



INTERIOR BOARD OF INDIAN APPEALS

Georgia Ann Harris-Noble, Maxine Trubshaw, Edward C. Spoon, Shalah Rowlen, Edith Harjo, Lee Bass, Jr., Beverly Jackson, Janet White, Michael W. Hackbarth, Henrietta Massey, Gaylon R. Franklin, Sr., Lavetta "Lolly" Ashley, Carol Childers, Yvonne M. Goodeagle, Robert A. Musgrove, Lena Clark, Roian Musgrove, Elmer Manatowa, Mary F. McCormick, Mary E. Black Osborn, Roseanna Preston, Gwen Wilburn, Lina Ortega, Dora S. Young, Marjorie A. Black Roane, Candace Howard, Amos E. Black, IV, Amos E. Black, III, and Joshua Barkley Black v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

45 IBIA 224 (08/31/2007)

Related Federal case:

Sac and Fox Nation v Norton, CIV-05-1234-R (W.D. Okla.)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

GEORGIA ANN HARRIS-NOBLE,) Order Dismissing Appeal
MAXINE TRUBSHAW, EDWARD)
C. SPOON, SHALAH ROWLEN,)
EDITH HARJO, LEE BASS, JR.,)
BEVERLY JACKSON, JANET)
WHITE, MICHAEL W.)
HACKBARTH, HENRIETTA)
MASSEY, GAYLON R. FRANKLIN,)
SR., LAVETTA "LOLLY" ASHLEY,)
CAROL CHILDERS, YVONNE M.)
GOODEAGLE, ROBERT A.)
MUSGROVE, LENA CLARK,) Docket No. IBIA 05-40-A
ROIAN MUSGROVE, ELMER)
MANATOWA, MARY F.)
McCORMICK, MARY E. BLACK)
OSBORN, ROSEANNA)
PRESTON, GWEN WILBURN,)
LINA ORTEGA, DORA S. YOUNG,)
MARJORIE A. BLACK ROANE,)
CANDACE HOWARD, AMOS E.)
BLACK, IV, AMOS E. BLACK, III,)
and JOSHUA BARKLEY BLACK,)
Appellants,)
)
v.)
)
ACTING SOUTHERN PLAINS)
REGIONAL DIRECTOR,)
BUREAU OF INDIAN AFFAIRS,)
Appellee.) August 31, 2007

Appellants are members of the Sac and Fox Nation (Nation), who appealed to the Board of Indian Appeals (Board) from a December 14, 2004, decision of the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA),

denying their petition contesting the validity of an August 20, 2004, Secretarial election.¹ The sole subject of the Secretarial election was a proposed amendment to the Nation's Constitution.

While this appeal before the Board was pending, the Nation filed suit against the Secretary in Federal court seeking a declaratory judgment that the amendment must be deemed approved by operation of law, under 25 U.S.C. § 476(d), because the Secretary had neither approved nor disapproved the amendment within 45 days after the election. *Sac and Fox Nation v. Norton*, CIV-05-1234-R (W.D. Okla.). In *Sac and Fox Nation*, the district court held that the Nation was not required to exhaust administrative remedies and agreed with the Nation that the amendment was approved by operation of law when the Secretary failed to make a decision in accordance with subsection 476(d). Because the relief sought by Appellants in this case — to declare the election, and by necessary implication the amendment, invalid — is inconsistent with the court's judgment, we are unable to grant Appellants the relief they seek and therefore this appeal is moot.²

Background

In May of 2004, the Nation's Business Committee passed a resolution proposing an amendment to the Nation's constitution and requesting that BIA conduct a Secretarial election to allow the Nation's membership to vote on the proposed amendment.³ On June 16, 2004, the Regional Director approved the substance of the proposed amendment and authorized a Secretarial election. On August 20, 2004, the Secretarial election was held, and on the same day the Secretarial Election Board certified the results of the election,

¹ A Secretarial election is a Federal election conducted by BIA, acting pursuant to authority delegated to BIA by the Secretary of the Interior (Secretary). The Secretarial election in this case was conducted pursuant to 25 C.F.R. Part 81, which authorizes qualified voters to contest the election results, *see* 25 C.F.R. § 81.22.

² We express no view, of course, on the merits of Appellants' claims regarding the validity of the election.

³ The proposed amendment would amend Article II, Section 3, and Article III, Section 2, of the Nation's Constitution, both of which had previously been amended in 1990 and 1991, respectively. The effect of the proposed amendment apparently was to limit the power of the Nation's Governing Council (composed of the Nation's voting members) and to expand the power of the Business Committee.

in which a majority of the votes cast were in favor of the amendment (187 in favor, 143 against). Appellants filed a contest of the election with BIA, alleging that a variety of procedural irregularities rendered the election invalid.

On December 14, 2004, the Regional Director rejected the election contest and decided that the election was valid. Appellants then appealed that decision to the Board.

On June 13, 2005, after the Board had scheduled briefing in this appeal, the Nation submitted a copy of a letter dated June 8, 2005, from the Nation's Principal Chief to the Secretary. In the letter, the Nation took the position that the statutory time limit for Secretarial action under 25 U.S.C. § 476(d) had expired, and that the Nation considered the amendment to be in effect by operation of law. Subsection 476(d) provides in relevant part:

(1) If [a Secretarial] election called under [§ 476(a)] results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

In response to the Nation's letter, the Board issued an order, dated June 13, 2005, noting that under the provisions of 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314(a), the Regional Director's decision that the election was valid had not become effective because Appellants had filed a timely appeal with the Board. Thereafter, in its answer brief, the Nation reiterated its position that BIA was required to either approve or disapprove the results of the Secretarial election within 45 days after the election, and because it had not done so, the amendment must be deemed approved by operation of law. The Nation asserted that the Board was without jurisdiction and that the appeal should be dismissed.

In their reply brief, Appellants agreed with the Nation's position that 25 U.S.C. § 476(d) placed time restrictions on the Secretary when determining the validity of

Secretarial elections held pursuant to that section of the Indian Reorganization Act (IRA). Appellants argued, however, that section 476 does not apply to the Nation.⁴

Judicial Proceedings

On October 25, 2005, the Nation filed suit in Federal court against the Secretary, arguing that because the Secretary had neither approved nor disapproved the amendment within 45 days following the election, the amendment must be deemed as having been approved by operation of law under subsection 476(d). The Nation alleged that it was suffering irreparable harm because “the status of its Constitutional amendment [was] in limbo.” Complaint, ¶ 22, *Sac and Fox Nation v. Norton*; see also Brief in Support of Plaintiff’s Motion for Summary Judgment, ¶ 18 (Nation was suffering irreparable harm by not knowing whether the amendment was valid and effective under Federal law).

The Secretary sought dismissal of the Nation’s suit, arguing among other things that the Nation had failed to exhaust its administrative remedies prior to seeking judicial relief, that section 476 of 25 U.S.C. did not apply to the Nation, and that Appellants must be joined as necessary parties. The Secretary’s Motion for Summary Judgment characterized the Nation’s suit as seeking an order from the court “compelling the Secretary’s approval of the contested August 20, 2004 election,” and argued that the sole issue in the case — the validity of election — was pending before the Board and was subject to the normal rule that a plaintiff must exhaust administrative remedies before proceeding to court. Defendant Secretary’s Motion for Summary Judgment at 4. The Secretary also argued that the issue of the approval of the amendment itself — i.e., the substance of the amendment — was moot because the Regional Director had approved the amendment prior to the election in his June 16, 2004, letter, subject only to ratification by the Nation’s membership in a valid election.

⁴ Appellants’ argument, also asserted by the Secretary in *Sac and Fox Nation*, is based on 25 U.S.C. § 473, which excluded the Nation (and other named Oklahoma tribes) from the applicability of section 476. The Nation’s position is that its Charter, which was approved by the Secretary, expressly incorporated section 476 by reference, and that such incorporation was authorized by section 3 of the Act of June 26, 1936, 49 Stat. 1967 (the Oklahoma Indian Welfare Act), codified at 25 U.S.C. § 503.

On September 15, 2006, the court issued an order denying the Secretary's motion for summary judgment.⁵ The court rejected the Secretary's argument that section 476 is not applicable to the Nation. The court also concluded that final agency action and exhaustion of administrative remedies was not required in this case, interpreting subsection 476(d)(2) to provide a right of judicial review independent of the administrative review process. The court found that the Secretary had not shown that Appellants were necessary parties and that "complete relief" could be granted to the Nation in their absence. *See* Amended Order at 16-17.

On the merits, the court held that the Secretary had "failed to meet her statutory obligation to approve or disapprove the amendment[] within 45 days," *id.* at 15, and also held that BIA's pre-election approval of the amendment did "not satisfy the Secretary's obligation to conduct a post-election review under Section 476(d)," *id.* at 19. The court therefore granted the Nation's motion for summary judgment and its request for declaratory relief.

Motion to Dismiss and Discussion

Following the court's order, the Nation moved to dismiss this appeal on the ground that the court's order had rendered these proceedings moot.⁶

In response to the Nation's motion to dismiss, Appellants make three arguments: (1) Appellants were not a party to the Federal court proceedings and are not bound by the court's judgment, (2) the Board possesses exclusive jurisdiction over the issues raised by Appellants challenging the validity of the Secretarial election; and (3) the court "did not address any issues regarding the unconstitutionality of all pertinent regulations or the procedure employed during the elective process contested by Appellants," and therefore the court's judgment is not *res judicata* or binding on the Board.⁷ Appellants' Response to the [District Court's] Order of Sept. 15, 2006, at 2.

⁵ The court issued an amended order on November 27, 2006, to make several corrections that are not relevant here, and final judgment, as set out in the amended order, was entered on January 3, 2007.

⁶ The Secretary initially appealed the Federal district court's decision to the Court of Appeals for the Tenth Circuit, but then voluntarily withdrew the appeal. The court of appeals dismissed the appeal on March 29, 2007.

⁷ The Regional Director, although represented by counsel from the Department of the Interior Solicitor's office, has taken no position before the Board regarding the effect of the court's ruling.

The doctrine of mootness, to which the Board adheres, is based on the principle that an active case or controversy must be present at all stages of litigation. *See Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). Relevant to this case, mootness may occur when nothing turns on the outcome of a proceeding because the adjudicating forum has been divested of the ability to grant the relief requested. *See Brown v. Navajo Regional Director*, 41 IBIA 314, 318-19 (2005). We address each of Appellants' arguments in turn, but none of them persuades us that we can grant the relief that Appellants request, and therefore we conclude that this appeal is moot.

With respect to Appellant's first argument, it does not matter whether or not Appellants (who did not seek to intervene in the Federal court proceedings) are legally bound by the court's judgment. The Secretary, and therefore the Board as the Secretary's delegate, is bound by that judgment. Thus, if the court's judgment precludes the Secretary from granting Appellants the relief that they seek, the Board is similarly precluded from doing so.

Appellants' second argument is similarly unavailing as a basis to find that the court's judgment did not render these proceedings moot. Appellants cite no authority for the proposition that the Board has "exclusive jurisdiction" over the issues raised in their appeal, which implies that the Federal court lacked jurisdiction over such issues. Nor do they address the more fundamental issue: whether the exercise of that purported "exclusive jurisdiction" and granting them the relief they seek would run afoul of a Federal court judgment against the Secretary. In addition, to the extent Appellants argue that the Board has "exclusive jurisdiction" over the matter until a final and effective administrative decision has been issued, the court clearly rejected that argument by denying the Secretary's motion to dismiss for lack of jurisdiction based on the Nation's failure to exhaust administrative remedies.

Turning to Appellants' third argument, we agree that the Federal court did not explicitly address the issues raised by Appellants in this appeal regarding the validity of the election. However, by concluding that the 45-day time period in subsection 476(d) had been triggered, the court necessarily, though without being explicit, concluded that the Secretarial election had "result[ed] in," *see* 25 U.S.C. § 476(d)(1), adoption of the amendment by the Nation.⁸ And by rejecting the Secretary's argument that an

⁸ The court specifically noted that the Secretary had not refused to approve the amendment "based on concerns about the fundamental validity of the election; instead, the Secretary has failed to meet her statutory obligation to approve or disapprove the amendment[] within 45 days." Amended Order at 15. Of course, Appellants' challenge to the "fundamental validity
(continued...)

administrative determination regarding the validity of the election — what the Secretary characterized as the “sole issue” — was a necessary prerequisite to final approval of the amendment by the Secretary, the court rendered the proceedings before the Board of no consequence. For us to decide the merits of Appellants’ appeal would be to render an advisory opinion, which we do not do. *See Washoe Tribe of Nevada and California v. Western Regional Director*, 45 IBIA 180, 186 (2007).

The issue before the Board is not whether we agree or disagree with the Federal court’s ruling; rather, the issue is what effect that ruling has on these proceedings. The Nation sought relief from the Federal court to have Secretarial post-election approval of the amendment be declared to have occurred by operation of law under 25 U.S.C. § 476(d)(2), and to redress an alleged injury resulting from uncertainty over whether the amendment was both *valid and effective* under Federal law. *See* Brief in Support of Plaintiff’s Motion for Summary Judgment, ¶ 18. The court granted the Nation’s motion for summary judgment. The relief sought by Appellants in this appeal is to have the Board declare the Secretarial election invalid and to refer the sole subject of the election — the proposed amendment — to the Governing Council before proceeding with a new Secretarial election. Opening Brief at 31-32; *see also* Notice of Appeal at 11 (requesting an order vacating the Regional Director’s decision and ordering that a new election be held on the proposed amendment). That relief would run counter to the relief granted to the Nation by the Federal court in a decision that is binding on the Secretary, and therefore we conclude that this appeal is moot because the Board cannot grant Appellants effective relief.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal as moot.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

⁸(...continued)
of the election” is precisely the issue pending before the Secretary through these Board proceedings, but the court appears to have treated BIA’s decisions approving the election, though neither final nor effective under the regulations, as sufficient to trigger the 45-day period for post-election final approval of the amendment by the Secretary.