



INTERIOR BOARD OF INDIAN APPEALS

Ute Indian Tribe of the Unitah and Ouray Reservation v. Phoenix Area Director,
Bureau of Indian Affairs

21 IBIA 24 (10/22/1991)



United States Department of the Interior

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

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS 1/

IBIA 90-146-A

Decided October 22, 1991

Appeal from the disapproval of a tribal ordinance.

Reversed.

1. Administrative Procedure: Administrative Review--Indians:
Generally--Rules of Practice: Supervisory Authority of the
Secretary

In exercising the authority of the Secretary of the Interior to review decisions issued by officials of the Bureau of Indian Affairs, the Board of Indian Appeals is not limited by the standards of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706 (1988), for review of agency decisionmaking by the Federal courts.

2. Indian Reorganization Act--Indians: Tribal Government:
Constitutions, Bylaws, and Ordinances

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

3. Indian Reorganization Act--Indians: Tribal Government:
Constitutions, Bylaws, and Ordinances

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

1/ This case was docketed as Northern Ute Tribe, Uintah and Ouray Reservation v. Phoenix Area Director. The title was changed to reflect the tribal name as formally recognized by the Department of the Interior.

4. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--
Indians: Tribal Government: Elections

The constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation does not require that ordinances establishing recall election procedures be approved by the Secretary of the Interior.

5. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The inclusion of a provision requiring Secretarial review in a tribal ordinance that otherwise would not be subject to review does not render the entire ordinance subject to review. Rather, approval or disapproval must be limited to those sections of the ordinance subject to Secretarial review under the terms of the tribal constitution.

APPEARANCES: Gary J. Montana, Esq., Fort Duchesne, Utah, and Daniel H. Israel, Esq., Boulder, Colorado, for the tribe; William Robert McConkie, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Ute Indian Tribe of the Uintah and Ouray Reservation (tribe) seeks review of an August 3, 1990, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving Tribal Ordinance No. 90-02, entitled "Amended Recall Election Ordinance of the Uintah and Ouray Reservation of Utah" (ordinance). For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision.

Background

The tribe is organized under the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988) (IRA). ^{2/} Its constitution was adopted on December 19, 1936, and was approved by the Secretary of the Interior on January 19, 1937.

Articles IV and V of the tribe's constitution deal with election issues. Article IV, section 3, states: "All elections shall be by secret ballot and shall be held in accordance with rules and regulations prescribed by the Tribal Business Committee or by an election board appointed by the Tribal Business Committee." Article V, section 3, provides:

Upon receipt of a petition signed by one-third of the eligible voters in any band calling for the recall of any member of the committee representing said band, it shall be the duty of the

^{2/} All further references to the United States Code are to the 1988 edition.

Committee to call an election on such recall petition. No member may be recalled in any such election unless at least thirty percent of the legal voters of the band which he represents shall vote at such election.

Articles III and IV, respectively, of the tribal by-laws deal with certification of elections and the installation of new committeemen. Neither the constitution nor the by-laws provide other specifics as to the conduct of elections.

In order to provide procedures for recall elections, the tribe passed Ordinance No. 89-09 on July 6, 1989. Ordinance No. 89-09 was presented to the Superintendent, Uintah and Ouray Agency, BIA (Superintendent), apparently for a determination of whether it required Secretarial approval. ^{3/} By letter dated June 15, 1990, the Superintendent advised the tribe:

We do not believe the Secretary has authority to approve this Ordinance since its provisions pertain only to Tribal Elections and recall procedures. Elections and recall procedures are not listed among those powers of the Business Committee the exercise of which require Secretarial approval under Article VI, Section 1, of the Tribal Constitution. Therefore we have not approved or disapproved this ordinance but consider [it] together with the constitution as providing the Tribal Law and Regulations for Elections and Recalls.

On May 9, 1990, the Business Committee enacted the ordinance at issue here. The ordinance, which amends Ordinance No. 89-09, was conveyed to the Superintendent on May 10, 1990. In a letter dated May 17, 1990 the Superintendent stated that Secretarial approval of this ordinance was required because section C.2 of the ordinance governed the conduct of tribal members within the meaning of Article VI, section 1(k), of the tribal constitution. This section grants the Business Committee authority

[t]o promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and providing for the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers.

Section C.2 of the ordinance provides:

If any person or persons are found to be campaigning or attempting to influence the voting in any recall election or petition drive

^{3/} Authority is granted to the Secretary under some tribal constitutions to review and approve or disapprove tribal ordinances. This authority has been delegated to BIA Area Directors. See Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, 17 IBIA 144, 147-50 (1989).

by intimidation, said person or persons if found guilty shall be fined not more than \$500,00 [sic] and/or imprisoned not more than 5 days in the Ute Indian Tribal jail.

No provision similar to section C.2 appeared in Ordinance No. 89-09.

The Superintendent did not limit his review of the ordinance to section C.2, but instead examined the entire ordinance. He ultimately disapproved the ordinance on the grounds that several of its provisions, including but not limited to section C.2, violated other laws, including the tribal constitution.

The tribe appealed the disapproval to the Area Director, who, on August 3, 1990, affirmed the Superintendent's decision. Although based upon the same legal analysis as the Superintendent's decision, the Area Director's decision was more extensive.

The Board received the tribe's notice of appeal on September 5, 1990. Both the tribe and the Area Director filed briefs on appeal.

Standard of Review

The tribe stated that it brought this appeal because the Area Director's decision was "arbitrary and capricious and reflects an abuse of discretion based upon established federal case law" (Opening Brief at 6). Referring to this statement, the Area Director contends that the proper standard for Board review is that set forth in the Administrative Procedure Act, 5 U.S.C. § 706: A "reviewing court shall * * * (2) hold unlawful and set aside agency action, findings and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[1] The Board has previously held that 5 U.S.C. § 706 does not apply to its decisions. In Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 80, 90, 90 I.D. 521, 527 (1983), the Board stated that it "is not a reviewing court. It is part of the administrative body making the determination and is acting by specific delegation from the head of that administrative body. It, therefore, is not limited by statutes restricting judicial review of administrative decisionmaking."

The Board further held that the scope of its review authority was established in regulations promulgated by the Secretary. In this case, the issues raised involve questions of law. Because its review authority over such decisions is not limited, the Board has authority to review this case "as fully * * * as might the Secretary." 43 CFR 4. 1.

Discussion and Conclusions

[2] It is settled law that although the IRA requires Secretarial approval of tribal constitutions, it does not require that such constitutions make tribal ordinances subject to Secretarial review. Kerr-McGee

Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985); Fort McDermitt Paiute Shoshone Tribe, 17 IBIA at 147. However, provisions in tribal constitutions requiring Secretarial approval of ordinances are part of the tribe's law as adopted by the tribal members. Those provisions must be enforced until they are removed from the constitution by another vote of the tribal members. Wheeler v. U.S. Department of the Interior, 811 F.2d 549, 551 (10th Cir. 1987). ^{4/}

[3] At the same time, the Federal Government is "firmly committed to the goal of promoting tribal self-government." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983). "Consequently, while the Department may be required by statute or tribal law to act in intratribal matters, it should act so as to avoid any unnecessary interference with a tribe's right to self-government." Wheeler, 811 F.2d at 553. Review of tribal ordinances, even though required by a tribe's constitution, is an intrusion into tribal self-government. Review should, therefore, be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

The tribe appears to characterize the issue here as an election dispute. The Area Director disagrees with this characterization. The Board agrees with the Area Director that this case does not involve an election dispute but concerns the Secretary's authority and responsibility to review this particular tribal ordinance.

[4] The ordinance sets forth procedures for conducting recall elections. The Area Director stated on page 1 of his decision that "an election ordinance ordinarily does not require Secretarial approval." After careful review of Articles IV and V and Article VI, section 1, of the tribal constitution, the Board agrees with the Area Director's statement and finds no basis for a determination that the Ute Indian Tribe's ordinances concerning election procedures, including recall election procedures, are subject to Secretarial review.

Therefore, whatever authority the Secretary has to review this ordinance, or any part of it, must be found in sections of the constitution other than those relating to election procedures. The Area Director contends that sections B.5, B.6, and B.7, of the ordinance, which impose duties relating to recall elections upon certain tribal officials, is regulation of member conduct under Article VI, section 1(k), of the tribal constitution. This section, quoted supra, clearly refers to the establishment of a tribal law and order code and of a tribal court. The imposition of recall election duties upon tribal officials is not regulation of member

^{4/} As the Supreme Court noted in Kerr-McGee, 471 U.S. at 199, tribes which adopted constitutions in the early years of the IRA "are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval."

conduct within the meaning of Article VI, section 1(k), of the tribal constitution. 5/

The Area Director next argues that section C.2 of the ordinance governs the conduct of tribal members by establishing criminal penalties for certain actions concerning recall elections. In its reply brief, the tribe concedes, for the purpose of this appeal only, that sections C.2 and C.3 6/ of the ordinance were subject to Secretarial review under the terms of Article VI, section 1(k), of the tribal constitution. The tribe also accepted the Area Director's objection to section C-3's retroactive application of the criminal penalties established in section C.2, and offered to insert a provision making the criminal penalties not retroactive.

The tribe's willingness to remedy the problems cited by the Area Director with these two sections, however, does not moot this controversy. As noted previously, the Area Director did not confine his review of the ordinance to sections C.2 and C.3, but instead reviewed the entire ordinance. The Area Director argues that he was required to review and approve or disapprove the entire ordinance once any part of it was determined to be subject to Secretarial approval because the Secretary does not have a "line-item veto" over tribal ordinances. He contends that the Secretary could not approve some sections of the ordinance, while disapproving other sections.

This argument appears to be based on an opinion issued by the Acting Solicitor for the Department of the Interior on September 28, 1940. See I Op.Sol. 987, "Secretarial Authority Regarding Rescission of Only a Portion of Prior Approved Resolution." The Solicitor's Opinion, which interpreted a Secretarial approval and rescission provision in the constitution of the Papago Tribe, now Tohono O'odham Nation, found that

[n]o power [was] conferred to approve part of a resolution and rescind another part. It is my opinion, therefore, that the Department has no more right to rescind a portion of a tribal

5/ For the first time in his answer brief before the Board, the Area Director contends that the entire ordinance seeks to govern the conduct of tribal members through the establishment of procedures for recall elections. If the Area Director was basing his decision on this contention, he should have explicitly stated so in the decision. The Board will not consider a reason for a BIA decision that was not set forth in the original decision. Stone Trucking v. Portland Area Director, 19 IBIA 312, 316 n.3 (1991); Price v. Portland Area Director, 18 IBIA 272, 280 (1990) ("It is an abuse of discretion and a violation of due process to [make a decision] on grounds that are not communicated to the [party]").

6/ Section C.3 provides: "This ordinance supersedes all prior ordinances, resolutions, or customs relating to the subjects herein treated and shall be effective from the date of Ordinance 89-09. All provisions of this ordinance apply to any recall within the last six (6) months."

The Area Director objected to section C.3 on the grounds that it applied the criminal penalties established in section C.2 retroactively.

enactment than has the President with respect to Congressional legislation or State governors with respect to State legislation generally.

The Area Director cites no other authority for the determination that the inclusion of section C.2 in the ordinance rendered the recall election provisions subject to Secretarial approval. Instead, he states:

The nature of this ordinance is such that it is impossible not to review the entire ordinance and approve or disapprove the ordinance in its entirety. The Area Director found seven separate reasons for upholding the decision of the Superintendent to disapprove the ordinance. Each of these problem areas was based upon a tribal or federal constitutional objection. Additionally, there was sloppy drafting. The purpose of disapproval of Tribal Ordinance 90-02 is because of these seven separate instances wherein the ordinance was contrary to the tribal Constitution or federal Constitution or federal statutes; and ultimately to protect the civil rights of the members of the Tribe against an oppressive ordinance. We feel that an examination of [the relevant documents] substantiates the proposition that Tribal Ordinance 90-02 should have been disapproved in its entirety. A review of these instruments also shows an attempt by the Area Director, the Superintendent and the Regional Solicitor to assist the Tribe in drafting a better ordinance.

The Area Director then devotes 10 pages of his brief to an analysis of the problems found in the ordinance. Approximately one-half page of this discussion deals with sections C.2 and C.3.

[5] The recall election provisions were not subject to Secretarial review. The mere inclusion of a provision that is or may be subject to review in an ordinance that is otherwise not subject to review does not render the entire ordinance subject to review. 7/ Any other holding would violate both the tribal constitution and the government-to-government relationship with the tribe, and would be an impermissible intrusion into tribal self-government. 8/

7/ Because the recall election procedures set forth in the ordinance were not subject to Secretarial review, the Area Director's comments concerning those procedures in his Aug. 3, 1990, decision should be considered advisory only.

8/ The tribe also argues that BIA had no authority to invalidate this ordinance because section C.4 establishes a tribal forum for resolution of any questions related to the ordinance. Section C.4 states: "Challenges to this ordinance on any grounds shall be made to the Tribal Court, whose decision shall be final." Citing Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 14-15 (1987), and Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), the Board has previously noted that "[r]espect for

The question remains, however, how BIA should deal with an ordinance that combines sections that are subject to review with sections that are not. A May 13, 1947, memorandum from the Assistant Secretary of the Interior to the Commissioner of Indian Affairs, discusses a White Mountain Apache tribal ordinance concerning the elimination of useless animals from the tribal range. The Assistant Secretary indicated that the ordinance could have been enacted under two separate authorities of the tribal council: (1) the authority to provide for the use of tribal lands within the reservation, or (2) the authority to enact ordinances governing law enforcement. The first authority did not require Secretarial approval; the second did. The Assistant Secretary stated:

The question is thus raised whether an ordinance authorized under overlapping provisions of a tribal constitution, some of which require departmental review and others of which do not, should be reviewed.

This question was before the Department in the case of the Pine Ridge Tribal Code, approved March 20, 1937, and it was then held that the exercise of tribal powers not subject to review * * * should not be reviewed by the Department even though such exercise of tribal power involved the imposition of criminal penalties and penal ordinances otherwise came under a power subject to review. This ruling is, I believe, in the interest of expediting tribal action and minimizing drains on the time of both our offices. Any other holding would render nugatory various non-reviewable tribal powers, since such powers commonly need to be implemented by penal provisions. I believe that hereafter if an ordinance can reasonably be viewed, in its entirety, as authorized by a provision of a tribal constitution which does not require review, the ordinance should not be submitted for review. The mere fact that an ordinance otherwise non-reviewable contains a penalty clause should not be construed to necessitate departmental review.

Accordingly, I recommend that in the instant case your office merely acknowledge receipt of the ordinance in question.

(Memorandum at 1-2).

The reasoning set forth in the Assistant Secretary's memorandum is consistent with the goal of avoiding unnecessary interference with a tribe's right to self-government. If the memorandum were followed in the present case, none of the ordinance, including section C.2, would be reviewed, because the ordinance is reasonably viewed, in its entirety,

fn. 8 (continued)

tribal courts is a well-recognized aspect of the Federal Government's commitment to tribal self-determination." Martin v. Billings Area Director, 19 IBIA 279, 291, 98 I.D. 200, 206 (1991).

as authorized by the election provisions of the tribal constitution which do not require Secretarial approval.

The Assistant Secretary's memorandum discusses policy, rather than law. It appears unlikely that BIA has followed the recommended policy in the years since 1947. The Board has no authority to set policy for BIA and so cannot require that the Area Director adopt the policy recommended by the Assistant Secretary in 1947.

However, as discussed above, the Board has found, as a matter of law, that Secretarial authority is limited by the tribal constitution. When confronted with an ordinance that contains sections that are subject to review and sections that are not, BIA must limit its review and approval or disapproval to those sections that are specifically subject to Secretarial review. BIA should clearly indicate which sections of such an ordinance have been reviewed and approved or disapproved and which sections have not. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 3, 1990, decision of the Phoenix Area Director is reversed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ This procedure does not conflict with the 1940 Solicitor's opinion, which concerned a situation where the Secretary evidently had authority to review the entire ordinance, and where BIA proposed different actions on different parts of the ordinance. Here, BIA simply recognizes that its jurisdiction is limited and acts to the extent of its jurisdiction, but no further.