



INTERIOR BOARD OF INDIAN APPEALS

Ronald T. Welch, et al. v. Minneapolis Area Director, Bureau of Indian Affairs

17 IBIA 56 (01/30/1989)

Reversing:

16 IBIA 180



# United States Department of the Interior

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

RONALD T. WELCH ET AL.

v.

AREA DIRECTOR, MINNEAPOLIS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-14-A

Decided January 30, 1989

Reconsideration of Welch v. Minneapolis Area Director, 16 IBIA 180 (1988).

16 IBIA 180 (1988) reversed; appeal dismissed.

1. Administrative Practice: Generally--Board of Indian Appeals:  
Jurisdiction--Bureau of Indian Affairs: Administrative Appeals:  
Generally--Indians: Attorneys: Contracts--Rules of Practice:  
Generally

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal within the Department.

APPEARANCES: James E. Townsend, Esq., Minneapolis, Minnesota, for appellants; Mark A. Anderson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee; Thomas W. Fredericks, Esq., and John Fredericks III, Esq., Boulder, Colorado, for intervenor.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

By memorandum dated January 25, 1988, the Acting Deputy to the Assistant Secretary--Indian Affairs (Tribal Services) referred this appeal to the Board of Indian Appeals (Board) pursuant to 25 CFR 2.19(a)(2). 1/ Appellants Ronald T. Welch, et al., 2/ sought review of an October 1, 1987,

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1/ Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

2/ The appellants are listed in Welch v. Minneapolis Area Director, 16 IBIA 180, 181 n.2 (1988).

decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; appellee), approving general counsel contract #F50CI4207A34 between the Shakopee Mdewakanton Sioux Community (tribe) and the law firm of Fredericks & Pelcyger, Boulder, Colorado (intervenor). By decision dated July 22, 1988, the Board set aside appellee's decision and referred this case to the Hearings Division of the Office of Hearings and Appeals for assignment to an Administrative Law Judge who was to hold an evidentiary hearing and issue a recommended decision. Welch, supra.

On August 25, 1988, the Board received a petition for reconsideration from intervenor. Intervenor sought dismissal of this case on the grounds that the Board lacked jurisdiction to consider the appeal. Intervenor submitted evidence tending to show that appellee had taken contradictory positions on whether or not there was a right to appeal an Area Director's approval of a tribal attorney contract under 25 CFR 88.1.

Based on the apparent conflict in appellee's position, the Board granted reconsideration and stayed the proceedings before the Administrative Law Judge in an order dated September 1, 1988. All parties filed briefs on reconsideration.

#### Discussion and Conclusions

Intervenor argues that in Welch, supra, the Board incorrectly held that 25 CFR 88.1(c) 3/ merely limits the general rule, set forth in 25 CFR 2.3(b), 4/ that BIA decisions are not final if they are subject to appeal to a superior authority within the Department. The Board held that 25 CFR 88.1(c) reversed this rule, and allowed an appellant to seek immediate review in Federal court without the requirement to exhaust administrative remedies. The Board also held, however, that a party could choose to continue within the administrative review process established in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

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3/ Section 88.1(c) states: "Any action of the authorized representative of the Secretary of the Interior which approves, disapproves or conditionally approves a contract pursuant to paragraph (a) or (b) or this section shall be final." Paragraph (a) concerns attorney contracts entered into by tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982) (IRA), and paragraph (b) deals with attorney contracts entered into by tribes not organized under the IRA. There is no dispute that the "authorized representatives" of the Secretary in this instance are the Area Directors.

4/ Section 2.3(b) states in pertinent part:

"In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the officer to whom the appeal is made shall rule that the decision appealed from shall be made immediately effective."

Intervenor contends instead that, under 25 CFR 88.1(c), decisions of an Area Director approving, disapproving, or conditionally approving a tribal attorney contract are final for the Department with no right of appeal within the Department. Intervenor argues that this interpretation of section 88.1(c) is strengthened by 25 U.S.C. § 1331 (1982), which provides:

Notwithstanding any other provision of law, if any application made by an Indian, Indian tribe, Indian council, or any band or group of Indians under any law requiring the approval of the Secretary of the Interior or the Commissioner of Indian Affairs of contracts or agreements relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribes, council, band, or group is neither granted nor denied within ninety days following the making of such application, such approval shall be deemed to have been granted.

Appellants argue that the regulatory history of section 88.1(c), including representations made by the Department to Congress after its promulgation, show that the delegation to Area Directors was not intended to be final and nonreviewable, but that, in fact, the Department continued to hear appeals from Area Directors' decisions approving or disapproving tribal attorney contracts. Appellants cite a 1946 Solicitor's Opinion and testimony of Departmental officials before the Senate in support of their position. See "Delegation of Authority to Perform Certain Functions Relating to Attorney Contracts with Indian Tribes," 59 I.D. 189, 2 Op. Sol. on Indian Affairs 1381 (Jan. 22, 1946); 5/ "Constitutional Rights of the American Indian," Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 88th Cong., 2nd Sess., June 22-24, 29, 1965. 6/ Appellants further argue that 25 U.S.C. § 1331 (1982) merely requires that the initial decision on whether to approve or disapprove a tribal attorney contract be made within 90 days, and does not require the holding that any appeals of such decisions must also be completed within 90 days.

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5/ This Solicitor's Opinion states in pertinent part: "Any order prepared for the purpose of effecting such a delegation [of the Secretary's authority to approve tribal attorney contracts to the Commissioner of Indian Affairs or Assistant Commissioner] should contain a provision which gives interested parties the right to appeal to the Secretary from actions of the Commissioner or Assistant Commissioner." 59 I.D. at 192, 2 Op. Sol. on Indian Affairs at 1383.

6/ The Senate Subcommittee was considering several bills to ensure greater constitutional protections for Native Americans. One of those bills contained language substantively identical to the present language of 25 U.S.C. § 1331 (1982). The Solicitor of the Department and the Commissioner of Indian Affairs testified against this bill, indicating that the regulatory changes made in 1962, which became the present 25 CFR 88.1(c), had obviated the problem with approval of tribal attorney contracts. During their testimony, these officials indicated that these contracts were being considered in the field, although in some instances, certain cases had been brought to their attention. The Commissioner at one point mentioned that appeals had been taken from Area Director decisions (Report at 42).

Appellee Minneapolis Area Director agrees with intervenor that section 88.1(c) was intended to delegate final authority relating to the approval or disapproval of tribal attorney contracts to BIA Area Directors. Appellee cites a November 26, 1962, memorandum from the Commissioner of Indian Affairs to all BIA Area Directors in support of this position. The memorandum states at page 1:

As stated in the amended regulations (25 CFR § 71.1 [now section 88.1(c)]), the Area Directors, as the authorized representatives of the Secretary of the Interior, have been given final authority to approve, disapprove or conditionally approve tribal attorney contracts. The decision not to allow appeals from the actions of the Area Directors on these matters has been made in order to insure prompt final action on the approval or disapproval of tribal attorney contracts. The magnitude of the responsibility thus given the Area Directors is obvious. Only the decisions of the Area Directors with regard to a tribal attorney contract after it has been approved, as, for example, decisions involving interpretations of approved contracts, will be subject to appeal under the general appeals regulations of Part 2, Title 25, CFR.

[1] The Board has carefully reviewed all of the materials presented by the parties, and has concluded that, under 25 CFR 88.1(c), it lacks jurisdiction to hear appeals from an Area Director's decision approving, disapproving, or conditionally approving a tribal attorney contract. Such decisions are, instead, final for the Department. Accordingly, this case is recalled from the Hearings Division, 16 IBIA 180 (1988) is reversed to the extent it concluded that the Board had such jurisdiction, and the appeal is dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the October 1, 1987, decision of the Minneapolis Area Director is dismissed for lack of jurisdiction.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge