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THE UNDER SECRETARY OF LABOR  
WASHINGTON, D.C. 20210



In the Matter of  National Urban Indian Council	) ) ) ) )	<b>81-CETA-329</b>
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DECISION AND ORDER

BACKGROUND

National Urban Indian Council (NUIC) in 1981 applied for but was denied designation as the Native American grantee for the state of Maryland<sup>1/</sup> for fiscal year 1982 under Title III of the Comprehensive Employment and Training Act of 1973 as amended, 29 U.S.C. § 302 (CETA).<sup>2/</sup> Following a hearing on that denial held at NUIC's request under 20 CFR 676.88(f), Administrative Law Judge (ALJ) Samuel B. Groner held that NUIC should have received preference as the Native American grantee for Maryland under section 302 of CETA and section 7 of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e. He **ordered** that NUIC be given preference, effective **October 1, 1984** as the Native American grantee for Maryland over organizations or agencies not directly controlled by Indian

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<sup>1/</sup>Originally this matter concerned the denial of **NUIC's** designation for Ohio and Maryland, but the Grant Officer represented in his brief that NUIC is now the Native American grantee for Ohio.

<sup>2/</sup>NUIC also requested and was denied designation as the Native American grantee for fiscal year 1983.

people.<sup>3/</sup> The Grant Officer requested that the Secretary assert **jurisdiction** and he did so on May 7, 1984.

DISCUSSION

NUIC asserts, as a preliminary matter, that the Secretary's assertion of jurisdiction in this matter was not timely. Under 20 CFR 676.91(f) the Secretary has thirty days from the service of an ALJ decision to modify or vacate it. Even assuming the **ALJ's** decision was served on April 5, 1984, the day it was issued, the 30th day fell on Saturday May 5, 1984. There is nothing in the CETA regulations explicitly addressing time computation in matters before the Secretary. However, under both the Federal Rules of Civil Procedure, (see Rule **6**), made applicable to matters before an ALJ by 20 CFR § 676.89(a), and under the comprehensive procedural rules of the Office of Administrative Law Judges, 29 CFR § 18.4, when a time period falls on a Saturday, Sunday or legal holiday, the time period includes the next business day. Monday May 7, the date the **Secretary asserted jurisdiction**, was the next business day.

The Grant Officer does not take issue with the **ALJ's** finding that NUIC was entitled to have been designated the Native American grantee for the State of Maryland for fiscal year

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<sup>3/</sup> That preference would apply to grants made under Title IV, **section 401** of the Job Training Partnership Act (JTPA), 29 U.S.C. S-1671, which is virtually identical to section 302 of CETA, as are the respective implementing regulations, 20 CFR Part 632, Subpart B (JTPA) and 20 CFR Part 688, Subpart B (**CETA**) (1984) (with the exception of 20 CFR § **632.10(c)**.)

1982. Fiscal year 1982 having ended before the hearing was even held, however, the Grant Officer asserts that this matter is moot. In addition, CETA expired at the end of fiscal year 1982. Therefore, the Grant Officer argues, no retroactive relief can be provided for 1982 and nothing the Secretary could decide can provide any precedent for future action. Finally, even if his mootness argument is rejected, the Grant Officer urges the Secretary not to order the redesignation of the Native American grantee for Maryland now because it would disrupt administration of the program.

Designation of Native American grantees for program years 1985 and 1986 (running from July 1, 1985 to June 30, 1986, and July 1, 1986 to June 30, 1987) is now under way.<sup>4/</sup> The Grant Officer therefore suggests that, to avoid program disruption, the remedy here should be limited to incorporation by ETA of the ALJ's findings in the designation process now under way for program year 1985 (July 1, 1985 to June 30, 1986).

The Grant Officer's repeated assertions of **mootness**, both **before the ALJ and the Secretary**, seem inconsistent with his plea in his Request for Secretary's Review of ALJ Decision that "it is necessary for the Grant Officer to receive a definitive decision of the Secretary concerning the appropriate procedures

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<sup>4/</sup>Grants are now made for two years, rather than one.

for designating grantees under Title IV of JTPA [the Job Training Partnership Act]." Having sought review for the purpose of obtaining what is, in effect, a declaratory judgment, it is very questionable whether the Grant Officer should now be heard to argue mootness. In any event, I agree with the ALJ that this case falls within the recognized "exception" to the doctrine of mootness where a controversy is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). As the ALJ pointed out, this dispute is not simply capable of repetition, it has already recurred - the denial of designation of NUIC for fiscal year 1983.<sup>5/</sup> Where a controversy is a "continuing" or "recurring" one which the facts here show - and the public interest lies in resolving it, which seems clear here, where it involves grant administration in the major job training program for Indians and Native **Ameri-**  
**cans** - courts may exercise their discretion to maintain an appeal **even** where a particular controversy has expired. Alton & Southern Ry. Co. v. Int'l. Assoc. of Mach. & A.W., 463 F.2d 872, ~~878-879~~ (D.C. Cir. 1972). Indeed, the Secretary's authority and discretion are probably even broader because he is not constrained by "case or controversy" considerations which limit the discretion of an Article III court under the Constitution,

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<sup>5/</sup> I would also note that the same dispute, although broader in scope, is pending before me again in the Matter of National Urban Indian Council, **84-JTP-11**, where NUIC was denied designation **as** the Native American grantee for a number of geographic areas.

id. 878, and he **has** Congressionally granted authority under the Administrative Procedure Act to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 **U.S.C.** **§ 4(e)**.

The Grant Officer relies on United Indians of Nebraska v. Donovan, 702 **F.2d** 673 (8th Cir. 1983) in which a petition for review of a denial of designation of the plaintiff as the Native American grantee for certain counties in Nebraska was dismissed as moot. The fiscal year in question had expired, as had CETA itself, by the time the case reached the court of appeals. In a per curiam decision, the court said no retroactive relief could be granted and "in light of the circumstances nothing that this court could decide on the merits . . . can or should provide any precedent for future action." 702 **F.2d** at 674. But it was not apparent from the decision **whether** plaintiffs in that case had also sought designation under CETA for subsequent years, as well as designation for the same Nebraska counties under JTPA. Thus the court had **no occasion to** consider whether there was a continuing **controversy** which presented an actual, live issue and not a moot one. Indeed, as noted above, the Grant Officer here sought review of the merits of the **ALJ's** decision, i.e., the question of preference in designating grantees under Title IV of JTPA, **because** he represented it was "a matter of substantial significance" with future implications. Furthermore, in view of these representations, and more significantly, 'the continuing nature

nature of the controversy, I reject the **Grant**' Officer's assertion that this matter should be dismissed because **NUIC's** own alleged lethargy in pursuing it rendered it moot.

The Grant Officer does not take issue with the **ALJ's** basic conclusion that NUIC was entitled to be designated as the Native American grantee for Maryland for fiscal year 1982, and is entitled to preference over non-Indian controlled organizations in the designation process under JTPA. That conclusion was based on his finding on the record, which I adopt, that NUIC was a proper organization to administer the grant, and that its designation was "possible" and "feasible" as those terms are used in CETA and JTPA, and their implementing regulations respectively. In other words, where a Native American controlled organization meets the requirements of 29 CFR § 632.10, the Division of Indian and Native American Programs has no discretion ~~to~~ award the grant to public or private agencies not controlled by Indians. In fact, ETA published designation procedures on October 23, 1984 (49 FR 42559) explaining 29 CFR Part 632, which ~~state that Indian and~~ Native American - controlled organizations ~~will~~ have preference in designation of grantees for off - reservation areas when more than one organization applies for the same or overlapping areas. (Final Designation Procedures for Grantees, I(1) and (4); IV **(3)**, 49 FR 42560, 42561-2.) (Designation Procedures)

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The Grant Officer's objection to the **ALJ's** decision thus comes down to concern that, because the ALJ was under the misapprehension that the grant year began on October 1, 1984 when in reality it began on July 1, 1984, giving immediate preference to NUIC would disrupt the existing program in the middle of the grant year.<sup>6/</sup> I share the **ALJ's** doubts that changing grantees in mid-year would not cause significant disruption of the program. Furthermore, since the designation process for program years 1985 and 1986 is now under way, provision of a remedy in this case which coincides with the beginning of the next two year grant period, July 1, 1985, would insure the most orderly transition. It will provide enough lead time to plan for the transfer of functions and responsibilities and possible relocation of programs to new facilities.

Accepting the facts set forth in **NUIC's** Reply Brief that ~~it~~ is a responsible, **fully capable** grantee, I must weigh that against the possibility of disruption of service to gain only a few extra months for NUIC as the designated grantee. On ~~balance, I think it~~ will more effectively serve the purposes of JTPA to make the remedy in this case effective July 1, 1985.

Therefore, for the reasons set forth above, I adopt the

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<sup>6/</sup>The ALJ apparently thought these grants were still made on a fiscal year basis, when in fact the grants are now made for a two year period based on a "program year" running for example, from July 1, 1984 to June 30, 1985.

ALJ's declaration that NUIC was entitled to have been designated the Native American grantee for Maryland for fiscal year 1982, and that NUIC shall have preference over organizations or agencies not controlled by Indians or Native Americans in the designation process for Indian and Native American grantees under section 401 of JTPA. That preference shall apply to the designation process now underway for the two year grant period consisting of program years 1985 and 1986 (July 1, 1985 to June 30, 1986, and July 1, 1986 to June 30, 1987). This decision shall be treated as **NUIC's** Notice of Intent under 20 CFR § 632.11 and shall be considered timely filed under the Designation Procedures, III. In addition, since NUIC should have **been so** designated in the past, it shall be placed in category (2) of the "Preferential Hierarchy for Determining Designations" (Designation Procedures, IV) if another Native American - **con-** trolled organization applies to be designated for Maryland.

SO ORDERED.

  
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Under Secretary of Labor

Dated: MAR 5 1985  
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: National Urban Indian Council  
Case No.: 81-CETA-329  
Document: DECISION AND ORDER

A copy of the foregoing document was mailed to each of the following persons listed below on MAR 6 1985.

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