



INTERIOR BOARD OF INDIAN APPEALS

Walker River Paiute Tribe v. Phoenix Area Director, Bureau of Indian Affairs

18 IBIA 109 (01/17/1990)



# United States Department of the Interior

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

WALKER RIVER PAIUTE TRIBE

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-67-A

Decided January 17, 1990

Appeal from a letter of the Acting Phoenix Area Director, Bureau of Indian Affairs, notifying the Walker River Paiute Tribe that its request for payment of attorney's fees from appropriated funds had been denied.

Referred to Assistant Secretary - Indian Affairs.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals lacks jurisdiction to review decisions of the Assistant Secretary - Indian Affairs unless the matter is referred to it under 43 CFR 4.330(a)(2).

2. Attorney's Fees: Generally--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

APPEARANCES: Jeanne S. Whiteing, Esq., Boulder, Colorado, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Walker River Paiute Tribe seeks review of a January 18, 1989, letter from the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), informing it that its request for payment of tribal attorney's fees from FY 1988 appropriated funds had been denied. For the reasons discussed below, the Board refers this matter to the Assistant Secretary - Indian Affairs.

### Background

Regulations at 25 CFR 89.40 through 89.43 set forth BIA policy concerning payment of tribal attorney's fees from appropriated funds. 25 CFR

89.40 provides: "It is the policy of the Department of the Interior not to use federally appropriated funds to pay for private counsel to represent Indian tribes." Exceptions to the policy are listed in section 89.41, which provides:

The Assistant Secretary--Indian Affairs upon concurrence of the Solicitor and receipt of a recommendation as provided by § 89.43 may, in his/her discretion, authorize the direct or indirect expenditure of appropriated funds to pay reasonable attorney's fees in order to permit an Indian tribe to secure private legal representation in [certain described] circumstances.

Section 89.42 lists the factors to be considered in determining whether a tribe's attorney's fees should be paid from appropriated funds. Section 89.43 describes procedures. Tribes are required to submit their requests, accompanied by certain specified statements, through their Agency Superintendents and Area Directors. Section 89.43 further provides:

(a) \* \* \* All requests shall be considered by a committee consisting of the Deputy Assistant Secretary--Indian Affairs (Policy), or his delegate, the Director of the Office of Trust Responsibilities in BIA or his delegate, and the Associate Solicitor--Indian Affairs or his delegate.

(b) If two of the three committee members recommend approval of a tribe's request, the request, along with the committee's recommendation, shall be submitted to the Assistant Secretary for final determination after consultation with and the advice of the Solicitor. The committee's recommendation shall indicate the amount of funds recommended to assist the tribe, the hourly rate allowed, the maximum amount permitted to be expended in the recommended action and the tribal contributions, if any. The Assistant Secretary shall approve the request only with the concurrence of the Solicitor.

On December 18, 1986, appellant wrote to the Superintendent, Western Nevada Agency, BIA, requesting that BIA pay its attorney's fees in connection with its efforts to obtain additional water for its reservation. The request was forwarded to the Phoenix Area Office but subsequently returned to appellant because it lacked the current financial statement required by 25 CFR 89.43(a)(3). The resubmitted request package was received in the Area Office on September 9, 1987. The Area Director requested some further information from appellant, upon receipt of which he referred the request to the Office of the Field Solicitor, Phoenix, for review. By memorandum of December 17, 1987, the Field Solicitor advised the Area Director that appellant's request met the criteria set out in the regulations and on January 11, 1988, the Area Director transmitted the request to the Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development), recommending that it be approved.

On May 16, 1988, the Washington, D.C., Office of BIA notified the Area Office by telephone that the committee had recommended approval of

appellant's request in the amount of \$56,000, and that the recommendation was pending review in the Washington Solicitor's Office. On September 12, 1988, the Washington BIA Office advised the Area Office by telephone that appellant's request had been approved. Also on that date, Fund Distribution Document No. H3400-12, covering the amount approved for appellant, inter alia, was telefaxed to the Area Office. 1/

On September 13, 1988, the Washington Office again called the Area Office, this time stating that appellant's request had been denied. By memorandum of September 20, 1988, the Washington Office advised the Area Office that the \$56,000 allocated to appellant in Fund Distribution Document No. B3400-12 was to be reallocated to the Pyramid Lake Paiute Tribe. The reallocation was shown on Fund Distribution Document No. H3400-13, on September 19, 1988, which also stated that appellant's attorney's fees request had been denied.

By memorandum of September 23, 1988, the Acting Assistant Secretary - Indian Affairs informed the Area Director that the attorney's fees request of the Pyramid Lake Paiute Tribe had been approved in the amount of \$163,000, which included the \$56,000 previously allocated to appellant. 2/ Apparently, neither the Washington Office nor the Area Office notified appellant at that time that its attorney's fees request had been denied.

Acting on the assumption that its request had been approved, 3/ appellant submitted vouchers to BIA for payment. By Resolution No. WR-52-88, adopted on October 13, 1988, appellant requested BIA to make payment to its attorneys in the amount of \$11,870.33 for legal services rendered from March through September, 1988. After reviewing the vouchers and the payment request, the Area Office returned them to the Superintendent by memorandum of January 10, 1989, stating that the payment would have to be made from tribal funds because no appropriated funds had been allocated to pay appellant's attorney's fees. At this point, the Area Office realized appellant

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1/ Fund Distribution Document No. B3400-12 is dated Aug. 19, 1988. It was approved by the Acting Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development) on Sept. 2, 1988.

41 BIAM Supp. 4, Bulletin 2, May 19, 1988, governed the issuance of fund distribution documents at the time this document was issued. The Bulletin authorized certain BIA officials to issue the documents and certain other officials, including Area Directors, to receive them. Sections 1.6., 1.8. Subsection 1.8B provided: "The fund distribution document shall serve as the notification and authority for recipients to incur obligations and expenditures."

2/ The decision authorized payment of fees retroactive to Oct. 1, 1987, "[b]ecause of the unusual delay in the processing of the application." It impliedly waived 25 CFR 89.41 (f), which provides that "[p]ayment of fees will not be allowed if such payment was not authorized before services were performed."

3/ Appellant states that it was informed orally on Sept. 12, 1988, that its request had been approved and was not informed otherwise until Jan. 18, 1989.

had never been notified that its attorney's fees request had been denied. The Area Director so notified appellant by letter of January 18, 1989, stating that the request had been denied "due to the exhaustion of funds." In a second letter to appellant dated January 26, 1989, the Area Director described the chain of events concerning the apparent approval and ultimate disapproval of appellant's request.

Appellant appealed from the January 18 letter by notice of appeal dated February 21, 1989. The appeal was pending in the Washington BIA Office on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). It was transferred to the Board on June 19, 1989, for consideration under the new procedures. The appeal was docketed on July 19, 1989, following receipt of the administrative record. Both appellant and appellee filed briefs.

Discussion and Conclusions

Appellant argues that the denial of its request for payment of attorney's fees was arbitrary and capricious because the reason given for denial, i.e., exhaustion of funds, was in conflict with the facts and because the denial was not based on any reasonable or rational justification. Appellant further argues that it was denied due process and equal protection of the law. Finally, appellant contends that BIA is estopped to deny payment of its attorney's fees incurred between August 19, 1988 (the date of Fund Distribution Document H3400-12), and January 18, 1989.

The Area Director argues that the Board lacks jurisdiction over the appeal under 43 CFR 4.330(b) because the decision appealed from was based on the exercise of discretionary authority. <sup>4/</sup> He also argues that the decision was made by the Assistant Secretary - Indian Affairs. Further, the Area Director contends that, even if the Board has jurisdiction over the appeal, appellant has not shown that the decision was arbitrary or capricious, that it was contrary to law, or that there is any basis for estoppel.

[1] As a threshold matter, the Board must consider whether it has jurisdiction over this appeal. If, as the Area Director contends, the decision was made by the Assistant Secretary, the Board lacks jurisdiction to review it. E.g., Hill v. Acting Assistant Secretary - Indian Affairs, 17 IBIA 3 (1988); Dorsay v. Assistant Secretary - Indian Affairs, 16 IBIA 39 (1988); Willie v. Commissioner of Indian Affairs, 10 IBIA 135, 138-39 (1982).

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<sup>4/</sup> 43 CFR.4.330(b)(2) provides:

"Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate:

\* \* \* \* \*

(b) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

Unfortunately, the identity of the deciding official is not readily apparent from the administrative record. <sup>5/</sup> The record does make clear, however, that the decision was made by someone in the Washington BIA Office, rather than the Area Director. The Area Director's January 18, 1989, letter merely conveyed notice, albeit belated, of a decision made by another BIA official. <sup>6/</sup>

Under 25 CFR 89.43(b), a decision to approve an attorney's fees request must be made by the Assistant Secretary. The regulation does not specify which official or officials have authority to deny requests, and it is possible that officials other than the Assistant Secretary have that authority. <sup>7/</sup> In this case, however, it appears that the committee made a recommendation of approval to the Assistant Secretary and that the request was, for a short period of time, approved. Since it must have been the Assistant Secretary who approved the request, it was presumably the Assistant Secretary who subsequently denied it. There is, however, no unequivocal evidence in the record that the denial decision was made by the Assistant Secretary personally. <sup>8/</sup>

[2] To the extent the decision was based on the exercise of discretionary authority, the Board also lacks jurisdiction over it, regardless of which BIA official made the decision. 43 CFR 4.330(b)(2). As the Board has often held, however, it does have jurisdiction over discretionary decisions of BIA officials to the extent necessary to ensure that proper consideration

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<sup>5/</sup> The Board requested BIA to submit a unified administrative record containing documents from the Area Office and the Washington Office. The Area Office prepared a record and transmitted it to the Washington Office for addition of documents from that office. However, no documents were added by the Washington Office, and the record received by the Board contained only the documents from the Area Office.

<sup>6/</sup> It is apparent that the circumstances which gave rise to this appeal were caused by the failure of BIA to notify appellant in a timely manner of the decision to deny its request for attorney's fees. This failure might have resulted from the lack of clear direction concerning what BIA official was responsible for providing the notification. Revised 25 CFR Part 2 provides guidance in this regard for the future. New 25 CFR 2.7(a) requires that "[t]he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail."

<sup>7/</sup> It is possible that the committee established under 25 CFR 89.43(a) has authority to deny requests. Section 89.43(b) provides that a request is submitted to the Assistant Secretary only if two of the three committee members recommend approval. Presumably, therefore, if less than two committee members recommend approval, the committee itself, or some official other than the Assistant Secretary, may deny a request.

<sup>8/</sup> None of the documents concerning the committees or the Assistant Secretary's consideration of appellant's request appear in the record.

was given to all legal prerequisites to the exercise of discretion. See, e.g., Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50 (1989); Romo v. Acting Phoenix Area Director, 18 IBIA 16 (1989); City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989).

It is clear from 25 CFR 89.40 that a decision of the Assistant Secretary to approve an attorney's fees request is discretionary: "The Assistant Secretary \* \* \* may, in his/her discretion, authorize the expenditure of appropriated funds to pay reasonable attorney's fees \* \* \*." Of necessity, therefore, his decision, or the decision of a subordinate official, to deny an attorney's fees request is also discretionary.

The Board has considered requiring BIA to supplement the administrative record with, at least, the identify of the deciding official, in order to determine what, if any, jurisdiction it has in this matter. However, inasmuch as the ultimate decision must be made by the Assistant Secretary in any case, the Board concludes that no purpose would be served by further delaying resolution of this appeal. The Board finds therefore that the matter should be referred at this time to the Assistant Secretary pursuant to 43 CFR 4.337(b). 10/

In view of the fact that this appeal is now fully briefed, the Board requests that the Assistant Secretary give this matter prompt attention pursuant to 25 CFR 2.20. 11/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and pursuant to 43 CFR

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9/ In the case of a decision issued by the Assistant Secretary, the Board lacks jurisdiction, unless the Assistant Secretary has referred the case to the Board, whether or not the decision is based on the exercise of discretion. See, e.g., Great Lakes Indian Fish & Wildlife Commission v. Assistant Secretary - Indian Affairs, 15 IBIA 87 (1987).

10/ 43 CFR 4.337(b) provides:

"Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issues(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary - Indian Affairs for further consideration."

11/ 25 CFR 2.20(f) provides:

"When the Board of Indian Appeals, in accordance with 43 CFR 4.337(b) refers an appeal containing one or more discretionary issues to the Assistant Secretary - Indian Affairs for further consideration, the Assistant Secretary - Indian Affairs shall take action on the appeal consistent with the procedures in this section."

4.337(b), this appeal is referred to the Assistant Secretary - Indian Affairs for further consideration.

//original signed

Anita Vogt  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Chief Administrative Judge