



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

The Paiute Indian Tribe of Utah (PITU) v. Southern Paiute Agency Superintendent,
Bureau of Indian Affairs

Docket No. IBIA 07-92-A (01/22/2008)

Reversed in part:
46 IBIA 285



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

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January 22, 2008

THE PAIUTE INDIAN TRIBE OF)	IBIA 07-92-A
UTAH (PITU))	
Appellant)	Appeal of March 6, 2007, decision
)	regarding partial declination of a
v.)	proposed ISDA contract for Realty
)	Services
SOUTHERN PAIUTE AGENCY)	
SUPERINTENDENT, BUREAU OF)	
INDIAN AFFAIRS (BIA))	Indian Self Determination Act (ISDA)
Appellee)	25 U.S.C. §§ 450-450n

RECOMMENDED DECISION

Appearances: Jeffrey Zander, Cedar City, Utah, for Appellant
William W. Quinn, Jr. Esq., Phoenix, Arizona, for Appellee

Before: Administrative Law Judge Andrew S. Pearlstein

Summary

BIA only partly met its burden of proof to clearly demonstrate the validity of the ground it cited for partially declining PITU's proposal to contract the tribal realty program: that the amount of funds proposed under the contract is in excess of the applicable funding level for the contract. BIA did not clearly demonstrate that any of the funds allocated for Southern Paiute Agency's ("SPA") realty program should be retained by SPA to perform inherent federal functions. BIA also did not clearly demonstrate that its method used to allocate PITU's tribal share of available funds, based solely on the tribe's share of acreage, was reasonable in the circumstances. BIA did clearly demonstrate the validity of its declination of that part of the Tribe's proposal that sought a total of \$75,000 from BIA's Central Office and Western Regional Office funds. The preponderance of the evidence in this proceeding shows

that the applicable funding level for the contract proposed by the Tribe to manage its realty program should be half the funds allocated to the SPA realty program, or \$72,660 of the 2007 Agency budget of \$145,319. This decision recommends that BIA's partial declination be reversed and remanded for BIA's reconsideration in a manner consistent with this decision.

Proceedings

On April 5, 2007, the Paiute Indian Tribe of Utah ("PITU" or the "Tribe") filed an appeal with the Interior Board of Indian Appeals ("IBIA" or the "Board") of a March 6, 2007, decision letter ("Decision") issued by the Bureau of Indian Affairs ("BIA") Superintendent of the Southern Paiute Agency ("SPA" or the "Agency"). That Decision partially declined the Tribe's December 7, 2006, proposal to enter into a contract with SPA under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("ISDA"), to assume responsibility for the real estate services program ("realty program") currently being provided to the Tribe by SPA. PITU filed its appeal pursuant to the 25 U.S.C. §450f(b), and the ISDA regulations, 25 C.F.R. Part 900, specifically §900.158.

On April 6, 2007, the Board referred the Tribe's appeal to the Department of the Interior's Office of Hearings and Appeals, Departmental Cases Hearings Division. This case was then assigned to the undersigned Administrative Law Judge ("ALJ") Andrew S. Pearlstein for hearing and issuance of a recommended decision.

Pursuant to 25 C.F.R. § 900.161(b), I convened a pre-hearing telephone conference with the parties on April 19, 2007. After postponement of the original hearing date upon the request of PITU, the hearing was held on August 14-15, 2007, in Cedar City, Utah. BIA produced four witnesses, and PITU produced one witness. The record of hearing consists of a 299-page stenographic transcript of hearing ("Tr."), and 45 exhibits ("Ex.") received into evidence. BIA's exhibits are designated with letters and the Tribe's exhibits are designated with numbers.

Findings of Fact

– Southern Paiute Agency Land Base

SPA is responsible for providing BIA services, including real estate services, to five Indian tribes or bands in the Agency's jurisdiction. Those five tribes are the Kaibab Band of Paiute Indians located in or near Fredonia, Arizona; the Moapa Band of Paiute Indians located in Moapa, Nevada; the Las Vegas Paiute Tribe located in Las Vegas, Nevada; the Southern San Juan Paiute Tribe located in Tuba City, Arizona; and PITU headquartered in Cedar City, Utah. Those tribes all have their own trust or reservation lands, except the Southern San Juan Paiute Tribe. That tribe has entered into a treaty with the Navajo Nation to acquire 5,200 acres of trust lands. However, the treaty is not yet in effect while the parties await its approval by the U.S. Congress. (Tr. 58, 123).

PITU, in turn, is actually a federation consisting of five more bands, each with its own reservation scattered over a wide area of southwestern Utah. Those constituent bands are: the Cedar Band located near Cedar City in Iron County; the Indian Peaks Band also in Iron County; the Shivwits Band located near Santa Clara in Washington County; the Koosharem Band located in Sevier County; and the Kanosh Band located in Millard County. PITU itself also has some trust land in the Cedar City vicinity. (Ex. 6, Tab A).

The records showing the precise land area that SPA administers for each tribe, consisting primarily of certified title status reports, may not be completely accurate at any given time due to the difficulty in obtaining complete records from the Land Title Records Office in Albuquerque, the uncertain status of various parcels pending transfers, the transition to a new computer system, and other record-keeping issues. However, based on the most recent accounting, SPA administers a total of approximately 241,802 acres of trust lands for its constituent tribes. These lands are divided as follows: Kaibab - 120,798 acres; Moapa - 70,587 acres; Las Vegas - 3,853 acres; and PITU - 46,564 acres. PITU's proportion of the total trust land acreage within SPA's jurisdiction is 19.26%. The addition of the San Juan's anticipated treaty lands would reduce PITU's proportion to 18.85%. (Exs. J, X, X-1; Tr. 66-78, 139-145, 189-191).

Among PITU's constituent bands, the Shivwits has the largest reservation, at 31,335 acres; followed by Indian Peaks with 9385 acres. The Cedar, Kanosh, and Koosharem Bands have about 2000 acres each, and PITU itself owns a 48-acre parcel. (Ex. X-1).

All trust land parcels in SPA's jurisdiction are identified by a 3-digit land code, keyed to the particular reservation on which it is located. PITU has 6 land codes, for its 5 constituent bands plus one for its headquarters. The remaining three tribes with reservations in SPA's jurisdiction, the Kaibab, Moapa, and Las Vegas, each have their own land code. PITU's reservations thus comprise 6 of SPA's total of 9 land codes. (Ex. N).

– SPA Realty Program

In 2007, Congress funded the Department of the Interior, including BIA, in a continuing resolution that maintained funding at essentially the same level as authorized in the last regular appropriation act, in 2005. For fiscal year 2007, BIA budgeted \$145,319 for SPA's realty program. (Exs. W, X-1; Tr. 250-252).

The budget of \$145,319 is intended to administer SPA's realty program on the basis to fund the salary and benefits for two full time employees: a Realty Specialist and a Realty Assistant. The salary and benefits for a federal general schedule ("GS") 11 Realty Specialist totals \$83,330. The balance of \$61,989 is intended to fund the position of a GS-7 Realty Assistant. (Ex. X-1; Ex. 6, Tab H; Tr. 92).

The SPA Realty Specialist's duties are set forth in a position description used by the Agency to advertise for a vacancy that has existed in that position for much of the past few years. As stated in that exhibit, the incumbent is responsible for real property management. The summary of the Realty Specialist duties reads as follows:

Responsible to the Field Representative [now the Agency Superintendent] for legal actions involving the land held in trust for the tribe, its bands or individual tribal members. Provides technical advice to the Field Representative [Superintendent], tribes, bands, and individual Indians on matters pertaining to trust lands. Carries out all real property management functions including acquisition, disposal, leasing, rights-of-way, and probates.

(Ex. 6, Tab J at 2). The duties of the SPA Realty Specialist more specifically include:

- Initiating and maintaining informational programs to advise tribes and individuals of real estate management property rights and probate;
- Managing acquisition, sale and exchange of lands between the tribes and individual owners, both within the reservations and fee-to-trust or trust sale transactions;
- Preparing and recommending approval of deeds, fee patent requests, escrow agreements, contracts for sale, and title documents;
- Recommending approval of leases for agricultural, pasture, business, commercial, recreational, residential and other purposes; as well as for mineral, oil, gas, and coal prospecting or extraction;
- Recommending for approval the granting of easements for rights-of-way for utilities, roads, industry, mines, and other projects;
- Directing the operation and maintenance of the agency's land records system, including recording and filing of all transactions; examining records and title documents to determine and certify ownership; examining public records; and preparing affidavits or other instruments for recording of titles;
- Developing and managing plans for land and economic development projects, including establishing and evaluating objectives, goals, priorities, and manpower requirements;
- Initiating, consulting, and maintaining contact with Agency and BIA personnel, tribal officials, and those doing business on reservation lands, in order to carry out the various realty programs and projects; and
- Supervising the GS-7 Realty Assistant.

(Ex. 6, Tab J at 2-4). The Realty Specialist reports directly to the Agency Superintendent at SPA, who in turn reports to the WRO. The Realty Specialist is expected to exercise independent judgment and initiative in negotiations with affected

parties. The incumbent also bears final responsibility for the technical sufficiency of real estate documents sent to the Superintendent or other BIA officials for approval.

The Realty Specialist, however, does not have final authority to approve land transactions such as for land disposal, transfer and acquisition, or for long-term leases. The inherent federal trust responsibility over Indian trust lands resides in the Secretary of the Interior who has delegated certain of those functions to BIA administrators – in the regional offices and, in turn, in the local agencies. In the Western Regional Office in Phoenix, the approval authority for various types of transactions resides in the several agency Superintendents, the Director of the WRO, or officials at BIA's Central Office, depending on the nature of the transaction. (Ex. 6, Tab L at 7-8; Tr. 64-65, 107, 171, 191).

The Realty Specialist prepares the documents for all realty transactions for lands both on and off reservations, for review by the Superintendent, who forwards them to the appropriate approving official. The SPA Superintendent herself has authority to approve trust-to-trust transfers, within a reservation, as the local delegated trustee. WRO has authority to approve fee-to-trust transactions within reservations, while BIA's Central Office must approve those transactions for off-reservation lands. The WRO is responsible for approval of long-term leases on trust lands administered by SPA. The SPA Realty Specialist is responsible for providing information to the parties to transactions, negotiating with them, and preparing the final documents, but does not have ultimate authority to approve or deny any of those transactions. (Tr. 64-65, 107, 109, 165, 191-92, 207; Ex. 6, Tab J).

The Realty Specialist position at SPA has been vacant since June 2005. It was also vacant from about September 2001 until July 2002. For part of 2007, around the time of the hearing, Denise Begay was appointed to act in that position, under the supervision of the Natural Resources Specialist, Paul Schafly. Ms. Begay transferred to another BIA office shortly after the hearing. Kelly Youngbear, the SPA Superintendent, advertised the Realty Specialist position twice without success in filling it with a suitable candidate. At the time of the hearing, Ms. Youngbear had a certificate of eligibles from which she could possibly fill the position. (Tr. 91-94, 114-116; Affidavit of Superintendent Kelly Youngbear, December 14, 2007).

BIA's WRO conducted a review of the Southern Paiute Agency (then called the Southern Paiute Field Station) Real Estate Services Program in 1999. The report of that

review concluded that, due to years of neglect: “the Field Station’s Realty Program [is] in very poor shape and in need of some very serious work to raise the effectiveness and productivity of this program.” (Ex. 8, Part IV). The major problem areas in need of improvement were: the filing system; lack of documentation of receipt of rents and royalties; recording titles and leases with the Lands Title and Records Office in Albuquerque; lack of environmental documentation; lack of heirship documentation; and delegation of authority. The review team, with the approval of the WRO Director, provided recommendations to improve the performance of the SPA Realty Program in those areas. (Ex. 8).

The written work product of the Realty Specialist consists primarily of correspondence with the several tribes in its jurisdiction; the WRO; various federal, state, and local government agencies; and private and public entities doing business on SPA trust lands. Many transmittals to the WRO involve ensuring the completeness of documents necessary for fee-to-trust acquisitions for the several PITU bands. Others concern trespasses, rights-of-way, and reporting of transactions. The correspondence shows that the SPA Realty Specialist acts basically as an intermediary among the Agency, the tribes, other BIA offices, other governmental units, and the business community, to advance the smooth functioning of the real estate transaction process involving trust lands. Most of the letters and memoranda were signed by the Superintendent at the time, although notations indicate the work of the Realty Specialist for those periods when the position was filled. (Ex. 7).

From 2001 through June of 2007, the SPA realty program generated approximately 220 pieces of correspondence. Approximately 70% of these related to transactions involving PITU and its constituent bands. The remaining 30% related to the other three tribes with reservations in SPA’s jurisdiction – the Kaibab, Moapa, and Las Vegas bands. This proportion was fairly consistent from year to year, ranging from about 80% PITU-related in 2001 to 63% in the first half of 2007. (Ex. 7; Tr. 7-13).

– PITU’s Contract Proposal and BIA Response

On December 7, 2006, pursuant to the ISDA, PITU submitted its contract proposal to SPA to take over its own realty program from BIA, beginning on April 1, 2007. The proposal set forth in sequence the elements required for such a contract proposal pursuant to 25 C.F.R. § 900.8. The statement of work to be contracted was outlined in two attachments describing the realty services PITU proposed to contract,

and a proposed tribal redesign of the realty program to serve PITU and its constituent bands. Essentially, PITU proposed to assume the duties of the SPA Realty Specialist for transactions relating to its own reservation lands and those of its constituent bands. (Ex. A).

PITU's proposal to assume responsibility for its realty program tracks the duties of the SPA Realty specialist. The proposed functions include providing policy direction, technical assistance, and review of realty operations; management of realty transactions of all constituent bands; Tribal land use planning; and development of trust land management systems. The proposed redesign of the realty program includes some more specific initiatives, including plans for file and record maintenance; preparation of fee-to-trust acquisition applications for submission to BIA; maintaining an inventory of all title status reports, leases, and rights-of-way; contracting with a geographic information systems ("GIS") consultant; and providing annual training to all Band Councils on realty functions and trust land management. (Ex. A, Attachments A, B).

PITU requested funding for its realty contract in the total amount of \$150,000 annually, and divided that among BIA's organizational levels as follows: \$25,000 from "national;" \$50,000 from "regional;" and \$75,000 from "local" BIA offices. The Tribe proposed direct contract support costs of \$130,500 and one-time start-up costs of \$40,000. The proposal would allocate 50% of the salary and benefits of its Trust Resources Director to the realty program, in the amount of \$41,000, plus \$23,000 for the salary of a part-time records clerk. Other costs were listed for equipment, supplies, travel, and subcontracts. (Ex. A).

Superintendent Youngbear and the SPA Self-Determination Specialist, Frances Price, in consultation with WRO personnel, then began review of PITU's realty program contract proposal. The chief negotiators on behalf of the Tribe were the Chairperson, Lora Tom, the Trust Resources Director, Jeffrey Zander, and Tribal Councilwoman, Gayle Rollo. The Tribe supplemented its application with a new Tribal resolution and additional information requested by BIA. BIA then determined that the application was complete on or about December 29, 2006. (Exs. B, C, D, E, F, G, H; Tr. 16-25).

On February 8, 2007, Ms. Youngbear sent a letter to Chairperson Tom, stating that "[t]he funding available at Southern Paiute Agency for PITU's share of the Real

Estate Program is \$8,863.” The letter enclosed a spreadsheet showing BIA’s calculations resulting in that tribal share, and a listing entitled “Inherent Federal Functions and Authorities – Real Estate Services.” The letter proposed a meeting with PITU to further explain BIA’s position. (Ex. J). That meeting took place on February 16, 2007, without reaching a resolution. BIA provided the Tribe with voluminous information at the meeting, including material on acreage of the SPA tribes, inherently federal functions, the realty specialist position, and the realty handbook. (Exs. K, 6; Tr. 27-30).

On March 5, 2007, facing the imminent 90-day deadline for review of the contract proposal, BIA requested a 30-day extension of time to render its formal response. (Ex. M). The Tribe responded on March 6, stating it was willing to grant an extension if “the Southern Paiute Agency and Western Regional Office cease providing incomplete, inaccurate, misleading, and false information to the Tribe.” (Ex. N). PITU’s letter continued to criticize BIA’s calculation of tribal shares and its application of the doctrine of inherent federal functions. PITU proposed that its tribal share be based on the number of land codes used for SPA realty transactions for the various tribes and bands. Since PITU has 6 of the Agency’s 9 land codes, this would entitle the Tribe to 2/3 of the total SPA realty program funding amount, then given as \$144,713. (Ex. N).

BIA then withdrew its request for an extension, and, on March 6, 2007, issued its formal partial declination of PITU’s contract proposal. BIA maintained its position that only \$8,863 was available to PITU from the SPA funding amount of \$144,713. BIA therefore cited the statutory and regulatory criteria for declining a contract in 25 U.S.C. § 450f(a)(2)(D) and 25 C.F.R. §900.22(d) that: “[t]he amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act.” BIA asserted that no funds were available for the contract from Central Office or the WRO. With respect to the \$75,000 PITU had requested from SPA, BIA pointed out that some of the proposed activities were already Tribal responsibilities. For those functions that were contractible, BIA asserted that “the available funding is insufficient to support these activities.” PITU filed a timely appeal of this partial declination, giving rise to these proceedings. (Ex. P).

BIA had also contacted the other four tribes or bands in its jurisdiction to notify them of PITU’s application. None of those tribes had a self-determination contract to

run its realty program. The Kaibab, Moapa, and Las Vegas bands responded that they supported BIA's calculation of the tribal share for distribution of realty funds within the Agency. (Exs. L, Q, R, S; Tr. 101-105).

Before the hearing BIA revised its calculation of PITU's tribal share of funding for the realty program, based on updated information on the Tribe's acreage, to \$11,685. BIA calculated this tribal share as follows, from the \$145,319 available for the entire SPA realty program. BIA first subtracted \$83,330 as the personnel costs for the Realty Specialist at GS-11 Step 5, considered to be performing inherent federal functions, leaving \$61,989, the funding for the GS-7 Realty Assistant position, for potential distribution to contracting tribes. BIA then distributed this remaining fund based on each tribe's proportion of the total SPA acreage within its jurisdiction (counting the San Juan Tribe as having 5200 acres although the treaty transferring this land has not yet been ratified). PITU, with 18.85% of the total SPA acreage, thus ends up with that percentage of \$61,989, equaling \$11,685. (Ex. X-1; Tr. 204).

In 1996, the WRO (then called the Phoenix Area Office) undertook to establish a uniform process to determine the tribal shares of all the tribes in the region for various programs. At that time, WRO used a weighted average method to calculate tribal shares for realty services. This method attributed a 40 percent factor to the percentage of total acres of trust land owned by each tribe and a 60 percent factor to the workload those trust lands generated for BIA. Under this formula, since PITU's share of SPA's realty workload is about 70% and its share of acreage is about 19%, the Tribe's share of available funding from SPA would be 49.94%, rounded to 50%. (Ex. 9 at 6-7; Tr. 133-135).

Discussion

In its partial declination of PITU's contract proposal, BIA relied on two bases to support its declination on the ground that the amount of funds requested is in excess of the applicable funding level for the contract. These are the doctrine of inherent federal functions and the method of calculation of tribal shares. BIA first reduced the total Agency realty program funding amount that could be provided to PITU by more than half to account for functions it alleged were inherently federal. BIA then allocated PITU's tribal share of the remaining funds based on its percentage of total acreage in SPA's jurisdiction, leaving PITU with less than 20% of those remaining funds, and about 8% of the Agency's total funding for its realty program. In this

proceeding, BIA failed to clearly demonstrate the validity of either of these two supporting grounds that resulted in its declination of the great majority of the funding requested by the Tribe to carry out its realty program self-determination contract. Therefore, this Recommended Decision would reverse BIA's declination and remand the Tribe's contract proposal to BIA to reconsider in a manner consistent with this Recommended Decision.

– Inherent Federal Functions

BIA calculated the tribal share available to PITU for its proposed realty contract by first determining the amount BIA needed to retain to perform its "inherent federal functions" or "residual functions" under the real estate services program. As seen above, BIA determined this amount to be \$83,330 of the \$145,319 allocated to the SPA realty program. In addition, BIA contends that essentially all realty functions at the Central Office and WRO are such residual functions; hence no funds allocated to those offices are available to a contracting tribe.

Title I of the ISDA, under which PITU made its contract application, does not mention the terms "inherent federal function" or "residual function." Presumably, if a tribe sought to contract to perform functions that BIA felt were inherently federal, BIA would decline that portion of the contract by citing the reason in 25 U.S.C. § 450f(a)(2)(E) and 25 C.F.R. § 900.22(e): that the program, function, service or activity cannot lawfully be carried out by the contractor. BIA did not cite that reason in its declination here. Indeed, BIA has not alleged that any of PITU's proposed realty programs, functions, and services would encroach on residual federal functions or would otherwise not be contractible. (Tr. 9; BIA Initial Post-Hearing Brief at 2). Rather, BIA asserts that the amount of funding available to the Tribe is limited by the need to retain funds for the Agency to perform its inherently federal functions.

Although it is not mentioned in Title I, the term "inherent federal function" is referred to in Title IV of the ISDA, also known as the Tribal Self-Governance Act, 25 U.S.C. § 458aa *et seq.* The Tribal Self-Governance Act ("TSGA") similarly provides a process for Indian tribes to enter into self-governance compacts to assume responsibility for programs and services previously provided by the BIA or other federal agencies, under somewhat different procedures and with greater flexibility than those for discreet contracts under Title I of the ISDA. The relevant section of the TSGA, at 25 U.S.C. § 458cc(k), reads as follows:

(k) Disclaimer

Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under subsection (b)(2) of this section and section 458ee(c)(1) of this title with respect to functions that are *inherently Federal* or where the statute establishing the existing program does not authorize the type of participation sought by the tribe.

(emphasis added). The TSGA itself does not further define “inherent federal functions,” although the regulations do state that BIA must retain funding for “inherently federal functions identified as residuals.” 25 C.F.R. § 1000.82(a). Residual funds are in turn defined as follows:

BIA residual funds are the funds necessary to carry out BIA residual functions. BIA residual functions are those functions that only BIA employees could perform if all Tribes were to assume responsibilities for all BIA programs that the Act permits.

25 C.F.R. § 1000.94. While the procedures may vary, the substantive principles behind Title I of the ISDA and Title IV, the TSGA, are identical. It is therefore appropriate, as BIA contends, to consider and apply the doctrine of inherent federal functions in the context of PITU’s proposal to contract the realty program under Title I of the ISDA.

At hearing, BIA addressed the issue of inherent federal functions through the testimony of several witnesses and the introduction of several exhibits, indicating that the doctrine has been the source of ongoing discussion within BIA. (Tr. 225-230). The key documentary exhibit is a memorandum from the Office of the Solicitor, signed on May 17, 1996, by the Solicitor at the time, John Leshy, with attachments. (Ex. AA, the “Leshy Memorandum”). The Leshy Memorandum analyzes the issue in the context of the TSGA, including a review of case law and the legislative history of the Act. Solicitor Leshy concludes that “the inherently Federal restriction can only be applied on a case-by-case basis.” The Leshy Memorandum, however, and other exhibits in evidence cite for general guidance an Office of Management and Budget (“OMB”) policy letter, which is attached to the memorandum. OMB Policy Letter 92-1, entitled *Inherently Federal Functions*, September 23, 1992, defines such a function as involving activities that:

- (1) bind the United States to take or not take some action by contract, policy, regulation, authorization, order or otherwise;
- (2) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise;
- (3) significantly affect the life, liberty, or property of private persons;
- (4) commission, appoint, direct, or control officers or employees of the United States;
- (5) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, disbursement of appropriated and other Federal funds.

Item (5) and the property reference in item (3) are most relevant to a realty program since they directly address the disposition of real property, or, in this case, lands held in trust for Indian tribes.

BIA's evidence was quite informative on the issue of inherent federal functions. Where it fell short, however, was in applying it to the facts of the realty program and the specific duties of the realty specialist that PITU is seeking to contract. BIA seeks to retain most of the funds allocated to the SPA realty program as needed to perform inherently federal or BIA residual functions. However, one searches the record in vain for any substantial evidence to support this position. BIA did make a sufficient showing that Central Office and, for the most part, WRO funds are needed to perform residual functions. But the facts revealed by the hearing record indicate that virtually all Agency level functions performed by realty program personnel are not inherently federal functions that can only be performed by BIA employees. Rather, those functions, as listed in the position description for the GS-11 Realty Specialist (Ex. 6, Tab H), are those that could be easily be performed by a contracting Indian tribe under the ISDA, or, for that matter, any other contractor.

BIA produced another exhibit listing those realty program functions that the WRO determined were residual federal functions, prepared in response to an inquiry by the Washoe Tribe in Nevada. (Ex. CC). In that exhibit, the WRO lists some 24 realty program functions and authorities it deems to be inherently federal that could not be contracted to a tribe. Most of those (15 of 24) explicitly encompass authority to

“approve” or “review and approve” transactions such as sales, acquisitions, grants of rights-of-way, and leases. Others that do not explicitly require approval involve final purchases and transfers, or enforcement and implementation of legal restrictions.

A comparison of this list in Ex. CC of realty program inherently federal functions with the list of duties of the SPA Realty Specialist, reveals no significant overlap or conflict. Where the inherently federal function is to approve transactions, the duty of the Realty Specialist is to recommend such transactions for approval. The other main duties of the Realty Specialist are local and programmatic – mainly involving record-keeping, document preparation, and providing policy direction and education at the local level. These are duties that could appropriately be performed by an employee of an Indian tribe operating under a self-determination contract. None of the functions of the SPA Realty Specialist, or of those proposed to be performed by PITU, involve the “ultimate control over the acquisition, use, or disposition of the property . . . of the United States,” the fairly clear guideline established by the OMB policy letter on inherently federal functions applicable to a realty program.

The testimony of BIA’s witnesses did not provide any substantial support for the proposition that most of the SPA realty program funds are needed to perform inherently federal functions. Where they did address the issue, their testimony tended to support the proposition that essentially only final approval and oversight authority could not be contracted. Superintendent Youngbear testified that she acts in the delegated role as local trustee with the authority to approve certain transactions. (Tr. 64-65). In response to a question about which functions are contractible and which are residual, she testified:

There are certain portions that can’t be contracted by the tribes and the Bureau of Indian Affairs. For example, approval, approval and oversight of programs. For instance, the awarding official couldn’t be contracted because that’s the person that awards the contracts. So there’s certain functions that are inherent that need to stay in the Bureau in order for the programs to be – to have oversight and management of those programs.

(Tr. 98). Such approval and oversight authority is not within the scope of duties of the SPA Realty Specialist or those sought to be contracted by PITU.

BIA's witnesses' other references to Agency level realty program residual functions were vague or confused with the separate issue involving the appropriate tribal share. BIA did not provide any specific examples of residual functions at the Agency level that could only be performed by federal employees, other than the final approval of realty transactions. Stan Webb, Realty Officer for WRO, provided ample examples of the work of the Regional Office indicating that most of those functions are indeed inherently federal and not contractible. These include litigation support, implementing nation-wide policy initiatives, and exercising delegated approval authority for off-reservation acquisitions and long-term leases. (Tr. 165-166). However, one of Mr. Webb's references to residual functions at the Agency level reads as follows:

So our position has been that the Agency needs to withhold from those contracts sufficient funds for them to carry out what we're calling residual functions where they have in realty, they have secretarial approval authorities that they have to carry out and the review that goes along with that would make up the major part of the residual function.

(Tr. 170). To the same effect is WRO Natural Resources Director Kathy Wilson's testimony. (Tr. 231). Mr. Webb continues by pointing out that SPA, as a multiple tribe agency, must retain sufficient funds to serve its other non-contracting tribes. However, that is a separate issue.

Again, however, the authority to finally approve realty transactions is not within the duties of the SPA Realty Specialist, but resides at the Superintendent level or above. While it is true that the Superintendent will have to spend some time reviewing recommendations of the Realty Specialist or those of a contracting tribe, before final approval, she has that responsibility already. The evidence shows that the funding provided for the realty program is devoted entirely to the salary and benefits for the Realty Specialist and Realty Assistant, whose duties do not encroach on the Superintendent's or WRO officials' authority that is properly characterized as inherently federal.

Mr. Webb also confirmed, as indicated in Exs. J and X-1, that the inherent federal functions were funded essentially as equivalent to the costs of the Realty

Specialist position. (Exs. E, I; Tr. 204).¹ However, at no point does he or any other BIA witness actually define alleged inherently federal functions in terms of the specific duties of the Realty Specialist or any other realty program functions the Tribe proposes to contract. Rather, the picture that emerges is one of clear delegations of authority to approve realty transactions from the Secretary to the Agency Superintendent level and above. The duties of the SPA Realty Specialist, who reports to the Superintendent, simply do not encompass that approval authority or any other inherent federal functions. BIA thus did not clearly demonstrate the validity of this element of its partial declination. Therefore, this Recommended Decision concludes that virtually the entire \$145,319 budget allocated to SPA for its realty program should be available to tribes that wish to contract their own realty programs.

– Organizational Levels

As noted above, Mr. Webb’s testimony did sufficiently support the proposition that essentially all WRO realty activities are inherently federal, with the possible minor exception of funds allocated to provide technical assistance to the tribes. (Tr. 182-183). In addition, as testified by Ms. Wilson, the language in the appropriations acts funding BIA prohibits the use of funds directed toward “central office oversight and executive direction” for contracts or compacts under the ISDA or TSGA. P.L. 109-54 (September 30, 2006). (Ex. W; Tr. 246-250).

The Tribe had applied for funds from those two organizational levels as seemingly directed by 25 C.F.R. § 900.8(g)(3). However, PITU did not specifically divide its proposed programs, functions, services, and activities (“PFSA’s”) by national, regional, and local organizational levels as indicated by that rule. In any event, this Recommended Decision finds that all the PFSA’s the Tribe seeks to contract are those that would only be performed at the local Agency level. Therefore, BIA properly declined the \$25,000 the Tribe sought from BIA Central Office and the

¹To the contrary is BIA’s statement in its Reply Brief (p. 5) to the effect that the Tribe incorrectly asserts that BIA believes the position of Realty Specialist is “synonymous” with inherent federal functions. Whether they are exactly “synonymous” or not, the labeling of the columns in Exs. J and X-1 indicate that that exact amount of funding for the salary and benefits of the realty specialist, \$83,330, is needed to carry out alleged inherent federal functions at the Agency. Mr. Webb testified that defining inherently federal functions as equivalent to the duties of the Realty Specialist is “a reasonable way to view what it takes to carry out the inherently federal function.” (Tr. 204).

\$50,000 the Tribe sought from WRO. As further discussed below, however, the \$75,000 PITU sought from SPA funds is fairly close to the mark, and was not properly declined by BIA.

– Tribal Share

Once we have determined that the full amount of Agency level funding available for the SPA realty program, \$145,319, is available for tribes wishing to contract that program, it is necessary to determine how to apportion that amount among the several tribes in SPA's jurisdiction. Pursuant to 25 U.S.C. § 450j-1(a)(1):

The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity, or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

The Act further provides:

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. § 450j-1(b). Thus, PITU is entitled to contract funding in the amount that SPA would otherwise use to deliver realty services to the Tribe, without reducing funding available to SPA's other tribes.

SPA provides realty services to four tribes and five constituent bands of PITU. Accordingly, in order to calculate PITU's tribal share, SPA had to determine what portion of SPA's total annual realty services budget is spent providing services to PITU, including its constituent bands. As seen above in the Findings of Fact (p.10),

BIA calculated PITU's tribal share on the basis of the area, or acreage, of its land base within SPA's jurisdiction. Since PITU has about 19% of those acres, BIA determined its tribal share would be 19% of the funds remaining after subtracting the amount retained to perform alleged residual functions (19% of \$61,989 = 11,685). Since we have disregarded that subtraction, under BIA's acreage formula, PITU would be entitled to 19% of the full \$145,319 appropriation for the SPA realty program, or \$27,611.

However, as seen in the Findings of Fact, about 70% of the realty program correspondence during the past 7 years consisted of PITU-related items, while the remaining tribes generated only about 30% of that written work. When questioned about this, WRO's Mr. Webb testified that there was no established or uniform formula for determining the tribal share for a realty program, but that the use of acreage as the sole distribution factor was WRO's preferred approach. He acknowledged that other factors could also be used, but asserted that the use of acreage would be most accurate assuming all tribes were seeking to develop their land to its maximum potential. He and Superintendent Youngbear also pointed out that realty workload could vary from year to year, and could not easily be quantified. (Tr. 118-119, 178-180). However, no BIA witness attempted to contradict PITU's assertion, based on counting pieces of realty correspondence, that about 70% of the SPA realty workload since 2001 has involved PITU trust lands. (Ex. 7).

In the circumstances presented by this case, BIA's use of acreage as the sole factor to allocate tribal shares must be considered arbitrary and unreasonable. Acreage should certainly be considered as a major factor, at least as a starting point. But when there is a demonstrated consistent significant discrepancy between a tribe's proportion of acreage and proportion of realty workload, BIA should take that into account. Indeed, BIA formerly did that, as recently as 1996, when it determined realty program tribal shares by weighing workload as 60% and acreage as 40% of the calculation. (Ex. 9). Under this weighted formula, PITU's tribal share of the realty program would be an even 50% (rounded to the nearest percent).

The use of workload as a key tribal share allocation factor would also be more consistent with the BIA's statutory obligation to provide a level of funding that the BIA would otherwise spend for operation of the contracted program. The actual time spent or work done by realty program personnel is more directly related to the expenditure of funds than the land area or acreage involved. In this case as well,

PITU acts in effect as its own agency within the Southern Paiute Agency, since it is a confederation consisting of five constituent bands, each with its own trust lands. The disparate needs of the constituent bands would be expected to generate more realty transactional work than those of a single contiguous, although perhaps larger, reservation. Under these circumstances, calculating PITU's tribal share based solely on PITU's percent ownership of trust land fails to meet SPA's statutory obligation under 25 U.S.C. § 450j-1(a)(1), to provide the tribe with the level of funding the Secretary would have otherwise provided for the operation of the contracted program. BIA thus did not clearly demonstrate the validity of its method of calculating PITU's tribal share, which formed the basis for its partial declination of the funding amount requested by the Tribe.

The hearing record indicates several methods or formulas that could be used to determine tribal shares for a realty program for a SPA tribe. If only workload were used, PITU would be entitled to 70% of available funding. If land codes were used, PITU would be entitled to 67% (or 60% if the San Juan Paiute tribe were given a code). Under BIA's former weighted method, with workload weighed at 60% and acreage at 40%, PITU's share would be 50%.² If this method were varied somewhat, by weighing workload and acreage equally, PITU's share would be 45%. WRO's formula, using acreage alone, drops PITU's share of available funding to 19%. This Recommended Decision will rely on BIA's actual formerly used weighted formula set forth in Ex. 9 as the one best supported by the record, striking a proper balance of factors in PITU's unique circumstances. Thus, PITU's tribal share of the available realty program funds should be 50%.

Allocating half the \$145,319 funding for the SPA realty program will not reduce funding available to carry out realty program functions for SPA's other tribes. Dividing the funds this way will allow PITU to employ one full-time employee or equivalent ("FTE") at near the GS-11 grade to manage its realty program, and SPA to retain one FTE to manage its program for the other tribes. The record shows this amount of funding will be ample to sustain the past level of realty work being done by the SPA realty program for those tribes. This is especially so in view of the fact that the Realty Specialist position has not even been filled for the past three years.

² [(19 x .40) + (70 x .60)] = 49.6%

Conclusion and Recommendation

BIA only partly met its burden of proof to clearly demonstrate the validity of the ground it cited for partially declining PITU's contract proposal: that the amount of funds proposed under the contract was in excess of the applicable funding level for the contract. BIA did not clearly demonstrate that any of the funds allocated for SPA's realty program should be retained by SPA to perform inherent federal functions. BIA also did not clearly demonstrate that its method used to allocate PITU's tribal share of available funds, based solely on the tribe's share of acreage, was reasonable in the circumstances. BIA did clearly demonstrate that it properly declined that part of the Tribe's contract proposal that sought \$25,000 from BIA Central Office funds and \$50,000 from WRO funds. The preponderance of the evidence in this proceeding shows that the applicable funding level for the contract proposed by the Tribe to manage its realty program should be half the funds allocated to the SPA realty program, or \$72,660 of the 2007 Agency budget of \$145,319.

This Recommended Decision therefore recommends that BIA's partial declination of PITU's contract proposal be withdrawn, and that, upon reconsideration, BIA respond to PITU's proposal in a manner consistent with this decision, by increasing the funding awarded to the Tribe to one half the amount budgeted for SPA's realty program for the relevant fiscal year.

Appeal Rights

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. § 900.165(c). An appeal to the IBIA under 25 C.F.R. § 900.165(c) shall be filed at the following address: Interior 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.

// original signed

Andrew S. Pearlstein

Administrative Law Judge