



INTERIOR BOARD OF INDIAN APPEALS

Prairie Band of Potawatomi Indians v. Acting Anadarko Area Director,  
Bureau of Indian Affairs

17 IBIA 97 (03/28/1989)



# United States Department of the Interior

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

PRAIRIE BAND OF POTAWATOMI INDIANS

v.

ACTING AREA DIRECTOR, ANADARKO AREA OFFICE,  
BUREAU OF INDIAN AFFAIRS

IBIA 88-28-A

Decided March 28, 1989

Appeal from a decision of the Acting Anadarko Area Director, Bureau of Indian Affairs, declining to approve an amendment to the tribal program portion of a judgment fund distribution plan.

Appeal dismissed in part; decision affirmed.

1. Indians: Judgment Funds--Indians: Tribal Government: Elections

Where an Indian tribe's judgment fund distribution plan requires that the funds be expended only as approved by the tribal membership, the Bureau of Indian Affairs, as trustee for the funds, has the authority to decline to recognize the results of a tribal mail survey conducted for the purpose of approving expenditure of the funds, upon reasonably concluding that the results do not represent the informed views of the tribal membership.

2. Indians: Judgment Funds--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibility under Federal law for ensuring the proper performance of the tribe's judgment fund distribution plan requires it to make an independent judgment concerning whether the tribal membership has approved a proposal for expenditure of the funds.

APPEARANCES: Nathan H. Young III, Esq., Tahlequah, Oklahoma, for appellant; Neil R. McDonald, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Prairie Band of Potawatomi Indians (tribe) challenges a March 3, 1988, decision of the Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs (Area Director, BIA), declining to approve an amendment to the tribal program portion of the tribe's judgment fund distribution plan. For the reasons discussed below, the Board dismisses this appeal in part and affirms the Area Director's decision.

### Background

The Act of October 19, 1973, as amended, 25 U.S.C. §§ 1401-1407 (1982), 1/ requires the Secretary of the Interior to prepare, after consultation with the affected Indian tribes, plans for the use and distribution of funds appropriated to pay judgments awarded to the tribes by the Indian Claims Commission or the United States Claims Court. The act requires the Secretary to submit the plans to Congress and provides that a plan becomes effective 60 days after it is submitted to Congress, unless during the 60-day period, either House adopts a resolution disapproving it. 25 U.S.C. §§1402(a), 1405(a) .

A judgment fund distribution plan for the Potawatomi Nation of Indians was prepared and submitted to Congress in April 1983. It became effective on July 17, 1983, and was published in the Federal Register on September 8, 1983. 48 FR 40567 (Sept. 8, 1983). The plan covered funds appropriated to pay several awards made to the Potawatomi Nation by the Indian Claims Commission and the United States Court of Claims (now United States Claims Court). 2/ The tribe, one of four tribal entities of the Potawatomi Nation, received 22.9634 percent of the total amount awarded. Pursuant to 25 U.S.C. § 1403(b)(5), the plan included a provision for the tribal program portions of the funds for each of the four tribal entities. 3/ The plan for the tribe's portion provided:

Section 5. Prairie Band Potawatani of Kansas. The funds for the programing aspects of the plan (20%), shall be held and invested by the Secretary pursuant to 25 U.S.C. 162a, until such time as social, economic, tribal governmental, or other developmental program or programs benefiting the Prairie Band are established.

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1/ All further references to the United States Code are to the 1982 edition.

2/ These were Dockets 15-C, 29-A and 71, appropriated Mar. 10, 1978; Docket 29-E, appropriated Sept. 13, 1978; Dockets 15-P, 29-N, and 306, appropriated Oct. 31, 1978; Docket 29-D, appropriated Oct. 31, 1978; Dockets 15-D, 29-B and 311, appropriated Feb. 22, 1979; Dockets 15-I, 29-G and 308, appropriated Mar. 2, 1979; Dockets 216, 15-L and 29-I, appropriated May 21, 1979; Dockets 128, 309, 310, 15-N, O, Q and R, and 29-L, M, O, and P, appropriated July 24, 1979; and Dockets 15-E, 29-C and 338, appropriated Mar. 17, 1981.

3/ 25 U.S.C. § 1403(b) requires the Secretary of the Interior to be assured, inter alia, that:  
 "(5) a significant portion of such [judgment] funds shall be set aside and programed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the affected Indian tribe may justify, except not less than 20 per centum of such funds shall be so set aside and programed unless the Secretary determines that the particular circumstances of the pertinent Indian tribe clearly warrant otherwise."

Such plans as proposed by the tribal council shall be brought before the General Council [4/] in a meeting or by a mail survey for concurrence or modification according to the wishes of the tribe. All program plans and tribal budgets are subject to the approval of the Secretary. Interest earnings on the principal program amount shall be utilized first in the administration of any of the approved programs.

48 FR at 40568.

In 1986, the tribal council developed a 3-year proposal for partial use of the program funds 5/ and conducted a mail survey of tribal members, as authorized by the distribution plan. The tribal members approved all but one of the tribal council's proposals, and the tribal council submitted the program, minus the disapproved item, to the Superintendent, Horton Agency, BIA, for approval. The Superintendent approved the program on July 17, 1986. The total amount budgeted for the program was \$557,715.53, with a first year budget of \$375,668.52. The Superintendent's approval letter noted that the tribal council was required to submit a report of the first year's program operation, including a full accounting of the expenditure of program funds.

An amendment to the original plan was approved by the General Council in a meeting held on August 30, 1986. The Superintendent approved it on September 18, 1986.

In July 1987, the tribal council adopted a budget of \$87,333 for the second year of the program and submitted it to the Superintendent for approval. Also in July, the tribal treasurer submitted a report of the first year's expenditures. By letter of August 17, 1987, the Superintendent notified the tribe that the tribal treasurer's report did not adequately explain how the first year's funds had been spent. She stated that she would not authorize withdrawal of the funds for the second year until she received documentation concerning the first year's expenditures. She also stated that the General Council's approval was required for any modification to the approved 3-year program.

In August and September 1987, the tribe conducted a mail survey of tribal members, proposing a new plan for the use of the judgment funds. The materials mailed out included an undated memorandum signed by the tribal chairman, a ballot, budget justifications for the proposed expenditures, and, apparently, a proposed amended tribal governmental program for the preceding year and a proposed second-year budget for the tribal governmental

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4/ Article IV, section 1, of the tribal constitution provides: "The General Council of the Prairie Band of Potawatomi shall consist of all enrolled members of the Prairie Band who are eighteen (18) years of age or older meeting in a general council."

5/ The plan called for expenditure of interest only. The principal was to remain invested in the United States Treasury.

program. 6/ The total proposed expenditures were \$763,483. The proposal did not indicate the time period over which the expenditures were to be made. Tribal members were asked to respond within 15 days. Sixty-nine members voted in favor of the proposal, and 44 voted against it.

A petition to invalidate the mail survey was circulated among tribal members and received 329 signatures. A copy of the petition was submitted to the agency on September 18, 1987. By letter of September 22, 1987, the Superintendent notified the tribal chairman that withdrawal of funds could not be approved until the petition was considered and resolved by the tribe.

On September 30, 1987, the tribal Election Board determined that the petition was invalid, 7/ and on October 27, 1987, it reaffirmed its decision.

In a decision dated November 24, 1987, the Superintendent held that the funds for the second year program would not be released until the report requested by her letter of August 17, 1987, had been submitted. She also stated that she considered the issue of the petition to be still unresolved by the tribe.

The tribe appealed to the Area Director. On February 5, 1988, the Area Director dismissed the appeal for failure to file a timely brief. Following the tribe's submission of documentation tending to show that its brief had been timely mailed but had gone astray in the mail, the Area Director reconsidered the dismissal and considered the tribe's appeal on the merits.

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6/ The last two documents are listed on the ballot and the tribal chairman's memorandum but are not included in the record copy of the mail survey. The tribal chairman's memorandum states that an expenditure report for the preceding year is included and that approval of the report is sought as an amended plan. Although not entirely clear from the record, it appears that this approval may have been sought to overcome the Superintendent's objections to some of the previous year's expenditures as having been unauthorized by the approved plan.

7/ The decision states in relevant part:

"The Election Board has determined the following as minor errors to the petition:

1. Under married name or other name.
2. Signature illegible.
3. Signature crossed off.
4. Unable to identify person by signature alone.
5. Date petition signed.

Additionally, the major errors to the petition are:

1. Eight (8) forgeries.
2. Sixteen (16) individuals not on Prairie Band Potawatomi Tribal Roll.
3. Thirty (30) signature discrepancies, potential forgeries.
4. Two (2) individuals under age.
5. Eleven (11) pages without petition summation at top.
6. Entire petition or individual pages not notarized.
7. Two hundred fourteen (214) signatures without addresses."

In a decision dated March 3, 1988, the Area Director stated that he was sustaining the Superintendent's November 24, 1987, decision. <sup>8/</sup> He stated that, because "the ultimate result in this case is the disbursement of the [tribe's] total judgment funds of \$1,194,056.28 \* \* \* we find it reasonable to determine that the issue was satisfactorily presented to the tribal members by reviewing the procedures followed by the Tribe (Decision at 1). He concluded that "insufficient information was given the tribal members for them to make a collective decision on the use of the money subject to their vote." Id. at 2. He noted that tribal members were apparently not given the 45-day notice required by the tribal election ordinance. He also expressed concern that, because no standards for petitions were established in tribal law, the petitioners had no advance knowledge of the standards applied by the Election Board in its decision invalidating the petition.

The Area Director's decision concluded:

We believe that the issue must be presented and explained to the membership so it can make an informed decision by vote. Based on the information and evidence presented, we do not believe that the mail survey provided the voting membership with this type of opportunity. We, further, do not find that the petition was without merit or so fatally prepared that it should have been invalidated. Considering the consequences of proceeding on the results of this mail survey, that is, the total expenditure of these judgment funds, we cannot pretend that we would be a prudent trustee by approving the amended budget and program.

Id. at 4.

The tribe appealed to the Washington, D.C., office of BIA on April 1, 1988. By letter dated June 16, 1988, and received by the Board on June 20, 1988, the tribe requested the Board to assume jurisdiction over its appeal pursuant to former 25 CFR 2.19. <sup>9/</sup> On June 21, the Board made a preliminary

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<sup>8/</sup> The Area Director's decision does not address the tribe's appeal of the Superintendent's refusal to release the second-year budget funds. By letter of Jan. 20, 1988, the Superintendent approved the tribe's second-year budget and authorized the release of \$87,333 to the tribe. The letter stated that the release had been agreed upon in a meeting between the Area Director, the Superintendent, and tribal representatives.

<sup>9/</sup> Former 25 CFR 2.19 provided in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA 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.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

Revised 25 CFR Part 2, Appeals from Administrative Actions, became effective Mar. 13, 1989. 54 FR 6478 (Feb. 10, 1989).

determination that it had jurisdiction over the appeal and requested the administrative record. Subsequent requests for the record were made on August 3 and September 12, 1988.

On September 27, 1988, the Board received a motion for summary judgment from the tribe. The motion was based on the failure of BIA to submit the administrative record. The Board allowed BIA to respond to the motion. BIA submitted the record and asked the Board to deny the tribe's motion.

The appeal was docketed on October 11, 1988. Prior to filing its opening brief, the tribe filed a motion for evidentiary hearing. The Board took the notion under advisement pending briefing. The tribe then filed its opening brief, the Area Director filed an answer brief, and the tribe replied.

#### Motion for Summary Judgment

The tribe's motion for summary judgment was based on the failure of BIA to submit the administrative record. Assuming arguendo, that the Board has authority to render summary judgment in such circumstances, the filing of the administrative record, even though belated, removed any basis for summary judgment on these grounds. The tribe's motion for summary judgment is denied.

#### Motion for Evidentiary Hearing

The Board may require an evidentiary hearing "where the record indicates a need for further inquiry to resolve a genuine issue of material fact." 43 CFR 4.337(a). The Board is an appellate forum, however, and appeals in which evidentiary hearings are ordered are the exception rather than the rule.

Because the tribe's motion for evidentiary hearing did not identify any unresolved factual issues it believed required a hearing, the Board took the motion under advisement and ordered the tribe, in its opening brief, to specify the factual issues for which it sought a hearing. The tribe reiterated its request for a hearing in both its opening brief and its reply brief but in neither instance responded to the Board's order to identify the factual issues requiring a hearing.

The Board finds that the tribe has shown no reason why an evidentiary hearing is required. It therefore denies the tribe's motion.

#### Discussion and Conclusions

On appeal, the tribe argues: (1) the petition to invalidate the mail survey is invalid on its face, (2) BIA should recognize the tribal determination concerning the validity of the petition, and (3) BIA's refusal to release the second-year budget funds is a violation of the trust responsibility and an invasion of tribal sovereignty.

Appellant's third argument is quickly disposed of. Because the Superintendent authorized the release of the tribe's second-year budget funds on January 20, 1988, this issue is moot. <sup>10/</sup> The mootness doctrine normally preclude the consideration of moot issues. The Board recognizes an exception where there is a potentially recurring question raised by short term orders, capable of repetition, yet evading review. E.g., Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 32-34, 93 I.D. 409, 413-14 (1986). However, appellant puts forth no reason for the Board to invoke this exception, and the Board sees none. This appeal is dismissed as moot insofar as it seeks release of the second-year budget funds.

Appellant's first and second arguments concern the Area Director's decision not to recognize the results of the mail survey. That decision was based on two grounds: (1) tribal members were given insufficient information in the mail survey to enable them to make an informed decision on the proposed expenditure and (2) the petition should not have been invalidated by the Election Board.

The tribe's appeal addresses only the second ground. <sup>11/</sup> The tribe contends that the petition was properly invalidated by the Election Board and that BIA should defer to the tribe's interpretation of its constitutional provision concerning petitions. <sup>12/</sup>

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<sup>10/</sup> As noted above, the Area Director's Mar. 3, 1988, decision did not address this issue, presumably because it had been made moot by the Jan. 20 decision.

<sup>11/</sup> For purposes of the conclusions reached in this decision, the Board assumes the tribe also intended to argue that the mail survey was valid under tribal law.

<sup>12/</sup> Article IX, section 1, of the constitution provides:

"Initiative. Upon receipt of a valid petition signed by at least three hundred (300) adult enrolled tribal members, it shall be the duty of the Election Board to call and conduct within sixty (60) days, an initiative election to be conducted at a special meeting of the General Council. Such meeting shall be for the purpose of presenting to the qualified voters for their determination any issue or question, except recall, and as otherwise provided by this Constitution.

"If the Election Board refuses to notify the petition spokesman of the validation, or invalidation of the petition, within 15 days or refuses to call and conduct an initiative election, the petition spokesman shall be empowered to do so. If the Election Board determines that the petition is invalid because of minor errors that can be corrected the petition spokesman shall be officially notified and given at least one opportunity to bring the petition up to validation according to the petitioning provisions of the Election Ordinance. [There are no petitioning procedures in the tribe's election ordinance.]

The Board has often held that both BIA and the Board should give deference to a tribe's interpretation of its own laws. E.g., Menominee Tribal Enterprises v. Minneapolis Area Director, 15 IBIA 263 (1987). <sup>13/</sup> In this case, however, Federal law as well as tribal law is involved. The pivotal questions here are whether the Area Director's responsibilities under Federal law authorized him to make a judgment, independent of tribal law, as to the adequacy of the tribal mail survey procedures and, if so, whether his judgment was correct.

[1, 2] BIA acts as trustee in the management of the tribe's judgment funds. See United States v. Mitchell, 463 U.S. 206, 225 n.29 (1983); Rogers v. United States, 697 F.2d 886 (9th Cir. 1983); Kaibab Band of Paiute Indians v. Acting Phoenix Area Director, 15 IBIA 277, 282 n.5 (1987). Further, the Area Director is specifically given responsibility, in both the regulations governing use and distribution of judgment funds and the tribe's approved distribution plan, for ensuring the proper performance of the plan. 25 CFR 87.12; 48 FR 40568. <sup>14/</sup> The plan required that the tribal programing funds would be spent only as "concurr[ed in] or modifi[ed] according to the wishes of the tribe." Thus the Area Director had the responsibility under Federal law to ensure that the tribal membership had approved the tribal council's proposal, and the corresponding authority to decline to recognize the results of the mail survey upon concluding that it did not represent the informed views of the tribal membership.

The Board holds, therefore, that, in determining whether to approve the tribal council's proposal for expenditure of its judgment funds, the Area Director's trust responsibility was paramount and authorized him to make an independent judgment concerning the adequacy of the mail survey.

The only remaining question is whether the Area Director correctly concluded that he should not recognize the results of the mail survey because they did not represent the informed views of the tribal membership.

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fn. 12 (continued)

"A decision by the majority of those voting shall be binding on the Tribal Council until it expires by its own terms or is otherwise changed by action of the voters. A quorum must be present to validate such action. Once an initiative issue has been submitted to the voters and rejected, the same issue shall not again be considered for such action for at least six (6) months."

<sup>13/</sup> It has also held that, in appropriate circumstances, both BIA and the Board have authority to interpret tribal law. Estate of Peshlakai v. Navajo Area Director, supra; Crooks v. Minneapolis Area Director, 14 IBIA 181 (1986).

<sup>14/</sup> Section 6(c) of the tribe's approved plan provides:

"To insure the proper performance of the approved plans, the Area Director shall provide an accounting of the expenditure of all programing funds and shall report deficient performance of any aspect of a plan to the Secretary, together with the corrective measure the Area Director has taken or intends to take, as provided in [25 CFR 87.12]."

It is apparent from the record that tribal members were confused both concerning the procedures being followed in the mail survey and concerning the questions upon which they were being asked to vote. The fact that 329 tribal members signed the petition to invalidate the survey, while only 69 members voted in favor of the tribal council's proposal, indicates that a substantial majority of the voting population either failed to understand or objected to the survey for one reason or another. This in itself is strong support for a conclusion that the tribal membership did not, by an informed vote, approve the proposal.

As to the procedures followed, there was confusion concerning the date by which a response was required. The tribal chairman's memorandum stated that a response should be mailed within 15 days, but the memorandum was undated, making it uncertain when the 15-day period began to run. Further, whether or not the 15-day response time was unreasonably short, it clearly deviated from the 45-day notice period set out in the tribe's election ordinance, which the petitioners, at least, believed was applicable to the mail survey. 15/

As to the substance of the mail survey, the Board is persuaded, upon review of the materials, that tribal members reasonably raised questions concerning their meaning. The petitioners, for instance, expressed concern that there was no indication whether the proposal required expenditure of principal. There is no discussion of this in the materials, although the proposal, if adopted in its entirety, would require expenditure of principal, unlike the plan approved in 1986, under which only interest was to be spent. 16/ Tribal members were entitled to receive a clear explanation of the implications of a vote approving the proposal. The mail survey materials did not provide such an explanation.

The Board finds that the Area Director reasonably concluded that the results of the mail survey did not represent an informed affirmative vote of the tribal membership. It holds therefore that he correctly declined to recognize the survey.

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15/ The tribe's judgment fund distribution plan does not specifically require that the election ordinance procedures be followed in the conduct of a mail survey. There is, however, no evidence in the record of any other tribal enactment governing procedures for a mail survey. Section 4 of the election ordinance, as amended on April 1, 1986, provides in relevant part: "The duties of the Election Board shall include, but not be limited to, the following: a. Mailing and posting of Election Notice at least 45 days before the date of any election of the Tribal Council members or any election on issues. \* \* \* c. Preparation and mailing of ballots to registered voters." The mail survey materials in this case, including the ballots, were sent out by the tribal chairman rather than the Election Board. It also appears that the 45-day notice required by the ordinance was not given.

16/ As noted above, the Area Director construed the proposal to require the expenditure of all the tribe's remaining judgment funds.

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 dismissed in part, and the March 3, 1988, decision of the Acting Anadarko Area Director is affirmed.

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//original signed  
Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge