Case No. 12-16539

United States Court of Appeals for the Ninth Circuit

Cloverdale Rancheria of Pomo Indians of California, et al.,
Plaintiffs and Appellants,

v.

Kenneth L. Salazar, et al.
Defendants and Appellees

Appeal from the U.S. District Court for the Northern District of California
Case No. 5:10-cv-01605-JF
Hon. Jeremy Fogel

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the subject matter of this action on the basis of 28 U.S.C. § 1331, in that this is a civil action arising under the Constitution and laws of the United States, including but not limited to the following provisions: U.S. Const. Art. I, § 8, cl. 3 (Indian commerce clause); U.S. Const. Amend. V (due process clause); the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. and § 701 et seq.; 28 U.S.C. §§ 2201 and 2202 (declaratory judgments); the All Writs Act, 28 U.S.C. § 1651; the Indian Reorganization Act, 25 U.S.C. § 461 et seq.; the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq., 43 U.S.C. § 1451 (establishment and responsibilities of the Department of the Interior); 25 C.F.R. Part 900 (contracts under the ISDA); and the federal common law. The district court also had jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), in that this is a civil action against the United States not exceeding $10,000 in amount, founded upon the Constitution, Acts of Congress and regulations of an executive department. The district court also had jurisdiction pursuant to 28 U.S.C. § 1361, in that this is a civil action in the nature of mandamus seeking to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiffs. The district court also had jurisdiction pursuant to 25

U.S.C. § 450m-1, in that this is a civil action or claim against the Secretary of the Interior arising under the ISDA. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested herein by the APA, 5 U.S.C. § 702, and by the ISDA, 25 U.S.C. § 450m-1.

The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment dismissing the action, which is an appealable final decision. *See Ordonez v. United States*, 680 F.3d 1135, 1136 (9th Cir. 2012).

The judgment appealed from was entered on May 11, 2012. Appellants filed their notice of appeal on July 9, 2012. This appeal is timely pursuant to Rule 4(a)(1)(B) of the Federal Rules of Civil Procedure, which allows 60 days for a notice of appeal after entry of the judgment or order appealed from if one of the parties is the United States.

STATEMENT OF THE ISSUES

(1) Is judicial review available under the Administrative Procedure Act ("APA") to challenge the Department of the Interior's current recognition of and dealing with a purported Tribal government not created by, and officials not elected by, the only class of persons legally authorized to form the Tribal government?

(2) Does the APA authorize a court to compel legally required agency action when the agency's legal duty to act is not expressed in a specific legislative command?

(3) Is judicial review available under the Indian Self-Determination and Education Assistance Act ("ISDA") and/or the APA for the Department of the Interior's refusal to approve contract proposals on the sole ground that the Department currently recognizes and deals with a purported Tribal government not created by, and officials not elected by, the only class of persons legally authorized to form the Tribal government?

(4) Is it error for the district court on a motion to dismiss to contravene the factual allegations in the complaint that the Plaintiffs/Appellants are the same entity and officials who submitted to the Department of the Interior the ISDA contract proposals at issue?

STATEMENT REGARDING ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, pertinent statutes and regulations are set forth in an addendum bound with this brief.

STATEMENT OF THE CASE

Appellants seek an order compelling the Department of the Interior and its officials ("Department") to make a final decision formally recognizing a Tribal Council for the Cloverdale Rancheria of Pomo Indians of California ("Cloverdale Rancheria" or "Tribe"). The Cloverdale Rancheria requested such recognition from the Department, and the Department refused on the grounds that a decision of this nature was unnecessary without a simultaneous need for federal action that requires the Department to decide which Council to recognize. The Tribe also requested federal action from the Department, in the form of two proposals to modify and renew the Tribe's federal contract, and the Department refused to take these actions on the ground that the Tribal Council submitting the proposals was not the Council recognized by the Department.

The Tribe and the members of the Tribal Council elected in 2009 (the "2009 Council") sued the Department under the APA, seeking to compel agency action unlawfully withheld or unreasonably delayed, and seeking review of the final agency action that is the Department's continuing engagement with a rival Tribal Council first elected in 1996 (the "1996 Council").

On the Department's motion, the district court dismissed the three APA claims of the Tribe's First Amended Complaint ("FAC") for lack of subject matter jurisdiction. Order of May 17, 2011 (Ex.R. at 15-23[1]) ("First Order"). The court allowed the Tribe to amend its complaint to add three new claims based on the ISDA, then dismissed the new claims in the Second Amended Complaint ("SAC") for lack of statutory standing. Order of May 11, 2012 (Ex.R. at 2-14) ("Second Order"). This appeal follows.

[1] Citations to documents in the Excerpts of the Record are abbreviated "Ex.R." followed by the page number or range of pages.

STATEMENT OF FACTS

The Cloverdale Rancheria is a federally recognized Indian tribe. SAC ¶ 17 (Ex.R. at 31); *see* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012). The individual plaintiffs are the members of the 2009 Tribal Council, which is the Tribe's governing body, as elected in January 2009 by a majority of the people eligible to organize the Tribe's government. SAC ¶ 18 (Ex.R. at 31).

The factual background relevant to the issues in this case involves the Tribe's termination and restoration by the federal government, the decisions of the Interior Board of Indian Appeals ("IBIA") directing the manner in which the Department must treat the restored Tribe, and the Department's treatment of the Tribe in contravention of its legal obligations.

A. The Tribe's Termination, Restoration and Establishment of the 1996 Interim Tribal Council

In the early 1960s, pursuant to the California Rancheria Act of 1958, Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390, the United States distributed the Tribe's lands to individual tribal members and removed the Tribe from federal supervision. SAC ¶¶ 31-32 (Ex.R. at 34-35). The Tribe was restored to federal recognition in 1983 in accordance with the stipulated judgment in *Hardwick v. United States*, No.

C-79-1710 (N.D. Cal. Dec. 22, 1983). SAC ¶¶ 33-35 (Ex.R. at 35-36). Paragraphs 2 through 4 of the *Hardwick* judgment provided in relevant part that:

> 2. The Court shall certify a class consisting of all those persons who received any of the assets of the Rancherias listed and described in paragraph 1 [including Cloverdale Rancheria] pursuant to the California Rancheria Act . . . and any Indian heirs, legatees or successors in interest of such persons with respect to any real property they received as a result of the implementation of the California Rancheria Act.
>
> 3. The status of the named individual plaintiffs and other class members of the seventeen rancherias named and described in paragraph 1 as Indians under laws of the United States shall be restored and confirmed. . . .
>
> 4. The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities, or groups of the seventeen rancherias listed in paragraph 1 as Indian entities with the same status as they possessed prior to the distribution of assets of these Rancherias under the California Rancheria Act . . . .

SAC ¶ 34, SAC Exh. 4-H (Ex.R. at 35-36, 278-279).

After the *Hardwick* judgment, disagreement arose as to who was entitled to organize the Tribe's government. SAC ¶ 42 (Ex.R. at 38); *see Alan-Wilson v. Sacramento Area Director*, 30 IBIA 241 (1997) (hereafter "*Alan-Wilson I*") (describing Tribe's governance disputes during the 1990s). In 1992, the Bureau of Indian Affairs ("BIA") recognized a tribal government established through an election conducted by Jefferey Alan-Wilson, and over the next two years provided services to the Tribe through

this government. *Alan-Wilson I* at 247. In 1994, a BIA official recognized that the BIA "was administratively in error in allowing [Wilson's] group the right to organize the Cloverdale Rancheria" because "BIA knew Wilson was not a lineal descendent of a distributee or dependent member." *Id.* at 248.

According to BIA officials, "[BIA] recognizes the right of the distributees, dependent members, and lineal descendants to formally organize the Cloverdale Rancheria pursuant to the [Indian Reorganization Act] and the *Tillie Hardwick* judgment." *Alan-Wilson I* at 248 (quoting BIA Superintendent's August 19, 1994 decision). "The [*Hardwick*] case restored the Cloverdale Rancheria to Federal status and stipulated that only distributees, dependent members, and their descendants would have the right to organize." *Id.* (quoting BIA Area Director's April 4, 1995 decision). The BIA withdrew its recognition of Wilson's government and instead recognized an interim tribal council headed by distributee John Santana. *Id.*

Wilson appealed the BIA decision to the IBIA, "contending that the judgment does not address the manner in which restored tribes can organize." *Alan-Wilson I* at 254.

The IBIA disagreed with Wilson. It examined paragraph 4 of the *Hardwick* stipulated judgment, which directed the Department to restore the seventeen Rancherias "with the same status as they possessed prior to

distribution of [their] assets." *Alan-Wilson I* at 254. The IBIA found that "the Department considered the status of the Cloverdale Rancheria prior to termination to be that of a group of adult Indians residing on a reservation." *Id.* at 255. This understanding is consistent with the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, which provides that "[t]he term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or *the Indians residing on one reservation*." 25 U.S.C. § 479 (emphasis added). Therefore, upon restoration to that status, the restored Tribe would comprise "the distributees, dependent members, and, by extension, their adult lineal descendants." *Alan-Wilson I* at 255. The IBIA remanded to the Area Director to establish whether the Department had a "consistent practice in regard to determining who would be allowed to reorganize" the *Hardwick* tribes, and if so, to follow it with respect to the Cloverdale Rancheria. *Id.* at 261-62.

The dispute returned to the IBIA following the Area Director's decision on remand. *See Alan-Wilson v. Acting Sacramento Area Director*, 33 IBIA 55 (1998) (hereafter "*Alan-Wilson II*"). As recounted by the IBIA, the Area Director determined that the BIA had in fact "been consistent in following the Hardwick decision when recognizing all but the Cloverdale Rancheria Tribal Council," and reiterated that "the proper entities to

organize the Cloverdale Rancheria are the distributees, dependent members and lineal descendants thereof who were listed on the distribution plan for the Cloverdale Rancheria." *Id.* at 55. The BIA arranged a meeting of the 127 eligible voters, who on November 8, 1997 passed a resolution to support the council that had been elected on June 1, 1996 as their "interim governing body" (the "1996 Council"),[2] which the Area Director officially recognized. *Id.* (quoting BIA Area Director's December 23, 1997 decision).

The IBIA upheld the Area Director's decision. It examined the report of BIA official Dorson Zunie, which documented the BIA's efforts to assist with the organization of the restored *Hardwick* tribes. The IBIA found that in the case of tribes like the Cloverdale Rancheria, which did not have a governing document prior to termination, "the individuals eligible to participate [in the organization of the Tribe's government] were distributees and their lineal descendants." *Alan-Wilson II* at 57. Because the Area Director followed this practice in recognizing the confirmation of the 1996 Council, the IBIA affirmed his decision. *Id.* at 57-58.

B. The 1996 Council Goes Rogue

The 1996 Council was elected by the members of the *Hardwick* class for the purpose of facilitating the organization of the Tribe's government by

[2] The 1996 Council is sometimes referred to in the record as the "June 1 Interim Tribal Council" or variations thereof.

the *Hardwick* class. *See* SAC ¶ 42, SAC Exh. 1-D (Ex.R. at 38, 156). It was intended to be an interim body of limited authority. *Id.*; *see also Alan-Wilson II* at 55 ("The attendees then passed a resolution to support the June 1 Council as their interim governing body."). But the 1996 Council began taking actions outside its authority. In April 2003, the 1996 Council conducted a purported election, of which one-third or more of the eligible voters of the *Hardwick* class did not receive notice, which resulted in the purported enlargement of the class of persons authorized to participate in the organization of the Tribe's government. SAC ¶¶ 47, 55; SAC Exh. 1-F, 1-H, & 1-J (Ex.R. at 40, 42, 158-159, 163-232, 237.) Though only 37 of the 109 eligible voters participated, with just 26 voting in favor, the 1996 Council certified the election's results. *Id.* The Department did not consider the Tribe's expansion legitimate, the Regional Solicitor stating in an internal legal memorandum, "It does not appear the resolution to expand Tribal membership was adopted in conformance with a Tribal organizing document, or by a vote of the Hardwick class." SAC Exh. 1-J (Ex.R. at 237). Nevertheless, from that point forward, the 1996 Council took direction not from the 109 distributees, dependent members and lineal descendants the IBIA held were the only people authorized to permanently

organize the Tribe, but from an expanded membership with a purported 227 adult members. SAC ¶ 48, SAC Exh. 3 (Ex.R. at 40, 265-271.)

In 2008, the 1996 Council submitted to the Department a proposed Tribal Constitution. SAC ¶ 52, SAC Exh. 5 (Ex.R. at 41, 319.) BIA Central California Agency Superintendent Troy Burdick (a defendant in this case) declined to approve the constitution, stating that "the Bureau can only, for formal organizational purposes, reorganize [*sic*, recognize] an organizational document adopted under the provisions of 25 CFR Part 81 and by that class of individuals identified in the Tillie Hardwick decision." SAC ¶ 53, SAC Exh. 6 (Ex.R. at 42, 322). The 1996 Council did not appeal this decision.

In September 2007, the BIA explicitly confirmed that it had never recognized a reorganization of the Cloverdale Rancheria government. SAC ¶ 62, SAC Exh. 4-L (Ex.R. at 44, 317). The Department expressed the same view internally in June 2008, concluding, "there is no evidence the Tribe is an 'organized' tribe under the IRA." SAC Exh. 1-J (Ex.R. at 237).

C. The Tribe's Petition for Secretarial Election and First IBIA Decision

In 2007, members of the *Hardwick* class – the Cloverdale Rancheria distributees, dependent members and lineal descendants – formed the Committee to Organize the Cloverdale Rancheria Government ("Committee"), which petitioned the BIA to authorize a tribal election

supervised by the Secretary of the Interior, pursuant to section 16 of the IRA, 25 U.S.C. § 476, to adopt a constitution. SAC ¶ 80 (Ex.R. at 48-49). The Committee and the BIA worked together to compile a list of the individuals eligible to vote in the election. SAC ¶ 64, SAC Exh. 7 (Ex.R. at 44, 324). The BIA Regional Director authorized the Secretarial Election, but the IBIA ordered a stay of any further action by BIA to conduct the election. SAC ¶ 81 (Ex.R. at 49). The IBIA held that the BIA's authorization of the Secretarial Election was necessarily "premised on several threshold determinations," including "(1) that the Tribe is unorganized . . . and (3) that the Tribe's present adult membership and the adult members of the Tillie Hardwick class are one and the same." SAC ¶ 82, SAC Exh. 10 (Ex.R. at 49, 342-343). In the IBIA's view, the Regional Director had not "squarely addressed these issues," made explicit decisions, and provided appropriate appeal rights. *Id.* The IBIA ultimately remanded the matter to the Regional Director, stating, "In the event that in a future decision necessary for government-to-government relations, BIA must address one or more of the issues Appellants raised in this appeal," i.e., the status of the Tribe's organization, its governing document, and its voting membership, "the Board fully expects BIA to fully consider the arguments raised by Appellants, as well as the various interim orders that the Board

issued during this appeal, and afford proper appeal rights to interested parties." SAC ¶ 83 (Ex.R. at 49), *see Cloverdale Rancheria of Pomo Indians of California v. Pacific Regional Director*, 48 IBIA 308, 311 (2009). Since then, however, the BIA has avoided addressing these issues.

D. The 2008 and 2009 Tribal Elections and Second IBIA Decision

The Committee withdrew its Secretarial Election petition and opted instead to conduct tribal elections not administered by the Secretary. SAC ¶¶ 83, 65; *see* SAC Exh. 1-A (Ex.R. at 49, 44-45, 82-109). In December 2008, the members of the *Hardwick* class approved a Tribal Constitution and election ordinance. SAC ¶ 67; SAC Exh. 1-B (Ex.R. at 45, 111-113). In January 2009, they elected the 2009 Council, comprised of the five individual plaintiffs in this action, and removed the 1996 Council. SAC ¶¶ 68, 101; SAC Exh. 1-C & 18 (Ex.R. at 45-46, 53, 128-130, 376-377).

The Committee petitioned the Department to recognize the formal organization of the Tribe's government. SAC ¶ 69, SAC Exh. 1 (Ex.R. at 46, 71-80). BIA Superintendent Burdick refused, on the basis that there was no need for the federal government to make such a decision absent some federal action to be taken that required the identification of the Tribe's governing document or governing body. SAC ¶ 71; SAC Exh. 4-C (Ex.R. at

46, 274-275). BIA Acting Regional Director Dale Risling upheld this decision. SAC ¶ 75, SAC Exh. 8 (Ex.R. at 47, 326-331).

On August 6, 2012 (after the district court's judgment in this case), the IBIA affirmed, holding that "there was no Federal action required at the time from BIA that would have necessitated a decision on the tribal dispute." *Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220, 220 (2012). Neither the ongoing government-to-government relationship between the Tribe and the BIA, nor the 2009 Council's request to modify its federal contract to reflect the new tribal government (which was not submitted simultaneously with the recognition request, but after the Regional Director's decision) were sufficient to require the BIA to decide which group to recognize as the Tribe's government. *Id.* at 224. The IBIA vacated the remainder of the Regional Director's decision, on the grounds that it went beyond what was necessary to conclude that no decision should be made. *Id.* at 225-26. Among other things, the IBIA specifically disapproved the portion of the Regional Director's decision stating that the BIA continued to recognize the 1996 Council, because in their view it was "unnecessary to make a current determination regarding" any tribal leadership at all. *Id.* at 226. "'If no BIA action is required, BIA is not obligated to recognize *any* tribal government.'"

Id. at 224, (quoting *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320, 327 (2012).)

It bears emphasizing that the Department has made no decision on the merits of the Tribe's request to recognize the 2009 Council and acknowledge the December 2008 Tribal Constitution.[3] The Department decided only that no decision would be made.

E. The Department's Return of the Tribe's ISDA Contract Proposals

Though the IBIA's order forbids the BIA from stating which of two competing tribal governments it recognizes unless the conditions are just right, it is nevertheless a fact that the BIA sometimes must deal with one government or another in the course of its relationship with the Tribe. One such occasion for interaction can arise in connection with a contract between the Tribe and federal government under the ISDA. When the BIA disburses funds to a Tribe pursuant to an ISDA contract, or agrees to a tribal proposal to adjust the contract's terms or to renew the contract, the BIA necessarily deals with a person or group it accepts is authorized to represent the Tribe. The BIA has taken such actions with respect to the Tribe's ISDA contract, engaging with the 1996 Council while refusing to entertain contract

[3] This is contrary to an assertion in the district court's First Order. First Order at 7 ("Defendants did not fail to act on Plaintiffs' request; they denied it.").

modification and renewal requests by the 2009 Council. SAC ¶¶ 84, 90-97 (Ex.R. at 49-52).

The 2009 Council requested to amend the Tribe's ISDA contract in July 2010 "to accurately reflect the current duly-authorized governing body and duly elected officials of the Cloverdale Rancheria." SAC ¶ 90-91, SAC Exh. 11 (Ex.R. at 51, 352). The Department refused to act on the request on the ground that the administrative appeal then pending, as well as this federal litigation, precluded any action by the Department. SAC ¶ 92, SAC Exh. 12 (Ex.R. at 51-52, 359-360). The 2009 Council then made a request in November 2010 to renew the Tribe's ISDA contract subject to the previously requested amendments. SAC ¶ 93, SAC Exh. 13 (Ex.R. at 52, 363). The Department "return[ed] the proposal," stating, "we do not recognize the governing body referenced for the [Tribe]." SAC ¶ 94, SAC Exh. 13 (Ex.R. at 52, 373-374).

F. Procedural History of This Litigation

The Tribe initially sued the Department to compel a decision from the Regional Director which had not been issued within the time prescribed by the regulations. After the Regional Director issued his decision, the Tribe

amended its complaint.[4] The First Amended Complaint asked the court, pursuant to the APA, 5 U.S.C. § 706(1), to compel the Department to recognize the tribal government elected by a majority of the people authorized to organize the Tribe and choose its leadership. SAC ¶¶ 108-117 (Ex.R. at 55-56). The Tribe also specifically alleged that the Department's duty to act included the duty to recognize the 2009 Council and the constitution approved by the *Hardwick* class in December 2008. SAC ¶¶ 118-130 (Ex.R. at 56-58). Finally, the First Amended Complaint alleged that the Department's failure to recognize the Tribe's organization and government was a violation of the tribal members' right to equal protection. SAC ¶¶ 131-138 (Ex.R. at 58-59).

The district court dismissed these claims for lack of subject matter jurisdiction, but allowed the Tribe to file its Second Amended Complaint. First Order at 2 (Ex.R. at 15-23). The court concluded that an action under the APA to compel agency action unlawfully withheld or unreasonably delayed requires the agency to have "ignored a specific legislative command" for "discrete, nondiscretionary" action. First Order at 8 (Ex.R. at 22). In the court's view, the Tribe had not identified such a command. First Order at 8-9 (Ex.R. at 22-23).

[4] The three claims of the First Amended Complaint later became the first three claims of the Second Amended Complaint.

The Tribe's Second Amended Complaint added three causes of action stemming from the Department's refusal to accept the 2009 Council's proposals to amend and renew the Tribe's ISDA contract. The Tribe claimed that under the ISDA, the contract proposal should be "deemed approved," SAC ¶¶ 139-148 (Ex.R. at 59-60) (quoting 25 C.F.R. § 900.18), that the court should compel the Department to accept the proposals pursuant to the APA, SAC ¶¶ 149-159 (Ex.R. at 60-62), and that the Department's decision to deal with the 1996 Council rather than the 2009 Council was an arbitrary and capricious final agency action, reviewable in the district court under the APA and ISDA. SAC ¶¶ 160-170 (Ex.R. at 62-63).

The district court dismissed these claims as well. Second Order at 12 (Ex.R. at 2-14). After holding that the ISDA provided subject matter jurisdiction over these claims, Second Order at 10 (Ex.R. at 11), the court dismissed them for lack of statutory standing, giving three reasons. Second Order at 11-12 (Ex.R. at 12-13). The court noted what it perceived to be a critical difference between the 2009 Council, which submitted the contract proposals at issue, and the individual plaintiffs, whom the court characterized as "purporting to represent the tribe" and "acting in their individual capacities." Second Order at 11 (Ex.R. at 12). As such, the

individual plaintiffs and evidently the plaintiff Tribe lacked standing to seek review of the Secretary's conduct. *Id*. The court then held that even the 2009 Council itself would lack standing because the BIA already recognizes the 1996 Council, and there is "no authority for the proposition that the ISDA authorizes the government to enter into separate, additional contracts with other factions of the Tribe. To the contrary, the BIA is required to recognize and deal with a single tribal governing body at a time." Second Order at 12 (Ex.R. at 13). Finally, reaching the heart of the matter and recoiling, the court concluded without citations that the Tribe's claims were "simply not an appropriate means" to obtain review of the Department's recognition of the 1996 Council. *Id*.

The court dismissed the Tribe's claims with prejudice and entered judgment in favor of the Department. Ex.R. at 1. This appeal followed. Ex.R. at 24-25.

SUMMARY OF THE ARGUMENT

The Tribe asks for an order directing the Department to make a final, appealable decision as to whether it recognizes the 2009 Council as the governing body that reflects the will of the majority of the members of the Tribe. The Tribe's Complaint states causes of action under the APA and the ISDA, and both the Tribe and individual plaintiffs have standing to seek the requested relief.

Under the APA, the Department's engagement with the 1996 Council, in the form of contract awards and modifications, even in the absence of a formal, reasoned decision affirming any basis for recognizing the 1996 Council, is a final agency action subject to judicial review.

Also under the APA, the Department has a duty to take required actions, and has unlawfully failed to act. The Department is required by law, when carrying on relations with the Tribe, to ensure that the tribal government with which it maintains its relationship is the government that reflects the will of the tribal members. This guarantees that the Tribe has the right to determine its own destiny. These legal mandates are found in the federal common law, founded upon Congressional acts and the Constitution. The Department also owes the Cloverdale Rancheria the particular duty to restore the Tribe to the status it possessed prior to its termination. This legal

requirement is imposed by order of the federal court in *Hardwick*. In fulfilling this duty, the Department is further obligated to act in accordance with the binding decisions of the IBIA, which identify the initial Tribal membership entitled to organize the Tribe's government and elect its leaders. The Department having failed to act as required by law, the Tribe is entitled to an order under the APA compelling the required action.

The Department also failed to act in accordance with the ISDA, which requires the Department to provide specific findings clearly demonstrating why the Tribe's contract proposals were not approved. Under the ISDA, if the Department had reasons to deny the merits of the 2009 Council's legitimacy, it had an opportunity and an obligation to explain its reasons. It failed to do so, and the ISDA allows the Tribe to sue the Department to correct this failure. Both the APA and the ISDA authorize the court to compel the Department to undertake the required action that was not done.

Finally, the Tribe and individual plaintiffs have standing under the ISDA to bring this action. The district court's contrary conclusion was based on facts that conflict with those alleged in the complaint.

ARGUMENT

Introduction

"At the heart of this case is the . . . Tribe's right to self-determination, and the obligation borne by the federal government to recognize that self-determination." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 143 (D.D.C. 1999).

The Tribe finds itself caught between the district court's rulings and the Interior Department's policy. Both are based on a sound desire to avoid undue interference with the Tribe's internal affairs. But the particular legal duties owed to the Tribe under statutes and agency decisions require that in this case, the Department can only respect the Tribe's right to self-determination by bestirring itself to assess whether it is dealing with the government created and elected by the members of the Tribe. The court is authorized both to compel the Department to make this assessment in accordance with the law, and to review the Department's final agency actions that reflect its default position of maintaining a government-to-government relationship with the 1996 Council.

The Tribe requires the Department to evaluate questions that are fundamental to the federal government's relationship with the Tribe and its members: Is the Tribe governed by a constitution? If so, what does it say? If not, who can create it? Does the Tribe have a permanent government? If

so, who are its elected leaders? If not, who can create a government? When the federal government communicates with the Tribe through its representatives, and when it delivers services to the Tribe and its members, is it communicating with and serving the right people?

Adhering to its policy of non-interference, the Department refuses to decide whether it is a mistake to continue dealing with the 1996 Council, unless it is prompted to do so by a request and simultaneous need to take some federal action requiring an answer to the question. *See Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220 (2012). Anticipating this outcome, the 2009 Council submitted proposals to renew and amend the Tribe's federal ISDA contract to reflect the election of a tribal government different from the 1996 Council, which the Department had dealt with up to that point. But instead of making the required reasoned decision, the Department refused to consider the proposal on the ground that it came from a submitter other than the 1996 Council. The district court held this refusal was just fine; if the Department says it prefers to deal with the 1996 Council, it need not explain itself, even in the face of the Department's own significant doubts about the 1996 Council's legitimacy. Thus, the Tribe is caught in a Catch-22: the Department will not address the fundamental questions regarding the

legitimacy of the tribal government with which the Department maintains its relationship without a need for federal action, while the 2009 Council cannot seek the federal action that would trigger a decision because it is not currently recognized as the legitimate government.

The latter half of the dilemma is a result of the district court's orders now on appeal. The Department owes a duty to the Tribe obligating it to recognize the tribal government created and elected by the Tribe's members. The Tribe asks this Court to reverse the district court's orders so the Department may be directed to make the decision the law requires.

Standard of Review

The Court reviews de novo a dismissal for lack of subject matter jurisdiction and for lack of statutory standing. *Vaughn v. Bay Environ. Management, Inc.*, 567 F.3d 1021, 1022 (9th Cir. 2008). "Such a dismissal is proper only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Rivas v. Napolitano*, 677 F.3d 849, 853 (9th Cir. 2012) (citation and quotation marks omitted). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Products Co.*, 552 F.3d 934, 937 (9th Cir. 2008). The district

court's factual findings are reviewed for clear error. *Rattlesnake Coalition v. U.S. E.P.A.* 509 F.3d 1095, 1100 (9th Cir. 2007).

I. The APA Allows Judicial Review of the Department's Recognition of, and Maintaining a Government-to-Government Relationship with, an Illegitimate Tribal Government.

As the district court noted, the Tribe's primary aim in this litigation is to seek a determination from the federal courts or the Department, "whether the Department has recognized the correct governing body." Second Order at 12 (Ex.R. at 13). The court concluded that the Tribe's claims "challenging Defendants' failure to act on Plaintiffs' self-determination proposals, simply are not an appropriate means for raising this challenge." *Id.* The Department's policy of non-interference, however, requires that any demand that the Department reassess the identity of the legitimate tribal government be premised on a request for federal action, such as an ISDA contract proposal. *See Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320, 328, n.15 (2012) (ISDA contract request "may provide the required basis for a new BIA recognition decision"). The Department will not make a decision in the absence of an immediate need to identify the tribal government. *See id.* at 327 ("If no BIA action is required, BIA is not obligated to recognize *any* tribal government"); *Committee to Organize the Cloverdale Rancheria*

Government v. Acting Pacific Regional Director, 55 IBIA 220, 224 (2012). When the need to identify the tribal government arose, however, the Department still refused to make a decision addressing the salient issues. Both the APA and the ISDA empower the court to order to the Department to issue a reasoned decision.

Until that decision is made, however, the Department maintains the status quo, continuing its government-to-government relationship with the 1996 Council. *See Committee to Organize*, 55 IBIA at 221 ("Since [1997], BIA apparently has conducted government-to-government relations with the [1996] Council, including the execution of [ISDA] contracts between the Tribe and BIA.")[5] *See also* SAC ¶ 103 (Ex.R. at 54). Each of the Department's actions reflecting its choice to recognize the 1996 Council rather than the 2009 Council is a final agency action reviewable under the APA.

"Under the APA, agency action is subject to judicial review only when it is either (1) made reviewable by statute; or (2) a 'final' action 'for which there is no other adequate remedy in court.'" *Cabaccang v. U.S. Citizenship and Immigration Services*, 627 F.3d 1313, 1315 (9th Cir. 2010) (quoting 5 U.S.C. § 704). "The imposition of an obligation and the fixing of

[5] However, the BIA is now apparently prohibited from saying so outright. *See Committee to Organize*, 55 IBIA at 226.

a legal relationship is the indicium of finality in the administrative process." *Id*.

The Department's reviewable actions include the return of the Tribe's ISDA contract proposals in which the Department stated (without explanation) that it did not recognize the 2009 Council, and the Department's modifications and renewal of the Tribe's ISDA contract at the request of the 1996 Council. Through these actions, the Department fixed the legal relationship between the Tribe and the federal government as one involving the 1996 Council and not involving the 2009 Council. With respect to the 2009 Council's contract proposals and its right to represent the Tribe in its government-to-government relationship with the Department, these actions are the "consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). By these actions, the Tribe's "rights or obligations have been determined," and "legal consequences will flow." *Id.* at 178. The basic consequence of the Department's actions with respect to the Tribe's ISDA contract is that the federal funds used by the Tribe to administer tribal programs for its members will be programmed at the direction of the 1996 Council, for the benefit of a different set of tribal members than those who would be served by the 2009 Council if it were to control the funds. More broadly, the

consequence of the Department's actions is the continued disenfranchisement of those individuals who alone are authorized to create and elect the Tribe's government.

Additionally, the return of the 2009 Council's contract proposals is an agency action made reviewable by statute. Any "tribe or tribal organization" whose ISDA contract request is refused may "exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title." 25 U.S.C. § 450f(b)(3). In section 450m-1(a), Congress gave the Federal district courts "original jurisdiction over any civil action or claim arising under [the ISDA]." 25 U.S.C. § 450m-1(a). Agency action made reviewable by statute is subject to judicial review under the APA. 5 U.S.C. § 704.

The Department's actions in furtherance of its continuing relationship with the 1996 Council, as well as its refusal to address whether it should instead be dealing with the 2009 Council, are proper subjects of judicial review under the APA.

II. The APA Allows the District Court to Compel Agency Action Because the Department of the Interior has Failed to Take Discrete Actions it is Legally Required to Take.

The APA specifically authorizes judicial review of agency inaction and delay. "The reviewing court shall . . . compel agency action unlawfully

withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Department has unlawfully withheld actions required by common law, binding judicial and agency decisions, and the explicit mandates of the ISDA.

A. The Department Has Failed to Fulfill Its Duty to Recognize the Tribal Government Formed and Elected by the Members of the Tribe.

The Tribe's first three claims asked the court to compel the Department to take action unlawfully withheld or unreasonably delayed, namely, to recognize the tribal government elected by a majority of the people authorized to form and elect the government. The Tribe alleged that this would require recognition of the 2009 Council and the constitution approved in December 2008.

The district court's First Order dismissed the Tribe's first three claims for lack of subject matter jurisdiction. Subject matter jurisdiction was absent, in the court's view, because "'a court's ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific *legislative* command.'" First Order at 8 (Ex.R. at 22), (quoting *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010), emphasis by the district court); *see also* First Order at 6-7 (Ex.R. at 20-21). The district court acknowledged that the Tribe alleged the existence of an obligation "to assist with the effective organization of the

Cloverdale Rancheria government," and that the Department "concede[d] that the *Hardwick* stipulation 'included a requirement for the BIA to help the members of the Cloverdale Rancheria 'Hardwick Class' initially organize the government of their tribe.'" First Order at 8 (Ex.R. at 22). But because this legal duty to act was located in a court order, rather than a "legislative command," the court held it lacked power to compel the required action under the APA. *Id*.

The district court took too narrow a view of its power to compel agency action under the APA. It is true that an agency must be legally required to take an action before a court can compel it, but the source of the agency's duty to act need not be a "legislative command." Instead, a court has the power under the APA to compel an agency to take a discrete action required of it under *any* valid law, including common law, agency regulation, agency policy, administrative order, and court order.

In *Hells Canyon*, quoted by the district court, a panel of the Ninth Circuit stated, "Section 706(1) of the APA grants federal courts the power to 'compel agency action unlawfully withheld or unreasonably delayed.' This provision serves important interests, but does not give us license to 'compel agency action' whenever the agency is withholding or delaying an action we think it should take. Instead, our ability to 'compel agency action' is

carefully circumscribed to situations where an agency has ignored a specific legislative command." *Hells Canyon*, 593 F.3d at 932, (quoting 5 U.S.C. § 706(1)).

The requirement for a "specific legislative command," however, overstates the APA's limits. The *Hells Canyon* court relied on *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55 (2004) for its analysis. In *SUWA*, the Supreme Court described the type of agency action a court may compel under the APA when a "failure to act" is claimed. After it is established that the agency has failed to take a "discrete" action,[6] the key consideration "is that the only agency action that can be compelled under the APA is action legally *required*." *SUWA*, 542 U.S. at 63 (emphasis in original).

[6] "Discrete" actions include the "five categories of decisions made or outcomes implemented by an agency – 'agency rule, order, license, sanction [or] relief.'" *SUWA*, 542 U.S. at 62, (quoting 5 U.S.C. § 551(13)). The Tribe is asking the court to compel the Department to issue an order that grants relief, or denies it, on the merits. *See* 5 U.S.C. §§ 551(6) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making"); 551(11) ("'relief' includes the whole or a part of an agency . . . recognition of a claim . . . or taking of other action on the application or petition of, and beneficial to, a person"); *SUWA* at 62 (discussing APA definitions as examples of "discrete" actions). This duty – to issue an order deciding the merits of the Tribe's request for recognition of the 2009 Council – is a duty to take a discrete action.

From what source must this legal requirement to take action arise? In *SUWA*, the Court provided the broad requirement that the discrete agency action be "demanded by law (which includes, of course, agency regulations that have the force of law)." *SUWA* at 65. The Court also allowed that an agency policy short of a regulation, such as a land use plan, may qualify "when language in the plan itself creates a commitment binding on the agency." *Id.* at 71. Clearly the category of "legally required action" encompasses more than just "specific legislative command[s]."

Other cases further illustrate the breadth of courts' power to compel agency action "demanded by law." In *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), the District of Columbia Circuit ordered the Interior and Treasury Departments to take "specific actions toward fulfilling their fiduciary obligations" to Indian trust beneficiaries. *Id*. at 1108. Only the "general 'contours' of the government's obligations [were] defined by statute[;] the interstices [were] filled in through reference to general trust law." *Id.* at 1101. "While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms." *Id.* at 1099. "This does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its

responsibilities." *Id*. Thus, as the court explained, *Cobell* was a case where the federal government was "under an obligation to discharge the fiduciary duties owed to [Indian] trust beneficiaries for decades," which duties were not specified by any statute but found in common law. *Id*. at 1095, 1098-1101. "In such circumstances, federal courts may exercise jurisdiction to compel agency action unlawfully withheld or unreasonably denied." *Id*. at 1095.

Compliance with a court order may be compelled pursuant to the APA. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1269-70 (3d Cir. 1987) (failure to comply with court's previous judgment directing certain rulemaking actions, combined with statutory direction to promulgate regulations, led to order compelling agency to publish regulatory standard within sixty days).[7]

Besides common law duties and duties imposed by court order, enforceable obligations can be found in agency rules and policies. In *Hondros v. U.S. Civil Service Com'n*, 720 F.2d 278 (3d Cir. 1983), the United States Marshals Service had "an official agency program and policy," evidenced by "the Service's representations … and its official memoranda

[7] In *United Steelworkers*, the court invoked its authority under both the APA and the All Writs Act, 28 U.S.C. § 1651, to enforce its prior judgment. 819 F.3d at 1270. Plaintiffs, too, invoked both of these statutes in the present case. SAC ¶ 10 (Ex.R. at 29).

effecting these representations" providing for certain personnel procedures. *Id.* at 294. There were "no specific statutory or regulatory limitations on the power" of the Service to implement any particular procedures. *Id.* at 293. By adopting its own policy, however, "the Service obliged itself to act nonarbitrarily." *Id.* at 294. The Service's failure to take the action required by its internal policy (which would have resulted in an employee's appointment to a permanent position) violated the APA. *Id.* at 295. The Third Circuit held that the proper remedy under 5 U.S.C. § 706(1) was to compel the employee's appointment. *Id.* at 298.

In *Health Systems Agency of Oklahoma, Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978), the Tenth Circuit held that the trial court should have compelled the Department of Health, Education and Welfare to take action consistent with internal agency policy articulated in an agency memorandum. *Id.* at 491-92. The Department's refusal to take action in accordance with the memorandum's directive "was thus 'agency action unlawfully withheld' which the trial court must 'compel.'" *Id.* at 492, (quoting 5 U.S.C. § 706(1)).

In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Supreme Court ordered the reinstatement of a federal employee who was dismissed through procedures that did not conform to an Interior Department administrative

order. *Id.* at 539, 546. *See also Enterprise Nat. Bank v. Vilsack*, 568 F.3d 229, 234 (D.C. Cir. 2009) (accepting that decision of administrative appeals hearing officer can constitute a requirement for agency action for purposes of § 706(1)); *Alcaraz v. I.N.S.*, 384 F3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established").

The Department's duties in this case arise from the *Hardwick* stipulated order as applied to the Tribe by the IBIA (and extensively documented as the Department's consistent policy toward the other *Hardwick* tribes) as well as the Department's obligation to Indian tribes generally, rooted in the Constitution and statutes, and described in case law. *See* U.S. Const. Art. I, § 8, cl. 3 (conferring upon Congress the power to regulate commerce with the Indian tribes); 43 U.S.C. § 1457 (authorizing the Secretary of the Interior to manage Indian affairs); 25 U.S.C. § 2 (delegating management of Indian affairs to the Commissioner of Indian Affairs).

As a matter of federal Indian law, the Department is legally required to recognize a tribal government as a result of its "responsibility for carrying on government relations with the Tribe." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). This responsibility results from the Department's congressionally mandated "mission to 'have the management of all Indian

affairs and of all matters arising out of Indian relations.'" *Tarbell v. Department of the Interior*, 307 F.Supp.2d 409, 423 (N.D.N.Y. 2004) (citing 25 U.S.C. § 2, and referencing other federal programs and benefits relating to infrastructure, heath services, education and Indian gaming). The Department's duty includes the "responsibility to ensure that the Tribe make[s] its own determination about its government consistent with the will of the Tribe and the principals of tribal sovereignty." *Tarbell* at 423-24. "A cornerstone of this obligation is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decision affecting federal benefits." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). The federal government's promise that guarantees each Indian tribe "the right to determine its own destiny, remains binding upon the United States." *Harjo v. Kleppe*, 420 F.Supp. 1110, 1143 (D.D.C. 1976). When the Department refuses to acknowledge the Tribe's choice of how its government will operate, it turns the notion of tribal self-determination "on its head." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C. 1999). Agency actions that avoid these responsibilities are "arbitrary, capricious, and contrary to law." *Id.*, citing 5 U.S.C. § 706(2)(A).

In addition, under the *Hardwick* stipulated judgment, the Department is legally required to return the Tribe to the status it possessed prior to its termination. *Hardwick* Judgment ¶ 4 (Ex.R. at 279). Through the IBIA, the Department has reasonably determined that this court-ordered obligation requires the Department to ensure that the Tribe's government is organized and elected only by the people (and their descendants) the United States recognized as members of the Tribe at the time of termination. At that time, the United States viewed the Tribe as the term is defined in the Indian Reorganization Act – "the Indians residing on one reservation," 25 U.S.C. § 479 – and upon termination, distributed the Tribe's assets to the Indians residing on the reservation. The restored Tribe, returned to its pre-termination status, consists of these distributees, their dependents who were tribal members, and their lineal descendants. *See Alan-Wilson I*, 30 IBIA at 254-55; *Alan-Wilson II*, 33 IBIA at 57. These people comprise the Tribe today, and it is their exclusive right to develop and adopt a form of organization, elect a government, and expand the membership.

It is the Department's longstanding policy to ensure that these individuals shall control the organization of the Tribe and the formation of its government. The IBIA's *Alan-Wilson* decisions give this policy the force

of law.[8] In *Alan-Wilson II*, *supra*, the IBIA found that "in cases where BIA assisted in the reorganization of rancherias like Cloverdale (i.e., those lacking pre-termination constitutions), it took the position that the individuals eligible to participate were distributees and their lineal descendants." *Alan-Wilson II*, 33 IBIA at 57. The basis for this finding was the report of BIA Tribal Operations Officer Dorson Zunie, which is attached to the SAC as Exhibit 4-J (reproduced in part, Ex.R. at 291-317). The Zunie Report contains numerous examples of the Department's consistent practice. *See* Ex.R. at 306 (Notice of Election for Elk Valley Rancheria, c. 1985, describing eligibility requirements, "distributee or a lineal descendant of a distributee"); 309 (Rohnerville Rancheria, c. 1985, same); 308 (Redding

[8] An agency's actions carry the "force of law" and the "effect of law" when Congress "provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Alaska Dept. of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931, 939 (9th Cir. 2005) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227, 230 (2001)). A process that provides a party "opportunities to petition for reconsideration, brief its arguments, be heard at a formal hearing, receive reasoned decisions at multiple levels of review, and submit exceptions to those decisions" carries the "hallmarks of 'fairness and deliberation' [that constitute] clear evidence that Congress intended the Administrator's final determination to 'carry the force of law.'" *Alaska Dept. of Health and Social Services* at 939 (quoting *Mead* at 226-27). The BIA's formal adjudication process, of which the IBIA's *Alan-Wilson* decisions were a result, includes these hallmarks. *See* 25 C.F.R. §§ 2.1-2.21 (BIA administrative appeals); 43 C.F.R. §§ 4.20-4.31, 4.310-4.318, 4.330-4.340 (appeals to the IBIA). *See also* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1201 (general statutes authorizing establishment of agency's adjudication procedures).

Rancheria, c. 1985, "distributee or a lineal descendant"); 311 (Smith River Rancheria, c. 1985, same); 312 (Big Valley Rancheria, Feb. 21, 1997, "original distributees, dependent members and lineal descend[a]nts"); 314-315 (Potter Valley Rancheria, Jul. 11, 1997, "distributees, dependent members and direct lineal descendants thereof"). Because of the demonstrated consistent implementation of *Hardwick*, *Alan-Wilson I* and *II* established the rule that *only* the distributees, dependent members, and lineal descendants are entitled to organize the Cloverdale Rancheria and other tribes similarly situated. *Alan-Wilson I*, 30 IBIA at 261-62; *Alan-Wilson II*, 33 IBIA at 57.

These binding obligations constitute a legal requirement to act. The Department is required to recognize a tribal government that reflects the will of the members of the Tribe. If the Department withholds such action, the court must compel it.

B. The Department Failed to Act on the Tribe's ISDA Contract Proposals.

Claim five of the Tribe's SAC alleged another failure by the Department to take a discrete action that was legally required. This was the Department's failure to comply with the mandatory directives of the ISDA following the Tribe's contract proposals. SAC ¶¶ 149-159 (Ex.R. at 60-62).

Using mandatory language, the ISDA directs the Secretary, within ninety days after receipt of a contract proposal submitted by an Indian tribe or a tribal organization authorized by an Indian tribe, to:

> approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—
>
> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracts will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2); *see also* 25 C.F.R. §§ 900.15, 900.16, 900.20-900.22, 900.29 (restating statutory requirements). The Department's regulations provide that the "proposal" to which this provision applies includes "any proposal to enter into a self-determination contract, to amend an existing self-determination contract, [or] to renew an existing self-determination contract." 25 C.F.R. § 900.14; *see also* 25 C.F.R. § 900.20

(declination procedures apply to all types of proposals). In any administrative process or civil action conducted pursuant to the ISDA, "the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." 25 U.S.C. § 450f(e)(1). "Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process." 25 C.F.R. § 900.3(a)(7). Thus, the Secretary cannot decline a proposal for any reason other than the five identified in the statute and regulations. 25 C.F.R. § 900.24; *see Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078-80 (10th Cir. 2011) (Secretary of Health and Human Services cannot decline ISDA contract proposal for lack of available funds). "A proposal that is not declined within 90 days . . . is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act [25 U.S.C. § 450j-1]." 25 C.F.R. § 900.18.

A regulation's mandatory language imposing a "nondiscretionary, ministerial duty" supplies a legal requirement for action that may be compelled under the APA. *Rivas v. Napolitano*, 677 F.3d 849, 852 (9th Cir. 2012).

The Department did not accept the Tribe's proposals, submitted by the 2009 Council, to amend and renew the Tribe's self-determination contract. SAC ¶¶ 90-94 (Ex.R. at 51-52). Nor did the Department decline the proposals for any of the five reasons a proposal may be declined. SAC ¶¶ 92, 94 (Ex. R. at 51-52). The reason given for rejecting the amendment proposal was the pendency of an administrative appeal and this case, which in the Department's view deprived the BIA of jurisdiction to act on the Tribe's request. SAC Exh. 12 (Ex.R. at 359-360). The Department also returned the renewal proposal, stating:

> Under [25 C.F.R. Part 900], consideration to contract federal funds to operate Bureau of Indian Affairs authorized programs will only be given to an application submitted by a federally recognized tribe with a recognized governing body. Because we do not recognize the governing body referenced for the Cloverdale Rancheria of Pomo Indians of California, we are unable to accept the enclosed proposal. We are hereby returning the proposal.

SAC Exh. 14 (Ex.R. at 373).[9]

Two consequences flow from the Department's failure to either accept the proposals or decline them in accordance with 25 U.S.C. § 450f(a)(2).

[9] The Department's response to the fundamental premise of the Tribe's contract proposals, "we do not recognize the governing body referenced," possesses "all the explanatory power of the reply of Bartelby the Scrivener to his employer: 'I prefer not to.' Which is to say, it provided no explanation." *Butte County, Cal. v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010) (quoting Herman Melville, *Bartelby, the Scrivener: A Story of Wall Street* 10 (Dover 1990) (1853)).

First, under 25 C.F.R. § 900.18, the proposals are "deemed approved and the Secretary shall award . . . any amendment or renewal." (The Department has also failed to take this required action.) Second, under the APA, 5 U.S.C. § 706(1) (and under the ISDA itself, 25 U.S.C. § 450m-1(a), discussed in section III below), the court may compel the Department to take the discrete action required by the ISDA: either accept the proposals or, if they are to be declined, provide a specific finding supported by controlling legal authority or clearly demonstrating that any one of the five grounds for declination are present. The Tribe asks the court to compel the Department to take one of these actions in the form of a final, appealable decision – to either recognize that the 2009 Council is the Tribe's rightful government or to clearly demonstrate why the Department believes it is not.

Federal statutory and case law obligate the Department to identify a tribal government, and one that reflects the Tribe's own determination, in order to carry on government relations with the Tribe. The *Hardwick* judgment and the *Alan-Wilson* decisions establish the rules for the Department's recognition of the Cloverdale Rancheria's government. The Department's failure and refusal to make the required decision, and to comply with the binding rules of the Department's own adjudications and

the ISDA, are failures the court has the power to correct with an order compelling the agency to act as required by law.

III. The ISDA Provides the Tribe and the 2009 Council the Right to Challenge the Department's Return of the Tribe's ISDA Contract Proposals.

In addition to the authority under the APA to compel the Department to take legally-required actions, and to review the Department's actions taken in maintenance of the status quo, the district court had authority under the ISDA itself to compel the Department to comply with the ISDA's statutory mandates. The ISDA specifically confers jurisdiction and authorizes mandamus relief with respect to agency inaction that violates the ISDA:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter . . . . In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a).

In recognition of the Department's stated policy of avoiding interference with internal tribal affairs unless it becomes necessary, the Tribe attempted to spur Departmental action by submitting a proposal to amend the Tribe's existing ISDA contract to reflect the election of the 2009 Council. A second proposal sought to renew the expiring contract, subject to the requested amendment.

Under the ISDA, an Indian tribe or tribal organization may submit a proposal for a contract, or a proposal to amend or renew a contract. 25 U.S.C. § 450f(a)(1), (a)(2). The Tribe submitted its proposals through the 2009 Council, elected by a majority of the members of the Tribe as its government and representatives.[10] The 2009 Council is also a "tribal organization" as defined in the ISDA, because it is a "legally established organization of Indians . . . which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities." 25 U.S.C. § 450b(*l*); *accord* 25 U.S.C. § 2511(3)(A); 25 C.F.R.

[10] The Tribe's December 2008 Constitution authorizes the Tribal Council to deal with federal officials on behalf of the Tribe, and specifically authorizes the Tribal Council to enter into self-determination contracts with the BIA. Cloverdale Rancheria Const. art. V, § 4 (Ex.R. at 94).

§ 900.6 (same definition).[11] The 2009 Council comes within this definition even if it is not the governing body recognized by the Department.[12]

The Secretary "shall" approve the proposal within 90 days unless he notifies the applicant in writing of one or more of five disqualifying findings specified in the statute. 25 U.S.C. § 450f(a)(2); *see Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2195 (2012) ("Congress obligated the Secretary to accept every qualifying ISDA contract"), *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1073 (10th Cir. 2011). The Secretary may evaluate a contract proposal *only* under these five criteria; there are to be no "threshold issues which would avoid the declination, contract review, approval, and appeal process." 25 C.F.R. § 900.3(a)(7). "[T]he Secretary's determinations regarding whether a contract proposal is authorized by the [ISDA] . . . must be addressed as part of the declination, contract review, approval and appeal process set forth in section [450f(a)(2)] (that is, these

[11] A tribal organization must be "authorized by an Indian tribe" to submit a contract proposal. 25 U.S.C. § 450f(a)(2). The 2009 Council is so authorized by the Tribe in its December 2008 Constitution, see note 10, *supra*, and the resolution submitted with the proposals. Ex.R. at 355-357, 365-367.

[12] The Tribe argues, of course, that the 2009 Council legally ought to be the recognized governing body, in which case it should also be a "tribal organization" under this clause of the statutory definition. 25 U.S.C. § 450b(*l*) ("tribal organization" definition includes "the recognized governing body of any Indian tribe").

issues may not be identified as part of some 'threshold' assessment, nor in any other way that would escape the critical procedural protections available under section [450f])." S. Rep. No. 103-374, at 5-6 (1994), 1994 WL 530979.

These "procedural protections" include immediate judicial review. Upon the declination of a proposal, the applicant may request an administrative appeal, or "in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a)." 25 U.S.C. § 450f(b).

The Department did not approve the Tribe's proposals, and did not decline them for any of the five disqualifying reasons permitted by the statute. Instead, the Department simply returned the proposals to the Tribe, stating that the Department "did not recognize the governing body referenced." Though imprecisely stated, the Department's ostensible statutory basis may be that the tribal resolution authorizing the submission of the contract proposals was insufficient, because the Department does not recognize the 2009 Council, which issued the resolution, as the Tribe's governing body. Alternatively, the Department may have meant it did not consider the 2009 Council to be a "tribal organization" because it was not the recognized governing body (even though, as described above, the 2009

Council is a tribal organization under a different part of the statutory definition, *see* 25 U.S.C. § 450b(*l*)). Whatever the Department's intention, however, it is clear that the Department is not free to make this "threshold" determination as a substitute for declining a contract proposal in the manner the ISDA prescribes. *See* 25 C.F.R. § 900.3(a)(7). Any such determination must be addressed as part of the criteria Congress set forth in the ISDA. 25 U.S.C. § 450f(a)(2); *see* S. Rep. No. 103-374, at 5-6 (1994), 1994 WL 530979.

Under the clear language of the ISDA, the Department's refusal to approve the Tribe's proposals gives rise to a claim in the district court. The ISDA authorizes the court to order the Department to undertake a proper evaluation of the proposals in accordance with the statute. These claims therefore were properly before the court under the ISDA. No "threshold" criteria can allow the agency to avoid judicial review.

IV. The Tribe's Factual Allegations Establish Statutory Standing To Proceed Under the ISDA.

Though the district court accepted that it possessed subject matter jurisdiction over the Tribe's ISDA claims based on the statute's specific grant of jurisdiction over such claims, Second Order at 10 (Ex.R. at 11), the court concluded that neither the Tribe nor the individual plaintiffs had statutory standing to proceed under the ISDA. Second Order at 11 (Ex.R. at

12). The district court's conclusion was based on an erroneous understanding of the facts alleged in the Tribe's complaint.

A dismissal for lack of statutory standing is equivalent to a dismissal for failure to state a claim. *Vaughn v. Bay Environ. Management, Inc.* 567 F.3d 1021, 1022 (9th Cir. 2009). On a motion to dismiss for lack of statutory standing, the court must accept as true all of the factual allegations set out in plaintiffs' complaint and draw inferences from those allegations in the light most favorable to plaintiffs. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011) (in assessing statutory standing, court is to credit factual assertions made in the pleadings, and complaint must allege facts that plausibly entitle plaintiffs to relief).

In a case challenging an administrative action, statutory standing can arise from the APA or directly from the substantive statute itself. *Cetacean Community v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004). The APA grants standing "to all those 'arguably within the zone of interests' protected by the substantive statute whose duties the plaintiff [is] seeking to enforce." *Id.* at 1177 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)); *see* 5 U.S.C. § 702 ("A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency

action within the meaning of a relevant statute, is entitled to judicial review thereof."). "The 'zone of interests' test is 'not meant to be especially demanding.'" *Cetacean Community* at 1177, (quoting *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)). The ISDA authorizes "the tribe or tribal organization" whose contract proposal is declined to sue the appropriate Secretary. 25 U.S.C. § 450f(b).

As described above, and as alleged in the Tribe's SAC, the Tribe's contract proposals were submitted by the 2009 Council, a "tribal organization" within the statutory definition and the elected government and representatives of the Tribe. The Department refused to approve the proposals, though it failed to apply the mandatory declination criteria prescribed by Congress. Upon this refusal, both the Tribe and the 2009 Council are authorized to sue the Secretary pursuant to the ISDA.

The district court concluded otherwise, and based its conclusion on facts contrary to SAC's factual allegations. Second Order at 11-12 (Ex.R. at 12-13). The district court stated that the "members of the 2009 Council, *acting in their individual capacities*," did not have standing to sue, because it was not the individuals but the 2009 Council which submitted the proposals at issue. Second Order at 11 (Ex.R. at 12) (emphasis added). The SAC alleges, however, that the five members of the 2009 Council "bring this

action *in their official capacities*." SAC ¶ 18 (Ex.R. at 31) (emphasis added). Thus the court's holding was based on an understanding of the facts that directly contradicted an uncontested factual allegation.

The district court's next factual error supported its faulty conclusion that the 2009 Council, even if it were a plaintiff, would lack "standing to proceed under the ISDA." Second Order at 12 (Ex.R. at 13). The court stated that the IDSA did not "authorize[] the government to enter into separate, additional contracts with other factions of the Tribe," and that federal law requires the BIA "to recognize and deal with a single governing body at a time." *Id*. But as the SAC plainly alleged, the Tribe did not intend to enter into "separate, additional contracts." The Tribe requested to make an amendment to the *existing* contract, and renew the *existing* contract for another term with the requested amendment. SAC ¶¶ 90-92, SAC Exh. 11 & 13 (Ex.R. 51-52, 352, 363). The district court's erroneous disregard for the Tribe's factual allegations led it to the incorrect conclusion that the 2009 Council, as a tribal organization whose proposal was declined, would have no recourse in court.

In its discussion of statutory standing, the district court also correctly noted that "Plaintiffs are individuals purporting to represent the Tribe; the Tribe itself is also named as a plaintiff." Second Order at 11 (Ex.R. at 12).

Despite calling attention to this fact, however, the court did not address whether the *Tribe* possessed standing under the ISDA to sue the Secretary. The Tribe does have such standing. *See* 25 U.S.C. § 450f(b) ("the tribe or tribal organization" whose contract proposal is declined may sue the appropriate Secretary). Accepting the factual allegations in the SAC, even without accepting any legal conclusions, and in light of the ISDA policy that no "threshold assessments" may be made that would avoid the declination and appeal procedures, a proposal submitted even on the *purported* authority of a Tribe, and declined by the Secretary, gives rise to a claim *by the Tribe* under 25 U.S.C. § 450f(b) to compel the Department to take the required action.

Furthermore, the district court's holding as to these points essentially rules out any possibility of the 2009 Council achieving the Department's recognition of its having been elected, and of the Tribe having enacted a constitution and having formed a permanent government. If the court allows the Department to reject requests for action by the 2009 Council on the basis that the 2009 Council is not the recognized tribal government, then no other government may *ever* be recognized (at least not without the consent of the 1996 Council). The 1996 Council and its future successors will continue in place, in the eyes of the Department, without regard to the will of the

members of the Tribe. The district court's ruling allows the Department to avoid its "duty to recognize a tribal government" and to "ensure that the Tribe make its own determination about its government consistent with the will of the Tribe and principals of tribal sovereignty." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C. 1999).

The ISDA requires that the Department decline or accept the Tribe's proposals after a reasoned evaluation focused on the five statutory criteria, and the Department's duties to the Tribe require this evaluation to encompass an analysis of the merits of the Tribe's assertion that the 2009 Council now represents the Tribe. When this did not occur, the Tribe exercised its statutory right to sue the Department and seek an order compelling the required evaluation. The district court's misreading of the facts as alleged has allowed the Department to continue to ignore its duties to the Tribe, and the Tribe asks the Court to correct this injustice.

CONCLUSION

The Department is obligated to safeguard the sovereign right of each Indian tribe to organize and elect its own government, and it is obligated to the Cloverdale Rancheria in particular to restore the Tribe to the status it possessed prior to the unlawful termination of its federal recognition. These legal duties, together with the ISDA's mandate, require the Department to provide the Tribe a reasoned, final, appealable decision stating whether the Department will recognize the 2009 Council and the Tribe's December 2008 Constitution. The Department's refusal to do so denies the members of the Tribe their right to establish the government of their choosing, and it shrouds the Tribe, in its internal and external affairs, in a cloud of uncertainty.

With respect to the restoration of the Tribe's government, the Department is bound to the legal standards established by the IBIA: only members of the Tribe – the distributees, dependent members and lineal descendants – may organize the Tribe's government. The Department's engagement with a tribal government other than that created by the tribal members is a final agency action reviewable by the district court.

The district court's orders concluding the Tribe was without a remedy under the APA and ISDA were incorrect, having misapplied the law regarding the Department's unlawful failure to act, and having misstated the

facts regarding the plaintiffs' standing under the ISDA, and dismissing the Tribe's plea for administrative review based on nothing more than a vague misgiving.

The Tribe requests that this Court vacate the district court's orders and judgment, and remand with direction to deny the Department's motions to dismiss.

October 17, 2012

Respectfully submitted,

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Steven J. Bloxham
Tim Hennessy

By: /s/ Steven J. Bloxham

Attorneys for Appellants Cloverdale Rancheria of Pomo Indians of California, Javier Martinez, Sarah Goodwin, Lenette Laiwa-Brown, Gerad Santana and John Trippo

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 12,278 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman, *or*

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/s/ Tim Hennessy
Attorney for Appellants

Dated: Oct. 17, 2012

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that it knows of no related cases pending in this Court.

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS
(Ninth Circuit Rule 28-2.7)

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 551

§ 551. Definitions

Effective: January 4, 2011
Currentness

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;
or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

Notes of Decisions (240)

5 U.S.C.A. § 551, 5 USCA § 551
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

A-2

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011
Currentness

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Credits
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Notes of Decisions (782)

5 U.S.C.A. § 701, 5 USCA § 701
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Credits
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (1083)

5 U.S.C.A. § 702, 5 USCA § 702
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Credits
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Notes of Decisions (827)

5 U.S.C.A. § 704, 5 USCA § 704
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Credits

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3068)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 1. Bureau of Indian Affairs (Refs & Annos)

25 U.S.C.A. § 2

§ 2. Duties of Commissioner

Currentness

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Credits
(R.S. § 463.)

Notes of Decisions (65)

25 U.S.C.A. § 2, 25 USCA § 2
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 1. Bureau of Indian Affairs (Refs & Annos)

25 U.S.C.A. § 9

§ 9. Regulations by President

Currentness

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

Credits
(R.S. § 465.)

Notes of Decisions (26)

25 U.S.C.A. § 9, 25 USCA § 9
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter II. Indian Self-Determination and Education Assistance (Refs & Annos)

25 U.S.C.A. § 450b

§ 450b. Definitions

Currentness

For purposes of this subchapter, the term--

(a) "construction programs" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;

(b) "contract funding base" means the base level from which contract funding needs are determined, including all contract costs;

(c) "direct program costs" means costs that can be identified specifically with a particular contract objective;

(d) "Indian" means a person who is a member of an Indian tribe;

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) "mature contract" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided,* That except as provided [1] the last proviso in section 450j(a) of this title, no contract (or grant

or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

(k) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) "construction contract" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract--

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

Credits

(Pub.L. 93-638, § 4, Jan. 4, 1975, 88 Stat. 2204; Pub.L. 100-472, Title I, § 103, Oct. 5, 1988, 102 Stat. 2286; Pub.L. 100-581, Title II, § 208, Nov. 1, 1988, 102 Stat. 2940; Pub.L. 101-301, § 2(a)(1)-(3), May 24, 1990, 104 Stat. 206; Pub.L. 101-644, Title II, § 202(1), (2), Nov. 29, 1990, 104 Stat. 4665; Pub.L. 103-413, Title I, § 102(1), Oct. 25, 1994, 108 Stat. 4250.)

Notes of Decisions (10)

Footnotes

1 So in original. Probably should be "provided in".

25 U.S.C.A. § 450b, 25 USCA § 450b

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter II. Indian Self-Determination and Education Assistance (Refs & Annos)
Part A. Indian Self-Determination (Refs & Annos)

25 U.S.C.A. § 450f

§ 450f. Self-determination contracts

Currentness

(a) Request by tribe; authorized programs

(1) 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 programs or portions thereof, including construction programs--

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, 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. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that--

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection, [1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal--

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall--

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant

agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of Title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, Title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under section 450f or 450h of this title [2] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided,* That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 450m-1(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the “Department”) that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either--

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

Credits

(Pub.L. 93-638, Title I, § 102, Jan. 4, 1975, 88 Stat. 2206; Pub.L. 100-202. § 101(g) [Title II], Dec. 22, 1987, 101 Stat. 1329-246; Pub.L. 100-472, Title II, § 201(a), (b)(1), Oct. 5, 1988, 102 Stat. 2288, 2289; Pub.L. 100-581, Title II, § 210, Nov. 1, 1988, 102 Stat. 2941; Pub.L. 101-644, Title II, § 203(b), Nov. 29, 1990, 104 Stat. 4666; Pub.L. 103-413, Title I, § 102(5) to (9), Oct. 25, 1994, 108 Stat. 4251 to 4253; Pub.L. 106-260, § 6, Aug. 18, 2000, 114 Stat. 732.)

Notes of Decisions (37)

Footnotes

1 So in original. Probably should be “paragraph”.

2 So in original. Probably should be “this section and section 450h of this title”.

25 U.S.C.A. § 450f, 25 USCA § 450f

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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25 U.S.C.A. § 450m-1

§ 450m-1. Contract disputes and claims

Currentness

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

(c) Application of laws to administrative appeals

The Equal Access to Justice Act (Publc Law 96-481, Act of October 1, 1980; 92 Stat. 2325, as amended [1]), section 504 of Title 5, and section 2412 of Title 28, shall apply to administrative appeals pending on or filed after October 5, 1988, by tribal organizations regarding self-determination contracts.

(d) Application of chapter 71 of Title 41

Chapter 71 of Title 41 shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

(e) Application of subsection (d)

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such cases finally disposed of before October 5, 1988, the thirty-day period referred to in section 504(a)(2) of Title 5 shall be deemed to commence on October 5, 1988.

Credits

(Pub.L. 93-638, Title I, § 110, as added Pub.L. 100-472, Title II, § 206(a), Oct. 5, 1988, 102 Stat. 2295; amended Pub.L. 100-581, Title II, § 212, Nov. 1, 1988, 102 Stat. 2941; Pub.L. 101-301, §§ 1(a)(2), 2(b), May 24, 1990, 104 Stat. 206, 207; Pub.L. 103-413, Title I, § 104(2), (3), Oct. 25, 1994, 108 Stat. 4268.)

Notes of Decisions (16)

Footnotes

1 So in original. Probably should be "Public Law 96-481, Act of October 21, 1980, 94 Stat. 2325, as amended".

25 U.S.C.A. § 450m-1, 25 USCA § 450m-1

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter V. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 479

§ 479. Definitions

Currentness

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Credits
(June 18, 1934, c. 576, § 19, 48 Stat. 988.)

Notes of Decisions (24)

25 U.S.C.A. § 479, 25 USCA § 479
Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart A. General Provisions

25 C.F.R. § 900.3

§ 900.3 Policy statements.

Currentness

(a) Congressional policy.

(1) Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

(2) Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(3) Congress has declared that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(4) Congress has declared that the programs, functions, services, or activities that are contracted and funded under this Act shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions. Contracting of the administrative functions described herein shall not be construed to limit or reduce in any way the funding for any program, function, service, or activity serving any other tribe under the Act or any other law. The Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another Indian tribe or tribal organization under this Act.

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

(6) Congress has declared that one of the primary goals of the 1994 amendments to the Act was to minimize the reporting requirements applicable to tribal contractors and to eliminate excessive and burdensome reporting requirements. Reporting

requirements over and above the annual audit report are to be negotiated with disagreements subject to the declination procedures of section 102 of the Act.

(7) Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.

(8) Congress has declared that all self-determination contract proposals must be supported by the resolution of an Indian tribe(s).

(9) Congress has declared that to the extent that programs, functions, services, and activities carried out by tribes and tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under section 106(a) of the Act, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(b) Secretarial policy.

(1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

(2) It is the policy of the Secretary to encourage Indian tribes and tribal organizations to become increasingly knowledgeable about the Departments' programs administered for the benefit of Indians by providing information on such programs, functions and activities and the opportunities Indian tribes have regarding them.

(3) It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

(6) The Secretary shall maintain consultation with tribal governments and tribal organizations in the Secretary's budget process relating to programs, functions, services and activities subject to the Act. In addition, on an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1) (A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

(8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of the Act.

(9) It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act (or written notice of an Indian tribe or tribal organization's intention to contract), the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.

(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Notes of Decisions (5)

Current through September 20, 2012; 77 FR 58468

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Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.14

§ 900.14 What does this subpart cover?

Currentness

This subpart covers any proposal to enter into a self-determination contract, to amend an existing self-determination contract, to renew an existing self-determination contract, or to redesign a program through a self-determination contract.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 20, 2012; 77 FR 58468

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25 C.F.R. § 900.15

§ 900.15 What shall the Secretary do upon receiving a proposal?

Currentness

Upon receipt of a proposal, the Secretary shall:

(a) Within two days notify the applicant in writing that the proposal has been received;

(b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification; and

(c) Review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 20, 2012; 77 FR 58468

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Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.16

§ 900.16 How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?

Currentness

The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal in compliance with section 102 of the Act and subpart E. At any time during the review period the Secretary may approve the proposal and award the requested contract.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

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Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.18

§ 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

Currentness

A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90–day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

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Subpart E. Declination Procedures

25 C.F.R. § 900.20

§ 900.20 What does this subpart cover?

Currentness

This subpart explains how and under what circumstances the Secretary may decline a proposal to contract, to amend an existing contract, to renew an existing contract, to redesign a program, or to waive any provisions of these regulations. For annual funding agreements, see § 900.32.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

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25 C.F.R. § 900.21

§ 900.21 When can a proposal be declined?

Currentness

As explained in §§ 900.16 and 900.17, a proposal can only be declined within 90 days after the Secretary receives the proposal, unless that period is extended with the voluntary and express written consent of the Indian tribe or tribal organization.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

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25 C.F.R. § 900.22

§ 900.22 For what reasons can the Secretary decline a proposal?

Currentness

The Secretary may only decline to approve a proposal for one of five specific reasons:

(a) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(b) Adequate protection of trust resources is not assured;

(c) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(d) The 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; or

(e) The program, function, service, or activity (or a portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under section 102(a)(1) of the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 20, 2012; 77 FR 58468

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25 C.F.R. § 900.24

§ 900.24 Can a contract proposal for an Indian tribe or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified in § 900.22?

Currentness

No. The Secretary may only decline a proposal based upon one or more of the five reasons listed above. If a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 20, 2012; 77 FR 58468

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Subpart E. Declination Procedures

25 C.F.R. § 900.29

§ 900.29 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

Currentness

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required:

(a) To advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in § 900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision; and

(b) To advise the Indian tribe or tribal organization in writing of the rights described in § 900.31.
SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **October 17, 2012**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Sally Eredia