



INTERIOR BOARD OF INDIAN APPEALS

Hilda Smoke, et al. v. Acting Eastern Area Director, Bureau of Indian Affairs

30 IBIA 31 (09/24/1996)

Reconsideration denied:  
30 IBIA 90



## United States Department of the Interior

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

HILDA SMOKE, et al.,	:	Order Docketing Appeal and
Appellants	:	Affirming Decision
	:	
v.	:	
	:	Docket No. IBIA 96-108-A
ACTING EASTERN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	September 24, 1996

This is an appeal from a July 26, 1996, decision of the Acting Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), which recognized and accepted two orders issued by the tribal court of the Saint Regis Mohawk Tribe (Tribe) concerning the status of the tribal constitution and the identity of the tribal leaders. 1/ Appellants are Hilda Smoke, Alma Ransom, Paul Thompson, John Bigtree, Jr., Bryan Garrow, Barbara Lazore, and Carol Herne.

In their notice of appeal, appellants contended that, despite the holding of the tribal court, the constitution had never been adopted by the tribal members. They also contended that they, rather than the individuals identified in the Area Director's decision, were the rightful leaders of the Tribe. Further, they contended that the tribal court decisions relied upon by the Area Director were not valid judicial decisions.

The Area Director's decision stated in part:

[BIA] is not authorized to interfere or intervene in a purely internal tribal matter such as a tribal election dispute. Instead, when differences of opinion surface between groups of tribal leaders or between other groups on the reservation, tribal forums are the appropriate mechanisms for resolution. [BIA] has,

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1/ The tribal court orders were issued on June 7 and July 12, 1996, in Lazore v. Saint Regis Mohawk Tribal Council, S.R.M.T. Election Board, Case No. 96-CI 10080. In its June 7, 1996, order, the court held, inter alia, that a June 1, 1996, tribal referendum did not have the effect of amending or repealing the tribal constitution. In its July 12, 1996, order, the court held, inter alia, that a June 10, 1996, attempt to rescind the certification of the 1995 constitution was illegal; that the constitution was the law of the territory until amended or repealed; and that the tribal officials elected at a June 1, 1996, election were lawfully elected.

over the years, entered into contracts and grant agreements with the [Tribe] to assist it in establishing and operating a judicial forum for adjudication and resolution of issues such as this. We are pleased that the tribe has developed and is realizing its own capacity for resolving disputes without intervention from non-Mohawk entities.

[BIA's] policy with regard to tribal government is entirely supportive of self-government and self-determination, and both these aims are achieved when a tribe resorts to its own institutions for resolution of difficulties. The recently established tribal court of the St. Regis Mohawk Reservation accomplished precisely what it was created to do--analyze problem situations, apply law and custom to arrive at a reasoned decision, and issue a clearly worded order respecting the rights and responsibilities of all parties to the controversy.

The legitimacy of the tribal court at the St. Regis Mohawk Reservation was expressly confirmed by the United States District Court in Cook Enterprises v. St. Regis Mohawk Tribe, Civil No. 95-CV-1256 (U.S.D. N.Dist., N.Y., Feb. 14, 1996), where the question was whether exhaustion of tribal remedies was required before resorting to state or federal courts to resolve disputes relating to Indian affairs or arising on reservations. The federal court stated:

[T]he court finds that, although a fledgling court system, the tribal court system of the St. Regis Indians does exist, and should be afforded the initial opportunity to determine the issues presented in this case. Moreover, claims that the tribal courts should not be permitted to consider an action on the basis of inadequate legal training, bias, futility, or other grounds seeking to avoid the exhaustion requirement consistently have been rejected. (Citations omitted.)

(Area Director's July 26, 1996, Decision at 1-2).

Because it appeared that the Area Director's decision was consistent with the Board's previous decisions in this area, the Board ordered appellants to show why his decision should not be summarily affirmed. The Board referred appellants to, in particular, its decisions in Gonzales v. Acting Albuquerque Area Director, 28 IBIA 229 (1995); Johnson v. Acting Minneapolis Area Director, 28 IBIA 104 (1995); Mosay v. Minneapolis Area Director, 27 IBIA 126 (1995); and Smalley v. Eastern Area Director, 18 IBIA 459 (1990).

Appellants' response was received on September 13, 1996. Appellants acknowledge that the cited Board decisions require that parties exhaust their tribal remedies before seeking relief from the Board. They also acknowledge that, under those decisions, BIA and this Board are bound by the resolution of an intra-tribal dispute reached in a valid tribal forum.

Appellants contend, however, that the June 7 and July 12, 1996, tribal court orders are invalid because the appointment of the judge who issued them was invalid and, even if the appointment was valid initially, it had expired by June 30, 1996, i.e., before the July 12, 1996, order was issued. Appellants also contend that the judge was biased, that she conducted the hearing which led to the July 12, 1996, order on an ex parte basis, 2/ and that her orders were wrong on the merits. In essence, appellants seek to persuade the Board to find the tribal court orders invalid and then to re-decide the issues already decided by that court.

All of the contentions made by appellants are contentions which should be presented to a tribal forum.

This Board has held that an allegation of bias by a tribal court is insufficient to overcome the exhaustion requirement. Gonzales, supra. The Federal courts follow the same rule. E.g., Cook Enterprises, supra, slip op. at 6; Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995), and cases cited therein. As it was put by the district court in Bowen, the Federal courts "have declined to apply the exception [to the exhaustion requirement] based solely on allegations of tribal court bias or incompetence." 880 F. Supp. at 126. "Moreover," that court continued, "the federal courts have refused to adjudicate the competency or impartiality of the tribal court as a forum. Instead, the federal courts have consistently required that such allegations be addressed, in the first instance, in the tribal court itself." Id. at 126-27. It is clear that, under both Board and Federal court decisions, appellants in this case are required to present their allegation of bias to the tribal court before presenting it to the Board.

It is equally clear that appellants' allegation of procedural irregularity in the tribal court proceeding must be presented initially to the tribal court rather than raised collaterally in this administrative proceeding.

Federal case law also establishes that an allegation of error in a tribal court decision must be pursued through the tribal appellate court system. E.g., Cook Enterprises, slip op. at 5, quoting from Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 17 (1987): "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts.' \* \* \* 'Until appellate review is complete, [a tribe has] not had a full opportunity to evaluate the claim and federal courts should not intervene.'" Likewise, neither BIA nor this Board should intervene here to address the merits of the tribal court orders where there is no showing that tribal appellate procedures have even been invoked, let alone completed. 3/

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2/ The tribal court's July 12, 1996, stated at page 1: "A hearing was held on July 9, 1996, with the Plaintiff and one Defendant present. All Defendants were properly served according to the record and any non appearance by those absent parties forfeits defense of their actions."

3/ There is little information in the limited materials before the Board concerning the Tribe's appellate court system. However, such a system was established in the 1995 constitution, and the tribal court's June 7, 1996, order stated that it could "be appealed to the judges of the Mohawk Court of Appeals" (June 7, 1996, Order at 2).

In contending that the tribal judge's appointment is invalid and urging the Board to disregard her orders on that basis, appellants seek a particularly egregious form of interference in tribal affairs. Were the Board to purport to declare the tribal judge's appointment invalid, the Board's action would--assuming any credence were given to the Board's assertion of authority to make such a declaration--call into question, not only the June 7 and July 12, 1996, orders, but every other order or decision issued by the judge in the time she has served as a tribal judge. If there is any issue in this case upon which exhaustion of tribal remedies is critical, this is surely it.

Although the effect of an order declaring the judge's appointment expired as of June 30, 1996, would be less far-reaching, the same underlying considerations are present. It is for a tribal forum, not BIA or this Board, to decide whether the tribal judge acted under valid tribal authority.

Appellants make no allegation, let alone any showing, that they have exhausted their tribal remedies.

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 the Area Director's July 26, 1996, decision is affirmed.

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Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge