



INTERIOR BOARD OF INDIAN APPEALS

Burlington Northern Railroad v. Acting Billings Area Director,
Bureau of Indian Affairs

25 IBIA 79 (12/15/1993)



United States Department of the Interior

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

BURLINGTON NORTHERN RAILROAD,	:	Order Docketing, Granting Expedited
Appellant	:	Consideration to, and Dismissing
	:	Appeal
v.	:	
	:	
ACTING BILLINGS AREA DIRECTOR,	:	Docket No. IBIA 94-25-A
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	December 15, 1993

This is an appeal from an October 18, 1993, decision of the Acting Billings Area Director, Bureau of Indian Affairs, approving the Crow Tribal Railroad and Utility Tax Code. After appellant filed its notice of appeal, the Crow Tribe filed an objection to the appeal. Both appellant and the Tribe requested expedited consideration by the Board.

The Area Director's decision stated in part:

The record shows that the Crow Tribe consulted with prospective taxpayers on this code prior to Crow Tribal Council action. On December 21, 1992, the Crow Tribe held a hearing to allow prospective taxpayers the opportunity to voice their concerns about the code. Changes were made to the proposed tax code after that hearing.

In addition, this office hosted a meeting of prospective taxpayers on August 5, 1993. At that meeting each of the prospective taxpayers was given the opportunity to express their views on the Crow Tribal Railroad and Utility Tax Code. A record of that meeting is in our file.

It is understood that the Crow Tribe has the power to tax. It is also our finding that this code is not directly inconsistent with Federal law implemented by the [BIA].

Further it is our position that we cannot, in our action on the tribal code, decide the breadth of the tribal power to tax. Therefore, as we pointed out in our letters to prospective taxpayers dated June 30, 1993, our action basically focuses on whether the tax code is consistent with Federal statutes, regulations and policies the BIA is involved with implementing.

It is apparent from appellant's notice of appeal that its principal objection is to the Tax Code itself and, particularly, to the implementation of the code against its property. The Tribe has provided admin-

istrative and judicial forums for this kind of challenge, and it is clearly in those forums that primary jurisdiction over this challenge lies. As a procedural matter, the Board presently has jurisdiction over this appeal pursuant to 25 CFR Part 2 and 43 CFR Part 4, Subpart D. For a number of reasons, however, the Board concludes that, to the extent it has any jurisdiction over the merits of this appeal, it should abstain from addressing them in deference to the tribal forums available to appellant. The Board further concludes that expedited consideration is appropriate here in order to allow appellant to proceed promptly to those forums.

The Federal policy of respect for tribal courts, and of support for tribal self-government in general, counsels abstention by a Federal forum in a case in which a tribal forum has primary jurisdiction. In a recent decision of the Court of Appeals for the Ninth Circuit, abstention by a Federal district court was found proper even where it was Federal law which was sought to be enforced. United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992). Here, where the subject of the challenge is a tribal law, it is particularly important that the matter be addressed first in a tribal forum. See Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985).

Further, the Area Director's review of the Tax Code was authorized only by tribal law. See Article VI, section 10, of the Crow Constitution. No Federal law requires that tribal tax laws be approved by the Department of the Interior. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985). The fact that the Area Director acted here under authority of tribal law, and not Federal law, bolsters the conclusion that a challenge to the Tax Code should proceed in a tribal forum.

Finally, although the Board has jurisdiction over this appeal as a procedural matter, its jurisdiction over the substance of the appeal is limited. This is so because the Board's jurisdiction here can be no broader than was the Area Director's jurisdiction to review the Tax Code. The Area Director's approval role was legislative, rather than adjudicatory, in nature. It was not within his authority to determine whether the code could be enforced against any particular person or property. The responsibility for such adjudicatory functions rests with the Tribe. To the extent appellant seeks to challenge application of the Tax Code to its property, neither the Area Director nor this Board is a proper forum.

The Board has previously held that BIA review of tribal laws, even though authorized by the tribe's constitution, must be undertaken in such a way as to avoid unnecessary interference with tribal self-government. Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24 (1991). This means, among other things, that a tribe's assertion of jurisdiction to tax ought not to be disapproved by BIA unless it is absolutely clear that the tribe lacks the authority asserted. It is the tribal and Federal courts, not BIA or this Board, which have the authority to determine the extent of a tribe's jurisdiction in this area. In reviewing a tribal law, BIA must be guided by existing legal authority but should err, if err it must, in favor of a tribe's authority to exercise the authority it asserts. Cf. Cheyenne River Sioux Tribe v. Aberdeen Area Director,

24 IBIA 55 (1993). Any other practice would be in conflict with the controlling Federal policy favoring tribal self-determination because it could well preclude a tribe from exercising authority which it in fact possesses.

All but one of appellant's arguments are directed primarily to the Tax Code itself, or its application to appellant's property. As discussed, these arguments are properly within the jurisdiction of the tribal administrative and judicial forums. One argument, however, is directed exclusively to BIA's approval process. Appellant contends that BIA review and approval of the Tax code was "invalid because of the lack of any duly promulgated rules or guidelines for reviewing tribal taxing ordinances of this type." This contention must be rejected summarily. There is no Federal statute requiring the Secretary of the Interior to adopt rules or guidelines for approval of tribal tax ordinances. Absent such a statute, BIA's appropriate "guidelines" are, as discussed above, the Federal policy supporting tribal self-determination and Federal case law concerning the scope of tribal jurisdiction. This was the approach taken by the Area Director in approving the Tax Code. ^{1/}

Ultimately, appellant will be required to pursue its objections to the Tax Code through the tribal adjudicative process. For the Board to retain jurisdiction over this appeal would serve only to delay resolution of the matter. Both appellant and the Tribe seek to avoid delay.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is docketed and dismissed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

^{1/} Although he did not cite the case, the Area Director may have relied in part upon the decision of the court of Appeals for the Ninth Circuit in Burlington Northern Railroad v. Blackfoot Tribe, 924 F.2d 899 (9th Cir.), cert. denied, 112 S.Ct. 3013 (1991), holding that the Blackfoot Tribe and the Assiniboine and Sioux Tribes have the authority to tax railroads and utilities.