

IBCA

CONSOLIDATED APPEALS OF: ALAMO NAVAJO SCHOOL BOARD, INC., SHIPROCK  
ALTERNATIVE SCHOOLS BOARD, INC., SANTA FE INDIAN SCHOOL, INC., GREASEWOOD  
SPRINGS COMMUNITY SCHOOL, INC.

Grant Nos. GTN34X020706, GTN32X01514, GTMOOX00701, and GTN36X00806 and 807

Decided: January 6, 2005

Bureau of Indian Affairs

Appellants' Motion for Summary Judgment Granted; Government's Motion to Dismiss  
Denied

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

I. Background

The above-named four Navajo Indian school boards and schools (hereafter, Alamo, Shiprock, Santa Fe, and Greasewood Springs; collectively, "the schools") have each appealed from the failure of the Bureau of Indian Affairs (BIA) to pay interest and other penalties under the Prompt Payment Act (PPA), [31 U.S.C. § 3901](#), et seq., in connection with BIA's late payment, for School Years (SY) 2002 and 2003, of grant funds made available by the Department of Education (DOEd) pursuant to the Tribally Controlled Schools Act (TCSA), [25 U.S.C. § 2501](#), et seq., as amended by "The No Child Left Behind Act of 2001" (NCLBA) ([Pub. L. 107-110](#)), [25 U.S.C. § 2506\(a\)\(1\)](#). The amendment provides for distribution of the schools' grant funds in two installments, 80 percent by July 1 and 20 percent by December 1 of each year.

Although not denying that these payment deadlines were not met, BIA alleges that they cannot be binding if DOEd funds are not received by BIA in time to meet them. BIA asserts that its subsequent regulations are binding and take precedence over the statutory payment dates; and thus that the Board lacks jurisdiction over this matter.

Three of these appeals were filed between May 18 and June 25, 2004. On July 12, appellants' counsel moved to consolidate them, requesting accelerated processing

and a final Board decision within six months. The last appeal filed, Greasewood Springs Community Schools, also contained a request for accelerated processing, so the Board consolidated it with the other appeals on its own motion because it involves the same issues, the same funding periods, and the same counsel. All of the appeals involve the 2003 - 2004 school year, but Santa Fe and Greasewood Springs also claim interest arising from late payments of grant funds during the 2002 - 2003 school year.

All appellants, as well as the Government, have moved for summary judgment. Summary judgment is appropriate in all of the appeals because they involve the same legal issues, with no material facts in dispute. Only entitlement is to be decided here. Alamo will be discussed because it is the most representative of the other cases and contains the most detailed information.

The TCSA continues to provide that grant disputes are to be handled in the same way as disputes under the Indian Self-Determination and Education Assistance Act, [25 U.S.C. § 2507\(e\)](#). They are expressly to be decided by this Board under the Contract Disputes Act, despite the Government's arguments to the contrary.

I. Applicable Law.

The following statutory provisions are relevant. The pertinent parts of the statutes are quoted as follows:

A. Contract Disputes Act (CDA). [41 U.S.C. § 611](#),

Interest: Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until the payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

B. Prompt Payment Act (PPA), [31 U.S.C. §§ 3902\(a\) thru \(d\)](#), abridged:

[T]he head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. \*\*\* The interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made. \*\*\* The temporary unavailability of funds to make a timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section. \*\*\* An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accrues thereafter on the added amount. \*\*\* This section does not authorize the appropriation of additional amounts to pay an interest penalty. The head of an agency shall pay a penalty under this section out of amounts made available to carry out the program for which the penalty is incurred.

C. Tribally Controlled School Grants. [25 U.S.C. §§ 2501-2511 \(abridged\)](#):

2501(d)(2): Congress affirms that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; and (d)(3) that those needs may best be met through a grant program.

2503(b)(1)(A): Funds allocated to a tribally controlled school \*\*\* shall be subject to the provisions of this chapter and shall not be subject to any additional restriction, priority, or limitation that is imposed by the Bureau [under pertinent education grant laws]. (B) Indian tribes and tribal organizations to which grants are provided under this part, and tribally controlled schools for which such grants are provided, shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would not apply solely by reason of the receipt of funds provided under any law referred to \*\*\* in paragraph (A). [Emphasis added]

\* \* \*

2503(b)(4)(B)(iv): Any disputes between the Secretary and any grantee concerning a grant described in clause (I) shall be subject to the dispute provisions contained in [section \[2507\(e\)\]](#) of this title.

\* \* \*

2506(a)(1), (4), and (5): \*\*\* (1) the Secretary shall make payments to grantees under this chapter in two payments, of which (A) the first payment shall be made not later than July 1 of each year in an amount equal to 80 percent of the amount which the grantee was entitled to receive during the preceding academic year, and (B) the second payment, consisting of the remainder to which the grantee is entitled for the academic year, shall be made not later than December 1 of each year. (4) With regard to funds for grantees that become available for obligation on October 1 of the fiscal year for which such funds are appropriated, the Secretary shall make payments to grantees not later than December 1 of the fiscal year. (5) The provisions of chapter 39 of Title 31 shall apply to the payments required to be made by paragraphs (1), (3), and (4). [Emphasis added]

\* \* \*

D. Indian Self-Determination Act (ISDA), 25 U.S.C. § 450m-1(d):

The Contract Disputes Act \*\*\* 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.

E. Application of Self-Determination Act to Disputes. [25 U.S.C. § 2507\(e\)](#):

Any exception or problem cited in an audit\*\*\* any dispute regarding a grant authorized to be made pursuant to this part or any amendment to such grant, and any dispute involving an administrative cost grant\*\*\* shall be administered under the provisions governing such exceptions, problems, or disputes\*\*\*under the Indian Self-Determination and Education Assistance Act. The Equal Access to Justice Act shall apply to administrative appeals filed after September 8, 1988, by grantees regarding a grant under this chapter, including an administrative cost grant.

II. The Government's Arguments

We hereby set forth here the Government's contentions essentially as we received them, although we do not agree with them nor accept them as accurate.

A. The Government Alleges that the Board Lacks Jurisdiction over this Appeal

The Government maintains that the Interior Board of Contract Appeals does not have jurisdiction over Alamo's claim for interest under the TCSA because Department of Education sub-grants are not subject to the TCSA. It asserts that the Board has held that "a grantee under the TCSA has the same rights to seek adjudication of disputes that an ISDA contractor has: no more no less," citing [Rough Rock Community School Board. IBCA 3037, 93-2 BCA 25,837 at 128,587](#). It contends that Alamo attempts to expand the rights of contractors to make all sub-grants entitlements, despite having to fulfill statutory requirements to be eligible to receive a sub-grant.

Under the Contract Disputes Act, according to the Government, the Board has jurisdiction to decide "any appeal from a decision of a contracting officer (1) relative to a contract made by its agency and (2) relative to a contract made by any other agency when such agency or administrator has designated that agency board to decide the appeal". [41 U.S.C. 607\(d\)](#). However, it asserts that Alamo's claim is not a contract claim under the Contract Disputes Act as incorporated by the ISDA and the TCSA. Rather, Alamo's claim is for interest on dollars simply transferred from the Department of Education to the

Department of the Interior for further transfer to sub-grantees to the extent allowed by the NCLBA.

The Government then notes that before any Department of Education Title dollars can be transferred to the Department of the Interior, both Departments must enter into a Memorandum of Agreement (MOA) that outlines the use of these program funds and explains how the Bureau will assess program effectiveness, as required by [20 U.S.C. § 7824](#). [FN1] It insists that the Department must also have procedures for reviewing and approving applications for both sub-grants and amendments to those sub-grants. The review of the sub-grantee's program allows the Bureau to provide technical assistance, evaluate the schools' projects, and perform other administrative responsibilities that the state has determined are necessary to ensure compliance with applicable statutes, regulations, and assurances to the Department of Education. [20 U.S.C. § 1221](#) et. seq. and [34 CFR 76.770](#). [FN2]

Alamo, in the Government's view, is attempting to assert that the BIA, as the State Education Agency (SEA), does not have the authority to require the local submission of consolidated plans because the SEA has not "indicated whether the BIA, as an SEA, operates pursuant to an approved consolidated State Plan." However, the Government asserts that the Department of Interior did consult with tribes on its State Plan, and that a final plan was approved in 2002. Without the "state plan" approved by the Department of Education, the Department of Interior as the SEA (acting through the BIA in this case), would not receive Title dollars and in turn, Alamo would not receive any Title dollars.

The Government asserts that a DOE d sub-grant is not an entitlement as used in [25 U.S.C. § 2506\(a\)\(1\)\(A\)](#) and that it was not intended to be distributed as such. Instead, all Title funds are applied for and received through a grant process, beyond the scope of the TCSA. All SEA's are required to follow this process, and no other recipient of DOE d Title dollars, including all 50 states as State Education Agencies, Local Education Agencies, school districts or schools, receive additional interest dollars under the Prompt Payment Act for the delayed payment of a grant.

The Government further argues that Alamo's status as a sub-grantee allows it to bring an administrative claim under the Department of Education's independent hearing process for allegations of a violation of State or Federal Statute or regulation by a State Educational Agency. [34 CFR 76.400](#) and [76.783](#). And since there are specific administrative regulations that apply to the funds at issue in this

claim, this case is not properly before this Board and should be dismissed for lack of jurisdiction. The Government also notes that the TCSA specifically characterizes all Bureau-funded schools [FN3] as Bureau schools for the purposes of receiving funding from the Department of Education, as follows:

Tribally controlled schools for which grants are provided under this chapter shall be treated as Bureau schools for the purposes of allocation of funds provided under

A) title I of the Elementary and Secondary Education Act of 1965;

B) the Individuals with Disabilities Education Act and

C) any other Federal education law, that are allocated to such school for such fiscal year. [25 U.S.C. § 2503\(b\)\(3\)](#).

Although Alamo maintains that this provision merely speaks to the allocation of funds, the Government believes that the Congress specifically delineated in the TCSA when "Schools are Considered Contract Schools" and when "Schools are Considered Bureau Schools" for the purposes of the composition of grants under [25 U.S.C. § 2503\(b\)\(2\) and \(3\)](#). It further argues that Alamo attempts to negate the effect of these provisions by referring to them as simply the basis for allocating funds. However, the Government further notes that [25 U.S.C. § 1126\(e\)](#), [25 U.S.C. § 1127](#), and [25 U.S.C. § 1128](#) expressly state how such funds are calculated.

"Allocation," as used in [25 U.S.C. § 2503\(b\)](#), refers to the act of setting apart for a specific purpose or to distribute or allot, the Government asserts. Oxford English Dictionary 339 (2d ed. 2004). Therefore, it argues that tribally controlled schools that receive Title funds must be treated as Bureau schools for the purposes of distribution of funds and that they are not under the jurisdiction of the Board.

B. The Prompt Payment Act, according to the Government, does not apply to Department of Education Title Funds.

The Government asserts that the IBCA does not have jurisdiction over Alamo's appeal because the Prompt Payment Act does not apply to Title I of the Elementary and Secondary Education Act of 1965; to the Individuals with Disabilities Act; or to any other Federal Education Law that is allocated to such schools for such fiscal years, noting that in 1993 the Board held in *Rough Rock*, supra at 128,588, that:

Congress did not have the payment of interest in mind when it enacted the provisions of the TCSA; and we hold that grant recipients are not entitled to interest under the PPA on late payments made pursuant to TCSA grants, because the PPA by its terms applies only to contracts as such and therefore, any payment of interest on grant should require express statutory authority that clearly does not exist now.

According to the Government, in 1994 Congress recognized the lack of Prompt Payment Act, 31 U.S.C. § 39, authority in the TCSA and therefore amended [25 U.S.C. § 2506\(a\)\(5\)](#) to authorize the Prompt Payment Act to apply to "the payments required to be made by paragraphs 1, 3 and 4". Paragraph 1 designates amount and time frame of TCSA payments; paragraph 3 outlines the funding procedure for a newly funded school; and paragraph 4 outlines funds for grantees that become available for obligation on October 1.

However, closer examination of [Senate Report 103-314](#) -- the section-by-section analysis of the 1994 amendments to the TCSA--according to the Government, makes

clear that Congress only intended to "require the Secretary to make payments to grant schools by July 1 and December 1 of each year, conforming the requirements to the forward funding of the Indian School Equalization Program, and to authorize payment of interest to the schools in the event of late payments." [S. Rep. No. 103-314, at 44 \(1994\)](#).

This Senate Report also states that a number of improvements were being made in the Bureau's system of providing financial and other support to its schools. In particular, the amendments would require the Bureau to make payments to contract and grant schools on July 1 and December 1 of each year and to pay interest in the event payments were not timely made, and further to require that all amounts appropriated for school operations be distributed and not diverted to other Bureau programs. [S. Rep. No. 103-314, at 41 \(1994\)](#).

Thus, the Congressional intent in the language applying the PPA to the TCSA, the Government says, clearly only refers to the Department of Interior, Bureau of Indian Affairs', appropriations for the operation of schools under the Indian School Equalization Program. There is no mention of Title dollars received from the Department of Education. Therefore, there is no specific statutory authority for the PPA to be applied to the Title dollars at interest in Alamo's claim, and the present claim must be dismissed.

#### C. Government's Legal Conclusion

In summary, the Government concludes that a school operating as a Tribally Controlled School is not entitled to interest on sub-grants to the school under: Title I of the Elementary and Secondary Education Act of 1965; the Individuals with Disabilities Education Act; or any other Federal education law, that is allocated to such schools by fiscal year. The funds received from the Department of Education by the Bureau of Indian Affairs are used according to a consolidated state plan between the Department of Education and the Office of Indian Education Programs (OIEP).

The Government further asserts that because Tribally Controlled Schools are considered Bureau schools when receiving these Department of Education sub-grants, there is no requirement that OIEP allocate the DOEd sub-grants under the TCSA time frames. Similarly, funding received by the Department of Interior as a grant from the Department of Education does not fall under the Contract Disputes Act or the Prompt Payment Act and therefore is not entitled to the payment of interest or other penalties. For all the foregoing reasons, Appellant's appeal should be dismissed under [43 CFR 4.105](#).

As discussed below, we do not agree with the Government's views.

#### IV. Alamo's Arguments for Summary Judgment

By contrast, the Board finds that Appellants' following statements of the law governing these Appeals to be essentially accurate. In the interest of meeting the accelerated deadlines for these appeals, we adopt Alamo's reasoning and set forth its arguments. The same principles apply equally to the appeals of the three remaining schools as well. Appellants' presentation is as follows:

##### A. The Board's jurisdiction under the Tribally Controlled Schools Act.

This case presents a dispute regarding the late payment of funds due to the Alamo Navajo School Board under its Tribally Controlled Schools Act grant. The Act states that "any dispute regarding a grant authorized to be made" under the TCSA "shall be administered under the provisions governing such disputes in the case of contracts

under the Indian Self-Determination and Education Assistance Act." [25 U.S.C. § 2507\(e\)](#).

Appellant points out that the Contract Disputes Act is expressly applicable to ISDA contracts, and that the Interior Board of Contract Appeals is identified as the authority to hear these appeals. 25 U.S.C. § 450m-1(d). Thus, Federal law gives this Board jurisdiction over a TCSA grant dispute. The Board itself held eleven years ago that it has jurisdiction over such disputes. [Appeal of Rough Rock Community School Board. 93-2 BCA 25,837, 1993 WL 55995 \(IBCA Feb. 12, 1993\)](#). [FN4]

BIA, however, asserts that the Board has no jurisdiction over this dispute because, according to the Bureau, the CDA and the Prompt Payment Act do not apply to the portions of TCSA grants that consist of the pass-through funds supplied by DOEd. The Bureau cites no provision of law that exempts the portion of a TCSA grant consisting of pass-through funds from the DOEd from the payment deadlines established by [25 U.S.C. § 2506\(a\)\(1\)](#), or from the application of the Prompt Payment Act to payments under [25 U.S.C. § 2506\(a\)\(5\)](#), or from the incorporation of the ISDA disputes provisions in [25 U.S.C. § 2507\(e\)](#). There is no such exemption.

The Bureau attempts to cobble together such an exemption by offering two arguments. First, it cites the 1985 decision of the Claims Court in the case of [Busby School of the Northern Cheyenne Tribe v. United States. 8 Cl. Ct. 596 \(1985\)](#), which held that the CDA does not apply to ISDA contracts. This holding has long since been negated by Congressional action. Through the 1988 amendments to the ISDA, Congress enacted what is now [25 U.S.C. § 450m-1](#) (noted above) which expressly makes the CDA applicable to disputes involving ISDA contracts. The legislative history demonstrates that enactment of that provision was in direct response to -- and intended to legislatively overrule -- the Busby holding. [S. Rep. No. 100-274, at 34-37 \(1987\)](#). At least fourteen years ago, this Board formally recognized that Busby had been superseded by Congressional action. See [Appeal of Papago Tribe of Arizona. 90-3 BCA 22,965, 1990 WL 169271 \(IBCA, May 29, 1990\)](#).

Next, the Bureau points to two provisions of the TCSA to bolster its assertion, neither of which exempts DOEd funds included in a TCSA grant from the payment deadlines, the PPA, or the ISDA disputes mechanisms. The agency's reliance on Section 5204(b)(3), [25 U.S.C. § 2503\(b\)\(3\)](#), is misplaced. There, Congress merely directed that TCSA grant schools be treated as "Bureau schools" [FN5] for the purposes of allocation of funds received from DOEd and other Federal education laws.

The Board agrees that it is only for the purposes of allocation of funds that TCSA grant schools are to be treated as Bureau schools. That is, all schools in the system are to receive funds through application of the same funding allocation methodology. All categories of schools -- Bureau-operated schools, ISDA contract schools, and TCSA grant schools -- are to have their DOEd funding allocations calculated in the same way, with no preference in amount given to any category of schools. This provision says nothing about when such allocations are to be paid to TCSA grant schools. That topic is addressed -- in very explicit terms -- in [25 U.S.C. § 2506\(a\)](#).

The other TCSA provision relied upon by BIA, [25 U.S.C. § 2503\(b\)\(2\)](#), is similarly devoid of any language exempting DOEd funds from the grant payment deadlines. Alamo believes the Bureau is actually referring to [25 U.S.C. § 2503\(b\)\(1\)](#), which says in paragraph (A) that with respect to funds directly appropriated to the Bureau, TCSA grantees "shall not be subject to any additional restriction, priority, or limitation" imposed by the Bureau. In addition, paragraph (B) thereof sets out a similar command: With respect to DOEd pass-through funds, TCSA grantees "shall not be subject to any requirements, obligations, restrictions or limitations imposed by

the Bureau that would otherwise apply solely by reason of the receipt of" DOEd funds. [25 U.S.C. § 2503\(b\)\(1\)\(B\)](#) (emphasis added). [FN6]

The Bureau concludes its discussion of the cited TCSA provisions with the curious observation that TCSA grant schools receiving DOEd funds "are not separate contracting entities." As Appellant notes, while TCSA grantees are issued "grants", not "contracts", they are, nonetheless, operationally distinct entities. In fact, this is the whole purpose of the TCSA. That law established a mechanism that enables a tribe or tribal organization to exercise its Indian self-determination right to take over operation of a BIA-funded school and be responsible for that operation free of "further perpetuation of Federal bureaucratic domination of programs". [25 U.S.C. § 2501](#).

Appellant argues and the Board finds that the Bureau's strained interpretation of the statutory provisions it cites violates the fundamental principle of statutory interpretation that the plain language of the statute governs. [FN7] The plain language of [25 U.S.C. § 2503\(a\)](#), as to what funding sources comprise a "grant", and the plain language of the payment provision ([25 U.S.C. § 2506\(a\)](#)) as to the dates on which TCSA grant payments are to be made, must govern over the Bureau's assertion that these provisions are somehow rendered inapplicable to the DOEd pass-through funds included in the grant because of the statute's command that the Bureau use the same funding allocation methodology for all schools.

The Bureau's argument also ignores the principle that effect must be given, if possible, to every word, clause, or sentence of a statute. [FN8] Here, the statute's provisions regarding payment deadlines, PPA application, and application of the ISDA disputes provisions can and do comfortably co-exist with the requirement that the same funding allocation methodology be used for all schools.

Finally, the Board agrees that the Bureau's argument misses the most significant point: The reason Congress established express payment deadlines is because it wanted to assure that TCSA grant schools received their funds in a timely manner, recognizing that this is vital to the effective operation of a school. In the instant dispute, the BIA delayed payment of nearly \$700,000 in funding to Alamo until over five months into the school year.

Appellants ask, "How can a school be expected to operate according to its established budget, meet its payroll every two weeks, and acquire needed supplies and equipment when such a large amount of its expected funding is delayed until the school year is nearly half over?" Upon learning that such payment delays persisted, Congress, in the 1994 amendments to the TCSA, made the Prompt Payment Act applicable to TCSA grant payments in an effort to force the Bureau to make full grant payments on time. [S. Rep. No. 103-314, at 40- 41 \(1994\)](#). Failure to do so would require the agency to pay interest to the TCSA grantee, just as all other Federal agencies are required to do when they do not pay their Contractors within the timelines established by the Prompt Payment Act. [FN9]

B. The delay in execution of the Memorandum of Agreement between the DOEd and the Bureau of Indian Affairs does not absolve the BIA from its grant payment responsibilities under the TCSA.

Appellant argues that the Bureau seems to assert that it can escape its payment deadline responsibilities under the TCSA until the Memorandum of Agreement by which the DOEd transfers pass-through funds to the BIA is executed. BIA declarant Sharon Wells states that the Memorandum of Agreement (MOA), provided for in Sec. 9204 [FN10] of the NCLBA was not executed until September 24, 2003. The BIA apparently argues that since the DOEd did not transfer funds to the Bureau until on or after September 24, the payment deadlines of [25 U.S.C. § 2506](#) do not apply.

Both § 9204 calling for an MOA and the TCSA provision establishing payment deadlines and applying the Prompt Payment Act are contained in the same law, the NCLBA. The MOA provision appears in Title IX, whereas the re-enactment of the TCSA appears in Title X (NCLBA Sec. 1043; 115 Stat. 2063). While the NCLBA was signed into law by the President on January 8, 2002, the MOA called for by Sec. 9204 was not executed by the two agencies until nearly 21 months later. [FN11]

The Board finds that nothing in Sec. 9204 or in any other provision of the NCLBA exempts the BIA from the payment and PPA interest requirements of the TCSA ([25 U.S.C. § 2506](#)) with regard to DOEd funds that comprise a portion of a TCSA grant. Nonetheless, the Bureau raises the requirement of an MOA as not only a defense for its late grant payment to Alamo, but also as a reason why this Board should have no jurisdiction over this dispute. Both assertions are without foundation.

While it is true that the BIA cannot transfer funds to Alamo that have not yet been provided by the DOEd, neither Alamo nor any other TCSA grantee has any control over when the two agencies fulfill their obligation to execute the MOA and arrange for the funds transfer. Nonetheless, the BIA here seeks to make Alamo and other TCSA grantees the victims of interdepartmental delay. We agree with Alamo that such an outcome is not only patently unfair, it contravenes the law.

Both federal departments had access to the full text of the law the President signed on January 8, 2002, and both were charged with knowledge of their responsibilities under that law and with the knowledge that failure of the BIA to make timely grant payments to TCSA grantees subjects the United States to payment of interest under the PPA.

BIA asserts that DOEd's only responsibility was to obligate the pass-through funds to the BIA before they would lapse on October 1, 2003. (DOEd averted this potential danger by executing the MOA a mere six days before the lapse date.) By this rather remarkable assertion, BIA seems to be saying the Department of Education has no responsibility to assure that the funds appropriated to that Department actually reach any school for which they are intended (either on time or late) so they could be used for educational purposes.

In any event, the BIA's responsibilities under the law are clear: pay TCSA grantees on time or pay interest. Since this is a statutory responsibility imposed on BIA, one would expect that agency to make sure the DOEd knew the ramifications of late funding, and work with the Department to assure that the pass-through funds were supplied in time for the BIA to meet the statutorily-established deadlines. The penalty for failing to do so should fall on the BIA -- not on the backs of small schools that are dependent upon these funds for their educational programs.

The TCSA provides that a grantee may invest its grant funds and earn interest thereon before the funds are expended for program operations, and retain the interest earnings to spend on behalf of the school. [25 U.S.C. § 2506\(b\)](#). The BIA's nearly five-and-one-half month delay in paying nearly \$700,000 to Alamo deprived the School Board of its opportunity to earn interest on these funds, in addition to depriving the School of the cash flow needed to meet its obligations as they came due in SY03-04.

It is through the application of the PPA to late payments that Congress sought to make up for such a grantee's lost earnings opportunities. [FN12] Unfortunately, nothing can make up for the educational hardships suffered by the School and its students as a consequence of the BIA's laxity. The Board rejects BIA's attempt to shield itself from the violation of [25 U.S.C. § 2506](#) that resulted from the joint

BIA/DOEd failure to timely execute an MOA for transfer of funds.

C. Sections 1112 and 9305 of the No Child Left Behind Act pertaining to the development of plans for the use of ESEA funds do not relieve the Bureau of liability for interest payments under TCSA.

The BIA asserts that a BIA-funded school must have certain approved "plans" in place before the BIA, acting as a "state educational agency" (SEA) under the NCLBA, may distribute pass-through funds to such school. In this discussion, BIA cites to two provisions of the NCLBA -- Sec. 1112 and Sec. 9305 -- but does not fully describe the circumstances to which these provisions apply.

Sec. 1112, by its own terms, applies only to funds supplied under the Elementary and Secondary Education Act of 1965 (SEA) Title I, Part A. It does not apply to all DOEd funds for which Alamo seeks interest for late payment. Sec. 9305 is cited as authority for the notion that the BIA, as the SEA, "may review" each school's "consolidated local application" to assure that it complies with the law.

As an examination of Sec. 9305 reveals, however, an SEA may only require the submission of local consolidated plans if the SEA itself has a consolidated State plan or application approved by the Secretary of Education. Separate plans are not required, and the State may require only material "absolutely necessary" for its consideration of local agency plans or applications. [20 U.S.C. § 7845](#).

Neither the BIA's Motion nor the Declaration of Sharon Wells indicates whether BIA, as an SEA, operates pursuant to an approved consolidated State plan. Therefore, it is impossible to determine whether the BIA has the authority to require local schools to submit the "consolidated local applications" to which the Bureau's Motion refers. Even if it does, we agree that it does not permit the Bureau to hold up distribution of funds to schools until the plans are submitted and approved.

Nonetheless, the BIA claims that Secs. 1112 and 9305 give the agency the authority to violate the payment provision of the TCSA without being subject to the PPA interest penalty for a late payment. This BIA assertion is in error. Neither of the cited sections makes any reference at all to excluding SEA funds passed-through to the Bureau from the payment and penalty provisions of the TCSA.

Furthermore, both Sec. 1112 and Sec. 9305 are provisions of general applicability, as they have general application to every school in the nation that receives benefits from SEA Title I, Part A, funding (in the case of Sec. 1112), or operates in a State that has an approved consolidated state plan (in the case of Sec. 9305). By contrast, the TCSA establishes very specific deadlines for the distribution of grant funds to a very specific category of schools -- tribally operated schools that are funded through the TCSA grant mechanism.

The Bureau's attempt to use the general requirements of these provisions as a shield from its specific TCSA responsibilities ignores the long-standing principle of statutory construction that "general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general...." [FN13 ] The TCSA, as re-enacted in the No Child Left Behind Act, makes absolutely clear that grant funds must be provided to a specific sub-category of schools, tribally controlled schools, by the deadlines set forth in [25 U.S.C. § 2506\(a\)](#). We conclude that this specific provision must be honored.

In fact, the TCSA specific provision can co-exist with the general NCLBA provisions, provided the Bureau is required to fulfill its obligation to pay

interest when it has not approved any school plan that is required nor distributed funds to a TCSA grantee by the statutory deadline of July 1 of the school year.

The facts reveal, however, that on July 1, 2003 (the date the first grant payment for SY2003-04 was required to be made), Alamo did have an approved "Consolidated School Reform Plan" (CARP) [FN14] in effect. In fact, Alamo's CARP covering the period of SY2002-03 through SY2007-08 was approved by the BIA's Office of Indian Education Programs on Dec. 10, 2002.

The Declaration of Sharon Wells states that each year BIA requires each school to submit an amendment to its CARP. In its Motion to Dismiss, BIA makes no mention of an amendment submission requirement, nor does the agency (or Ms. Wells's declaration) cite any authority that permits the BIA to delay distribution of DOEd pass-through funds until an annual administratively required amendment has been approved. The Bureau apparently confuses the approval of the original plan with the approval of an annual amendment of the plan. The latter is a requirement imposed on the schools solely by the Bureau. The Wells Declaration confirms that the Bureau withheld Alamo's funding - not because there was no approved school plan -- but because the SY2003-04 amendment did not make it through the Bureau's approval process in time for a July 1 distribution.

The process employed by BIA for review of CARP amendments in 2003 merits examination. We note that BIA established a procedure that made it nearly impossible for a school's CARP amendment for SY2003-04 to be reviewed and approved by July 1, 2003, the date set by 25 U.S.C. § 2506(a) for the first TCSA grant payment. The procedure is as follows:

1. The amendment approval process requires a school to navigate through two bureaucratic layers: The first is the local BIA Agency where the Education Line Officer, special education coordinator and school reform specialist are all required to review and sign off on an amendment before it can be forwarded to the Center for School Improvement ("CAI" -- part of the BIA's Office of Indian Education Programs). The second layer is review by the CAI which may return an amendment to the Agency (not to the school!) if it is not satisfied.

2. The CAI established June 9, 2003 as the earliest date on which it would accept SY03-04 amendments for review. Note that this is only 21 days prior to July 1, the date on which the first TCSA grant payment is due. CAI also announced that "fund distribution documents" for a school's DOEd funds would not be requested until a school's amendment is approved by CAI.

3. Alamo submitted its SY2003-04 amendment to its Education Line Officer at the Eastern Navajo Agency (as directed by CAI) on June 9, 2003. Paragraph 9 of Ms. Wells's declaration, which states Alamo submitted its amendment on June 30, 2003, is in error. Most likely, this is the date on which the Eastern Navajo Agency transmitted Alamo's amendment to CAI. The school, of course, has no control over when its Agency forwards the amendment to CAI.

4. Subsequent to Alamo's June 9, 2003 submission, there followed several months of back-and-forth shuttling of Alamo's amendment between CAI, Eastern Navajo Agency, and the Alamo school. This process did not culminate in receipt of Alamo's DOEd funding until Dec. 10, 2003, a full six months after the amendment was submitted. Note that Ms. Wells's declaration at ¶ 11 states that the Alamo amendment was approved Nov. 6, 2003, and that a fund distribution document was issued on Nov. 17, 2003. Neither Ms. Wells's declaration nor the BIA's Motion reveal why the funds were not received by Alamo until Dec. 10, 2003.

This lengthy, inefficient, and cumbersome review process -- designed by the Bureau

itself -- practically guarantees that even when a TCSA grantee submits its proposed amendment on the very first day of the review period (as Alamo did), the amendment will not be approved by July 1. Nonetheless, the Bureau now asks this Board to excuse it from the payment deadline and late payment interest requirements of the law, even though BIA created the problem to begin with.

The Bureau's extra-statutory requirement that Alamo file an annual amendment to its already approved plan cannot serve as justification for withholding Alamo's funding past the July 1 deadline set in TCSA. There appears to be no valid legal basis for the Bureau's position. Moreover, the Bureau's argument runs afoul of the command in [25 U.S.C. § 2503\(b\)\(1\)\(B\)](#) that "tribally controlled schools...shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of funds provided under [the federal education laws.]" The requirement that Bureau schools have an annual amendment to their plans approved by the Bureau before funding is disseminated appear to be precisely the type of requirement, obligation, restriction, or limitation prohibited by TCSA.

Nor do DOEd regulations permit the Bureau to impose these additional requirements. [34 CFR 80.21 \(g\)](#), which, as generally applied, allows funding to be withheld for failure "to comply with grant conditions", cannot be read to nullify the statutory deadlines contained in TCSA. Moreover, [34 CFR 80.21 \(b\)](#) clearly states the DOEd's expectation that transferred funds be promptly distributed: "[m]ethods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee", a requirement that the Bureau ran afoul of here.

Finally, far from having "failed to comply with grant award conditions" -- the standard set out in [34 CFR 80.21\(g\)](#) -- the facts demonstrate that Alamo was neither recalcitrant nor incapable in responding to the Bureau's demands that annual amendments be submitted for the school reform plans. Rather, the facts support the conclusion that Alamo submitted all required documentation on time, expended considerable time and personnel resources in ensuring that not only its amendment but those of its neighboring schools met CSI's requirements, and promptly responded to follow-up questions relayed from the CAI through the local Agency.

We conclude that the Bureau established a procedure for submission and review of the school plan amendments that made the approval of these amendments by the CAI by the July 1 deadline for the distribution of funds all but impossible. The irony, of course, is that by withholding the funding from Alamo the Bureau made it much more difficult for the school to meet the objectives of its school reform plan and amendment.

D. The Bureau must pay interest and additional penalties due to its failure to make timely payment of the first installment of FACE funds for School Year 2003-2004.

Alamo's appeal also raises the issue of the late payment of \$200,000 in FACE [FN15] funds; this payment, due July 1, was not received until December 10, 2003. In its Motion to Dismiss, the BIA addresses neither the late payment of FACE funds, nor Alamo's claim for interest and penalties therefor, nor the Board's jurisdiction over that claim. Nonetheless, the Bureau's Motion asserts that Alamo's entire case should be dismissed by the Board. We therefore examine the FACE funds late payment.

FACE funds are appropriated directly to the Bureau for distribution and require no inter-departmental transfer. Such funds are clearly included in the "composition of grants" section of the TCSA ([25 U.S.C. § 2503\(a\)\(3\)\(c\)](#)), and must be paid by the

July 1 deadline contained in [25 U.S.C. § 2506\(a\)\(1\)\(A\)](#). Indeed, the initial Fund Distribution Document for these funds was issued by the Bureau on July 1, 2003, [FN16] but inexplicably the funds were not actually paid to Alamo until December 10, 2003, a total of 162 days late.

Thus, Alamo is entitled to the payment of interest on this claim under the Prompt Payment Act. Additionally, Alamo is entitled to the additional penalty authorized under [31 U.S.C. § 3902\(c\)\(3\)](#) and [5 CFR 1315.11](#) given that it made its request for interest within 40 days of the December 10, 2003 payment date, and made an explicit demand for the additional interest penalty.

## VI. Summary

It is difficult to imagine an arena of the law more tortuous or surrounded by legal mine fields than the first 30 years of the Indian Self-Determination Act (ISDA), [Pub. L. 93-638](#), Jan. 4, 1975. Typically, the Indians experience a real or perceived injustice and go to the Congress for relief; Congress passes a law; the Government ignores or circumvents the law; and the Indians then have to go to court or back to the Congress for a decision so that the issue can be contested all over again.

The Government is not entirely to blame for this state of affairs because the Congress tends to be much more generous with its authorization language than it is with its appropriations, leaving the Government with far more financial needs than it can satisfy with the money made available. As a result, in enacting Indian law, Congressional committees have begun adding more frequent "this time we really mean it" language to their authorization statutes. Like the Indian Self-Determination Act, the Tribally Controlled School Act contains many such mandates.

All a judicial tribunal can do is to try to adhere as closely to the letter of the law as possible, which is what the Board will attempt to do here. It is immaterial that Indian tribes may be treated differently from the States for education funding purposes if we find that the Congress intended the Prompt Payment Act to apply to Indian tribal school grants, as we do. Nothing prevents the two Departments involved from going back to the Congress for reconsideration.

Although interest on grant funds can be paid only if the authorizing language is clear enough to constitute a waiver of sovereign immunity, and thus must be expressly authorized, we think that the ISDA at [25 U.S.C. §§ 2503, 2506\(a\)\(5\), and 2507\(e\)](#); the Contract Disputes Act at [41 U.S.C. § 611](#); and the Prompt Payment Act at [31 U.S.C. § 3902](#), taken together, are sufficiently explicit to meet that test. [25 U.S.C. § 2506\(a\)\(5\)](#) expressly makes the provisions of the Prompt Payment Act applicable to investment funds, which includes school grants under [25 U.S.C. § 2506\(b\)](#) that are not received on time. Similarly, [25 U.S.C. § 2507\(e\)](#) also makes attorney fees available to recipients in the event of disputes, including those involving administrative cost grants.

Moreover, [§ 2503\(b\)\(1\)\(A\)](#) makes clear that "funds" allocated to a tribally controlled school "shall not be subject to any additional restriction, priority, or limitation that is imposed by [BIA] with respect to the funds provided..." This hands-off provision is repeated a second time in [§ \(b\)\(1\)\(B\)](#), which says that Indian tribes "shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of [those] funds."

In the cases before us, as Appellants' counsel have noted, the Government's various pleadings have erroneously omitted the word "not". The operative principle involved is that if the intent of the statutory language is clear, we are bound by

it. [Babbitt v. Oglala Sioux Tribal Public Safety Department. 194 F.3d 1374 \(Fed. Cir. 1999\)](#).

Here, for example, the Government's administrative requirement for a school to submit an acceptable annual amendment to its consolidated school reform plan before being funded clearly cannot overcome the statutory mandate to get school funds distributed promptly under [25 U.S.C. § 2506\(a\)](#), which was amended in 2002 to increase to 80 percent the original 50 percent amount of the initial payment and to provide it two weeks earlier. If this payment, or any other statutory payment, is not made on time, interest accrues under the Prompt Payment Act and/or the Contract Disputes Act, as appropriate.

The Government attempts to make an issue of the fact that Indian contract schools are denominated "Bureau schools" by the TCSA ([25 U.S.C. § 2503\(b\)\(3\)](#)) for the purpose of allocation of funds, concluding that therefore they are not subject to the Contract Disputes Act, the Prompt Payment Act, or the jurisdiction of the Board. But, like the Appellants, we read the qualification "for the purpose of allocation of funds" literally, and we reject any broader interpretation involving the distribution of funds.

The various dictionaries we consulted, including Black's Law Dictionary, all seemed to equate "allocation" with the authorization or right to distribute, rather than with the act of distribution. In addition, the other provisions of the Act are sufficiently specific to outweigh this monetary allocation language. The Government's citation of the Busby Claims Court case was also unpersuasive since, as the Appellants note, it was legislatively overturned in 1987.

We note that [Section 2503 of Title 25](#) deals with the composition of grants. Subsection 2503(a) says merely that grants allocated to tribes include both formula grants under section 2007 and administrative cost grants under section 2008, as well as all education fund grants. Paragraphs (b)(1)(A) and (B) then state that funds allocated to a tribally controlled school by reason of paragraphs (1) and (2) shall not be subject to any additional restriction, priority, or limitation that is imposed by BIA with respect to the various educational programs. The same prohibition applies as well to other tribal activities that receive these funds.

Paragraph 2506(a)(5) is explicit in making the Prompt Payment Act, 31 U.S.C. Chapter 39, applicable to the [§ 2506\(a\)\(1\)](#) July 1 and December 1 annual school payments; to payments to newly funded schools under [§ 2506\(a\)\(4\)](#). Subsection [§ 2506\(b\)](#) makes clear that tribes are entitled to any interest or other investment income earned on these grant funds. Paragraphs 2507(e)(2) and (3) also make former Bureau schools whose operations are assumed by a tribe, eligible for funding to the same extent as a Bureau school.

The overall effect of these statutory provisions is that the Department of Education and BIA must operate within their framework and cannot adopt any regulation or procedure that is contrary to them without first going to the Congress for authority to do so.

The July 1 and December 1 payment dates and amounts are specifically set forth in the Act, with provision for interest under the Prompt Payment Act if payments are not made by those dates. Nowhere does the Act relieve the Government of the need to pay interest on these funds if these payments are not made on time, although the statute is silent on which agency is liable for that interest. We agree with the Appellants that if DOE makes the late payment without interest, BIA is required to make the interest payment from its own funds. What we also think is that BIA and DOE have a statutory duty to cooperate and coordinate their payments so that the Indian schools will have by July 1 the 80-percent funds needed to operate as the

Congress intended.

VII. Decision.

Appellant has set forth four specific issues that it believes need to be resolved by the Board. To avoid confusion and misunderstandings, and in the absence of any direct comment by the Governments on them, we will respond to each one as Appellant framed them, as follows:

1) Does this Board have jurisdiction over a claim filed pursuant to the Contract Disputes Act for the imposition of the interest and penalties required by the Prompt Payment Act arising from the late payment of funds to a TCSA grantee by the Bureau of Indian Affairs on the portion of a grant consisting of pass-through funds from the DOEd?

Answer: YES.

2) Does a delay in executing a Memorandum of Agreement between the DOEd and the Bureau of Indian Affairs pursuant to Section 9204 of the No Child Left Behind Act of 2001, [20 U.S.C. § 7824](#), absolve the Bureau of Indian Affairs from the grant payment deadlines of the TCSA with regard to payment of DOEd funds and negate the application of the Prompt Payment Act for late payments?

Answer: NO.

3) Do Sections 1112 and 9305 of the No Child Left Behind Act of 2001, [20 U.S.C. § 6312](#) and [§ 7845](#), pertaining to development of school plans by schools, absolve the Bureau of Indian Affairs from its statutory obligation to pay DOEd funds on the timelines established by the TCSA and shield the BIA from the imposition of interest and additional penalties required by the Prompt Payment Act?

Answer: NO.

4) Is the Bureau of Indian Affairs liable for payment of interest and penalties under the Prompt Payment Act for the late payment of TCSA grant funds for the operation of the Bureau-funded FACE program?

Answer: YES.

In further response to Appellant's questions, we find that the Board does have jurisdiction over these claims and that Alamo's Appeals are sufficiently similar to those of the other Appellants for this decision to apply to them as well. We find that neither contrary administrative regulations nor a delay in executing a Memorandum of Agreement is sufficient to relieve the Bureau from adherence to the TCSA grant payment deadlines. Neither is the Bureau shielded from the payment of statutory interest or penalties by its requirement that schools develop and submit annual plans. The Bureau is liable for payment of interest and related penalties pursuant to the Prompt Payment Act for failure to provide timely TCSA grant funds.

Because the Board has jurisdiction in this matter under 25 U.S.C. § 450m-1(d), the Government's motion to dismiss is denied.

The appeals are hereby remanded to the parties for a determination of quantum. They are to report back to the Board jointly within 60 days from the date of this decision to inform us of their progress in arriving at an equitable determination of the damages involved with respect to each appeal.

Bernard V. Parrette

Administrative Judge

I concur:

Candida S. Steel

Chief Administrative Judge

FN1. The BIA does not claim that the Department of Education's only responsibility to sub-grantees is to obligate the grant to the Department of the Interior before October 1. The BIA is attempting to explain to the Board and to Alamo how the Title funds in question are not merely appropriated to the Department of Interior for distribution. The Department of the Interior, as an SEA, has specific statutory obligations it must fulfill before the Department of Interior or any bureau-funded school will receive Title dollars from the Department of Education.

FN2. According to the Government, Alamo attempts to argue the merits of No Child Left Behind, the Department of Education's requirements of SEA's, and the SEA's requirements of a Consolidated School Reform Plan and amendments from each bureau-funded school. Again, the BIA would assert that this Board would not have jurisdiction over these education issues. If however the Board were to consider these issues the BIA would submit that the Department of Education would be an indispensable party to this appeal.

FN3. Bureau-funded schools refers to all 184 schools in the Department of Interior, Office of Indian Education Programs, school system, despite their status as grant schools, contract schools or bureau schools.

FN4. See also *Alamo Navajo School Board, Inc. and Miccosukee Corp v. BIA*, IBCA 3463-3466, IBCA 3560-3562 (Dec. 4, 1997), slip op. at 5 (IBCA asserted jurisdiction of administrative cost grant dispute pursuant to authority of 25 U.S.C. §§ 450m-1(d) and [2508\(e\)](#)). NOTE: [Sec. 2508 of Title 25 US Code](#) cited by the IBCA in that case is now codified at [25 U.S.C. § 2507](#).

FN5. The term "Bureau school" is defined to mean a school directly operated by the BIA. [25 U.S.C. § 2021\(4\)](#).

FN6. The Bureau's paraphrasing of this provision at page 5 of its Motion to Dismiss omits the rather critical word "not", i.e., pursuant to [25 U.S.C. § 2503\(b\)\(1\)\(B\)](#), TCSA grantees "shall not" be subject to additional Bureau requirements.

FN7. See, e.g., [Caminetti v. United States, 242 U.S. 470, 485 \(1917\)](#); [Hartford Underwriters Insurance Company v. Union Planters Bank, N.A., 530 U.S. 1, 6 \(2000\)](#).

FN8. See [Rake v. Wade, 508 U.S. 464, 471 \(1993\)](#).

FN9. The Bureau of Indian Affairs is well aware of its responsibility for paying interest under the Prompt Payment Act when it is late in paying bills from its vendors. See Memorandum from Acting Assistant Secretary for Indian Affairs to Central Office Directors, et al., dated June 29, 2004. Appellant's Exhibit 2. It appears, however, that the Bureau is not as conscientious about complying with the Prompt Payment Act when it comes to its statutory responsibility to pay interest to TCSA grantees -- who operate schools for Indian children -- when BIA makes late grant payments.

FN10. Codified at [20 U.S.C. § 7824](#).

FN11. While Sec. 9204 requires that the MOA be developed in consultation with Indian tribes, no such consultation has occurred.

FN12. Indeed, this type of situation was anticipated and is addressed in the Prompt Payment Act which states that "[t]he temporary unavailability of funds to make timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section." [31 U.S.C. § 3902\(d\)](#).

FN13. [Townsend v. Little, 109 U.S. 504, 512 \(1883\)](#).

FN14. The term "consolidated school reform plan" appears to be one coined by the BIA. Neither Secs. 1112 nor 9305 cited in the Bureau's Motion use that term.

FN15. "Family and Children Education" program.

FN16. See Administrative Record at 2.

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