



INTERIOR BOARD OF INDIAN APPEALS

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs

24 IBIA 55 (06/15/1993)



# United States Department of the Interior

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

CHEYENNE RIVER SIOUX TRIBE

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-218-A

Decided June 15, 1993

Appeal from disapproval of an amendment to a tribal constitution.

Reversed and remanded.

1. Indian Reorganization Act--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Although required by statute, review of amendments to Indian Reorganization Act constitutions is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government.

APPEARANCES: Mark C. Van Norman, Esq., Eagle Butte, South Dakota, for appellant; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Cheyenne River Sioux Tribe (Tribe) seeks review of an August 7, 1992, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving an amendment to the Tribe's constitution. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him with an order directing him to approve the amendment.

### Background

The Tribe is organized under the Indian Reorganization Act (IRA), 25 U.S.C. § 476 (1988). <sup>1/</sup> Its constitution, adopted on December 7, 1935, was approved by the Secretary of the Interior on December 27, 1935. Article VIII, section 1, concerns allotted lands and includes the following provision dealing with condemnation: "It is recognized that under existing law

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<sup>1/</sup> All further references to the United States Code are to the 1988 edition.

such land may be condemned for public purposes, such as roads, public buildings, or other public improvement, upon payment of adequate compensation, by any agency of the State of South Dakota or of the Federal Government, or by the tribe itself." 2/

In August 1991, the Tribe notified BIA that it was considering several amendments to its constitution, including one which would revise Article VIII, section 1, to read:

ALLOTTED LANDS. -- Allotted lands, including heirship lands, within the Cheyenne River Reservation shall continue to be held as heretofore by their present owners. Such lands may be condemned by the Tribe. It is recognized that under existing law such lands may be inherited by heirs of the present owner, whether or not they are members of the Cheyenne River Sioux Tribe, and it is recognized that under existing law, the owners of allotted land may sell or transfer their land to the Tribe or other Indians while the land remains in trust status, but may only sell the land to non-Indians if the Secretary of the Interior, in his discretion, removes the restrictions upon alienation of the land.

The Tribe requested advance review of the draft amendments by BIA and the Field Solicitor's Office, Twin Cities.

The initial review by the Field Solicitor's Office produced no objection to the draft amendment to Article VIII, section 1. See September 6, 1991, Letter from Attorney, Field Solicitor's Office, to Area Director. However, in January 1992, the Tribe submitted its formal request for a

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2/ Article VIII, section 1, provides in its entirety:

"Allotted lands. - Allotted lands, including heirship lands, within the Cheyenne River Reservation shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of South Dakota or of the Federal Government, or by the tribe itself. It is further recognized that under existing law such lands may be inherited by the heirs of the present owner, whether or not they are members of the Cheyenne River Sioux Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold.

"The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in this constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Cheyenne River Sioux Tribe either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided."

constitutional election, and BIA sought further comments from the Field Solicitor. This time, a different attorney responded, stating in part:

The Constitution and Bylaws of the Cheyenne River Sioux Tribe, Article VIII, Section 1, currently recognizes state and federal authority to condemn allotted lands on the reservation. State authority to condemn allotted lands on the reservation was expressly granted by Congress at 25 U.S.C. § 357. Federal authority to condemn allotted lands is found at 25 U.S.C. § 465. The Tribe may not alter state or federal authority by amending [its] constitution. Further, even though the Tribe's constitution currently acknowledges tribal \* \* \* authority to condemn allotted land, the Solicitor has opined that Indian tribes are without authority to condemn trust lands. See Memorandum of the Solicitor to the Assistant Secretary - Indian Affairs, "Tribal Condemnation of Purchased Trust Lands on the Fort Berthold Reservation" (October 18, 1979). \* \* \* Thus, to the extent that the proposed amendment includes tribal authority to condemn trust lands, it is not approvable.

(Jan. 30, 1992, Letter from Attorney, Field Solicitor's Office, to Area Director).

By memorandum of April 14, 1992, the Area Director authorized the Superintendent to conduct an election under 25 CFR Part 81 for the purpose of voting on the proposed amendments. <sup>2/</sup> The Area Director noted, however, that the amendment to Article VIII, section 1, might be disapproved if adopted at the tribal election.

The election was held on June 23, 1992. The proposed amendment to Article VIII, section 1, was included on the ballot as Amendment G. The ballot stated: "Purpose of proposed AMENDMENT G is to clarify that the Tribe is the appropriate governmental authority to exercise the power of condemnation concerning Indian lands within the reservation." All proposed amendments, including Amendment G, were adopted at the tribal election. They were presented to BIA for approval, and all except Amendment G were approved and returned to the Tribe on July 17, 1992.

By letter of August 7, 1992, the Area Director informed the Tribe that Amendment G could not be approved. The Area Director based his decision on the January 30, 1992, letter from the Field Solicitor's Office.

The Tribe's notice of appeal from this decision was received by the Board on September 9, 1992. Both the Tribe and the Area Director filed briefs.

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<sup>3/</sup> 25 CFR Part 81, "Tribal Reorganization under a Federal Statute," governs, inter alia, elections for the purpose of amending a constitution adopted under the IRA.

Discussion and Conclusions

As amended in 1988, 4/ section 16 of the IRA, 25 U.S.C. § 476, provides:

(a) Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

\* \* \* \* \*

(c) (1) The Secretary shall call and hold an election as required by subsection (a) of this section—

\* \* \* \* \*

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall

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4/ Act of Nov. 1, 1988, P.L. 100-581, 102 Stat. 2938, § 101.

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.

Section 102 of the 1988 Act, 25 U.S.C. § 476 note, provides:

For the purpose of this Act, the term--

(1) "applicable laws" means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts.

The Tribe contends that its amendment is not contrary to applicable laws and therefore should have been approved by the Area Director. It first argues that there is nothing in applicable law which requires the Tribe to maintain an explicit recognition of State and Federal condemnation authority in its constitution.

The Field Solicitor's letter stated that the Tribe could not alter State or Federal authority by amending its constitution, and this statement was quoted by the Area Director in his disapproval letter. It appears likely that the statement in the Field Solicitor's letter was intended only to mean that State and Federal condemnation authority, which derive from Federal law, would continue to exist even if specific reference to such authority were removed from the Tribe's constitution. In any case, the Area Director does not contend before the Board that the Tribe is required to acknowledge State and Federal condemnation authority in its constitution.

The Board agrees with the Tribe that no applicable law requires the Tribe's constitution to include an explicit acknowledgment of State and Federal condemnation authority. To the extent the Area Director may have intended to impose such a requirement, the Board finds his decision to be in error.

With respect to tribal condemnation authority, the Tribe first contends that, since the Tribe's present constitution authorizes tribal condemnation of allotted land, there would be no change to the constitution in this regard. Thus, it continues, the question of whether tribes have authority to condemn allotted land is irrelevant to the question of whether the amendment may be disapproved. Further, the Tribe contends, the 1979 Solicitor's Memorandum is not an "applicable law" as defined in the 1988 Act and is wrong on the law as well.

The Area Director, noting that the Department's legal position has changed since the Tribe's original constitution was approved, argues that Amendment G must be reviewed under present applicable law. He argues further that BIA is bound to follow the legal advice of the Solicitor's Office as to what constitutes "applicable law."

When the condemnation provision in the Tribe's 1935 constitution was approved, the Department's legal opinion was that tribes organized under the IRA had the power to condemn restricted lands of their members. This view was expressed in Solicitor's Opinion M-27810 (Dec. 13, 1934), 1 Op. Sol. on Indian Affairs 484, 489-91. In that opinion, the Solicitor concluded that the tribal power of eminent domain over such lands was confirmed in section 4 of the IRA, 25 U.S.C. § 464, although qualified by a requirement of Secretarial approval. <sup>5/</sup>

The Department's 1934 opinion was explicitly overruled, as to this issue, in the October 18, 1979, Solicitor's Memorandum cited by the Field Solicitor (1979 Memorandum at 8). The 1979 Memorandum stated that, "[b]ecause of the [General] Allotment Act prohibitions against involuntary alienation, [<sup>6/</sup>] powers vested by existing law in Indian tribes at the time of passage of the (IRA) did not include the power to condemn allotted land. Nor was the power granted to tribal governments under [25 U.S.C. § 476]." <sup>7/</sup> Id. at 7. The memorandum concluded that "the tribal court of the Three Affiliated Tribes [of the Fort Berthold Reservation] has no power to order the condemnation of individually owned trust property of tribal members." Id. at 13.

In 1981, the United States Court of Appeals for the Eighth Circuit held that the Fort Berthold tribal court lacked the power to condemn a right-of-way over individually owned trust land. The court stated:

If the power of the Tribe to condemn exists, suit must proceed in federal court and the United States must be joined as a party. As a prerequisite to such suit, if it can be shown that the Secretary of the Interior has consented to the acquisition of the land, then the federal court would have to decide the question we

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<sup>5/</sup> 25 U.S.C. § 464 provides that restricted Indian lands "may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands \* \* \* are located."

<sup>6/</sup> See 25 U.S.C. § 348.

<sup>7/</sup> The relevant portion of section 476 is now found in subsection 476(e):

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments."

reserve here: whether the tribal government possesses the power of eminent domain and may sue the United States in federal court.

Fredericks v. Mandel, 650 F.2d 144, 147 (8th Cir. 1981). The court noted that it found the 1979 Solicitor's Memorandum persuasive but declined to rule on "the effect of the IRA provisions on the [General Allotment Act]." 650 F.2d at 146 n.6. 8/

The Cheyenne River Reservation is located within the jurisdiction of the Court of Appeals for the Eighth Circuit. The Tribe is therefore bound by the decision in Fredericks, which is, accordingly, an "applicable law" within the meaning of 25 U.S.C. § 476. It is thus clear that the Tribe cannot condemn allotted land in tribal court. It is also apparent that the Tribe would face serious obstacles in seeking to condemn such lands in Federal court. Nevertheless, as far as the Eighth Circuit is concerned, the possibility of tribal condemnations is not completely foreclosed.

The 1979 Solicitor's Memorandum does not recognize the possibility of tribal condemnations in any forum. 9/ The Tribe argues that the memorandum is not an "applicable law" within the meaning of section 476. The Board agrees that the memorandum, per se, is not such an "applicable law." However, under the analysis in the memorandum, it is a Federal statute, i.e., the General Allotment Act, which prohibits tribal condemnation of allotted land. The Board construes the Area Director's decision as having incorporated the analysis in the 1979 memorandum and, accordingly, as having concluded that it was a Federal statute, clearly an "applicable law," which required disapproval of the amendment.

The Board must consider whether, even given the legal view of the Solicitor, disapproval of Amendment G was required in this case. In considering this question, the Board takes into account the Federal Government's commitment to tribal self-determination, a commitment reflected in the 1988 amendment to the IRA, in the IRA as originally enacted, and in intervening legislation. See, e.g., Indian Self-Determination Act of 1975, as amended, 25 U.S.C. §§ 450-450n. The Board has held that this commitment requires BIA to undertake the review of tribal ordinances, where review is

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8/ At another point, the court noted that 25 U.S.C. § 357 "does not distinguish between Indian and non-Indian condemnors," thus seeming to suggest the possibility that tribal condemnations might be pursued under that statutory provision. 650 F.2d at 145 n.2.

25 U.S.C. § 357 provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

9/ The memorandum does not specifically address the possibility of tribal condemnations in Federal court. For purposes of this decision, the Board assumes that the Solicitor did not deem tribes to have the authority to condemn allotted land in Federal court.

required by a tribe's constitution, in such a way as to avoid unnecessary interference with tribal self-government. Ute Indian Tribe v. Phoenix Area Director, 21 IBIA 24 (1991).

[1] Review of IRA constitutions and amendments, even though required by statute, is an intrusion into tribal self-government. The 1988 amendment to 25 U.S.C. § 476 indicates that Congress intended to minimize that intrusion. Prior to 1988, there were no statutory limitations upon the Secretary's power to disapprove IRA constitutions and amendments. In 1988, Congress not only imposed stringent time limits on the Secretary's review procedures but, more relevant here, explicitly narrowed the Secretary's disapproval authority to cases where he finds the tribal document to be contrary to applicable law. The Board concludes that, in reviewing IRA constitutions or amendments, BIA must, as it must when it reviews ordinances, seek to avoid unnecessary interference with tribal self-government.

One way in which the Tribe's right to self-determination may be respected in this case, without running afoul of the Solicitor's Memorandum, is to view the approval/disapproval action as applicable only to the actual change made to the Tribe's existing constitutional provision concerning condemnation. The effect of the amendment, the Tribe argues, is simply to remove unnecessary references to state and Federal condemnation authority. Indeed, it is apparent that, regardless of whether or not Amendment G is approved, the Tribe's constitution will include a provision stating that the Tribe is authorized to condemn allotted land. Under the suggested analysis, the Secretary, in acting on the amendment, would neither approve nor disapprove the pre-existing assertion of tribal condemnation authority. This approach keeps BIA's interference into tribal self-government at a minimum while allowing BIA to avoid approving a provision which is in conflict with the Department's current legal position. It seems clear that, when the analysis is conducted from this perspective, there is nothing in Amendment G which would warrant disapproval.

Other factors are also relevant. The Tribe's condemnation authority, while it is specifically made applicable to allotted land by Article VIII, section 1, actually derives from Article IV, Powers of Self-Government, which provides in relevant part:

Section 1. The tribal council of the Cheyenne River Reservation shall exercise the following powers vested in the present council under existing laws or conferred by the act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached bylaws.

\* \* \* \* \*

(1) To purchase under condemnation proceedings, land or other property needed for public purposes, subject to the approval of the Secretary of the Interior. [Emphasis added.]

The Tribe's constitution thus places explicit limits on the exercise of its powers of self-government, including the power of condemnation, corresponding to the limitations imposed by Federal statute.

It is also significant that no Federal statute or Federal court decision explicitly prohibits tribal condemnation of allotted land. The relevant statutes have been the subject of two completely contradictory interpretations by the Solicitor, demonstrating that their proper construction is not so clear as to be beyond dispute. <sup>10/</sup> Especially in light of the self-limiting language discussed in the previous paragraph, a lack of absolute legal certainty as to tribal condemnation authority should weigh in favor of approval of the amendment.

Also worthy of consideration is the fact that, under Fredericks v. Mandel, the Tribe must go to Federal court to condemn allotted land, must join the United States as a party, and must obtain the consent of the Secretary. Thus, tribal condemnation authority, if it exists, is subject to extensive safeguards against the possibility that the Federal trust responsibility for allotted lands will be compromised. The fact that such safeguards exist does not, of course, establish that the Tribe actually possesses the condemnation authority it asserts. It does, however, mean that any potential damage resulting from the Tribe's exercise of its possibly non-existent authority would be minimal.

Under the circumstances described, where the Tribe's constitutional amendment is subject to a construction which would avoid a conflict with the Solicitor's Memorandum, and where there is not at present a definitive ruling in Federal court that the Tribe lacks authority to condemn allotted land, the Board concludes that BIA's duty to respect tribal self-government requires that it approve the amendment.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's August 7, 1992, decision is reversed, this matter is remanded to him, and he is directed to approve Amendment G to the Tribe's constitution.

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Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

<sup>10/</sup> This fact distinguishes the present case from that addressed in White Mountain Apache Tribe v. Acting Phoenix Area Director, 21 IBIA 151 (1992). It was clear in that case that the tribal ordinance at issue purported to authorize certain forms of gaming in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.