INTERIOR BOARD OF INDIAN APPEALS

Navajo Nation and Board of Directors of Shiprock Alternative Schools, Inc. v.
Office of Indian Education Programs, Bureau of Indian Affairs, and
Principal Deputy Assistant Secretary - Indian Affairs

40 IBIA 2 (05/10/2004)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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NAVAJO NATION and BOARD OF DIRECTORS OF SHIPROCK ALTERNATIVE SCHOOLS, INC., Appellants,	:	Order Vacating Recommended Decision, Dismissing for Lack of Jurisdiction, and Referring Appeal to the Assistant Secretary - Indian Affairs
v.	:	
OFFICE OF INDIAN EDUCATION PROGRAMS, BUREAU OF INDIAN AFFAIRS,	:	
and	:	Docket No. IBIA 04-20-A
PRINCIPAL DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS, Appellees.	:	
	:	May 10, 2004

The Navajo Nation (Nation) and the Board of Directors of Shiprock Alternative Schools, Inc. (SASI) (collectively "Appellants") appeal from a September 26, 2003, decision by the Principal Deputy Assistant Secretary - Indian Affairs (PDAS) and the Office of Indian Education Programs, Bureau of Indian Affairs (BIA). The PDAS refused to consider and approve a proposed grant amendment from SASI, submitted pursuant to the Tribally Controlled Schools Act (TCSA), 25 U.S.C.A. §§ 2501 - 2511 (Supp. 2004), to expand SASI's grant activities to include administration of the Kayenta Community School (Kayenta school), in Kayenta, Arizona, on the Navajo Reservation. A previous grant to the Kayenta Community School Board, Inc. (Kayenta School Board) had expired and the Nation did not reauthorize that entity to operate the Kayenta school. Following the September 26 decision, BIA took over administration of the Kayenta school.

The Nation and SASI appealed to the Board of Indian Appeals (Board) pursuant to the Indian Self-Determination and Education Assistance Act (ISDA) regulations, 25 C.F.R. Part 900, subpart L. On December 12, 2003, pursuant to 25 C.F.R. § 900.160(a), the Board referred the matter to an Administrative Law Judge (ALJ) after finding that the appeal fell under 25 C.F.R. § 900.150(c) as a decision to decline a proposed amendment to a

self-determination contract and that the appeal also involved several other issues appropriate for referral to the ALJ. On March 18, 2004, the ALJ issued a recommended decision against the PDAS and BIA, recommending that they be ordered to immediately approve SASI's grant amendment and transfer control of the Kayenta school to SASI as soon as practicable. On April 19, 2004, the Board received objections to the recommended decision from the PDAS and BIA. 1/

On full consideration of the jurisdictional issues raised in this appeal, and for the reasons discussed below, the Board vacates the recommended decision, dismisses the appeal from the Board for lack of jurisdiction, and refers the appeal to the Assistant Secretary - Indian Affairs (Assistant Secretary) for consideration on the merits. As explained in this decision, this case is governed by TCSA, and under the specific facts of this case, TCSA does not incorporate ISDA's appeal provisions for purposes of addressing the precise issues on appeal.

We begin with a factual chronology of the dispute, and then provide an overview of the relevant statutes and regulations, before providing our legal analysis.

Factual Chronology

For the 2002-2003 school year, the Kayenta school was administered under a TCSA grant provided by BIA to the Kayenta School Board, which at the time was authorized by the Navajo Nation to administer the grant to operate the school. The Nation's authorization for the Kayenta School Board to be the grantee for the Kayenta school expired on June 30, 2003, without having been renewed by the Nation.

For the 2002-2003 school year, the Shiprock Alternative School was administered under a TCSA grant by Appellant SASI, as authorized by the Nation. SASI is located in Shiprock, New Mexico, approximately 100 miles east of Kayenta, Arizona.

On July 1, 2003, the Education Committee (EC) of the Navajo Nation Council passed a resolution (No. ECJY-44-03) approving and recommending that SASI be authorized to

1/ Under the ISDA regulations, 25 C.F.R. § 900.167(a), the Board has 20 days from its receipt of any timely written objections to modify, adopt, or reverse a recommended decision issued under 25 C.F.R. § 900.165(a). If the Board does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final. Although the Board ultimately concludes in this decision that the ISDA appeals regulations do not apply, the Board nevertheless issues this decision within 20 days to avoid any uncertainty about the effect of subsection 900.167(a) on this case.

amend its TCSA grant to include operation of the Kayenta school. 2/ On July 3, 2003, the Intergovernmental Relations Committee (IGRC) of the Navajo Nation Council passed a resolution (No. IGRJY-113-03) endorsing the EC resolution and authorizing SASI to operate the Kayenta school for the fiscal 2003-2004 school year, which had begun July 1, 2003, and runs through June 30, 2004. On July 15, 2003, the EC Chairperson wrote BIA informing it that the Kayenta School Board had not been reauthorized as a sanctioned tribal organization when its authorization expired on June 30, 2003, and that, through the EC and IGRC resolutions, the Nation had authorized SASI to request an amendment to its existing grant for the 2003-2004 school year to add the Kayenta school program.

On July 21, 2003, SASI submitted such a proposed grant amendment to BIA. SASI requested expedited consideration by BIA in order to allow SASI to commence operation of the Kayenta school the following month.

During the first half of August, 2003, representatives of BIA and EC communicated by telephone and in writing concerning operation of the Kayenta school. BIA identified several options for the Kayenta school, including amending SASI's grant to allow SASI to operate the Kayenta school. On several occasions, officials from EC and the Nation's Office of Legislative Counsel expressed urgency for a decision by BIA.

Sometime during the month of August, SASI began operating the Kayenta school using carryover funds, without having received approval from BIA to amend its TCSA grant to include the Kayenta school.

On August 20, 2003, Navajo Nation President Joe Shirley, Jr., wrote to Acting Assistant Secretary Aurene Martin, raising questions about the validity of the EC and IGRC resolutions. The President stated that it was his position that BIA "must continue to fund the Kayenta Community School, under the governance of the Kayenta Community School Board, until such time as the [EC] and [IGRC] have received the approval and endorsement of the Kayenta Chapter and other affected Navajo People to the proposed change to place the Kayenta Community School under the administration and management of Shiprock Alternative Schools, Inc." (Letter from Shirley to Martin of Aug. 20, 2003.) The letter stated that the President "firmly support[ed] local control of the Kayenta Community School by the Kayenta Community School Board, subject to the provision of immediate technical assistance by [BIA], and request[ed] that [PDAS and BIA] continue to work with the Kayenta Community School Board to provide funding for the school until the tribal internal issues are resolved." Id.

2/ The EC's action was prompted by a report from an investigation, which had been requested by the EC, into complaints about the Kayenta School Board's operation of the Kayenta school.

On August 25, 2003, Navajo Nation Attorney General Louis Denetsosie wrote to Acting Assistant Secretary Martin, asserting that the Navajo Nation President's letter of August 20 had "correctly state[d] Navajo law on the question of whether the [IGRC] and [EC] * * * complied with Navajo Nation law in assigning the administration and operation of the Kayenta Community School to [SASI]." (Letter from Denetsosie to Martin of Aug. 25, 2003.) The Attorney General stated that neither the EC nor IGRC resolution indicated compliance with certain provisions of the Navajo Code. The letter concluded: "In this instance, I agree with the Navajo Nation President that the IGRC and EC did not comply with the Navajo Nation policies adopted by the Navajo Nation Council in approving [the resolutions authorizing SASI to amend its grant and to operate the Kayenta school]." Id.

On August 28, 2003, the Navajo President again wrote to Ms. Martin, stating that an agreement had been reached between his office and the IGRC, which would allow SASI to continue its "oversight" of the Kayenta school through October 2003, and then transfer control back to the Kayenta School Board on November 1, 2003. The letter did not refer to any resolutions either pending or passed to reauthorize the Kayenta School Board as a sanctioned tribal organization.

On September 15, 2003, representatives of SASI met with representatives of the Department of the Interior. Notes from that meeting indicate that the Department's representatives were advised that a public meeting had been scheduled for September 30, 2003, at Kayenta, Arizona, concerning the situation. The notes also indicate an understanding by the Departmental representatives that fiscal year 2003 funds had not been posted to the Kayenta school account, that the payroll for the school had been paid using money in an existing bank account, and that "Next Friday Sept. 26th account will run out." Notes of Lisa Lance, Office of the Solicitor, of Sept. 15, 2003.

On September 23, 2003, the EC Chairperson sent a memorandum to the Kayenta School Board; SASI; BIA; and the Division of Diné (Navajo) Education, announcing a special meeting to be held by EC at the Kayenta school on September 30, 2003. The stated purpose of the meeting was to receive input on two separate resolutions that EC would consider – one reauthorizing the Kayenta School Board to again operate the Kayenta school, and another reaffirming the authorization for SASI to operate the Kayenta school through a grant amendment.

On September 26, 2003, Ms. Martin, as the PDAS, wrote a letter to the Nation's President, stating that if SASI were to administer the Kayenta school grant, a grant amendment would be required. The letter continued: "However, the Navajo Nation as a whole has not expressed an interest in amending the Kayenta Community School Board, Inc. grant for a full year." (Letter from Martin to Shirley of Sept. 26, 2003). The letter also asserted that the Kayenta School Board could reassume the grant and the operation of the Kayenta school, after

elections in October, but also stated: "However, again, the Navajo Nation as a whole has not expressed any interest in authorizing the grant for the [Kayenta School Board] for the 2003-2004 school year." Id. The letter noted that the Navajo Attorney General had "opined" that the EC and IGRC resolutions "were not valid." Id. The letter concluded in relevant part:

> While I desire to give the Navajo Nation the opportunity to resolve this situation internally, I have been informed that Shiprock Alternative School will not be able to meet any financial obligations for the Kayenta Community School Board, Inc. after September 26, 2003. Because the Navajo Nation has not provided the Bureau of Indian Affairs with a legal solution to this difficult situation, it has effectively retroceded the Kayenta Community School Board, Inc. grant to the Bureau of Indian Affairs. * * * The retrocession determination is effective immediately and the Bureau will contact the Shiprock Alternative School regarding the transition.

Id. The PDAS's letter did not state that it was a final determination for the Department. Also on September 26, 2003, BIA sent a letter to SASI reporting that the PDAS had "announced the Navajo Nation had retroceded the [Kayenta School Board] grant" to BIA and, as a result, BIA "must begin operation of the school immediately." (Letter from Frazier to BlueEyes of Sept. 26, 2003).

On September 29, 2003, the EC Chairperson wrote to the PDAS protesting BIA's takeover of the Kayenta school operations, stating that the resolutions authorizing SASI to amend its grant were still in full legal effect, disagreeing with the PDAS's characterization of the situation as a "retrocession," and advising the PDAS that EC would be conducting a meeting at the Kayenta school the following day, September 30.

On September 30, 2003, EC passed a resolution (ECS-70-03) reaffirming the prior EC and IGRC resolutions authorizing SASI to amend its grant to operate the Kayenta school. The new resolution recites that on September 30, 2003, EC met with and received input from the Kayenta School Board members, the Shiprock Alternative School Board members, the Division of Diné Education, and the community members of Kayenta, Arizona, including parents of children attending the school, school personnel, and local tribal officials. The resolution recommended that IGRC reaffirm its earlier resolution authorizing SASI to operate the Kayenta school. This was memorialized in an October 1, 2003, letter from the EC Chairperson to BIA. On October 2, 2003, IGRC passed a resolution (IGRO-191-03) reaffirming its earlier resolution (IGRJY-113-03), and again authorizing SASI to amend its grant to include operation of the Kayenta school.

On October 8, 2003, the Nation's Attorney General wrote a letter to Ms. Martin, enclosing a copy of IGRC Resolution No. IGRO-191-03, and stating that in the opinion of

the Office of the Attorney General, "IGRJY-113-03 and IGRO-191-03 are final and complete resolutions of the Navajo Nation that comply with all legal and procedural requirements and that require no further action on the part of the Nation." (Letter from Denetsosie to Martin of Oct. 8, 2003.) The letter stated that the Attorney General's previous concerns had been satisfied, and that the resolutions "are the legitimate legal means by which such sanctioning applies." Id. The Attorney General stated that any disagreements within the Nation would be handled internally, and that the PDAS should complete processing SASI's application.

On October 17, 2003, the Attorney General again wrote to Ms. Martin. Summarizing the PDAS's "effective retrocession" characterization and the funding concerns stated in her September 26 letter, the Attorney General stated that "[t]he Navajo Nation disputes the basis for both conclusions." (Letter from Denetsosie to Martin of Oct. 17, 2003.) The letter reiterated the Attorney General's legal opinion that the EC and IGRC resolutions were the official sanctions of "tribal organization" status; that the resolutions were not subject to Presidential veto; and that, even if subject to Presidential veto, the time period for a veto had expired. Id. The letter recited that though telephone conversations and correspondence, the Nation "has restated its position that the Navajo Nation never requested a retrocession, which is required pursuant to 25 U.S.C. § 2502(f)." Id.

On October 17, 2003, SASI wrote a letter to Ms. Martin stating that SASI had never received a direct response from the Assistant Secretary or BIA regarding its proposed amendment, but understood that Ms. Martin had communicated directly with the Navajo Nation by letter dated September 26, 2003. SASI's letter cited the EC and IGRC actions reaffirming their prior resolutions, and the Attorney General's October 8 letter. The letter requested that BIA approve the grant amendment, and turn over control of the Kayenta school to SASI, effective October 27, 2003.

On October 24, 2003, the Navajo Attorney General and counsel for SASI jointly wrote to Ms. Martin, appealing her September 26, 2003, decision, and requesting an informal conference pursuant to the ISDA appeal regulations.

On November 14, 2003, Ms. Martin, as the PDAS, wrote a letter to President Shirley, referring to their conversation on October 24, 2003. The letter indicated that Ms. Martin had received the most recent IGRC resolution concerning this matter, and the Attorney General's October 8, 2003, letter. The PDAS stated that, as a general rule, the Department does not involve itself in internal tribal disputes, leaving such disputes for internal tribal resolution. She added: "However, it has always been my understanding, that in regards to the government-to-government relationship, the President of the Navajo Nation speaks for the Nation. * * * Therefore, based on our conversation and the continuing internal tribal dispute over the operation of the Kayenta Community School, the Department will continue to operate the Kayenta Community School. Please notify me when your office can ensure that the Kayenta

Community School Board has appropriate legal authority to administer the grant, or that some other entity has been legally delegated with the authority to administer the grant." (Letter from Martin to Shirley of Nov. 14, 2003 (emphasis added))

On November 14, 2003, the PDAS also responded to the Attorney General's October 24, 2003, appeal of her September 26 decision. Stating that the Nation had "effectively retroceded" the Kayenta school grant, and that the ISDA appeal process "would not apply to the retrocession," the PDAS denied the request for an informal conference. (Letter from Martin to Denetsosie of Nov. 14, 2003.) The response also stated that SASI had indicated that the Kayenta school would close on September 26, 2003, absent a grant. The letter concluded:

> According to my October 24, 2003, conversation with President Shirley, he still believes the Kayenta Community School Board, Inc. should be operating the school. Therefore, the Navajo Nation continues to disagree on which tribal organization should operate the Kayenta Community School. Until the Department receives clarification on who has the appropriate legal authority to speak for the Tribe and who has the legal authority to administer the grant, the Department will continue to run the Kayenta Community School.

Id. (emphasis added).

On December 4, 2003, the Nation and SASI filed an appeal with the Board pursuant to TCSA, ISDA, and the related ISDA appeals regulations, 25 C.F.R. §§ 900.150, 900.152, 900.158, and 900.170. The Board received the appeal on December 8, 2003, and on December 12, 2003, issued an order pursuant to 25 C.F.R. § 900.160(a), referring the appeal to the Hearings Division of the Department of the Interior. The Board's December 12 order made an initial finding that the appeal fell under 25 C.F.R. § 900.150(c), which applies to decisions to decline a proposed amendment to a self-determination contract. The Board also noted, however, that the appeal appeared to involve an internal tribal dispute concerning authorization to contract the Kayenta school program, as well as issues involving whether the Nation retroceded the Kayenta program or BIA reassumed it. The Board concluded that apart from subsection 900.150(c), the appeal would otherwise be appropriate for referral to an ALJ.

In the ALJ proceedings, Appellants contended that the PDAS erred in finding an "effective retrocession" of the Kayenta school program because retrocession must be voluntary and the Nation never consented to BIA's takeover of the school's operations. Thus, according to Appellants, BIA's actions constituted an improper reassumption of BIA control of the Kayenta school, without following the statutory and regulatory procedures. Appellants also contended that the PDAS's September 26 decision and related BIA takeover of school operations constituted an improper declination of SASI's proposed grant amendment. Appellants argued that under Navajo law, SASI had been fully sanctioned to include the

Kayenta school operations within its TCSA grant, and that, at least as of October 2, 2003, both the IC and IGRC resolutions had been cured of any alleged defects, had not been challenged in tribal court, and must be considered valid until determined otherwise under tribal law.

Appellees PDAS and BIA moved to dismiss the appeal, contending that the appeal did not fall under 25 C.F.R. § 900.150(c) because there was no proposed grant amendment properly before the PDAS, given the unresolved legal questions concerning SASI's authority to submit the amendment. Appellees also contended that there was an "effective retrocession," and that BIA's actions thus could not be characterized as any type of appealable "reassumption" of the program. 3/ Appellees further contended that the appeal is simply a challenge to an administrative action of a BIA official, in effect made by the Acting Assistant Secretary, which was final for the Department. 4/ Appellees argued that section 43 C.F.R. § 4.331 precludes review by the Board. That regulation authorizes the Board to review final decisions of officials of the BIA, except when the decision has been approved by the Secretary or the Assistant Secretary.

On March 18, 2004, the ALJ issued a recommended decision. First, he relied on the Board's earlier order which, as a threshold matter, found that the appeal fell under 25 C.F.R. § 900.150(c) as a declination of a proposed grant amendment. Second, he determined that there was no actual or "effective" retrocession of the Kayenta school to BIA. Third, he found that, at least by November 14, 2003, SASI's grant amendment had been authorized by the Nation. Fourth, he concluded that because the decision on appeal was signed by Ms. Martin as the PDAS, and not as Acting Assistant Secretary, the decision was reviewable by the Board. The ALJ then concluded that BIA's action amounted to a declination of a grant amendment, followed by an emergency reassumption without following ISDA statutory and regulatory procedures. He recommended that the PDAS and BIA be required to approve SASI's grant amendment and allow SASI to resume control of the Kayenta school as soon as practicable.

On April 19, 2004, the Board received objections to the ALJ's recommended decision from the PDAS and BIA. The objections raise the same arguments made in the proceedings before the ALJ, including challenges to the Board's jurisdiction.

3/ The specific procedural requirements, including appeals procedures, that apply to reassumption of a program depend on whether it is a "non-emergency reassumption," 25 C.F.R. § 900.150(e), or an "emergency reassumption," 25 C.F.R. § 900.170.

4/ During the time period in which this dispute arose, Ms. Martin alternately acted as the PDAS and the Acting Assistant Secretary.

Relevant or Applicable Statutes and Regulations

The Tribally Controlled Schools Act requires that the "Secretary shall provide grants to Indian tribes, and tribal organizations that – * * * operate * * * tribally controlled schools eligible for assistance under this chapter and submit applications (which are approved by their tribal governing bodies) to the Secretary for such grants." 25 U.S.C. § 2502(a)(1)(B) (emphasis added). 5/ If the Secretary refuses to approve a grant, the Secretary is required to state the objections to the tribe or tribal organization in writing within a statutorily-prescribed time period; provide assistance to the tribe or tribal organization to overcome the stated objections; provide the tribe or tribal organization a hearing on the record under the ISDA rules and regulations, if requested; and provide an opportunity to appeal the objection raised. 25 U.S.C. § 2504(f)(1).

In relevant part, the term "tribal organization," as defined by TCSA, includes the recognized governing body of any Indian tribe, and any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body. 25 U.S.C. § 2511(8). 6/

After a TCSA grant has been provided for a program to a tribe or tribal organization, the statute authorizes the tribal governing body to "request[] retrocession" to BIA of the program for which the grant was provided. 25 U.S.C. § 2502(f)(1). The term "retrocession" is not defined in TCSA, but the ISDA regulations define "retrocession" as "the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract." 25 C.F.R. § 900.6.

"Reassumption" of a contracted program, in contrast to retrocession, is defined as "rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization pursuant to the notice and other procedures set forth in [the retrocession and reassumption procedures]" of the ISDA regulations. 25 C.F.R. §§ 900.6, 900.246.

5/ Similarly, ISDA 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 with a tribal organization to plan, conduct, and administer" certain programs described in the Act. 25 U.S.C. § 450f(a). ISDA also provides that "[i]f so authorized by an Indian tribe * * * a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review." 25 U.S.C. § 450f(a)(2).

6/ The ISDA regulations include a similar definition of "tribal organization." See 25 C.F.R. § 900.6.

The Department has not promulgated regulations for TCSA. However, TCSA itself expressly incorporates certain sections of ISDA, including those relating to reassumption of a program, 25 U.S.C. § 2507(a)(12). TCSA also incorporates ISDA's appeals rules and regulations when the Secretary refuses to approve a TCSA grant proposal submitted by a tribe or tribal organization. See 25 U.S.C. § 2504(f)(1)(C). Neither TCSA nor ISDA (nor the ISDA regulations), addresses appeal rights in the context of tribal retrocession of a TCSA program to BIA.

Discussion

Jurisdictional issues may be raised at any stage of an appeal, and the Board is obligated to ensure that it has fully considered and resolved its jurisdiction before considering the merits of an appeal. Although the Board made an initial determination that the appeal fell under ISDA, 25 C.F.R. § 900.150(c), it noted that additional issues were involved. With the benefit of briefing and the administrative record developed in the ALJ proceedings, the Board reexamines its initial jurisdictional determination that the appeal falls under the ISDA regulations.

This case arises under TCSA. As described above, TCSA expressly incorporates the provisions of ISDA relating to reassumption of a program, as well as ISDA appeals rules and regulations when the Secretary refuses to approve a grant to a tribe or tribal organization. As such, if BIA's actions taking control of the Kayenta school in September 2003 constituted a "reassumption" within the meaning of TCSA and ISDA, then the ISDA provisions for such a reassumption apply and the Board would at least presumptively have jurisdiction pursuant to the ISDA regulations. Similarly, if the PDAS's decision on September 26, 2003, constituted a refusal to approve a grant to a tribe or tribal organization, within the meaning of TCSA, then the ISDA appeals rules and regulations pertaining to declination of a contract or grant would apply. However, unless the facts of this case fall within a specific provision of TCSA that incorporates ISDA or ISDA regulations, ISDA's appeals regulations do not apply and the Board's jurisdiction must be found elsewhere.

Reassumption

The Board begins by examining whether the BIA's takeover of the Kayenta school, following the PDAS's September 26, 2003, decision, constituted a "reassumption," thus triggering the ISDA provisions relating to reassumptions. We conclude, based on the administrative record and facts before us, that the BIA's action taking control of the Kayenta school under the specific circumstances involved in this case did not constitute a "reassumption" as defined by the statute and regulations. Even assuming that the Nation did not consent to BIA's operation of the Kayenta school – and there is certainly evidence in the record to support

that – a reassumption under TCSA and ISDA requires a "rescission" of a grant, and the record here does not support a finding that such a rescission occurred. 7/

Reassumption has a multi-part definition, which requires "rescission * * * of a contract [or grant] and assuming or resuming control or operation of the contracted program," by the Secretary without the consent of the Indian tribe or tribal organization. See 25 C.F.R. §§ 900.6, 900.246. The EC and IGRC resolutions passed in July 2003 variously describe the TCSA grant period for the Kayenta school program as "ending" or "terminating" on June 30, 2003. Although SASI was operating the Kayenta school in September 2003 when BIA took over, the ALJ found – and it is undisputed in this appeal – that SASI was operating it without a grant from BIA. Therefore, the record does not show that when BIA began operating the school, there was an existing grant or contract to "rescind," or an existing grantee for the Kayenta school from which to rescind the grant, given the lapse of authority for the Kayenta School Board. 8/

At the time, of course, the PDAS and BIA – justifiably or not – had concluded that SASI had not adequately demonstrated that it had been authorized to submit a proposal to broaden the scope of its existing grant to include the Kayenta school operation. But the PDAS and BIA did not affect, let alone "rescind," SASI's existing grant, and the Board is not convinced that SASI's admittedly unauthorized assumption of control over the Kayenta school in August 2003 transformed the Department's assumption of control in September into a

7/ The parties vigorously dispute whether or not the PDAS was correct in her characterization of the situation as an "effective retrocession." While the Board questions her characterization, the issue is whether BIA's takeover of operation of the Kayenta school constituted a "reassumption" within the meaning of TCSA and ISDA. Only if a "reassumption" occurred would TCSA's incorporation of ISDA's reassumption provisions provide a basis for the Board to exercise jurisdiction.

8/ It is undisputed in this appeal the Kayenta School Board's tribal authorization as a TCSA grantee expired of its own terms on June 30, 2003, and that the Nation did not renew that authority.

"rescission and reassumption" of an existing grant. Thus, the record here does not identify an existing grant that the PDAS and BIA "rescinded." 9/

The parties implicitly assume that what occurred in this case must either be a "retrocession" or a "reassumption." Both terms, however, incorporate the concept of some action occurring during the term of a contract or grant – either a voluntary return of responsibility to BIA by a tribe "before expiration of the contract," 25 C.F.R. § 900.6, in the case of retrocession; or "rescission" of a contract, id., in the case of a reassumption. By giving effect to the definitions, however, it appears that the facts of this case do not fall under either definition. This conclusion does not leave Appellants without recourse, but it does affect where their appeal lies within the Department. 10/

Declination of a Grant Proposal

The Board next turns to whether the PDAS's decision constituted a refusal to approve a grant amendment to a tribal organization, within the meaning of TCSA. If so, TCSA incorporates the ISDA appeals rules and regulations; if not, the ISDA regulations do not apply.

TCSA requires the Secretary to provide grants to "Indian tribes and tribal organizations." 25 U.S.C. § 2502(a)(1). A legally established organization of Indians only becomes a "tribal organization" within the meaning of TCSA when it has been authorized, or sanctioned, by the tribe's governing body. 25 U.S.C. § 2511(8) (definition of "tribal organization"). Only a tribe or "tribal organization" may submit a proposal for a grant for consideration by the Secretary. And the Secretary's specific obligations under TCSA when she refuses to approve a grant are owed only to tribes or tribal organizations. 25 U.S.C. § 2504(f). Thus, it is only grant applicants who qualify as tribes or tribal organizations – and not

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9/ Appellants cite the Interior Board of Contract Appeals (IBCA) decision in Appeal of Kaw Nation, IBCA 4455A/03, in which the parties disputed whether the Department had taken over a tribal court program pursuant to the tribe's voluntary retrocession or as a reassumption. The IBCA concluded in that case that an improper reassumption had occurred. That case, however, is distinguishable. In Kaw Nation, the Department's actions occurred during the term of an ISDA contract. Here, the record does not show that a grant for the Kayenta school was in effect when BIA took over operation of the school. As such, the Board is not convinced that a "reassumption" occurred within the meaning of the statute and regulations.

10/ For purposes of the Board's jurisdiction, the Board's conclusion here would likely make little or no difference if this case arose under ISDA, rather than TCSA, because of the "catch-all" appeals provision in 25 C.F.R. § 900.150(i).

"applicants" generally – that are entitled to these substantive and procedural rights, including ISDA appeals rights. 11/

Section 2504(f) thus necessarily presumes that the type of refusal to approve a grant under TCSA, triggering obligations toward the applicant tribe or tribal organization, is one involving some actual review of and decision concerning the proposal itself, and not a threshold determination that the applicant is not qualified or authorized to submit the proposal.

In this respect TCSA and ISDA are similar. In discussing the issue that an applicant for an ISDA contract be properly authorized, the preamble to the ISDA rule states:

> It should be clear * * * that [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 [25 U.S.C. § 450f(a)(1)]. Therefore, although technically outside of the enumerated declination criteria in [25 U.S.C. § 450f(a)(2)], it is also clear that [ISDA] precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

61 Fed. Reg. 32482, 32486 col. 2 (June 24, 1996) (emphasis added), quoted in Hannahville Indian Community v. Minneapolis Area Education Officer, 34 IBIA 4, 9-10 (1999).

In the ISDA context, the Board has recognized that "declination" of a proposed contract on the threshold ground of "lack of authorization" is properly characterized as an "otherwise appealable" action, falling under 25 C.F.R. § 900.150(i), rather than a true ISDA contract "declination" falling under 25 C.F.R. § 900.150(a) - (g), for which the appellant would be entitled to a hearing. See Unpublished Order at 1, Sharon Wasson v. Western Regional Director, IBIA No. 04-81-A (April 8, 2004) (ISDA appeal from BIA "declination" of contract proposal from individuals not recognized as constituting the tribal council does not fall under 25 C.F.R. § 900.150 (a) - (g), but under 25 U.S.C. § 900.150(i), to be considered under 43 C.F.R. Part 4 appeals regulations); Unpublished Order at 3, Sharon Wasson v. Acting Western Regional Director, IBIA No. 03-142-A (Sept. 3, 2003) (same; "real issue" is not an ISDA issue, but one concerning an internal tribal dispute). In such a case, because the decision is made in the context of an ISDA proposal, the ISDA appeals regulations apply in the first instance. The Board then makes the determination that the appeal falls under the "catch-all"

11/ It would make little sense to require the Secretary, as grounds for denying an application, to find "by clear and convincing evidence that the services to be provided by the Indian tribe or tribal organization will be deleterious to the welfare of the Indians served by the school" if the applicant was not even authorized to submit the proposal. See 25 U.S.C. § 2504(b)(2)(B)(ii).

provision, 25 C.F.R. § 900.150(i), and then considers the appeal under the appeals procedures in 43 C.F.R. Part 4. See 25 C.F.R. § 900.160(b).

Similarly, for TCSA, the Act does not require the Secretary to consider the substance and merits of a proposal if the applicant has not been authorized to submit the proposal. 12/ In the case of a tribal organization that submits a proposal, the Secretary is only required to consider it on the merits if the applicant can show that it constitutes a "tribal organization" for purposes of that proposal, within the meaning of TCSA. To hold otherwise would unnecessarily trigger obligations on the part of the Secretary toward a group which, in essence, has not demonstrated that it has standing to submit the proposal. It would also afford the applicant ISDA's extensive substantive and procedural rights before it has been determined whether the applicant even has status as a tribe or tribal organization.

As such, it is critical to distinguish between a decision by the Secretary refusing to recognize an applicant as a tribe or tribal organization, and a decision by the Secretary accepting a proposal as having been submitted by a tribe 13/ or tribal organization, but then refusing to approve it. In the former case, until the status of the applicant is resolved, the Secretary's substantive obligations and the ISDA appeals rights that flow to tribes and tribal organizations are not triggered. Applicants whose proposals are rejected because the Secretary concludes that they have not demonstrated that they are a tribe or tribal organization may still

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12/ Because the Board decides this case on jurisdictional grounds, it expresses no view on obligations that the Secretary might have under TCSA to respond to a proposal submitted by an applicant whom the Secretary considers as lacking proper authorization or proof of such authorization. The Board notes that for ISDA contract proposals, the ISDA regulations create specific obligations on the part of the Secretary to notify the applicant of any missing information, including lack of a statutorily-required tribal resolution, and to give the applicant an opportunity to submit the missing information. See Hannahville Indian Community v. Minneapolis Area Education Officer, 34 IBIA 4, 10 (1999). Appellants in this case note that those ISDA regulations do not apply to TCSA grant proposals, and that no TCSA-specific regulations have been promulgated. Apart from TCSA, however, BIA does have general regulations that provide a right of appeal from inaction of a BIA official, once the regulatory steps have been taken to demand a decision from BIA. See 25 C.F.R. § 2.8.

13/ With respect to applications submitted in the name of a tribe, assuming that the tribe is federally-recognized, the issue is whether the individuals purporting to act on behalf of the tribe are authorized.

have appeal rights within the Department, but not under the ISDA rules and regulations, which are only incorporated under TCSA with respect to tribes or tribal organizations. 14/

In the present case, after considering the administrative record and the briefs submitted to the ALJ, the Board concludes that the PDAS's decision is most accurately characterized as a refusal to recognize SASI's authorization or standing to submit the grant proposal. In characterizing the nature of the decision, the Board emphasizes that it does not presume either that the PDAS's decision was justified or not justified. Instead, the Board only determines that the decision was a threshold determination concerning the status of the applicant, rather than a determination concerning the proposal itself. As such, the Board also concludes that the PDAS's decision was not a "declination" within the meaning of TCSA and ISDA, and thus did not trigger the provisions in TCSA that incorporate ISDA appeals rules and regulations. Therefore, SASI and the Nation's appeal rights are governed by the general BIA and Departmental appeal regulations governing challenges to administrative actions by BIA officials, rather than by the ISDA appeals rules and regulations. 15/

Our interpretation of the scope of "tribal organization" status under TCSA is consistent with the facts of this case. Rather than contending that SASI's status as a tribal organization for receiving a TCSA grant to operate the Shiprock school 16/ automatically gave it "tribal organization" status to amend its grant and receive TCSA funds to also operate the Kayenta

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14/ Even in the context of ISDA, the distinction between a declination based on a refusal to recognize the applicant as properly authorized to submit a contract proposal, and a true ISDA declination based on objections to the proposal itself, has significance. For a true ISDA "declination" or refusal to approve a proposal that has been submitted by an authorized tribal organization, the Secretary has the burden of proof. 25 C.F.R. § 900.163. In contrast, for a declination or refusal to approve or consider a proposal based on a threshold issue falling under 25 C.F.R. § 900.150(i), such as lack of tribal authorization, the burden of proof is on the applicant, consistent with the usual Administrative Procedure Act standard. See Final Rule, Indian Self-Determination and Education Assistance Act Amendments, 61 Fed. Reg. 32482, 32497 col. 2 (June 24, 1996).

15/ The Board acknowledges that the PDAS's decisional letters contain certain inconsistencies, and that even while the PDAS refused to accept SASI's proposal for the Kayenta school operation as one submitted by a properly authorized tribal organization, she also suggested other objections to the proposal. On both September 26 and November 14, however, the PDAS's letters clearly indicate that she was unwilling to accept SASI's proposal as having been authorized.

16/ As the ALJ noted, it is undisputed that SASI is a tribal organization with respect to the Shiprock Alternative School.

school, the EC and IGRC, the Nation's President, and the Nation's Attorney General, all recognized that additional tribal authorization was needed before SASI could submit its grant amendment proposal for operating the Kayenta school. This is consistent with the self-governance principles on which TCSA is based: the scope of an organization's status as a "tribal organization" is defined by the scope of the authorization granted to it by the tribal governing body.

The real dispute in this case is not whether SASI needed tribally-sanctioned "tribal organization" status to submit its proposal for Kayenta; the dispute is whether the Nation gave it that authority and whether the PDAS was justified in refusing to recognize SASI as having been so authorized. Even assuming that Appellants are correct that SASI had clear legal authorization, at least after the second round of EC and IGRC resolutions and the Attorney General's October 8, 2003, letter, that does not change our characterization of the PDAS's determination as one that refused to recognize SASI's status as a tribally-sanctioned organization with authority to submit its proposal for Kayenta, rather than a decision denying the application after accepting it as a proposal received from a tribal organization.

In summary, if the Secretary refuses to approve a grant under TCSA on the grounds that no proper proposal is before her because she concludes that the applicant is not authorized to submit the proposal – is not a "tribal organization" for purposes of that proposal – that decision may be appealable, but not as a refusal to approve a grant to a tribe or tribal organization within the meaning of TCSA, 25 U.S.C. § 2504(f)(1). Instead, an applicant's appeal rights from such a decision under TCSA are determined by looking to the general Departmental rules and regulations governing administrative appeals.

Board Jurisdiction in Non-ISDA Appeals

Having determined that Appellants' appeal rights in this case are determined by the general BIA and Departmental appeal regulations, rather than the ISDA regulations, the Board next discusses whether it has jurisdiction to review the merits of the appeal under 25 C.F.R. Part 2 and 43 C.F.R. Part 4.

The Board's administrative appeal regulations apply to (1) appeals to the Board from BIA Administrative action issued under 25 C.F.R. chapter 1 (which further defines the scope of the Board's jurisdiction); and (2) other matters referred to the Board by the Secretary or the Assistant Secretary. The Board has not been delegated general authority to review decisions of the Assistant Secretary, although it may do so when authority has been specifically granted to the Board by the Assistant Secretary or by regulation. Deganawidah-Quetzalcoatle University v. Assistant Secretary - Indian Affairs, 39 IBIA 265 (2004).

The ALJ concluded that the limitations on the Board's jurisdiction to review decisions of the Assistant Secretary did not apply here, because Ms. Martin was acting in the official capacity of Principal Deputy to the Assistant Secretary, when she issued her decision on September 26, 2003, and again when she denied Appellants' request for an informal conference on November 14, 2003. We agree. The fact that Ms. Martin was designated Acting Assistant Secretary intermittently during the relevant time period does not change the fact that she made the decisions that are the subject of this appeal in the official capacity as PDAS. 17/

The Board next examines whether it has jurisdiction to review a decision of the Principal Deputy Assistant Secretary, acting in her supervisory capacity over the Office of Indian Education. The Board has jurisdiction, pursuant to 25 C.F.R. § 2.4(e) and the provisions of 43 C.F.R. part 4, subpart D, to review an appeal "from a decision made by an Area Director or a Deputy to the Assistant Secretary – Indian Affairs other than the Deputy to the Assistant Secretary/Director (Indian Education Programs)." (Emphasis added). As the language indicates, the Board does not have jurisdiction to review decisions of the Director, Office of Indian Education Programs. Borrego Pass Community School, Inc. v. Director, Office of Indian Education Programs, 39 IBIA 231 (2004); Deganawidah-Quetzalcoatle University v. Director, Office of Indian Education Programs, 39 IBIA 222 (2004), and cases cited therein. The regulatory language also indicates that the Board does not have jurisdiction over Indian education program decisions made at the Deputy to the Assistant Secretary level. Under the current organizational structure of the Office of the Assistant Secretary and BIA, the Director of the Office of Indian Education Programs is under the direct supervision of the Principal Deputy Assistant Secretary – Indian Affairs, who in turn is under the supervision of the Assistant Secretary – Indian Affairs. 130 DM 8.1, 110 DM 8.1 (April 21, 2003).

17/ Appellees attempt to have the Board treat Ms. Martin's decisions as having "in effect" been made by the Acting Assistant Secretary by explaining that the only reason she was not designated as Acting Assistant Secretary on September 26 and November 14 was because the Appointments Clause of the U.S. Constitution limited the time periods during which she could be so designated. Rather than supporting her argument, this explanation appears to undermine it. If she was constitutionally precluded at the time from acting in the official capacity of Acting Assistant Secretary, the Board has difficulty understanding why her actions should be deemed as having been made in that capacity. The issue here is not whether the PDAS is delegated all of the authority of the Assistant Secretary; the issue is whether action taken by the PDAS is appealable within the Department.

Therefore, the Board concludes that it lacks jurisdiction to review the Principal Deputy Assistant Secretary's September 26, 2003, and November 14, 2003, decisions because of the jurisdictional limitation in 25 C.F.R. § 2.4(e). 18/

The Board also concludes, however, that this appeal from the Principal Deputy Assistant Secretary's decision is properly subject to consideration by Assistant Secretary. See 25 C.F.R. § 2.4(c); Deganawidah-Quetzalcoatle University, 39 IBIA 222 (dismissing appeal for lack of jurisdiction by the Board and referring it to the Assistant Secretary). The PDAS's decisions on September 26, 2003, and November 14, 2003, did not state that they were final for the Department, and the Assistant Secretary has authority to review those decisions. The Board refers the matter to the Assistant Secretary to determine: (1) Was the PDAS justified in refusing to consider and to approve SASI's grant amendment proposal on the merits, on the ground that SASI had not demonstrated that it had been authorized pursuant to tribal law to submit the proposal; and (2) Was the Department legally justified in taking over operation of the Kayenta school.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the ALJ's recommended decision, dismisses this appeal for lack of Board jurisdiction, and refers it to the Assistant Secretary - Indian Affairs for consideration on the merits.

// original signed	// original signed
Steven K. Linscheid	Colette J. Winston
Chief Administrative Judge	Administrative Judge

18/ The Board emphasizes that its jurisdictional determination in this appeal is limited to applying TCSA to the particular facts involved in this case. The ISDA regulations provide the Board with broader jurisdiction that it has under 25 C.F.R. Part 2 or 43 C.F.R. Part 4.