



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Apache Tribe of Oklahoma v. Southern Plains Regional Director, Bureau of Indian Affairs

Docket No. IBIA 11-105 (12/15/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Departmental Hearings Division
405 South Main Street, Suite 400
Salt Lake City, Utah 84111
TELEPHONE: (801) 524-5344
FACSIMILE (801) 524-5539

December 15, 2011

APACHE TRIBE OF OKLAHOMA,)	IBIA 11-105
)	
Appellant)	Appeal of a February 10, 2011, Notice
)	of Reassumption of Administration of
v.)	Programs included in six Indian Self-
)	Determination and Education
SOUTHERN PLAINS REGIONAL)	Assistance Act contracts.
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
)	
Appellee)	

RECOMMENDED DECISION

Appearances: David McCullough, Esq., Norman, Oklahoma, for the Apache
Tribe of Oklahoma
Jessie Huff Durham, Esq., Tulsa, Oklahoma, for the Southern
Plains Regional Director, Bureau of Indian Affairs

Before: Administrative Law Judge Robert G. Holt

I. Introduction

This matter is before me on an appeal filed by the Apache Tribe of Oklahoma (the "Tribe") from a Notice of Reassumption, issued February 10, 2011, by the Southern Plains Region Awarding Officer, Bureau of Indian Affairs ("BIA"), and concurred in by the Southern Plains Regional Director, BIA. The notice informed the Tribe that BIA would reassume administration of the programs included in six contracts awarded under the Indian Self-Determination and Education Act, 25 U.S.C. §§ 450 to 458bbb-2 (2006) ("ISDA"). BIA cited the Tribe's mismanagement of funds as grounds for the reassumption. The Tribe filed an appeal and the Board of Indian Appeals (the "Board") referred the appeal to this office for a recommended decision.

The Tribe subsequently waived its right to an evidentiary hearing and agreed to have the appeal decided on the records relied upon by BIA. The parties completed briefing on November 7, 2011, and they have stipulated that this recommended decision may be issued within 60 days after the end of briefing.

The record demonstrates that the Tribe has mismanaged the funds provided under its ISDA contracts. The Tribe does not dispute this finding but claims that a former tribal chairman, Alonzo Chalepah, was responsible for the mismanagement. It argues that a fiduciary relationship prevented BIA from reassuming the contracts after the Tribe voted out the old chairman and elected a new Business Committee. I have concluded that no fiduciary obligation exists that prevents BIA from reassuming the contracts.

The following sections will first examine the statutes, regulations, and contract terms that govern the Tribe's financial management obligations. Next the Tribe's mismanagement of funds will be described and the final section will examine whether BIA breached a fiduciary obligation to the Tribe.

II. Background¹

A. Applicable Statutes, Regulations, and Contract Provisions

The ISDA provides Indian tribes with the opportunity to assume the control and operation of Federal Indian programs by entering into contracts or grant agreements with the appropriate Secretary to perform those programs. 25 U.S.C. § 450f(a)(1) (2006). When a tribe elects to enter into an ISDA contract, BIA must provide to the tribe all the funds that BIA would have otherwise expended for the operation of the portion of the program covered by the contract. *Id.* §§ 450j-1(a), 450j-1(g). Unlike other contracts, the Government may pay funds to the tribe in advance of its expenditures and the tribe need not account for the interest it earns on those funds. *Id.* § 450j(b). But a tribe must still account for the funds provided, and a tribe must repay any funds not expended to the United States Treasury. *Id.* § 450c.

¹ Much of the following section is borrowed, with little modification, from the briefs filed by the parties.

Under the statute and the regulations at 25 C.F.R. part 900, tribes must keep adequate records to document expenditures and must submit a single-agency audit report in accordance with the Single Audit Act of 1984, 31 U.S.C. §§ 7501-7507 (2006), as implemented by OMB Circular A-133. Tribes must also expend and account for funds according to all applicable tribal laws, regulations and procedures. 25 C.F.R. §§ 900.42-.43. Federal regulations provide minimum standards for financial, procurement and property management systems used by tribes. *Id.* pt. 900, subpt. F.

At a minimum, a tribal financial management system must be sufficient to 1) prepare required ISDA reports, and 2) trace contract funds to a level of expenditure adequate to establish that the tribe has not used the funds in violation of any statutory restrictions or prohibitions. *Id.* § 900.44. Every tribal financial management system must include provisions for financial reports, accounting records, internal controls, budget controls, allowable costs, source documentation, and cash management. The regulation provides:

(a) *Financial reports.* The financial management system shall provide for accurate, current, and complete disclosure of the financial results of self-determination contract activities. This includes providing the Secretary a completed Financial Status Report, SF 269A, as negotiated and agreed to in the self-determination contract.

(b) *Accounting records.* The financial management system shall maintain records sufficiently detailed to identify the source and application of self-determination contract funds received by the Indian tribe or tribal organization. The system shall contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income.

[* * *]

(d) *Allowable costs.* The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of self-determination contract costs based upon the terms of the self-determination contract and the Indian tribe or tribal organization's applicable OMB cost principles, as amended by the Act and these

regulations. [OMB Circulars A-87 and A-122 may be utilized by agreement.]

(e) *Source documentation.* The financial management system shall contain accounting records that are supported by source documentation, e.g., canceled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that support self-determination contract fund expenditures.

Id. § 900.45.

OMB Circular A-87 (2 C.F.R. pt. 225) governs costs under Federal awards. OMB Circular A-102 establishes uniformity between Federal agencies in the use of grants and cooperative agreements with state, local and federally-recognized Indian tribal governments, and is implemented for the Department of the Interior at 43 C.F.R. part 12. OMB Circular A-133 sets the uniform standards for the audit of non-Federal entities expending Federal awards.

Regulations also establish standards for procurement management systems to govern the performance of employees who award and administer contracts or purchase orders. These include no conflict of interest, no solicitation of favors from contractors, full and open competition, due diligence in selecting responsible contractors, record keeping, and a process for resolving procurement disputes. 25 C.F.R. §§ 900.47–.50. They also establish standards for property management systems to account for all property furnished or transferred by the Secretary for use under the contract or acquired with contract funds. *Id.* §§ 900.51–.60.

The contracts also contain numerous provisions governing the management of the Federal funds. The work that the Tribe must perform with the funds awarded under its contracts is set forth in an Annual Funding Agreement ("AFA"). *E.g.*, R. bk. 3, tab H, Contract CTB06T80948, Attach. 2, § B at 29-30. The Tribe's contracts state that, in addition to the regulations, OMB Circulars A-87, A-102, and A-133 also apply. *E.g.*, *Id.* § C(9) at 39.

To ensure compliance with the terms of the contracts, statutes, regulations and OMB Circulars, the contracts require the Tribe to submit quarterly financial status reports to BIA with detailed expenditure reports. *E.g., Id.* § 1(E)(3) at 15, and Attach. 2, § C(1) at 31. The contracts also require the Tribe to submit a single audit report in accordance with the Single Audit Act. *E.g., Id.* Attach. 2, § C(2) at 31. Should the Tribe mismanage the funds awarded under its contracts, the contracts provide for reassumption in accordance with the ISDA and the regulations at 25 C.F.R. part 900, subpart P. *E.g., Id.* Attach. 2, § D(7) at 43.

B. The Tribe's Mismanagement of Funds

The first serious evidence of the Tribe's mismanagement of ISDA contract funds surfaced in the Fall of 2005. At that time BIA conducted a financial review of the programs then being operated by the Tribe. The review covered calendar years ("CYs") 2002, 2003, and 2004. BIA advised the Tribe of the results in January 2006. In addition to numerous programmatic and management system deficiencies, BIA initially questioned nearly \$300,000 in costs. R. bk. 2, tab B(1), at 1-91. After working with the Tribe in an effort to document the questioned costs from the 2005 financial review, BIA issued its Findings and Determination on October 24, 2006. BIA disallowed \$43,133.23 in costs. *Id.* at 103-113. It found that the Tribe could not charge these costs against the contracts because the Tribe had not properly documented them in accordance with 25 C.F.R. § 900.45(e), or because they were not allowable under the contracts or OMB Circular A-87. *Id.* at 106-07, 113.

BIA also cited widespread systemic deficiencies in the Tribe's required management systems. It found that the Tribe did not follow its travel and procurement policies, that the Tribe did not have an approved property management system, that the Tribe had an inadequate finance accounting system, that the Tribe needed a payroll system, that the Tribe did not have a records management system, and that the Tribe's finance office staff lacked qualifications and training. *Id.* at 108-110. As a result of these findings, BIA warned: "If the Tribe continues in its present state of doing business, the Bureau will have no alternative but to proceed with placing the Tribe on "High Risk" status and possibly reassume all P.L. 93-638 [i.e., ISDA] contracts and grants, if corrective actions are not taken to comply with the Indian Self-Determination and Education Assistance Act right

away.” *Id.* at 111-112. The Tribe did not appeal this decision and, as such, the factual findings are no longer subject to challenge. R. bk. 2, tab C(3) at 1.

The Tribe also failed to comply with audit and financial reporting requirements during this period. In May 2005 BIA imposed Level I Sanctions against the Tribe in accordance with OMB Circular A-133, because the Tribe had not submitted its 2002 and 2003 single audits. Level I Sanctions limit a tribe’s contract payments to monthly advances, rather than the quarterly, semi-annual, or annual payments permitted by the ISDA. R. bk. 2, tab A(2), at 1-8. By May 2006 the Tribe had still not submitted its CY 2003 single audit, and its CY 2004 audit was by then delinquent as well. Accordingly BIA placed the Tribe on Level II Sanctions. Under Level II Sanctions, the Tribe may not receive contract support payments until it submits the delinquent audit. R. bk. 2, tab B(7), at 1-3.

In July 2006 BIA advised the Tribe that it was delinquent in the submission of financial status reports for several contracts. R. bk. 2, tab B(6), at 1-9. In November 2006 BIA provided the Tribe with copies of the 1997-2004 contracts, which the Tribe’s Chairman stated had either been lost or removed from the Tribe’s administrative offices. R. bk. 2, tab B(8). In May 2007 BIA again provided the Tribe with copies of several contracts. R. bk. 2, tab C(11). In July 2007 BIA returned 32 financial status reports to the Tribe for corrections. R. bk. 2, tab C(8). In August 2007 BIA reminded the Tribe that dozens of financial status reports were outstanding on its transportation contracts. R. bk. 2, tab C(9).

The Tribe finally submitted its CY 2004 single audit to BIA in April 2007. The independent auditor identified deficiencies in the Tribe’s payroll processing (item 04-1), accounting system (item 04-2), and reconciliation of activities to general ledger account balances (item 04-3). R. bk. 1, tab 3(A), at 50-51. With particular respect to these deficiencies, the auditor’s report stated:

A control deficiency exists when the design or operation of a control does not allow management of employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis. A significant deficiency is a control deficiency, or a combination of control deficiencies [*sic*] that adversely affects the entity’s ability to initiate, authorize, record, process, or report financial data reliably in accordance with generally accepted

accounting principles such that there is more than a remote likelihood that a misstatement of the entity's financial statements that is more than inconsequential will not be prevented or detected by the entity's internal control. I consider the deficiencies described in the accompanying schedule of findings and questioned costs as items 04-1, 04-2, and 04-3 to be significant deficiencies in internal control over financial reporting.

A material weakness is a significant deficiency, or combination of significant deficiencies, that results in more than the remote likelihood that a material misstatement of the financial statements will not be prevented or detected by the entity's internal control. [...] However, of the significant deficiencies noted above, I consider all deficiencies to be material weaknesses.

Id. at 39-40. In other words, the Tribe's financial management systems were so bad, the Tribe could not rely on their financial statements to be accurate. The auditor then questioned over \$2,000,000 in costs charged to the Tribe's contracts, as well as to the Tribe's contracts and grants with other Federal agencies. *Id.* at 48-54.

As a result of the 2005 programmatic and financial review and the Tribe's adverse CY 2004 audit, BIA designated the Tribe a "High Risk Contractor/Grantee," in June 2007, in accordance with OMB Circular A-102, as implemented by 43 C.F.R. part 12. R. bk. 2, tab C(4) at 6-8. BIA considers a tribe as "high risk" if the tribe (1) has a history of unsatisfactory performance, (2) is not financially stable, (3) has a management system that does not meet the management standards set forth in 43 C.F.R. part 12, (4) has not conformed to the terms and conditions of previous awards, or (5) is otherwise not responsible. 43 C.F.R. § 12.52(a). As a result of the Tribe's "high risk" designation, BIA placed a number of special conditions on the contracts. The most significant condition required the Tribe to submit documentation (i.e., vouchers, purchase orders, vendor invoices, payroll documents) to BIA in advance of each payment request. R. bk. 2, tab C(4) at 6-8.

Throughout 2007 BIA met with tribal officials and representatives regularly to resolve the questioned costs from the CY 2004 audit, to provide technical assistance in developing a plan to correct the deficiencies found during the 2005 financial review, and to assist the Tribe in removing its "High Risk" designation. R. bk. 1, tab

3(B), at 5-12; bk. 2, tabs C(2), C(6), C(7) and C(13). After receiving the Tribe's CY 2004 single audit, described above, BIA worked with the Tribe for nearly a year to resolve the auditor's questioned costs. R. bk. 1, tab 3(B), at 1-32. BIA advised the Tribe why the auditor questioned its costs:

1. Documentation did not include all itemized receipts to document they were necessary, reasonable or allocable.
2. Documentation submitted identifies items that were not allowable under the contract.
3. There were no Purchase Requisitions or Purchase Orders for the majority of purchases that were processed for payment.
4. There were not any copies of "subcontract agreements" to verify that three bids were obtained for all of the expenditures made, as required for such documentation.
5. Several payments for travel did not include required receipts or evidence to support the employee attended the meeting, etc. that they proposed to attend.
6. Some expenditures were processed for payment utilizing only a statement received from the vendor. This does not document what was purchased and whether or not the items/goods purchased are allowable expenditures of the program.
7. Many expenditures did not include documentation to support prior approval of Tribal Administrator and Chairman or Secretary/Treasurer of the Tribe, where required.
8. Based upon documentation submitted, it appears an employee of the Tribe, who earned approximately \$52,000 in salary payments, is an owner of a company to which the Tribe has paid a large amount of money, approximately \$241,603, for contractual services of which this employee had direct involvement and oversight of such expenditures. Review of the documentation submitted indicates this is a "conflict of interest" to which funding may be disallowed. [See 25 CFR 900.48(b)(1) – "No employee, officer, elected official, or agent of the Indian tribe or tribal organization shall participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, would be involved.]

Id. at 26.

On March 26, 2008, in accordance with 25 U.S.C. § 450j-1(f) (2006), BIA issued its Findings and Determination regarding the CY 2004 audit. BIA disallowed \$772,784.19 in costs. *Id.* at 29-39. It attached detailed spreadsheets summarizing the basis for the disallowances. BIA disallowed expenditures for such things as the lack of source documentation, the lack of necessary approval, expenditures unrelated to the contract scope of work, duplicative expenditures, and expenditures inconsistent with procurement policy. *Id.* at 33-39. BIA's decision also noted that the Tribe remained on Level II Audit Sanctions because of its delinquent CY 2005 and 2006 audits. R. bk. 1, tab 3(B), p 31. The Tribe did not appeal this decision and, as such, the factual findings are no longer subject to challenge. *Id.* at 50.

Despite the lack of timely appeal, a delegation of tribal officials traveled to Washington, D.C. in 2009 to meet with the Assistant Secretary—Indian Affairs concerning the Tribe's CY 2004 audit related debt. As a courtesy to the Tribe, the Assistant Secretary—Indian Affairs asked the Director of BIA to review the Region's March 26, 2008 Findings and Determination. In September 2009 the Director wrote to the Tribe with respect to the disallowed costs for the Tribe's transportation contracts:

First, there was a large amount of costs disallowed because of a conflict of interest. [...] In my opinion, a conflict of interest did exist and these costs are therefore disallowed.

Second, numerous costs were disallowed because there was no prior approval of the purchase and there were not three bids on aggregate purchases of \$2,500.00 or more as specified in the purchasing guidelines of the Apache Tribe of Oklahoma's Financial Accounting Manual. [...] Because of no prior approval and no three bids, the majority of these purchases were disallowed.

Third, there were purchases made from the transportation funds that were not related to the project. [...] These purchases from the estimated savings of

the project were not eligible transportation related activities and were not allowed by the Secretary and therefore are disallowed.

Id. at 70-71. In sum, a year and a half after the Tribe had received BIA's Findings and Determination, the Director found that the Tribe had only presented documentation sufficient to support another \$4,111.70 in allowable costs.

BIA continued to provide regular technical assistance and training in 2008 and 2009. R. bk. 2, tabs D(2), D(9); bk. 3, tab E(2). But the Tribe made little progress. In February 2008, the tribal chairman wrote to BIA² to explain why the Tribe was having difficulty meeting its financial reporting requirements and completing its CY 2005 audit. With respect to the audit, the chairman stated: "The task was virtually impossible due to the fact that the prior governing body destroyed nearly all records relevant to the audit." R. bk. 2, tab D(2), at 6.

In 2008 BIA finally received the Tribe's CY 2005 single audit. The 2005 audit, like the 2004 audit, was adverse to the Tribe. R. bk. 2, tab D(7). The independent auditor reported eight significant deficiencies in internal control over financial reporting, of which he considered six to be material weaknesses. *Id.* at 39-40. The following finding with respect to "Expenditures" provides an example of the other findings:

Criteria or Specific Requirement: The Apache Tribe of Oklahoma's purchasing policy and procedures manual requires that all expenditures to be supported by the following: a purchase order, a purchase requisition, proper supporting documentation, and all purchases greater than \$2,500 to have three bids.

Condition: during our review of thirty-six federal programs expenditures, we noted the following:

- Fifteen expenditures tested were missing the purchase requisition.
- Fourteen expenditures tested were missing the purchase order.
- One expenditure tested was not coded properly.
- Four expenditures tested were not properly authorized.

² This letter was erroneously dated February 6, 2007.

- Three expenditures [sic] tested were missing the supporting documentation.
- Two expenditures tested were missing 3 bids in writing.

Questioned Costs: CFDA number: 20.205, \$15,236 in questioned costs.

Effect: Unauthorized or missing purchase orders and payments to vendors without invoices could lead to unauthorized disbursements.

Cause: Lack of adherence to Tribe purchasing policies and procedures.

Auditors' Recommendations: We recommend that the Tribe follow the provisions of its purchasing policies and procedures.

Id. at 49. The Tribe did not contest this audit finding. *See* R. bk. 3, tab E(6), at 13.

In summary, despite years of technical assistance and training, the Tribe made insufficient progress in correcting the actions that caused BIA to disallow costs and designate the Tribe a "High Risk Contractor/Grantee." The Tribe turned in some delinquent financial status reports, but BIA routinely returned many of them for correction or simply for signatures. R. bk. 2, tab D(3); bk. 3, tabs E(3), F(8). As a result of the Tribe's designation as a "High Risk Contractor," BIA could no longer disburse the Tribe's contract funds in 2007 until the Tribe had properly obligated or expended them. To receive the funds, the Tribe had to provide proper source documentation to BIA (e.g., receipts, invoices, vouchers, purchase orders, contracts, payroll documents). The Tribe had great difficulty producing the documentation necessary to receive its contract payments. It often requested payments without the necessary source documentation or requested payments for expenses that had already been paid. R. bk. 2, tabs D(1), D(10); bk. 3, Tabs E(1), F(2), F(3). In 2010 BIA had to return thousands of dollars in contract funding to the Treasury because the Tribe had not properly documented its expenditures. R. bk. 3, tabs F(5), F(6).

Thus, on September 22, 2010, BIA notified the Tribe that BIA intended to reassume the Tribe's ISDA contracts due to mismanagement in the use or handling of funds. BIA cited the deficiencies listed in the June 2006 "High Risk Letter," and the deficiencies noted in the CY 2004 single audit, as basis for its finding of

mismanagement. It also cited 13 additional deficiencies, including but not limited to the Tribe's inability to provide accurate and timely financial and programmatic reports, the lack of qualified and trained finance office employees, the lack of documentation to support expenditure claims, and the failure to follow established tribal policies and procedures. BIA provided the Tribe a list of corrective actions that it could take to overcome the deficiencies and offered technical assistance. R. bk. 3, tab F(1) at 1-6. The Tribe did not overcome the deficiencies within the requisite time or the extensions. Therefore, on February 10, 2011, BIA issued its decision to reassume the following ISDA contracts:

1. CTB06T80943 – Transportation Improvement Planning
2. CTB06T80945 – Social Services
3. CTB06T80946 – Adult Education
4. CTB06T80947 – Higher Education/Scholarships
5. CTB06T80948 – Job Placement and Training
6. GTB06T80908 – Indian Child Welfare (ICWA)

R. bk 1, tab 1.

Following the Notice of Reassumption, the Tribe invoked its right to an informal conference, which culminated in a recommended decision by the Informal Hearing Officer, who concurred with the Notice of Reassumption and found that the Tribe had mismanaged the contract funds. Letter of April 15, 2011 (attached as Ex. B to the Tribe's Notice of Appeal). The Tribe then filed a notice of appeal with the Board.

C. The Tribe's View of Events

The Tribe does not dispute the findings described above. Rather it argues that the mismanagement occurred under the leadership of the former tribal chairman, Alonzo Chalepah. According to the Tribe, BIA did not afford the new Business Committee, which recently took office, the same opportunities to clean up the prior

six years of mismanagement. Appellant's Resp. to Appellee's Statement of Points and Authorities 5.

The Tribe points to the 83 days between July 1, 2010, when the new Business Committee took office and September 22, 2010, when BIA sent written notice of its intent to reassume the contracts. According to the Tribe, BIA had no contact with the Tribe during this period. Then during the next 125 days, between the notice of intent to reassume on September 22, 2010, and the notice of reassumption on February 10, 2010, BIA demanded that the new Business Committee resolve the issues that BIA had worked with the former chairman for more than 2,000 days to correct. *Id.* at 12.

The notice of intent to reassume identified 15 corrective actions. R. bk. 3, tab F(1), at 3-4. According to the Tribe, BIA should have given the new Business Committee the same extensions of time that it had given the prior chairman to clean up the governmental and fiscal mess.

The BIA acknowledges the Tribe had made progress on almost all the items and the items were in various stages of completion. The new Business Committee of the Tribe contends the progress made on the items in the approximately 120 days it had to address the items was significant. And, just as the BIA had done for the previous 2,000 days with Chalepah, should have resulted in further extensions of time for the new Business Committee to clean up the governmental and fiscal mess resulting from Chalepah's mismanagement of the 638 programs over the previous six years.

Appellant's Resp. to Appellee's Statement of Points and Authorities 14.

The following analysis will demonstrate that BIA gave the new Business Committee the extensions it requested and otherwise complied with all its obligations to the Tribe.

III. Analysis

A. The Tribe's Argument

The Tribe argues that BIA breached a duty to the tribal members to assist the tribal government in developing a government capable of administering the contracts and that BIA continued to breach that duty when it reassumed the contracts. It argues that BIA had a fiduciary duty to do what was in the best interest of the tribal members, yet it continued to work with the old Chalepah government "to the detriment of the tribal membership." It concludes by stating that "but for the tribal membership rejection of Chalepah as their chairman, the notice of reassumption would not have been issued." *Id.* at 14-16. The Tribe has cited to no evidence to prove this last statement. Therefore the following analysis will concentrate on the argument that BIA breached a fiduciary duty when it reassumed the contracts.

B. BIA has not Breached a Trust Responsibility

The United States Supreme Court has recently held that "[t]hough statutes denominate the relationship between the Government and the Indians as a 'trust' . . . that trust relationship is defined and governed by statutes rather than the common law." *United States v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S. Ct. 2313, 2323 (2011). It went on to note:

But the applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." [*United States v. Mitchell*, 463 U.S. 206, 224 (1983)]. When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." [*United States v. Navajo Nation*, 556 U.S. 287, 129 S.Ct. 1547, 1558 (2009)]. The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.

Id. at 2325.

In this case the Tribe has not identified a specific trust-creating statute or regulation that BIA violated. Instead it cites to a case that generally describes fiduciary relationships in the context of commercial dealings between private parties. Appellant's Resp. to Appellee's Statement of Points and Authorities 15 (citing *Devery Implement Co. v. J. I. Case Co.*, 944 F.2d 724, 729 (10th Cir. 1991)). But *Jicarilla Apache Nation* has instructed that the common law is not enough to create a fiduciary obligation between the Federal Government and an Indian tribe. Any fiduciary obligation must be found in a statute or regulation — and the Tribe has not identified such a statute or regulation here.

The Tribe also quotes from the policy declaration in the ISDA to support its assertion that the statute imposes fiduciary duties on BIA. That declaration provides

[T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b) (2006). In an analogous situation, the Supreme Court has held that the Indian Mineral Leasing Act did not impose fiduciary duties upon the Government to oversee management of tribal lands where the purpose of the act, like the ISDA, was to enhance tribal self-determination. *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003). Similarly the policy declaration in the ISDA cannot impose fiduciary duties upon BIA. Since the very purpose of the ISDA is to enhance tribal self-determination it cannot also impose a duty upon BIA to insure that the Tribe has a government capable of administering the contracts.

The Board has previously considered a very similar situation in *33rd Bus. Comm. of the Cheyenne & Arapaho Tribes of Okla. v. Superintendent and Awarding Official, Concho Agency, Bureau of Indian Affairs*, 39 IBIA 253 (2004). In that case BIA had reassumed a law enforcement contract. In response to an argument that BIA had a trust responsibility to provide assistance to correct deficiencies, the Board disagreed.

Appellant's last argument is that BIA had an obligation and trust responsibility to allow the Tribes additional time and assistance

to correct the deficiency of staffing, before reassuming the contract. The Board disagrees.

The Federal regulations provide for a transfer of program responsibilities along with the funding when a tribe contracts under ISDA.

When an Indian tribe contracts, there is a responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities funded under the contract.

25 C.F.R. § 900.3(b)(4).

BIA assisted the Tribes for 120 days under the [technical assistance plan] to bring their program up to Federal standards. . . . ISDA is not designed to transfer funds and responsibilities to tribes and yet create an open-ended obligation on the part of BIA to save the contract when a tribe fails to perform.

Id. at 257-58.

The ISDA authorizes BIA to rescind a contract and resume control of the program involved when a tribe's performance involves mismanagement in the handling or use of funds:

Each contract . . . shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, . . . such Secretary may, under regulations prescribed by him and after providing notice and a hearing on the record to such tribal organization, rescind such contract or grant agreement, in whole or in part, and assume or resume control or operation of the program,

activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by the Secretary to remedy the contract deficiency,

25 U.S.C. § 450m (2006).

In order to reassume a contract on a non-emergency basis, BIA must first notify the tribe of the deficiencies in contract performance, request specified corrective action within a reasonable period of time, and “[o]ffer and provide, if requested, the necessary technical assistance and advice to assist the contractor to overcome deficiencies in contract performance.” 25 C.F.R. § 900.248(c). The record demonstrates that BIA discharged this obligation. It continued to provide technical assistance to the new Business Committee. R. bk. 3, tab F(3), at 6-9, tab F(4), tab F(5), tab F(6), at 3-17, tab F(9), at 2-3, tab F(10), at 4. And in the notice of intent to reassume, BIA identified the deficiencies, requested specific corrective action, and offered the technical assistance required by the regulation. R. bk. 3, tab F(1) at 4-5. The Tribe requested and received two extensions of time to respond to the deficiencies, but did not request any additional technical assistance. R. bk. 1, tab 2; bk. 3, tab F(1) at 7-13. Accordingly BIA was justified in sending it notice of reassumption. *See* 25 C.F.R. § 900.249. Therefore I must conclude that BIA satisfied all of its statutory and regulatory obligations for reassumption.

In summary the Tribe has not pointed to a specific statute or regulation that places a trust or fiduciary obligation on BIA “to the members of the [Tribe] to assist the Tribal government in developing a government capable of administering [the ISDA contracts].” Further BIA has clearly demonstrated that it satisfied the regulatory obligation to provide requested assistance to the Tribe.

IV. Conclusion

BIA has clearly established that the Tribe has mismanaged the funds provided under its ISDA contracts. In these circumstances the contracts provide for reassumption in accordance with the ISDA regulations, and BIA has strictly followed these obligations. Even though the Tribe argues that a former tribal chairman was responsible for the mismanagement, it has failed to demonstrate that a statute or regulation establishes a fiduciary obligation that prevents BIA from

reassuming the contract. Accordingly I conclude that BIA has clearly established the grounds for reassuming the contracts.

Having considered the motion, the other papers on file, and for good cause, it is ordered that:

1. The Notice of Reassumption, dated February 10, 2011, issued by the Southern Plains Regional Office, Bureau of Indian Affairs, involving the following six Indian Self-Determination and Education Assistance Act contracts is affirmed:

- a. CTB06T80943 – Transportation Improvement Planning
- b. CTB06T80945 – Social Services
- c. CTB06T80946 – Adult Education
- d. CTB06T80947 – Higher Education/Scholarships
- e. CTB06T80948 – Job Placement and Training
- f. GTB06T80908 – Indian Child Welfare (ICWA)

2. The appeal filed by the Apache Tribe of Oklahoma is dismissed.

//original signed

Robert G. Holt
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 C.F.R. § 900.166. An appeal to the IBIA under 25 C.F.R. § 900.166 shall be filed at the following address:

Board of Indian Appeals
801 North Quincy Street
Arlington, VA 22203

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