from BIA since the inception of the compact, are available to conduct ANCSA 14(h)(1) and Cultural Heritage activities under this agreement." (BIA Ex. 5, § 5(c)). In addition, it was agreed that "funds shall be expended based on written objective work plans that are based on the overall intent and purpose of the ANCSA process, and approved by TAC." (Id.) It was also agreed that "[a]ll ANCSA 14(h)(1) work product shall be the sole property of TAC, *provided that,* A[PIA] shall have the opportunity to reproduce ANCSA 14(h)(1) materials for its own purposes and any such reproductions shall remain the property of A[PIA]." (BIA Ex. 5, § 5(d)).

Funding for carrying out ANCSA § 14(h)(1) PFSAs was included in AFIA's AFAs without objection until FY 2005. On May 24, 2004, just before the start of the BIA Alaska Region FY 2005 Self-Governance negotiations, the Office of the Regional Solicitor issued a memorandum to the BIA Alaska Region recommending that specific steps be taken in negotiating the inclusion of ANCSA § 14(h)(1) funding within Tribal Self-Governance AFA's. The memorandum first noted that because ANCSA § 14(h)(1) funding had been categorized as recurring Tribal Priority Allocation (TPA) funding, not all recipient entities had been using the funds for ANCSA-related work. The memorandum accordingly recommended that BIA rectify this problem by negotiating the "inclu[sion of] specific ANCSA-related tasks in the contracting entities' scopes of work, whereby they would agree after negotiations as to what activities they would undertake, and what ANCSA-related work product they would commit themselves to deliver." (BIA Ex. 1 at 2) The memorandum additionally noted that:

> [I]t is doubtful that contracting for the ANCSA conveyance work can properly be supported by a tribal or village resolution under the ISDA. Legally, the tribal entity benefitting from a program, function, service or activity, or portion thereof, is the entity which must provide the authorizing request to contract. In the case of ANCSA conveyance-related work, that entity would be the Regional Corporation * * * Indeed, the Regional Corporation would not only have the right to dictate who provides the services, but also the option of electing to contract directly with the Bureau to perform the work itself * * *.

(BIA Ex. 1 at 3) The memorandum accordingly recommended that BIA "require an ANCSA Regional Corporation resolution requesting that the BIA contract for performance of the relevant tasks." (Id.)

Negotiations for FY 2005 AFAs were conducted with the nine Alaska Self-Governance tribal consortia during the late Spring and early Summer of 2004. As part of the compact negotiations, BIA distributed copies of the May 24, 2004, Regional Solicitor's Office Memorandum (the Solicitor's Memorandum) to the tribal consortia. BIA also sent copies of the Solicitor's Memorandum to the affected Regional Corporations. BIA additionally requested that the tribal consortia include the following language in their Self-Governance AFAs or Multi-Year Funding Agreements:

> ANCSA: This program fulfills the mandate of the 1971 Alaska Native Claims Settlement Act (ANCSA [Section 14(h)(1), 14(h)(2), and 14(h)(5)], PL. 92-203) through investigation and certification of Alaska Native historical places and cemetery sites, native groups, and native primary places of residence. The program's remaining work, however, is focused on Section 14(h)(1) claims–the beneficiaries of which are ANCSA Regional Corporations. Program funds provided by this agreement are restricted in use to the performance of ANCSA-related work, the specific tasks of which will be jointly determined by [the consortium], the BIA ANCSA Office, and [the ANCSA Regional Corporation.]

BIA did not, however, require that any of the tribal consortia provide an ANCSA Regional Corporation tribal resolution requesting that BIA contract with the tribal consortia for performance of the ANCSA § 14(h)(1) PFSAs.

The negotiation meeting between BIA and APIA was held on June 10, 2004. As a result of the negotiation, APIA agreed to amend its existing "Self Governance Multi-Year Funding Agreement (10/01/03-09/30/08)" to include the above language. When APIA amended its Multi-Year Funding Agreement, however, it omitted the underlined portion of the provision from inclusion in the agreement.

In response to the Solicitor's Memorandum, the TAC Board of Directors passed a resolution on May 20, 2005, specifically "removing A[PIA] as the entity to receive ANCSA 14(h)1 funding on its behalf" and resolving to itself "directly contract with the Bureau of Indian Affairs for the ANCSA 14(h)1 Historical and Cemetery funding." (BIA Ex. 2) On June 30, 2005, BIA received from APIA a proposed FY 2006 AFA which included, as in previous years, funding for ANCSA § 14(h)(1) PFSAs. (BIA Ex. 6 at 2) The proposed FY 2006 AFA was not executed by the BIA's Office of Self Governance (OSG). (Id.) BIA communicated to APIA orally that it refused to sign the AFA as submitted because the ANCSA § 14(h)(1) funds were to be transferred to TAC pursuant to TAC's May 20, 2005,

Resolution. There is no evidence in the record as to what specific day BIA's decision was orally communicated to APIA.

On September 27, 2005, APIA submitted to BIA a revised FY 2006 AFA which reflected a deletion of funding for ANCSA § 14(h)(1) PFSAs. (BIA Ex. 7 at 2) Footnote 15 to the revised FY 2006 AFA further explained that "[the] [f]unds [are] to be transferred to The Aleut Corporation per resolution by the Aleut Corporation for FY 06. This is without prejudice to APIA[sic] to appeal the BIA decisions regarding these funds." (BIA Ex. 7 at 3 n.15) A letter accompanying the revised FY 2006 AFA and signed by the President/CEO of APIA, Dimitri Philemonof, additionally stated:

> Submitted herewith is a revised 2006 reprogramming request. We have modified line 15 to reflect the fact that the Aleut Corporation passed a resolution stating their intent to contact directly with the BIA for those funds for 2006. APIA makes this change in our reprogramming request without prejudice to filing an appeal of the BIA and Solicitor's opinion that the Aleut Corporation, rather than the tribes and their representative, APIA, can make the decision about how those funds can be spent.

(BIA Ex. 7 at 1) APIA's revised FY 2006 AFA was signed by OSG on October 3, 2005. APIA filed its Request for Informal Conference with BIA on November 14, 2005. (BIA Ex. 8)

Discussion

I. Timeliness of Appeal.

Before addressing the merits of the appeal, the undersigned must first address BIA's assertion that the appeal should be dismissed for lack of jurisdiction owing to the alleged untimeliness of APIA's initial pursuit of administrative remedies. BIA asserts that APIA's November 14, 2005, request for an informal conference was untimely as it was filed more than thirty days from the date that APIA was informed of BIA's decision to withhold the ANCSA § 14 (h)(1) funding from APIA's proposed FY 2006 AFA. BIA claims that APIA was informed of BIA's decision during the summer of 2005, at some point between the end of June and the beginning of September. It contends that at the very latest, APIA became aware of BIA's decision, as well as its right to appeal the decision, on September 27, 2005. On this date, APIA submitted its revised proposed FY 2006 AFA to BIA along with a cover letter stating that "APIA makes this change in our reprogramming request without prejudice to filing an appeal of the BIA and Solicitor's opinion that [TAC], rather than * * * APIA, can make the decision about how those funds can be spent." BIA concludes that APIA's November 14, 2005, request for an informal conference was submitted well outside of the permissible 30-day time period for filing such a request.

As APIA points out, however, the regulations provide that a tribe must file a request for an informal conference "within 30 days of the day it receives the decision," not within 30 days from the date it is informed of the decision. 25 CFR 1000.422; 25 CFR 900.154 (emphasis added). See also 25 CFR 1000.425. Upon deciding to decline a proposed AFA, BIA must "advise the Indian tribe or tribal organization in writing of the Secretary's objections * * * together with a detailed explanation of the reason for the decision to decline the proposal * * *." 25 CFR 900.29; 25 U.S.C. § 450f(b)(1) (emphasis added).[3/] See also 25 CFR 2.7(a) (requiring that "[t]he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.") Arguably, BIA's decision was never reduced to writing, as the only written statement of BIA's position is footnote 15 of the revised FY 2006 AFA signed by OSG. If this does not constitute a written decision, then APIA never "received" a decision. Accordingly, there is no date from which to begin calculating the 30-day period.

In addition, the ISDEAA regulations provide that BIA's written decision "shall contain information which shall tell the Indian tribe or tribal organization where and when to file the Indian tribe or tribal organization's appeal." 25 CFR 900.152. The general BIA regulations governing appeal similarly require that "[a]ll written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal." 25 CFR 2.7. BIA clearly failed to provide the required appeal information.

BIA regulations provide that the absence of accurate appeal instructions tolls the running of the appeal time limit. See 25 CFR 2.7(b) (providing that the time to file a notice of appeal shall not begin to run until proper notice of appeal procedures has been given); see also Ramah Navajo School Board, Inc. v. BIA, 24 IBIA 104 (1993). BIA asserts that although APIA was not given formal notice of its appeal rights, the time for APIA to file an informal decision should not be tolled because it is clear from APIA's September 27, 2005, letter and revised FY 2006 AFA that APIA was aware of its right to appeal BIA's decision. The fact that APIA knew of its right to appeal does not excuse BIA of its regulatory duty. Although APIA may have been aware of its right to appeal, it was not notified of the specific procedures applying to the appeal of a BIA decision to decline a proposed AFA, including the

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[3/] As APIA points out in its Opening Brief, § 201 of the ISDEAA and the declination criteria at 25 CFR part 900 apply to APIA's Title IV Self-Governance Compact because the Title IV regulations incorporate by reference the appeals procedures of Title I, which in turn incorporates § 102 of the ISDEAA. (APIA Opening Brief at 13 n. 8) 25 CFR 1000.432(a) provides that "[f]or Title I-eligible PFSA disputes, appeal may only be filed with IBIA under the provisions set forth in 25 CFR 900.150(a) through (h), 900.152 through 900.169." Before referring this appeal to the Hearings Division for assignment, the Board of Indian Appeals determined that this appeal falls under 25 CFR 900.150(a), which specifically incorporates § 102 of the ISDEAA. See Order Referring Appeal to the Hearings Division for Assignment to an Administrative Law (March 27, 2006).

30-day time limit for filing a request for an informal conference. Accordingly, the time for APIA to file a request for an informal conference did not begin to run and APIA's November 14, 2005, request for an informal conference was timely filed.

II. Validity of BIA's Decision to Partially Reject APIA's Proposed FY 2006 AFA.

As explained previously, BIA partially rejected APIA's proposed FY 2006 AFA on the basis that it proposed funding for conducting ANCSA § 14(h)(1) PFSAs. BIA determined that in light of TAC's Resolution specifically removing APIA as the entity to receive ANCSA § 14(h)(1) funding and resolving to itself directly contract with BIA, BIA was obligated to transfer the ANCSA § 14(h)(1) funds to TAC.

APIA has appealed BIA's decision to partially reject its proposed FY 2006 AFA, contending that it violates the terms of APIA's Tribal Self-Governance Compact, Titles I and IV of the ISDEAA, and applicable regulations. On appeal, APIA specifically challenges the validity of BIA's decision on the following four grounds: (1) APIA is the primary beneficiary of ANCSA § 14(h)(1) and thus has the right under the ISDEAA to compact to carry out the ANCSA § 14(h)(1) PFSAs; (2) APIA should be given contracting priority over TAC pursuant to BIA's longstanding "Order of Precedence"; (3) BIA's decision to partially reject APIA's proposed FY 2006 AFA was made in violation of ISDEAA's statutorily required declination criteria and procedures; and, (4) BIA's decision to partially reject APIA's proposed FY 2006 AFA was made in violation of § 106(b)(2) of the ISDEAA and the implementing regulations at 25 CFR 900.32 and 900.33. For the reasons discussed more fully below, the undersigned rejects APIA's arguments on appeal and recommends that BIA's decision to withhold the ANCSA § 14(h)(1) funding from APIA's FY 2006 AFA be upheld.

A. TAC is the Primary Beneficiary of the ANCSA § 14(h)(1) Funding.

The ISDEAA directs the Secretary "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs, or portions thereof * * * for the benefit of Indians because of their status as Indians * * *." 25 U.S.C. § 450f(a)(1)(E). The Indian tribe benefitting from the program must provide the authorizing request to contract. See 25 CFR 900.8(d) (requiring that an initial ISDA contract proposal contain "[a] copy of the authorizing resolution from the Indian tribe(s) to be served.") (emphasis added). For purposes of the ISDEAA, an "Indian tribe" is "[a]ny Indian tribe, band nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA] * * *." 25 U.S.C. § 450b(e) (emphasis added). Accordingly, ANCSA Regional Corporations are legally entitled to submit resolutions authorizing ISDEAA contracts pursuant to 25 U.S.C. § 450f(a). See Cook Inlet Native Assoc. v. Bowen, 810 F.2d 1471, 1476 (9th Cir. 1987) (specifically upholding the award of an ISDEAA contract pursuant to the authority of an ANCSA Regional Corporation resolution).

BIA argues that TAC's May 20, 2005, Resolution constitutes a request under 25 U.S.C. § 450f(a)(1) to enter into a self-determination contract to administer the ANCSA § 14(h)(1) program. BIA contends that TAC, as the Regional Corporation for the Aleut Region, is the entity which solely or primarily benefits from the ANCSA § 14(h)(1) program. Base upon this contenetion, BIA argues that TAC has the right to either elect to contract directly with the BIA to carry out the ANCSA § 14(h)(1) PFSAs, or authorize another entity to do so on their behalf.

Per its Resolution, TAC clearly elected to remove APIA as the entity to receive ANCSA § 14(h)(1) funding on its behalf and instead directly contract with BIA to receive the funding itself. In light of this clear request, BIA asserts that it had no choice but to withdraw the ANCSA § 14(h)(1) funding from APIA's FY 2006 AFA so that it could be transferred to TAC.

Contrary to BIA's interpretation, APIA asserts that the primary beneficiaries of the ANCSA § 14(h)(1) program are Alaska tribes and their members, not the Regional Corporations. It reasons that APIA, being a non-profit organization which represents thirteen Aleutian villages and the tribal members they serve, and not TAC, is the primary beneficiary of the ANCSA § 14(h)(1) program and thus has the superior right to contract for ANCSA § 14(h)(1) PFSAs.

APIA's assertion, however, is contradicted by the clear language, overall structure, and purpose of ANCSA. As explained previously, ANCSA was implemented by Congress in 1971 for the purpose of effecting "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). Section 14(h)(1) of ANCSA specifically provides a scheme under which the Secretary is authorized to withdraw from appropriation unreserved public land upon which a Native cemetery site or historical place is located. Under both ANCSA § 14(h)(1) and the implementing regulations, ANCSA Regional Corporations are the only entities authorized by law to file an application with BLM requesting the withdrawal and conveyance of existing cemetery sites or historical places. 43 U.S.C. § 1613(h)(1); 43 CFR 2653.5(f). The Regional Corporations must decide what lands to apply for, and have the sole authority to amend or withdraw applications. All application-related decision-making authority therefore lies with the Regional Corporations.

After BLM receives an application from a Regional Corporation, it is forwarded to BIA for investigation, report, and certification. 43 CFR 2653.5(h)-(k). Based on BIA's report and certification, BLM determines whether to issue a decision to convey. 43 CFR 2653.5(k). If BLM determines that the applied for site qualifies for conveyance, it "withdraw[s] and convey[s] to the appropriate Regional Corporation fee title" to the existing site. 43 U.S.C. § 1613(h)(1)(A). No other entities are qualified to receive conveyance or hold title to the site.

Unlike ANCSA § 14(c) conveyances to Village Corporations, which are subject to certain reconveyance requirements, the ANCSA § 14(h)(1) conveyances are permanently held by Regional Corporations. 43 U.S.C. §§ 1613(c), (h)(1). Regional Corporations take title to cemetery sites and historical places subject to a covenant running with the land which imposes on the Regional Corporation the responsibility of maintaining and preserving the sites solely as cemetery sites or historical places. 43 CFR 2653.5(a), 2653.11. The Regional Corporations therefore bear all of the expense and responsibility for not only acquiring Native cemetery sites and historical places, but for holding and maintaining these sites for the indefinite future.

APIA claims that despite the fact that Regional Corporations have been assigned the responsibility of identifying, applying for, owning, and protecting ANCSA § 14(h)(1) sites, Congress clearly intended the primary beneficiaries of ANCSA § 14(h)(1) to be Native peoples and Villages. In making this assertion, APIA relies primarily on floor statements made by Senators Stevens and Bible just prior to the passage of ANCSA.

As specifically regards ANCSA § 14(h)(1), Senator Stevens stated that:

> the intent of the conferees was not to take the places away from the village, to take away their cemeteries or their historical sites, but merely to place title in the regional corporation as the custodian of places properly identified as such sites * * * It is the intent of the conferees under this act that these areas will be preserved and that they are conveyed to the village corporations for that purpose and not for the purpose of commercial exploitation but to provide for the preservation of the cemeteries and historical sites.

117 Cong. Rec. 46964 (Dec. 14, 1971). Senator Stevens then yielded the floor to Senator Bible, who confirmed Senator Stevens' interpretation, stating that "[t]here is no intent whatever in the bill to take the last resting places or these historic sites away from the Native people or their village corporations." Id.

APIA asserts that in light of these floor statements, it is apparent that Congress simply intended the for-profit Regional Corporations to hold title to cemetery sites and historical places as trustees, or "custodians," on behalf of the true beneficiaries of ANCSA § 14(h)(1): Alaska Native peoples and Villages. APIA claims that consistent with Congress' intent to benefit tribal members, and not just corporate shareholders, the Department's regulations prohibit Regional Corporation's from using land conveyed under § 14(h)(1) for commercial purposes. In addition, the regulations impose on Regional Corporations the affirmative responsibility of maintaining and preserving the sites. 43 CFR 2653.5(a), 2563.11. APIA asserts that the de facto beneficiaries of the preservations of the sites are not the for-profit corporate shareholders of the Regional Corporation, but the Alaska Native peoples and Villages for whom the Regional Corporations simply act as "custodians." According to APIA, it is therefore APIA's member Villages, and the Native peoples they serve, which primarily benefit from the § 14(h)(1) PFSAs.

APIA's interpretation of these somewhat vague floor statements is, however, contradicted by both the clear language and overall scheme of ANCSA. As APIA correctly points out, it is obvious from both the floor statements as well as the regulations that Congress intended to convey cemeteries and historical sites to the Regional Corporations for the purpose of preservation instead of for commercial profit. However, contrary to APIA's further assertion, that fact does not demonstrate that village-based Native governments, or their members, are the primary beneficiaries of the ANCSA § 14(h)(1) conveyance program.[4/]

In implementing ANCSA § 14(h)(1), Congress specifically chose Regional Corporations instead of Village Corporations or Village governments as the entity to carry out the acquisition and protection of cemeteries and historical sites. Although Regional Corporations are for-profit corporations, their shareholders are made up entirely of Alaska Native peoples. In fact, at the time ANCSA was implemented, Regional Corporations represented the broadest-based group of Alaska Natives of any tribal entity. This is because ANCSA mandated that all Alaska Natives living on December 18, 1971, be enrolled into one of the thirteen ANCSA Regional Corporations. 43 U.S.C. § 1604. Even non-resident Alaska Natives were included in this enrollment, thereby ensuring that all living Alaska Natives were enrolled in a Regional Corporation.

Unlike universal Native enrollment in Regional Corporations, not all Alaska Natives were enrolled in a Village Corporation because if a Native was not a resident of a particular village at the time of enrollment (i.e., the Native was living outside Village limits or the State of Alaska), the Native was excluded from enrolling in a Village Corporation. Thus, while all Native members of a Village were also Regional Corporation shareholders, not all Regional Corporation shareholders were members of a Village. Therefore, at the time of ANCSA's passage, Regional Corporations were much more representative of Alaska Natives as a whole than Village Corporations or Village governments.

ANCSA also provides that lands in the core townships in which villages are located are subject to mandatory selection by and conveyance to Village Corporations. 43 U.S.C. §§ 1610(a)(1), 1611(a), 1613(h). The cemeteries and historical sites to be conveyed under § 14(h)(1) therefore cannot be located within the immediate vicinity of villages.

[4/] APIA's assertion that the primary beneficiaries of the ANCSA § 14(h)(1) program are Alaska Villages and their members, not the Regional Corporations, is further undercut by the fact that it itself recognized TAC, the ANCSA Regional Corporation for the Aleut Region, as the beneficiary of the ANCSA § 14(h)(1) program in its "Self Governance Multi-Year Funding Agreement (10/01/03-09/30/08). The agreement specifically states that "the program's remaining work, however, is focused on Section 14(h)(1) claims—the Native beneficiaries of which are ANCSA Regional Corporations."

Instead, the sites conveyed under § 14(h)(1) are not associated with any particular Village, but have a more regional focus which Congress recognized was better served by a regional entity. Accordingly, Congress provided for the conveyance of sites to Regional Corporations, the entities with the most regionally-based Native membership.

While Villages and their Native members may, in a broad sense, benefit from the preservation of § 14(h)(1) cemeteries and historical sites, there is nothing in the overall scheme of ANCSA which supports that Villages are the primary beneficiaries of § 14(h)(1) conveyances. These regionally located cemeteries and historical sites were to be selected for and preserved on behalf of all Alaska Natives affiliated with a region, not just those Alaska Natives who are members of a Village. Congress clearly recognized that the purposes of § 14(h)(1) would be best served by the entity with the broadest base of Native members—the Regional Corporation—and therefore gave each Regional Corporation the responsibility of identifying, applying for, and preserving § 14(h)(1) sites on behalf of its shareholders.

In conclusion, the undersigned finds that none of APIA's arguments fundamentally undermine the soundness of the BIA conclusion that ANCSA Regional Corporations, on behalf of their Alaska Native shareholders, are the primary and direct beneficiaries of the ANCSA § 14(h)(1) program. It is therefore TAC, and not APIA, that is the primary beneficiary of the ANCSA § 14(h)(1) program.

B. "Order of Precedence" is Inapplicable.

APIA asserts that even if TAC is the primary beneficiary of the ANCSA § 14(h)(1) program, APIA should be given contracting priority over TAC pursuant to BIA's longstanding "Order of Precedence." The "Order of Precedence" is a BIA-developed policy intended to apply in the case where there are competing requests by eligible tribes to contract under the ISDEAA to carry out the same PFSAs. Pursuant to this policy, BIA recognizes and requires supporting resolutions from tribal entities in order of their priority as follows:

1. Active Indian Reorganization Act (IRA) Council.
2. In the absence of an IRA, the formally established Traditional Council.
3. In the absence of either of the first two, the local ANCSA village/urban for-profit corporation.
4. In absence of all above, the ANCSA Regional for-profit Corporation.

Douglas Indian Assoc. v. BIA, 27 IBIA 292 (1995).[5/]

[5/] See also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364, 54366 n. 2 (Oct. 21, 1993) (stating that "[u]nder longstanding BIA policy, priority for contracts and services in Alaska is given to reorganized and traditional governments over non-tribal corporations.")

APIA claims that it has contracting priority over TAC under the "Order of Precedence" because it is the authorized representative of thirteen Aleut tribal governments. APIA therefore concludes that, with or without an authorizing resolution from TAC, it is the proper entity to compact under the ISDEAA to perform § 14(h)(1) PFSAs.

The undersigned is persuaded, however, that the "Order of Precedence" is inapplicable and non-binding in this instance. BIA's longstanding "Order of Precedence" is normally applied with respect to BIA programs designed to serve individuals or Native communities. In these instances, it is logical that contracts would be prioritized beginning at the most local tribal government level. The ANCSA § 14(h)(1) program constitutes an exceptional case in that it is specifically intended to benefit a broader group: ANCSA Regional Corporations and the shareholder class they represent.

As discussed previously in Subsection A of this decision, the Indian tribal organization most directly served by the ANCSA § 14(h)(1) program is the Regional Corporation. Section 14(h)(1) PFSAs are intended to primarily benefit the Regional Corporation and all of its shareholders, a substantially larger and different group of Alaska Natives than would be represented by the village governing bodies. Applying the "Order of Precedence" to the ANCSA § 14(h)(1) program would essentially circumvent this Congressional intent by allowing a local tribal government serving a narrower class of beneficiaries to contract for ANCSA § 14(h)(1) PFSAs instead of the intended Regional Corporation. Accordingly, the undersigned finds that the "Order of Precedence" is inapplicable and non-binding to requests to contract to carry out ANCSA § 14(h)(1) PFSAs.

As BIA points out, BLM similarly chose not to apply BIA's "Order of Precedence" when faced with an almost identical situation. In the early 1990's, BLM was confronted with competing requests to enter into ISDEAA contracts to perform ANCSA surveying work, including requests submitted by ANCSA Regional Corporations. BLM determined that ANCSA Regional Corporations, and the shareholder class they represent, rather than village-based tribal governments, were the direct beneficiaries of the ANCSA conveyance-related surveying activity. BLM reasoned that because Regional Corporations were clearly the Indian tribes to be served under the contract, they should have the first claim with respect to the right to contract to perform ANCSA-related surveys. (See October 5, 1992 Memorandum from Office of the Regional Solicitor to Division of Indian Affairs, BIA Ex. 3)

The undersigned is persuaded by the reasoned approach taken by BLM. Although the "Order of Precedence" reflects longstanding BIA policy, it should not be adhered to where its application has the effect of circumventing Congressional intent. See The Wilderness Soc'y, 106 IBLA 46, 55 (1988) (policy guidelines are not intended to provide inflexible constraints where variance from guidelines is justified); see also Kay Kayser-Meyring v. BLM, 152 IBLA 39 (2000) (policy is not binding on agency where it is contrary to any applicable law or

regulations). The "Order of Precedence" should therefore not be applied where, as in this instance, it is clear that the Regional Corporation is the Indian tribe to be served by the program to be contracted for. As the primary beneficiary of ANCSA § 14(h)(1), TAC should be given contracting priority over APIA.

C. BIA's Partial Rejection of APIA's Proposed FY 2006 AFA Did Not Violate ISDEAA Declination Procedures and Criteria.

APIA asserts that BIA's partial rejection of its proposed FY 2006 AFA was made in violation of ISDEAA's statutorily required declination procedures and criteria and should therefore be reversed. APIA contends that pursuant to § 102(a)(2) of the ISDEAA, BIA can reject APIA's proposal to amend its AFA only if one of five specific and limited conditions is met. 25 U.S.C. § 450f(a)(2); see also 25 CFR 900.22 (explaining that "[t]he Secretary may only decline to approve a proposal for one of five specific reasons"). APIA claims that BIA has failed to meet the statutory burden of producing "a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that" one of the five criteria exists. 25 U.S.C. § 450f(a)(2). Based on this claim, APIA argues for reversal of BIA's decision to partially reject APIA's proposed FY 2006 AFA.

Contrary to APIA's contention, a proposal to contract may also be properly declined if not supported by a legally sufficient tribal resolution. See Hannahville Indian Comm. v. BIA, 34 IBIA 4, 7-9 (1999) (holding that a legally sufficient tribal resolution is a statutorily necessary antecedent part of a request to enter into an ISDA contract). The submission of a tribal resolution is required by § 102(a)(1) of the ISDEAA which provides that "the Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts * * *." 25 U.S.C. § 450f(a)(1) (emphasis added). The implementing regulations further provide at 25 CFR 900.8(d) that "[a]n initial contract proposal must contain * * * a copy of the authorizing resolution from the Indian tribe(s) to be served." Whether a proposal to contract is supported by a legally sufficient tribal resolution is therefore a threshold issue to be determined prior to considering whether a contract proposal satisfies the five specific declination criteria set forth in § 102(a)(2).

Regarding the threshold requirement that an ISDEAA contract applicant have proper tribal authorization, the preamble to the final rule promulgating 25 CFR part 900 states:

> It should be clear, however, that Section 102(a)(2) of the Act[, 25 U.S.C. § 450f(a)(2),] only requires the Secretary to consider a proposal if "so authorized by an Indian tribe" pursuant to the tribal resolution required under Section 102(a)(1) of the Act[, 25 U.S.C. § 450f(a)(1)]. Therefore, although technically outside of the enumerated declination criteria in Section 102(a)(2) of the Act, it is also clear that the Act precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

61 Fed. Reg. 32482, 32486 (June 24, 1996). Accordingly, if a proposal for contract funding is not authorized by resolution "from the Indian tribe(s) to be served," the Secretary's obligation to approve the proposal unless it demonstrates that one of the five specified declination criteria apply is not triggered.

BIA admittedly did not apply the declination criteria or procedures set forth in Section 102(a)(2) in arriving at its decision to reject APIA's proposal to include ANCSA § 14(h)(1) funds in its FY 2006 AFA. This is so because BIA determined that APIA lacked a legally sufficient tribal resolution before reaching the issue of whether the proposed FY 2006 AFA satisfied all of the declination criteria.

Just prior to APIA's submittal of its proposed FY 2006 AFA, TAC passed a tribal resolution in which it specifically removed APIA as the entity to receive ANCSA § 14(h)(1) funding on its behalf and resolved to itself directly contract with BIA for the funds. BIA determined that in the light of TAC's resolve to contract directly with the BIA, it had no choice but to withdraw the ANCSA § 14(h)(1) funding from APIA's FY 2006 AFA so that the funding could be transferred to TAC.

Because APIA's proposal failed to meet § 102(a)(1)'s threshold requirement that it be supported by a legally sufficient tribal resolution, BIA properly rejected it before reaching the issue of whether the proposal satisfied the specific declination criteria set forth in § 102(a)(2). As explained previously in detail, TAC, as the ANCSA Regional Corporation, is the Indian tribe to be served most directly by the ANCSA § 14(h)(1) program. Accordingly, TAC is given priority over all other tribal entities to enter into an ISDEAA contract to carry out ANCSA § 14(h)(1) PFSAs, or authorize another entity to do so on its behalf.[6/] Given TAC's May 20, 2005, Resolution specifically denying APIA the authorization to contract on its behalf to carry out ANCSA § 14(h)(1) PFSAs, APIA's proposal to contract for ANCSA § 14(h)(1) funding in its FY 2006 AFA clearly was not supported by a legally sufficient tribal resolution.

APIA further argues that BIA was required, under § 102(a)(2) and 25 CFR 900.29(a), to provide APIA with its decision to partially decline its proposed FY 2006 AFA in writing

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[6/] As APIA points out, BIA has historically compacted with APIA to carry out ANCSA § 14(h)(1) PFSAs on the basis of sanctioning resolutions from the federally recognized tribes in the region, and has not required that APIA obtain a supporting resolution from TAC. Whether or not it was proper for BIA to compact with APIA to carry out ANCSA § 14(h)(1) PFSAs in the absence of a TAC resolution authorizing them to do so is, however, not the issue on appeal. At issue is whether it is proper for BIA to approve APIA's request to include ANCSA § 14(h)(1) funds in its proposed FY 2006 AFA in light of TAC's Resolution which expressly states TAC's intent to remove APIA as the entity to receive ANCSA § 14(h)(1) funding on its behalf.

within 90 days after receipt of the proposal. APIA contends that BIA's failure to do so resulted in the automatic acceptance of APIA's proposal to include ANCSA § 14(h)(1) funds in its FY 2006 AFA. See 25 CFR 900.18 (providing that "[a] proposal that is not declined within 90 days * * * is deemed approved).

However, § 102(a)(2) and 25 CFR 900.29(a) do not apply where, as here, the proposed funding agreement is submitted without a proper tribal resolution. As previously discussed, the Secretary's obligations under § 102(a)(2) are not triggered unless a proposal for contract funding is authorized by resolution "from the Indian tribe(s) to be served." See 25 CFR 900.8(d); 25 U.S.C. §§ 450f(a)(1)-(2). Because APIA's proposal was not supported by a legally sufficient tribal resolution as required by § 102(a)(1), the Secretary's obligation to approve the proposal within 90 days unless it provides APIA with written notice that one of the specified declination criteria apply was never triggered.

However, even assuming that those sections do apply, APIA's argument that its proposed FY 2006 AFA should be deemed approved because BIA failed to decline it in writing within 90 days cannot be sustained. BIA lacks authority to enter into an ISDEAA contract that is not authorized by a tribal resolution. See 25 U.S.C. §§ 450f(a)(1)-(2); 25 CFR 900.8(d). BIA therefore could not lawfully enter into an AFA with APIA because APIA's proposal for contract funding lacked a legally sufficient tribal resolution. BIA should not be required "to enter into an unlawful contract because no declination was made within 90 days of the submission" of APIA's proposed FY 2006 AFA. Hannahville Indian Community v. BIA, 37 IBIA 35, 43-44 (2001). Accordingly, even if BIA was required to provide a written decision declining APIA's proposal within 90 days of its submission, its failure to do so would not result in the approval of APIA's request to include ANCSA § 14(h)(1) funds in its proposed FY 2006 AFA.

In conclusion, the undersigned finds that BIA's rejection of APIA's proposed FY 2006 AFA on the basis that it included a request for ANCSA § 14(h)(1) funding did not violate the ISDEAA's declination procedures and criteria, as they were inapplicable in light of APIA's lack of proper tribal authorization.

D. BIA's Partial Rejection of APIA's Proposed FY 2006 AFA Did Not Violate § 106(b)(2) of the ISDEAA or the Implementing Regulations at 25 CFR 900.32 and 900.33.

APIA argues that BIA was required, under § 106(b)(2) of the ISDEAA, 25 U.S.C. § 450j-1(b)(2), and 25 CFR 900.32, to approve the proposed FY 2006 AFA because it is substantially the same as the prior AFA. Section 106(b)(2) states that the amount of funds initially provided under a self-determination contract shall not be reduced by the Secretary in subsequent years except in certain specified circumstances (such as reduction in federal appropriations for the contracted activity, tribal authorization for the reduction, or completion

of the activity). The implementing regulations at 25 CFR 900.32 provide that if a tribe's proposed successor AFA is "substantially the same" as the prior AFA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled and may not decline any portion of the successor AFA.

Any portion of the proposed successor AFA which is not substantially the same as the prior AFA is subject to the declination criteria and procedures in 25 CFR part 900, subpart E (25 CFR 900.20-900.33). 25 CFR 900.32. BIA argues that the proposed AFA is not substantially the same as the prior AFA, and is thus subject to declination, because of TAC's intervening issuance of the resolution withdrawing its authorization for APIA to handle the ANCSA § 14(h)(1) functions.

However, 25 U.S.C. § 106(b)(2) and 25 CFR 900.32 do not apply where, as here, the proposed funding agreement is submitted without that which is required by § 102(a)(1) of the ISDEAA, 25 U.S.C. § 450f(a)(1), and 25 CFR 900.8(d): an authorizing resolution to contract to carry out ANCSA § 14(h)(1) PFSAs from the tribe to be served (TAC). As previously mentioned, a proposal for contract funding is not valid, and it does not trigger the Secretary's obligation to approve the proposal unless one of the specified declination criteria apply, if the proposal is not authorized by resolution "from the Indian tribe(s) to be served." See 25 CFR 900.8(d), 900.15; 25 U.S.C. §§ 450f(a)(1)-(2).

Likewise, the obligation of the Secretary to approve a proposed successor AFA if it is "substantially the same" as the prior AFA is contingent upon the submittal of a valid proposal, i.e., one supported by an authorizing resolution from the tribe(s) to be served. In this case the tribe to be served is TAC, which has specifically stated by resolution that APIA is not authorized to handle the ANCSA § 14(h)(1) PFSAs, and therefore APIA's proposal for ANCSA § 14(h)(1) funding is not valid and does not trigger application of 25 U.S.C. § 106(b)(2) and 25 CFR 900.32.

Assuming, arguendo, that those sections do apply, a review of the cogent analysis of the Departmental Appeals Board (DAB) of the Department of Health and Human Services (HHS) in Ninilchik Traditional Council, HHS DAB No. 1711, Docket No. A-2000-17 (IBIA 99-72-A) (Dec. 7, 1999), leads to the conclusion that APIA's proposed FY 2006 AFA is not "substantially the same" as the prior AFA. In Ninilchik, the Ninilchik Traditional Council (NTC) submitted to the Indian Health Service (IHS), HHS, a proposed AFA for FY 1999 under an existing ISDEAA contract. That contract provided that the allowable indirect contract support costs (CSC) shall be obtained by applying negotiated indirect cost rates to direct cost bases agreed upon by the parties.

Pursuant to this provision, an initial provisional indirect cost rate of 80% for FY 1996 and FY 1997 was negotiated by NTC and the HHS Division of Cost Allocation (DCA). A provisional rate is a temporary indirect cost rate applicable to a specified period which is used pending the establishment of a final rate for that period.

With regard to the proposed AFA for FY 1999, IHS denied some of the funding for indirect CSC because IHS found that some of the costs, in violation of § 106(a)(3)(A) of the ISDEAA, were not reasonable and allowable costs and were duplicative of direct program funding provided under § 106(a)(1) of the ISDEAA. On appeal, NTC argued that IHS had to approve the funding for indirect CSC pursuant to 25 CFR 900.32 because the proposed AFA provided for approximately the same amount of funding for indirect CSC as set forth in the prior AFA.

However, the means for determining indirect CSC in the proposed AFA differed from the means in the prior AFA. The DAB concluded that the proposed AFA could not reasonably be viewed as "substantially the same" as the prior AFA, notwithstanding the fact that the amount of indirect CSC under the two funding agreements happened to be approximately the same.

The DAB reasoned:

> * * * NTC's proposed fiscal year 1999 funding agreement differs from its prior year funding agreement in that its prior year funding agreement was not based on a final negotiated rate or methodology that had been reviewed or approved by any component of HHS. Although the prior year funding agreement purported to be based on an indirect cost rate of 80%, NTC had an 80% [negotiated,] provisional indirect cost rate for fiscal years 1996 and 1997 only. DCA unilaterally reduced NTC's 80% provisional rate to a final rate of 47.5% for fiscal year 1996 and NTC failed to submit a proposal for a final indirect cost rate for fiscal year 1997. Thus, although NTC's self-determination contract requires a "negotiated" indirect cost rate, the prior year funding agreement was not based on any current negotiated or approved rate or methodology. In contrast, NTC's proposed fiscal year 1999 funding agreement is based on a indirect type cost methodology that is subject to negotiation with IHS. I agree with IHS that NTC's decision to submit a proposed fiscal year 1999 funding agreement with an indirect type methodology directly to IHS after having a prior year funding agreement that was not based on a negotiated or final rate resulted in a proposal that was not "substantially the same" as the prior year funding agreement, thus giving IHS both the opportunity and the responsibility to examine the types of indirect CSC NTC was claiming.

Ninilchik, at 10.

The DAB also noted that 25 CFR 900.32 gives as examples of situations where a proposed funding agreement is not "substantially the same" as the prior year funding agreement "a redesign proposal; waiver proposal; different proposed funding amount; or

different program, service, function, or activity." It reasoned that "[t]hese examples suggest that a proposed funding agreement could be not 'substantially the same' as the prior year funding agreement even if the amounts are the same, e.g., a proposal for a different PFSA could still be for the same amount as the prior year funding agreement." Ninilchik, at 13.

The DAB also found:

> My conclusion that NTC's proposed fiscal year 1999 funding agreement was not "substantially the same" as the prior year funding agreement within the meaning of section 900.32 is also consistent with the requirements of section 106(a)(3)(A) of the [ISDEAA]. As noted above, that section provides that CSC shall be "for reasonable and allowable costs" of operating the PFSAs pursuant to the contract, and "shall not duplicate" the direct program funding provided under section 106(a)(1). Assuming that IHS correctly determined that NTC's fiscal year 1999 proposed funding agreement included indirect type CSC which were duplicative and/or unreasonable, those costs would be unallowable under section 106(a)(3)(A). Thus, unless NTC's proposed fiscal year 1999 funding agreement is subject to the declination criteria pursuant to section 900.32, IHS would be required to award funding for costs that are clearly unallowable under the statute.

Id.

The proposed AFA in the present case is not "substantially the same" as the prior AFA because of TAC's intervening resolution passed on May 20, 2005, which specifically "remov[ed] APIA as the entity to receive ANCSA 14(h)[(1)] funding on its behalf" and provided that TAC would "directly contract with the Bureau of Indian Affairs for the ANCSA 14(h)[(1)] Historical and Cemetery funding." At that point any question as to whether APIA met the requirement of § 102(a)(1) and 25 CFR 900.8(d) of being authorized by resolution "from the tribe(s) to be served" to contract for ANCSA § 14(h)(1) activities was answered in the negative.

APIA's proposal to include ANCSA § 14(h)(1) funding in its FY 2006 AFA without authorization to contract is not "substantially the same" as its prior AFA for which it may have had such authorization by virtue of the resolutions from the 13 tribal organizations and the MOA between APIA and TAC. Unless APIA's proposed FY 2006 AFA may be declined with respect to the ANCSA § 14(h)(1) PFSAs, BIA would be required to award funding for PFSAs for which APIA is clearly no longer authorized to contract under 25 U.S.C. § 102(a)(1) and 25 CFR 900.8.

As such, declination of the proposal for ANCSA § 14(h)(1) funding is appropriate pursuant to § 102(a)(2)(E) of the ISDEAA, 25 U.S.C. § 450f(a)(2)(E), and 25 CFR 900.22(e), assuming, arguendo, that the declination criteria apply. Those sections allow for declination

where the Secretary clearly demonstrates that "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 covered under [25 U.S.C. § 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor." 25 U.S.C. § 450f(a)(2)(E); see also 25 CFR 900.22 (containing nearly identical wording). BIA has clearly demonstrated that without the requisite authorizing resolution, APIA cannot lawfully carry out the ANCSA § 14(h)(1) PFSAs. However, as discussed above, the declination criteria do not apply.

In conclusion, the undersigned finds that BIA's partial rejection of APIA's proposed FY 2006 AFA on the basis that it included a request for ANCSA § 14(h)(1) funding did not violate § 106(b)(2) of the ISDEAA or the implementing regulations at 25 CFR 900.32 and 900.33.

Conclusion

Without belaboring this Recommended Decision with additional references to contentions of fact and law, I hereby advise that all contentions submitted by the parties have been considered and, except to the extent they have been expressly or impliedly adopted herein, are rejected on the ground that they are, in whole or in part, contrary to the facts and law or are immaterial. Based upon the foregoing, BIA's rejection of that portion of APIA's FY 2006 AFA proposing funding for the performance of ANCSA § 14(h)(1) PFSAs is hereby affirmed.

// original signed

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Within 30 days of the receipt of this Recommended Decision, you 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, 801 North Quincy Street, Arlington, VA 22203-1905. 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.