INTERIOR BOARD OF INDIAN APPEALS

Morgan Underwood, Sr. v. Deputy Assistant Secretary -
Indian Affairs (Operations)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

MORGAN UNDERWOOD, SR.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-41-A Decided January 31, 1986

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) refusing to issue a certificate of degree of Indian blood based upon the blood quantum of the individual's alleged father.

Reversed.

1. Indians: Blood Quantum

   The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certificates of degree of Indian blood.

2. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

3. Indians: Blood Quantum--Regulations: Publication

   The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982)

and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

4. Administrative Procedure: Rulemaking--Indians: Blood Quantum--Regulations: Publication

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

APPEARANCES: Judy I. Lewis, Esq., Oklahoma City, Oklahoma, for appellant; Scott Keep, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On July 16, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Morgan Underwood, Sr. (appellant). Appellant sought review of a May 14, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) refusing to issue him a certificate of degree of Indian blood (CDIB) based upon the blood quantum of his alleged father, William Underwood. This refusal was inconsistent with a May 13, 1975, decision of the Ardmore Agency, Bureau of Indian Affairs (BIA, agency), which had issued appellant a CDIB showing him to be 4/4 Chickasaw, based upon the blood quantum of his mother and William Underwood. Appellee moved to dismiss the appeal. For the reasons discussed below, the Board denies the motions to dismiss and reverses the decision.

Background

Appellant was born on May 31, 1907, in Marshall County, Oklahoma. His birth apparently was not registered with the State. Appellant's mother was Bettie Sealy Burris, a 4/4 degree Chickasaw with enrollment No. [redacted]. Appellant states that his father was William Underwood, also a 4/4 degree Chickasaw with enrollment No. [redacted]. There is no dispute that both appellant's mother and William Underwood were full-blood Chickasaw. Appellant's mother died in 1955; William Underwood died in 1936.

In 1964 appellant applied for an Oklahoma Delayed Certificate of Birth. The application and supporting documentation were found sufficient by the Oklahoma State Bureau of Vital Statistics under procedures set forth in 63 Okla. Stat. § 1-313 (1963) 1/ and regulations implementing that statute. A delayed birth certificate, showing appellant's father to be William Underwood, was issued on March 24, 1964.

On May 13, 1975, appellant and his son and grandchildren received CDIBs from the agency. Appellant's CDIB showed him to be 4/4 degree Chickasaw.

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1/ Section 1-313 states in pertinent part:

"(a) When the birth of a person born in this state has not been registered, a certificate may be filed in accordance with regulations of the State Board of Health. Such certificate shall be registered subject to such evidentiary requirements as the Board shall by regulation prescribe, to substantiate the alleged facts of birth.

* * * * * * *

"(c) A summary statement of the evidence submitted in support of the delayed registration shall be endorsed on the certificate.

"(d) When an applicant does not submit the minimum documentation required in the regulations for delayed registration, or when the State Commissioner of Health finds reason to question the validity or adequacy of the

In 1983, the Indian Health Service in Lawton, Oklahoma, advised appellant that BIA was issuing CDIBs on a card rather than on the 8-1/2 by 11-inch certificate he had received in 1975. Appellant asked BIA for a card-size CDIB. Before issuing the smaller certificate, the agency reviewed appellant's records and determined it would not consider the blood quantum of William Underwood in issuing the card-size CDIB. In a December 20, 1983, letter concerning this matter, the agency Superintendent stated at page 1:

> We have reviewed the records available in this office and find that there is no judicial determination of heirs of record to establish Morgan Underwood as a son of William Underwood, Chickasaw 1071. The Departmental Proof of Death and Heirship on file for William Underwood, Chickasaw 1071, shows he was married only one time to Mary Underwood, Chickasaw IW-355, until his death on October 18, 1936. There were no children listed. The Decree of Heirship for Bettie Burris, Chickasaw 2836, lists Morgan Underwood as her son, but does not list William Underwood as his father or as her husband. [Emphasis in original.]

Appellant appealed this decision to the Muskogee Area Director, BIA, who forwarded the appeal to appellee without decision. On May 14, 1984, appellee issued a decision affirming the action taken by the agency. Appellee stated at pages 1-2 of his decision:

> You base your appeal on several points. You contend that Morgan's parentage as shown on the delayed certificate of birth is proof of the facts contained therein; that the Departmental proof of death and heirship of William Underwood is not conclusive proof that William Underwood was not Morgan's father; that the county court of Marshall County made findings of fact and conclusions of law that Morgan Underwood is a full blood

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fn. 1 (continued)
documentary evidence, the Commissioner shall not register the delayed certificate and shall advise the applicant of the reasons for his action."

Chickasaw; that the 1975 certificate of degree of Indian blood issued by the Ardmore Agency Superintendent is res judicata on the issue of blood quantum; principles of estoppel preclude the Superintendent from now changing his 1975 decision; and that the unwarranted change in position of the federal government without notice and opportunity to be heard affected substantial rights and privileges of the appellant.

While there is legislation which provides that the blood degree of persons named on the final rolls of the Five Civilized Tribes cannot be changed, there is no authority of law which prevents the correction of blood degree for descendants of final enrollees where error has been established. The certificates of degree of Indian blood are Bureau of Indian Affairs documents issued to identify eligible recipients of Bureau services and, as such, are not directly affected by state or county laws. The Five Civilized Tribes, through their constitutions, require that applicants for enrollment submit certificates of degree of Indian blood as proof of their descent from final enrollees.

* * * * * *

Based on the foregoing [discussion of the marital relations of William Underwood and Bettie Burris], we have concluded that Morgan Underwood was an illegitimate child of Bettie Burris. It has long been the policy of the Bureau that in determining the degree of Indian blood of children born out of wedlock, the child may only be credited with Indian blood derived from the mother UNLESS paternity has been acknowledged by the father or determined by the courts. The Bureau does not have the responsibility or obligation to make legal determinations of paternity. Only a court of competent jurisdiction has such authority.

We have concluded, therefore, that in Morgan Underwood's case, we can consider only Indian blood derived from his mother, Bettie Burris, until such time as a court determination of paternity has been made. Your appeal, therefore is denied. This decision is based on the exercise of authority delegated to me by the Secretary of the Interior and is final for the Department. [Emphasis in original.]

Appellant's appeal to the Board from this decision was received on July 16, 1984. In addition to the briefs filed by both parties, appellee filed a motion to dismiss the appeal, arguing that the Board lacks jurisdiction over the matter.

Jurisdiction

The parties and the administrative record in this case raise several logically disparate issues. These issues will not necessarily be addressed in the order in which they were raised.

Appellee challenges the Board's jurisdiction to hear this case on three grounds: (1) CDIB appeals are in the nature of enrollment appeals; (2) the underlying issue is a discretionary policy decision; and (3) there is no right to appeal this decision under 25 CFR Part 2.

Appellee first argues that the Board lacks jurisdiction over this case because it is "in the nature of an enrollment appeal." At page 3 of his answer brief, appellee states:

> In the absence of any regulations requiring or defining the issuance of CDIBs, the Assistant Secretary has taken the position that the issuance of them is in the nature of an enrollment matter. Although some of the Bureau's Area offices have advised individuals that they had a right to appeal the Area's decisions on CDIBs pursuant to 25 CFR Part 2, the Bureau's Central Office and the Assistant Secretary's office have always treated appeals from decisions related to the issuance of CDIBs as enrollment appeals pursuant to 25 CFR Part 62.

The pragmatic justifications cited by appellee for treating appeals from CDIB decisions as enrollment appeals are that the same type of genealogical research must be done in both cases; review of CDIB decisions is often lengthy because of the research requirements, and could easily extend beyond the time

periods set forth in 25 CFR Part 2; and enrollment appeals could be recast as CDIB appeals in order to circumvent the Department's proscription against Board review of enrollment disputes.

By regulation, the Board does not have jurisdiction over enrollment disputes. Section 4.330(b)(1) of 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate * * * tribal enrollment disputes." See Dahl v. Bureau of Indian Affairs, 10 IBIA 466 (1982). Special procedures for appealing tribal enrollment decisions are provided in 25 CFR Part 62. Section 62.2 states the purpose of the regulations:

> The regulations in this Part 62 are for the purpose of establishing the procedure for filing appeals in conjunction with the rejection of any name from a roll of an Indian tribe when final approval thereof rests within the purview of the Secretary either because of provisions in tribal constitutions or specific acts of Congress. The regulations are not to apply in those instances where the procedures for filing appeals by applicants rejected for tribal membership are prescribed in tribal documents. [Emphasis added.]

Section 62.3(a) states in pertinent part: "Any person who has been rejected for enrollment may file or have filed in his behalf an appeal from an adverse enrollment action." (Emphasis added.) Part 62 provides for initial action by superintendents and area directors, with appeals from area directors' decisions going to the Commissioner of Indian Affairs for transmittal to the Secretary, whose decision is final and conclusive. Section 62.9 provides

that "[t]o facilitate the work of the [Area] Director, the Commissioner may issue special instructions not inconsistent with the regulations in this Part 62."

Part 62 clearly applies by its own terms only to appeals from rejections of applications for tribal enrollment. The issuance of CDIBs is thus not covered by the express language of Part 62.

Appellee contends that despite the express language of Part 62, CDIB appeals are treated as enrollment appeals under Part 62 through a longstanding decision of the Assistant Secretary. Appellee fails, however, to cite any written policy statement or delegation of authority by the Secretary or Assistant Secretary making CDIB appeals subject to the enrollment disputes procedures of Part 62. The only evidence presented on this argument is an affidavit signed by the Chief, Branch of Tribal Enrollment Services, BIA, stating the conclusion that CDIB appeals are in the nature of enrollment appeals; a portion of a BIA instruction manual dealing with CDIB determinations; and a copy of a 1983 decision in an unrelated CDIB case in which the Assistant Secretary states that his "determination is based on the exercise of authority delegated to [him] by the Secretary of the Interior and is final for the Department" (Exh. C, page 2, to appellee's answer brief).

Neither the Chief of the Branch of Tribal Enrollment Services nor the BIA instruction manual does more than state a conclusion without legal support for that conclusion. The Assistant Secretary's 1983 decision does not cite

the regulation or delegation of authority under which he was acting. The Assistant Secretary, as a Secretarial-level official, has authority to issue final decisions for the Department that are generally not reviewable by the Board. See, e.g., Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, 13 IBIA 76, 92 I.D. 46 (1985). The fact that the Assistant Secretary stated his decision in a CDIB appeal was final for the Department does not, however, equate with a determination that finality attached because the decision involved a CDIB appeal that was in the nature of an enrollment appeal under Part 62.

Furthermore, appellee's arguments as to why CDIB appeals must be treated as enrollment appeals are unconvincing. The fact that the same type of genealogical research must be done in CDIB appeals as in enrollment appeals does not make the purpose of doing the research and the uses of the result equivalent. The time required for completing CDIB research can be allowed through a Board order granting a stay. Finally, BIA and the Department's Solicitor's Office are quite capable of informing the Board if an enrollment appeal were recast as a CDIB appeal in order to circumvent the finality of decisions under 25 CFR Part 62.

[1] Based on this discussion, the Board finds that although CDIB appeals have some features in common with enrollment appeals, CDIB appeals are not encompassed by the explicit language of 25 CFR Part 62, and there is no regulation or written policy statement equating CDIB appeals with enrollment appeals. Consequently, the Board holds that CDIB appeals are not subject to 25 CFR Part 62, and it is not precluded from reviewing CDIB appeals

by 43 CFR 4.330(b)(1). Appellee's motion to dismiss this case for lack of jurisdiction on the grounds that CDIB appeals are in the nature of enrollment appeals is denied. 2/

Appellee next argues the Board lacks jurisdiction to hear this appeal because the underlying issue concerns the degree of proof BIA requires in establishing the blood quantum of an illegitimate child, which is the subject of a longstanding BIA policy under which only the mother's blood quantum is considered in the absence of proof of paternity. Appellee contends that this policy decision is discretionary, and that the Board consequently has no jurisdiction to revise or require amendment of the policy under 43 CFR 4.330(b)(2).

[2] The Board agrees it does not have jurisdiction over decisions committed to BIA's discretion. Section 4.330(b)(2) of 43 CFR states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority." The Board has, however, held that whether a BIA decision is properly characterized as discretionary is a question of law over which the Board has jurisdiction. See Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146,

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2/ The fact that CDIB appeals may have been treated as enrollment appeals for a long period of time does not give validity to an erroneous interpretation of law. "Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected merely because it comes late." Western Coal Traffic League v. United States, 694 F.2d 378, 391 (5th Cir. 1983).

91 I.D. 43 (1984), and cases cited therein. If after reviewing a particular case, the Board concludes that the decision is based upon an exercise of discretion, it will limit its opinion to the extent required to avoid trespassing on BIA's legitimate exercise of discretion. The initial allegation that a decision is discretionary, however, does not negate the Board's jurisdiction; that allegation is more akin to an affirmative defense. 3/

Therefore, appellee's motion to dismiss this appeal for lack of jurisdiction on the grounds that the decision involves the exercise of discretion is also denied.

Finally, appellee argues the Board lacks jurisdiction because there is no right to appeal his decision under 25 CFR Part 2. Appeals to the Board from BIA administrative actions and decisions are a continuation of the internal BIA administrative review procedures begun in 25 CFR Part 2. See 43 CFR 4.330(a)(1). Appellee contends at pages 2-3 of his answer brief:

> There is no statute or regulation or fundamental constitutional law which requires the issuance of CDIBs. CDIBs are granted for the convenience of the government, solely at the Assistant Secretary's discretion, to facilitate its work in determining eligibility of persons for federal programs. There is no regulation or statute which requires the issuance of these certificates nor is there any statute or regulation which makes the eligibility for any benefits or programs dependent on the possession of such certificates. Thus, no right or privilege of the Appellant within the meaning of Part 2 has been violated and the regulations of Part 2 do not apply.

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3/ The exercise of discretion with respect to the blood quantum of an illegitimate child may, however, be subject to limitations imposed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 553 (1982). See discussion, infra. All citations to the United States Code are to the 1982 edition.

> In the absence of any statute or regulation requiring the issuance of the CDIBs, the decision to issue such [a] certificate is a policy decision addressed to the Assistant Secretary's discretion.

According to appellee, because of the absence of regulations concerning CDIBs, their issuance is totally gratuitous and discretionary, and, therefore, not covered by 25 CFR Part 2, which conditions the right to appeal on the "violation of a right or privilege of the appellant. Such rights or privileges must be based upon fundamental constitutional law, Federal statutes, treaties, or upon Departmental regulations." 25 CFR 2.2. The fact of this appeal, which by definition asserts a violation of appellant's rights and/or privileges, thus raises the issue of the relationship between legal rights/privileges and CDIBs, and whether the absence of regulations concerning CDIBs is legally permissible.

Indian blood quantum and its corollary, Indian status, are legal concepts from which individual rights and privileges arise. Many Federal statutes refer to and grant special privileges based upon Indian status or degree of Indian blood. See, e.g., the Indian Reorganization Act, June 18, 1934, 48 Stat. 988, 25 U.S.C. § 479 ("The term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, * * * and shall further include all other persons of one-half or more Indian blood"); and the Indian Appropriations Act of 1918, Act of May 25, 1918, 40 Stat. 564, 25 U.S.C. § 297 ("No appropriation, except appropriations made pursuant to treaties, shall be used to educate children of less than one- fourth Indian blood whose parents are citizens of the United

States and of the State wherein they live and where there are adequate free school facilities provided."). Other statutes apply to Indians without definition of the term, leaving such definition to the agency. See, e.g., 25 U.S.C. §§ 13, 44, 45, 46, and 47.

A cursory examination of 25 CFR Chapter I reveals that although for some purposes, BIA has defined "Indian" exclusively as a member of a Federally recognized Indian tribe, for many other purposes a certain percentage of Indian blood also qualifies a person as an Indian. See, e.g., 25 CFR 5.1 (Indian preference in employment); 25 CFR 20.1(n) (eligibility for Federal financial assistance and social services); 25 CFR 22.6 (care of Indian children in contract schools); 25 CFR 26.1(g) (Employment assistance for adult Indians); 25 CFR 27.1(i) (vocational training for adult Indians); 25 CFR 31.1(a) (enrollment in Federal Indian schools); 25 CFR 40.1 (eligibility for higher education loans, grants, and other assistance); 25 CFR 101.1(d) (loans from the revolving loan fund); 25 CFR 103.1(d) (loan guaranties, insurance, and interest subsidies for financing reservation economic enterprises and housing); 25 CFR 151.2(c)(3) (acquisition of land in trust status); 25 CFR 256.2(e)(3) (eligibility for the housing improvement program); and 25 CFR 286.1(f) (Indian business development program).

In his decision, appellee acknowledged that CDIBs are issued to identify eligible recipients of BIA services. This case demonstrates that CDIBs are also used for eligibility purposes by the Indian Health Service.

A BIA determination of Indian blood quantum is a prerequisite for acceptable proof of degree of Indian blood. BIA has chosen to memorialize its genealogic research through the issuance of a CDIB showing its determination of a person's degree of Indian blood. This CDIB is accepted as proof in determining eligibility or ineligibility for services and benefits available to Indians. BIA's practice of issuing CDIBs is thus an integral part of the process by which legal rights and privileges of Indians arise. 4/ An action or decision of BIA regarding CDIBs is, therefore, a proper subject for appeal to the Board.

If the rights and privileges of Indians are dependent on the proper issuance of CDIBs, and no regulations exist for governing this practice, the question then becomes whether or not this practice is subject to the APA requirements for rulemaking. An agency "rule" is defined in pertinent part in 5 U.S.C. § 551(4) as "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."

> While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking by an agency characteristically involves the promulgation of concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it. See 1 K. Davis, Administrative Law Treatise, § 5.01 (1958). Furthermore, rules ordinarily look to the future and are applied

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4/ It is possible that BIA determinations of Indian blood quantum provided to tribes for their enrollment decisions might be held by the courts to the same standards as such determinations for eligibility for Federal services. Because the issue is not raised in this appeal and concerns enrollment disputes the Board does not address this question.

> prospectively only, whereas orders are directed retrospectively, typically applying law and policy to past facts.

PBW Stock Exchange, Inc. v. Securities and Exchange Commission, 485 F.2d 718, 732 (3rd Cir. 1973), cert. denied, 416 U.S. 969 (1974). See also, American Express Co. v. United States, 472 F.2d 1050, 1055 (C.C.P.A. 1973) (inter alia, rulemaking "looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts").

Agencies sometimes use the term "guidelines," rather than "rule," in describing certain pronouncements.

> It is of no moment that, for reasons it has failed to articulate, the Commission has clad its promulgation in the cloak of guidelines rather than rules. * * * [I]t is the impact and not the phrasing that matters. Indeed, agencies often adopt policies having the status of rules without codifying them in regulations, guidelines, or in other formal formats.

Western Coal Traffic League, supra, at 392 and 392 n.61. See also Brown Express, Inc. v. United States, 607 F.2d 695 (5th Cir. 1979). In American Trucking Associations, Inc. v. ICC, 659 F.2d 452, 463 (5th Cir. 1981), the court discussed the differences between rules and guidelines and the criteria for determining whether a statement labeled a guideline actually constitutes a rule within the meaning of 5 U.S.C. § 551(4): "A policy statement is in reality a binding norm (a rule) unless (1) it acts only prospectively, and (2) it 'genuinely leaves the agency and its decision-makers free to exercise discretion.'" (Quotation from American Bus Association v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).)

In this case, appellee has presented a BIA instruction manual and a 1977 memorandum from the Muskogee Area Director to the superintendents of the agencies serving the Five Tribes as evidence of BIA policy regarding blood quantum determinations. It is clear BIA intended its instruction manual to be followed by all employees working with blood quantum determinations. The 1977 memorandum was likewise intended to control agency operations with respect to blood quantum determinations. The language used in both documents is mandatory and sets evidentiary standards for blood quantum determinations. Furthermore, the 1977 memorandum operates retrospectively. There is no evidence and no allegation that these standards were ever made known to the persons affected by them.

[3] The Board holds that, under the criteria established by the Federal courts for determining whether an agency policy statement is a "rule" subject to the provisions of the APA, BIA's standards for determining Indian blood quantum are "rules." These rules were not, however, by appellee's admission, published in accordance with 5 U.S.C. § 553, 5/ as mandated by section 552. 6/

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5/ Section 553 provides in pertinent part:

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. * * *

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

6/ Section 552 states in pertinent part:

"(a)(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public * * *

In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court reviewed the consequences stemming from the lack of published regulations governing BIA's general assistance program. The Court stated at pages 230-32:

> Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing "on or near" the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. * * * Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to ensure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.
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> * * * The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA. This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, * * * but also to employ procedures that conform to the law. * * * No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
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> The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain

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fn. 6 (continued)

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

> stated procedures so as to avoid the inherent arbitrary nature of unpublished ad hoc determinations. (Footnotes omitted.)

The Court went on to hold that procedures for providing assistance, published only in the BIA Manual, were not effective to deny coverage to certain individuals. The Court concluded at page 236:

> The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296 (1942); Board of County Comm'rs v. Seber, 318 U.S. 705 (1943). Particularly here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished ad hoc determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S., at 296; see Squire v. Capoeman, 351 U.S. 1 (1956). Before benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures.

After the Ruiz decision, BIA promulgated regulations governing financial assistance that are now found in 25 CFR Part 20. In Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982), the Board was called upon to review the regulations in Part 20. Unfortunately, the Board was compelled to find that the regulations were still insufficient to inform those persons affected by them of the eligibility requirements. Instead, BIA continued to rely on the BIA Manual for all of the pertinent requirements, while providing only general statements in Part 20.

This case presents the same situation. Accurate determinations of Indian blood quantum are required for the proper and consistent implementation of Federal statutes and regulations affecting the rights and privileges of Indians. In issuing CDIBs, BIA has assumed the responsibility for determining an individual's degree of Indian blood. 7/ The procedures and rules by which this determination is made, including the evidentiary standards employed, are known only by BIA, not by those persons affected. Unlike the situations in Ruiz and Allen, BIA has not even seen fit to set forth these rules in the BIA Manual. These are truly "hidden regulations," available to and known by only the initiated few. 8/

Based upon this discussion, the Board concludes that BIA's requirements relative to the issuance of CDIBs are rules within the meaning of the APA and should have been published in accordance with 5 U.S.C. §§ 552 and 553. The Board rejects appellee's argument that appeals from CDIB determinations are not subject to 25 CFR Part 2 because CDIBs are not required to be issued by regulation, when the reason they are not issued by regulation is that BIA has failed to follow the mandates of both the BIA Manual and the APA to publish

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7/ Cf. Aleutian/Pribilof Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 260, 89 I.D. 196, 199 (1982). The Board there cited, inter alia, United States v. Nixon, 418 U.S. 683, 694-96 (1974), and Service v. Dulles, 354 U.S. 363, 388 (1957), for the proposition that when an agency adopts a rule that is not required by statute, but is clearly within the agency's discretion in implementing a statute, it is bound by the regulation even though it imposes duties in excess of those required by the statute.

8/ A critical review of the BIA Manual is set forth in the Final Report, American Indian Policy Review Commission, submitted to Congress on May 17, 1977. See Vol. 1 at 278-79 under the heading "Hidden Regulations."

rules of general applicability. See the discussion of the 1968 introduction to the BIA Manual and 25 U.S.C. § 553 in Ruiz, supra, at 233-34. 9/

Accordingly, the Board denies appellee's final motion to dismiss based on the grounds that CDIB appeals are not subject to the provisions of 25 CFR Part 2.

Discussion and Conclusions

The Board therefore reaches the merits of appellant's appeal. Appellant requested that BIA issue him a card-size CDIB to replace the larger certificate he received in 1975. Rather than merely issuing the smaller CDIB, BIA, based upon the Muskogee Area Director's 1977 memorandum, reviewed the 1975 determination of appellant's blood quantum. As a result of this review, BIA determined that appellant's blood quantum should be changed from 4/4 to 1/2, because appellant was illegitimate and there had been no judicial determination of paternity. In reaching its decision, BIA apparently gave no weight whatsoever to appellant's delayed birth certificate. In fact, in his initial brief to the Board, appellee went to considerable length to suggest that appellant falsified the certificate.

[4] The Board has held herein that BIA's rules regarding Indian blood quantum determinations for the purpose of issuing CDIBs should have

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9/ The necessity of published regulations governing CDIB determinations and appeals is clearly demonstrated by appellee's own admission at page 3 of his answer brief that not even all BIA offices are aware of the procedures they should follow in CDIB appeals.

been published in accordance with 5 U.S.C. § 552. Section 552(a)(1) provides the penalty for failure to publish such rules: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Accordingly, because the APA required the publication of BIA's rules regarding CDIB determinations and because the rules were not so published, appellant cannot be adversely affected by them. In this case, therefore, appellant's degree of Indian blood cannot be changed on the basis of the evidentiary standards set forth in unwritten policy statements or the Muskogee Area Director's 1977 memorandum, and he is thus entitled to receive a card-size CDIB consistent with the initial 1975 determination. See discussion, supra; Ruiz; and Allen.

Furthermore, even if the 1977 memorandum could be used to establish requirements, BIA did not follow the procedures set forth in it. The memorandum states at page 2:

> The issuing of a plasticized card for a CDIB has resulted in requests for such cards by individuals who have previously received a CDIB on the old form. Anyone who received a certificate issued after January 1, 1975, can be issued a plasticized card. Those issued before January 1, 1975, must be reviewed in accordance with present standards before a card can be issued.

Appellant's initial CDIB was issued on May 13, 1975, a date clearly after January 1, 1975. Instead of being issued a plastic card in accordance with the Area Director's instructions, appellant's request was treated as if

his initial CDIB had been issued before January 1, 1975. The BIA thus failed to follow its own hidden regulations.

In addition, even if the Board were to hold that appellant could be denied a card-size CDIB containing the same information as his original CDIB, appellee has failed to provide any credible reasons for not ascribing any weight to appellant's delayed birth certificate. Appellee's suggestion that appellant himself added information to the delayed birth certificate is refuted by the information presented from the Oklahoma official having custody of the records. No other reason for ignoring the delayed birth certificate is given. Under 63 Okla. Stat. 1-324(b):

> A copy of a certificate or any part thereof issued in accordance with subsection (a) of this section, certified to by the State Commissioner of Health or by a person designated by him for such purpose, shall be considered for all purposes the same as the original, and shall be prima facie evidence of the facts therein stated, provided that the evidentiary value of a certificate or record filed more than one (1) year after the event * * * shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence.

Appellant's delayed birth certificate is, at least, some evidence of the information it contains. The value of the certificate depends in part upon the nature of the evidence supporting the State's decision to issue a certificate showing William Underwood to be appellant's father. The nature of the evidence and degree of support is based on the State regulations implementing 63 Okla. Stat. 1-313. These regulations are not available to the Board.

If the Board had found that BIA could change appellant's CDIB under these circumstances, it would have referred this case for an evidentiary hearing and recommended decision based in part on the weight that should be given to the information contained in his delayed birth certificate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 14, 1984, decision appealed from is reversed, and the Bureau of Indian Affairs is ordered to issue appellant a card-size certificate of degree of Indian blood showing him to be 4/4 Chickasaw.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Bernard V. Parrette
Alternate Member

//original signed
Franklin D. Arness
Alternate Member