United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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DEC 2 1 2007

James Steele, Jr., Chairman
Confederated Salish and Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855

Dear Chairman Steele:

I write in response to your August 17, 2007 letter (Letter), which requests the Department of the Interior's views on the applicability of the Indian Self-Determination and Education Assistance Act of 1975, (ISDEAA), codified at 25 U.S.C. § 450 *et seq.*, to the pending transfer of the operation and management of the Flathead Indian Irrigation Project (Project). Since 2002, the Department has consulted with the Confederated Salish and Kootenai Tribes (Tribes) and the Flathead Joint Board of Control (Board) regarding the necessary provisions and mechanism to transfer the Project's operation and management in an effort to facilitate a local solution.

Throughout this process, the Tribes have posited that a self-determination contract could serve as the appropriate mechanism for transfer. In February 2007, the Principal Deputy Assistant Secretary – Indian Affairs informed the Tribes and the Board that a self-determination contract would not work in this context. In July 2007, the Tribes requested an opportunity to present to the Department its legal views in favor of such a contract. Your August letter sets forth those views.

After further considering the Tribes' views and carefully reviewing the statutes and legislative history governing the establishment, construction and operation of the Project, I remain convinced that a self-determination contract does not provide an appropriate or viable mechanism to transfer the Project's operation and management. A detailed analysis of this position is set forth below.

Background and Statutory History

The ISDEAA, known also as Public Law 93-638, authorizes the Secretary of the Interior (Secretary) to enter into self-determination contracts for specific types of government programs.[1] Most applicably, the Secretary may enter into self-determination contracts for programs "for the benefit of Indians because of their status as Indians[.]" 25 U.S.C. § 450f(a)(1)(E).

[1] The ISDEAA authorizes contracts for five categories of federal programs. *See* 25 U.S.C. § 450f(a)(1)(A)-(E). The first three categories, subsections A through C, refer to specific statutes under which tribes can apply for self-determination contracts. The final two categories, subsections D and E, set forth general requirements for such contracts.

In its letter, the Tribes contend that "because the [irrigation Project] was authorized by Congress 'for the benefit of said Indians,' it clearly falls into the category of "contractible programs 'for the benefit of Indians because of their status as Indians.'" Letter at 4. In determining whether the Project is in fact contractible under the ISDEAA, we must consider the history of the Flathead Indian Reservation (Reservation) and, more particularly, the specific statutes that authorized the construction and expansion of an irrigation system on the Reservation.

In 1904, Congress passed a statute requiring the survey and allotment of lands within the Reservation. *See* 33 Stat. 302 *et seq*. Through this Act, Congress directed allotments to be made to all persons with tribal rights on the Reservation and required the remaining lands on the Reservation to be opened to settlement and entry. *Id.* at 303-04. Congress further directed that one-half of the proceeds received from the sale of lands within the Reservation were to be expended by the Secretary:

> for the benefit of the said Indians and such persons having tribal rights on the reservation ... in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising[.]

Id. at 305. Thus, the purpose of the Act was not only to provide for allotments to individual Indians and those with tribal rights on the Reservation, but also to open the remaining lands to settlement and to use a portion of the proceeds to provide agricultural assistance, including irrigation ditches, to the Indians of the Reservation.

In 1908, Congress amended the 1904 Act to clarify the rights and responsibilities that were to be conveyed with settlement and entry and to modify how the proceeds from the sale of lands within the Reservation should be expended. *See* 35 Stat. 444, 448-50. The 1908 Act prioritized the construction of irrigation systems for all irrigable lands within the Reservation, regardless of Indian ownership, and removed the 1904 Act's limitation on proceeds from "surplus" Reservation lands being used to construct irrigation structures solely for the benefit of the Indians of the Reservation. *See id.* Only after the use of proceeds to construct irrigation systems within the Reservation's boundaries would the Secretary expend the remaining money "for the benefit of said Indians" to purchase cattle, farm implements, and other necessary articles. *Id.* at 450.

Interpreting the 1904 and 1908 Acts

The Tribes' August 2007 letter focuses squarely on the language contained in the 1904 Act. In particular, the letter contends that the Project meets the requirements of the ISDEAA because the 1904 Act states that the proceeds from the sale of "surplus" lands shall be used to "benefit" Indians within the Reservation, including the construction of "irrigation ditches." Letter at 2, 4. The letter interprets this language as explicitly authorizing the construction of an irrigation system "for the benefit of Indians," and contend that the irrigation Project therefore falls within 25 U.S.C. section 450f(a)(1)(E) as a program "for the benefit of Indians because of their status as Indians." Letter at 4.

The cited language, however, must be read in light of the entirety of the 1904 Act, as well as the 1908 Act that amended it. The 1904 Act provided that half of the proceeds from the sale of "surplus" lands could be used to aid the Indians of the Reservation with agricultural endeavors, including the construction of irrigation ditches. In the Department's view, this language falls short of authorizing the construction of a full-fledged irrigation system "for the benefit of Indians because of their status as Indians." Authorization to construct an irrigation *system* did not come until 1908, when Congress explicitly directed the Secretary to reallocate the proceeds from the sale of "surplus" lands towards the construction of an irrigation system to benefit all irrigable lands within the Reservation, including those lands that passed out of Indian ownership.

Regardless of the percentage of unallotted lands that were held by non-Indian settlers at the time of the Act's passage, one cannot ignore Congress's clear intent to extend irrigation opportunities to all lands within the Reservation. Congress opened the Reservation for entry and settlement in 1904, and clarified in 1908 that these "surplus" lands were also entitled to benefit from an irrigation system. Congress instructed the buyers of Reservation lands to pay a proportionate cost for the construction of such system, and then directed the operation and management of the system to be transferred to the owners of the irrigated lands after construction costs were repaid. *See* 35 Stat. at 449-50. Even if Congress's original intent had been to authorize the construction of irrigation ditches for the benefit of Reservation Indians, Congress moved away from this intent in 1908 by directing the construction of an irrigation system to benefit *all* irrigable lands on the Reservation. Based on the express language of the 1908 Act, I cannot go so far as to conclude that the irrigation systems on the Reservation were intended to be operated in perpetuity "for the benefit of the Indians because of their status as Indians."

The 1908 Act presents an additional obstacle to transfer the Project via a self-determination contract. As discussed above, the 1908 amendment explicitly directed that "when the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works *shall pass to the owners of the lands* to be irrigated thereby." 35 Stat. at 450 (emphasis added). It is the Department's longstanding view that the italicized phrase must be read in light of the current ownership of Reservation lands.

In other forums,[2] the Tribes have emphasized the composition of ownership that existed at the time of the 1904 and 1908 Acts in support of their position that the irrigation of non-Indian lands was to be a "minor part" of the Project and that most of the Project was to serve Indian allotments. The Department cannot ignore, however, the dramatic shift in ownership that has occurred since the 1904 Act authorized the settlement and entry of Reservation lands. Congress authorized the allotment of Reservation lands and the disposal of unallotted lands to non-Indian settlers. Congress also directed that all irrigable lands within the Reservation shall benefit from an irrigation

[2] *See, e.g.*, "Summary of Testimony of the Confederated Salish and Kootenai Tribes of the Flathead Nation on Senate Bill 1186," April 1996.

system and that such system shall be transferred to the owners of those lands. Through the transfer provision of the 1908 Act, Congress created an explicit statutory right for all landowners served by the Project: *i.e.*, after the repayment of the Project's construction costs, the operation and management of the Project must pass to the owners of the irrigable lands. This construct does not meet the requirements under ISDEAA.

"For the Benefit of Indians Because of their Status as Indians"

Our analysis is informed by the decisions of administrative and federal courts that have considered whether certain programs are operated "for the benefit of Indians because of their status as Indians." In *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005), the U.S. Court of Appeals upheld the Department's determination that the Trinity River restoration program was not eligible for a self-determination contract under 25 U.S.C. section 450f(a)(1)(E). The court affirmed the Department's administrative determination that the purpose behind ISDEAA is "to give Indian tribes more autonomy by enabling tribal governments to contract for 'programs or portions thereof' that the federal government creates or administers for the benefit of a tribe's lands, resources or members," and that Congress did not intend to authorize tribes to administer programs benefiting "the general public or non-Indian lands, resources or people."[3] The court concluded that the Trinity River restoration program was not "specifically targeted to Indians" but was instead intended to benefit a wide range of interests. 415 F.3d at 991.

Hoopa Valley relied on *Navajo Nation v. Dep't of Health & Human Services*, 325 F.3d 1133, 1138 (9th Cir. 2003) (en banc), which held that the Temporary Assistance for Needy Families Act (TANF) is also not a program "for the benefit of Indians because of their status as Indians." The *Navajo* court considered the five categories of programs delineated in the ISDEAA and determined that the plain language "underscores that programs or services that are 'for the benefit of Indians because of their status as Indians' must be federal programs specifically targeted to Indians and not merely programs that collaterally benefit Indians as a part of the broader population." *Id.* at 1138.

Finally, the Department considered the applicability of Public Law 93-638 to a Bureau of Land Management "hotshot" firefighting crew that fought fires on tribal and non-tribal lands. *See Tanana Chiefs Conference Inc. v. Acting Associate Alaska State Director, Bureau of Land Management*, 33 IBIA 51 (October 5, 1998). The tribal organization seeking the self-determination contract argued that the portion of the hotshot program that benefited tribal lands should be contractible under Public Law 93-638. *Id.* The Interior Board of Indian Appeals (IBIA) disagreed and concluded that the hotshot program was not operated "for the benefit of Indians because of their status as Indians." The IBIA noted that, because of the "unique, checkerboard pattern of land ownership" in Alaska, "the only logical conclusion is that Alaskan hotshot crews are operated for the benefit of all persons and valuable resources within the State[.]" *Id.*

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[3] *See Hoopa Valley Tribe v. Northern Area Manager, Bureau of Reclamation*, Docket No. IBIA 00-41-A, 2001 I.D. LEXIS 140, *22-23 (February 8, 2001).

Each of these cases conclude that programs that are contractible under 25 U.S.C. section 450f(a)(1)(E) must be programs that are specifically created and carried out for the purpose of benefiting Indians. Programs that mutually benefit both Indian and non-Indian interests, lands or resources, by contrast, are not contractible under that statutory provision. The Project at issue here was constructed and has been operated for the benefit of all irrigable lands on the Reservation, regardless of Indian ownership. It is not a program that has been "specifically targeted to Indians," but rather a program that benefits both Indian and non-Indian irrigators alike. The cases discussed above provide additional support for the Department's conclusion that the Project has not been operated "for the benefit of Indians because of their status as Indians" such that 25 U.S.C. section 450f(a)(1)(E) would apply to the Project's transfer as mandated by statute.

Absence of "Federal" Nature After Transfer

As the language of Public Law 93-638 makes clear, self-determination contracts can only be issued for programs and services conducted by the Federal government on behalf of Indian tribes. The 1908 Act clearly states that operation and management of the Project shall be transferred to the owners of the irrigable lands serviced by the Project – and implicit in this transfer is the termination of federal control over such operation and management. Once the Secretary approves rules and regulations to transfer these specific functions and the Project has been transferred to the owners of Project lands, the Project's functions will no longer be "federal." While the Department intends to oversee the transfer of the Project to ensure that future operation and management is consistent with the Secretary's rules and regulations, the operation and management of the Project will transfer to the Project land owners and will no longer have a federal imprimatur.[4]

The intent of Congress to remove the operation and management of the Project from federal control is reinforced by the language of the 1908 Act. This Act states that, after the Project passes to the "owners of the lands irrigated thereby," the Project shall "be maintained *at their expense*[.]" 35 Stat. at 450 (emphasis added). Congress clearly intended that, after transfer, operation and management of the Project would no longer be funded or subsidized by federal funds. One of the primary objectives of Public Law 93-638 is to transfer federal programs and services to tribes and to ensure that Federal funds are provided to allow tribes to operate those programs and services. Allowing transfer of the Project's operation and management here through a self-determination contract would contradict Congress's directive that these specific functions be stripped of their federal status and maintained through non-federal funds.

Distinguishing Mission Valley Power

[4] The Tribes correctly note that the Department will retain ongoing responsibilities after transfer. In particular, the Department will continue to exercise its trust responsibilities over tribal trust resources, may incur specific responsibilities under the Endangered Species Act, and will retain ownership of the Project infrastructure. The existence of these responsibilities, however, does not alter the Department's view of the transfer requirements under the 1908 Act.

Your letter correctly notes that, in 1988, the Bureau of Indian Affairs issued a self-determination contract for the operation and management of the power distribution system now known as Mission Valley Power. Like the Project, this power distribution system serves both Indian and non-Indian customers. It is the Tribes' view that the ISDEAA should apply similarly to both of these federal programs. Letter at 5.

The history behind the construction and evolution of these two programs, however, is markedly different. Unlike the statutes authorizing the construction of irrigation works on the Reservation, the statutes that authorized the construction of the power distribution system created no rights for non-Indian landowners. Significantly, the statutes that authorized the power distribution system did not contain language requiring the benefits of the system to be extended to non-Indians on the reservation and did not require operation and management to be transferred to the affected landowners. *See, e.g.*, 45 Stat. 200 (1928); 45 Stat. 1562 (1929); 62 Stat. 269 (1948). In the Department's view, these distinctions highlight why a self-determination contract may have been appropriate for Mission Valley Power but not for the transfer of the Project.

Conclusion

The transfer provision of the 1908 Act has been triggered, and the Department is committed to facilitating the transfer of the operation and management of the Project to the owners of the lands irrigated thereby. Although the Department recognizes the potential advantages that could come from issuing the Tribes a self-determination contract for the operation and management of the Project, the ISDEAA cannot be read in a vacuum and must be considered in light of the language of the 1904 and 1908 Acts.

The 1904 legislation authorizing the construction of irrigation ditches for the benefit of Indians on the Reservation was subsequently amended to require the construction of an irrigation system that would benefit both Indian allottees and non-Indian purchasers of lands on the Reservation. Since its inception, the Project has been operated to benefit both Indian and non-Indian irrigators, and all of those irrigators contribute to the costs of operating and maintaining this system. Applying the standard set forth in *Navajo* and *Hoopa Valley*, the operation and management of the Project is not "specifically targeted" to the Tribes, but instead benefits both Indians and non-Indians alike.[5] Accordingly, we cannot conclude that the Project is "for the benefit of Indians because of their status as Indians" such that the Tribes would be entitled to a self-determination contract under the ISDEAA.

Assuming for the sake of argument that the Project may have been entitled to a self-determination contract prior to the repayment of construction costs, Congress directed the operation and management of the Project to be transferred to the owners of all lands irrigated by the Project, and intended that the federal imprimatur on these two functions be terminated. Public Law 93-638 only applies to programs or activities that are carried out by the federal government on behalf of Indian tribes, and a self-

[5] *See Hoopa Valley*, 415 F.3d at 990-92; *Navajo*, 325 F.3d at 1137-39.

determination contract cannot be issued for programs that are no longer "federal." Thus, Public Law 93-638 cannot provide the vehicle for transferring this Project.

The Department is committed to working diligently with the affected parties to develop the necessary mechanisms to transfer the Project that reflect the rights and interests of all parties and are satisfactory to the Secretary. I am informed that the Tribes have been meeting regularly with the Board and the BIA to develop contractual terms that could govern both the transfer and the future operation and management of the Project. I encourage you to continue on this path, and if I can provide any assistance in this process, please do not hesitate to contact me.

Sincerely,

Edith R. Blackwell
Deputy Associate Solicitor
Division of Indian Affairs

cc: Assistant Secretary – Indian Affairs
Director, BIA
FIIP Transfer Team Leader, BIA
Joint Board of Control