



INTERIOR BOARD OF INDIAN APPEALS

Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs

24 IBIA 92 (07/08/1993)



# United States Department of the Interior

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

OTTAWA INDIAN TRIBE OF OKLAHOMA

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-6-A

Decided July 8, 1993

Appeal from the denial of a request to transfer judgment funds from an educational loan program to a burial fund.

Affirmed in part, reversed in part, and remanded.

1. Indians: Judgment Funds

Use and distribution of funds awarded to an Indian tribe by the Indian Claims Commission or the United States Court of Federal Claims is governed by the provisions of the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408, which *inter alia*, requires the Secretary of the Interior to submit to Congress a plan for the use and distribution of the funds awarded.

2. Indians: Tribal Powers: Self-Determination

When statutorily required review of tribal decisions by the Department of the Interior constitutes an intrusion into tribal self-government, the Department should undertake that review in such a way as to avoid unnecessary interference with tribal self-government.

APPEARANCES: Charles Dawes, its Chief, for appellant; Dennis Springwater, Acting Muskogee Area Director, Bureau of Indian Affairs, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Ottawa Indian Tribe of Oklahoma (Tribe) seeks review of an August 13, 1992, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), denying a request to transfer funds awarded by the Indian Claims Commission (Commission) <sup>1/</sup> from an educational loan

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<sup>1/</sup> The jurisdiction of the former Indian Claims Commission was transferred to the United States Court of Federal Claims. For ease of reference, the Board will use the term "Commission" to refer to either entity.

program to a burial fund. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part, and reverses it in part. The matter is remanded to the Area Director for implementation of this decision.

### Background

The Tribe filed five claims with the Commission. During 1978 and 1979, the Commission awarded the Tribe a total of \$2,958,627.97 in Docket Nos. 133-A, 133-B, 133-C, 302, and 338. Money for the awards was appropriated by Congress, and the funds were deposited in the United States Treasury for distribution to the Tribe in accordance with the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408 (Distribution Act). <sup>2/</sup> Regulations implementing the Distribution Act are presently found in 25 CFR Part 87. <sup>3/</sup>

Pursuant to 25 U.S.C. § 1402, on March 11, 1983, the Secretary of the Interior (Secretary) submitted to Congress a proposed plan for the use and distribution of the funds awarded to the Tribe. The proposed plan became effective on June 14, 1983, and was published in the Federal Register on September 7, 1983. 48 FR 40442. The plan provided that 80 percent of the amount awarded would be distributed to the tribal members as a per capita payment. The remaining 20 percent was to

be utilized, subject to the approval of the Secretary, as follows:

- (a) Sixteen (16) percent for land purchase and improvements on, and/or to, such land.
- (b) Eight (8) percent for educational purposes.
- (c) Eight (8) percent for the upkeep, including maintenance, equipment and expansion of the Tribal Cemetery.
- (d) Five (5) percent for office building improvement.
- (e) Sixty-three (63) percent to be invested by the Secretary pursuant to the Act of June 24, 1938, 25 U.S.C. 162a. The interest and investment income accrued shall be utilized for the Tribe's governmental operations.

(48 FR at 40443).

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<sup>2/</sup> Unless otherwise stated, all further references to the United States Code are to the 1988 edition and its Supplements.

<sup>3/</sup> These regulations were promulgated in 1974. 39 FR 1835 (Jan. 15, 1974). Except for amendments to 25 CFR 87.10, dealing with per capita distributions, the regulations have not been amended to reflect amendments to the Distribution Act. Consequently, there are discrepancies between the regulations and the Act. To the extent that these discrepancies may have a bearing in this case, the Distribution Act is controlling.

By letter dated July 16, 1992, the Tribe informed the Miami Agency Superintendent, BIA (Superintendent), that it wished to change the allocation of a portion of the 20 percent of the award that was set aside for tribal purposes. The Tribe indicated that only nine loans had been made to tribal members from the funds set aside for educational purposes, and that only four of those loans were paid back timely, leaving a default rate of approximately 56 percent. It further indicated that its Business Committee had examined alternative uses of these funds, including possible methods of collecting outstanding loans, and had determined that a self-insured burial or death benefit was the preferable alternative. The Tribe stated that information concerning this alternative was published in the tribal newsletter before the proposal was presented to the General Council, and that the General Council voted unanimously in favor of the change.

On August 7, 1992, the Superintendent forwarded information concerning the Tribe's request to the Area Director with the recommendation that the funds be transferred.

By memorandum dated August 18, 1992, the Area Director responded to the Tribe's request. This memorandum was forwarded to the Tribe by the Superintendent on August 26, 1992. 4/ The Area Director noted that the regulations developed by the Tribe for the burial benefit provided that \$500 would be provided for the burial of tribal members, their spouses, and adopted children, even though spouses and adopted children might not be members of the Tribe by blood. 5/ The Area Director stated:

4/ Under 25 CFR 2.7(a), a BIA official making a decision is required to provide written notice of that decision to the interested parties. The Board has discouraged the practice under which a BIA Area Director provides his decision to the Superintendent, who then forwards the decision to the interested parties. This practice results in delays in informing parties of decisions and frequently causes confusion over the proper person to whom an appeal should be taken and the time for filing an appeal. See Leon v. Albuquerque Area Director, 23 IBIA 248, 253 n.7 (1993); Nix v. Acting Sacramento Area Director, 21 IBIA 42, 43 n.2 (1991); Parisian v. Acting Billings Area Director, 19 IBIA 109, 110 (1990).

5/ The rules and regulations for the administration of the Ottawa Burial Fund provide:

"I. PURPOSE

"The purpose of this fund is to provide a stipend of \$500.00 in memory of the departed tribal member or spouse.

\* \* \* \* \*

"IV. ELIGIBILITY

"Only enrolled members of the Ottawa Tribe, their infant children under one year of age who have not yet been enrolled and their legally married spouse are eligible. \* \* \*

\* \* \* \* \*

"VI. SUPPORTING DOCUMENTS

"1. Application for the Death Benefit for an enrolled member of the Ottawa Tribe must be accompanied by the Death Certificate and the deceased member's roll number. \* \* \*

The only individuals who can benefit from the program funds are those individuals who are enrolled members of the tribe or who, except for death, would have been eligible for enrollment. \* \* \* All correspondence and legislation pertaining to the subject judgment award authorized the funds to be utilized by the [Tribe] for the benefit of the tribal members. Pursuant to the tribe's constitution and bylaws, only those individuals who meet the requirements of Article III are eligible for membership with the [Tribe. 6/] We could find nothing that would even slightly indicate that nonenrolled tribal members could participate in the per capita payment or program funds derived from the subject dockets. If the tribe is releasing judgment funds for individuals who are not enrolled or eligible to be enrolled, then those funds have to be returned to the proper appropriation.

The programming aspect of the approved plan provided that eight (8) percent of the twenty (20) percent of the judgment funds would be utilized for the upkeep, including maintenance, equipment and expansion of the tribal cemetery. The Ottawa Tribal Business [Council] may want to adopt an ordinance which would provide that

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fn. 5 (continued)

“2 . An application for the death benefit for a spouse who is not a member of the Ottawa Tribe must be accompanied by a copy of the Death Certificate. In addition the Business Committee may require a copy of the Marriage License. \* \* \*

“3. An application for the Death Benefit for an adopted child who is not a member of the Ottawa Tribe must be accompanied by a copy of the Death Certificate, the Ottawa parent's roll number, and a copy of the Adoption papers, showing that the child was legally adopted by the tribal member.”

6/ Article III provides:

“Section 1. The membership of the Ottawa Tribe of Oklahoma shall consist of the following persons:

“(a) All persons of Indian blood whose names appear on the official roll of the tribe as of August 3, 1956, and/or the official Census Roll of January 1, 1940.

“(b) All children born since the date of the said roll, both of whose parents are members of the tribe.

“(c) Any child born to a member of the Ottawa Tribe and a member of any other Indian tribe whose parents choose to enroll said child with the Ottawa Tribe.

“(d) Any child born to a member of the Ottawa Tribe and any other person may be admitted to membership by a majority vote of the Ottawa Council.

“Sec. 2. The council shall have the power to prescribe rules and regulations, subject to the approval of the Secretary of the Interior, covering future membership including adoptions and loss of membership.

“Sec. 3. No member of another tribe shall be eligible for membership in the Ottawa Tribe of Oklahoma.”

Tribal Ordinance No. 1 further specifies membership criteria. Section 3, which concerns the enrollment of adopted children, repeats the membership criteria established in section 1 (a)-(d) of the constitution.

\$500 would be paid to the family member that was responsible for the burial expense and the upkeep and maintenance of the gravesite for the Ottawa Tribal member who was buried in the Ottawa Cemetery. This payment would be made from the burial appropriation (2617) and would cover only those tribal members who died after the burial assistance ordinance became effective.

Any plan to transfer funds from one appropriation to another would have to go before Congress. If Congress does not adopt a resolution objecting to the plan, it would become effective in sixty (60) days.

The Board received appellant's notice of appeal from this decision on September 25, 1992. The Area Director filed a statement in support of his decision with the administrative record. <sup>7/</sup> Appellant filed a brief in which it responded to the Area Director's statement.

#### Discussion and Conclusions

The Tribe contends that its General Council is "the sole determining body as to what is the best use of the twenty (20%) percent Set Aside Funds" (Opening Brief at 1). The Tribe argues that it, not the Secretary, was responsible for formulating the original plan, and that its General Council "is the only entity who can make a change in the use and distribution of these funds." *Id.* at 3. Although the Tribe may be correct that it is the only entity that has the right to initiate a change in the use of the set aside funds, its argument overlooks the fact that distribution of its judgment funds is governed by Federal legislation, namely, the Distribution Act.

25 U.S.C. § 1401(a) provides:

Notwithstanding any other law, all use or distribution of funds appropriated in satisfaction of a judgment of the [Commission] in favor of any Indian tribe, band, group, pueblo, or community \* \* \*, together with any investment income earned thereon, after payment of attorney fees and litigation expenses, shall be made pursuant to the provisions of this chapter.

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<sup>7/</sup> The Board has also discouraged this practice. Although here the Area Director's statement showed that a copy was sent to appellant, such statements are frequently not sent to the interested parties, and therefore constitute prohibited *ex parte* communications under 43 CFR 4.27(b). The Board attempts to ensure that all such statements are sent to the interested parties, but inevitably, some are overlooked. The briefing procedures in matters pending before the Board are set forth in 43 CFR 4.311, and are recited in the notice of docketing issued in every case. These procedures were developed to ensure that all parties, including the Department, receive due process.

Section 1403 requires the Secretary, after consulting with the tribes and/or individuals entitled to receive judgment funds and after holding a public hearing, to prepare a plan for the use and distribution of funds awarded by the Commission. Sections 1402 and 1404 require the Secretary to submit that plan, with supporting information, to Congress. As amended, section 1405 provides that the plan shall take effect 60 days later "unless a joint resolution is enacted [by Congress] disapproving such plan."

As stated in the House Report on the original bill, the purpose of the Distribution Act was "to provide for the use or distribution of Indian judgment funds appropriated in satisfaction of awards of the [Commission] without further legislation." H.R. Rep. No. 377, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S. Code Cong. & Admin. News at 2311, 2312. The report continues:

Funds appropriated to satisfy judgments of the [Commission] on behalf of Indian plaintiffs are deposited in the United States Treasury to the credit of the plaintiff tribe. Prior to 1960, under an opinion of the Interior Solicitor, these funds were distributed by the Secretary without further Congressional action. [8/]

Since 1960, each Interior Department Appropriation Act has included the following proviso:

Provided further, That nothing in this paragraph or in any other provision of law shall be construed to authorize the expenditure of funds derived from appropriations in satisfaction of awards of the [Commission,] ... until after legislation has been enacted that sets forth the purposes for which said funds will be used ....

In nearly twelve years of experience with the procedure, certain accepted guidelines and patterns for distribution of Indian judgment funds have been established. In addition, enactment of separate legislation for each award has imposed a severe burden upon the time and efforts of Members of the Committee on Interior and Insular Affairs, preventing the Committee from considering many of the more substantive, pressing issues in Indian affairs. \* \* \*

The bill is designed to delegate much of the function of the Congress in this respect to the Secretary while maintaining ample Congressional oversight.  
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8/ The Board has been unable to identify the Solicitor's Opinion mentioned.

[The Distribution Act] directs the Secretary \* \* \* to prepare and submit to the Congress a plan for the distribution of funds awarded to any Indian tribe by judgment of the [Commission] \* \* \*. The [Distribution Act] establishes guidelines, procedures, and factors which the Secretary must take into consideration in preparing such plan, including active consultation with affected Indian tribes and individuals.

The Congress has a sixty-day period to review the plan. If neither House of the Congress passes a resolution disapproving such plan within the sixty-day period, it becomes effective and the Secretary is directed to make distribution in accordance therewith. [9/]

The legislative history clearly shows that Congress intended that it would be involved in decisions concerning the use and distribution of

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9/ As originally enacted and as discussed in this report, section 1405 provided for a “one-House veto” of the plan. The section was amended in January 1983 to provide for the present “two-House veto.” Senate Report No. 658, 97th Cong., 2nd Sess. (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 4409, 4412, states that the section was amended to “eliminate[] the ‘One-House veto’ provision to which the Executive objects.”

As part of the Executive Branch of Government, the Board does not have authority to declare an act of Congress unconstitutional. That authority is reserved to the Judicial Branch. See, e.g. Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 928 (1983); Estate of Josephine Ruth Bergeron Whitaker, 23 IBIA 147 (1993), and cases cited therein; Reindeer Herders Association v. Juneau Area Director, 23 IBIA 28, 48, 99 I.D. 219, 229 (1992). The Board believes, however, that it has a responsibility to note the state of the law concerning legislative vetos.

In Chadha, the Supreme Court held a “one-House veto” to be unconstitutional as violative of both the bicameral requirement of Art. I, §§ 1 and 7, of the United States Constitution (legislative action is to be taken by a two-House Congress), and the presentment clause of Art. I, § 7, cl. 3 (bills approved by both Houses of Congress shall be presented to the President before becoming law).

In Consumers Union of the United States, Inc. v. Federal Trade Commission, 691 F.2d 575 (D.C. Cir. 1982), a “two-House veto” provision was held unconstitutional. Although the grounds upon which the Circuit Court found the provision unconstitutional were slightly different than those relied upon in Chadha, the Supreme Court summarily affirmed the decision. United States Senate v. Federal Trade Commission and United States House of Representatives v. Federal Trade Commission, 463 U.S. 1216 (1983). In Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987), the Supreme Court established guidelines for determining whether a legislative veto provision could be severed from the remainder of the legislation. The Court stated that “the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.” 480 U.S. at 685.

judgment funds. At no time did Congress leave such decisions within the sole discretion of the tribe receiving the award, and, since 1960, Congress removed any question as to whether the decisions were within the discretion of the Secretary. Rather, under present law, a plan for the use and distribution of funds awarded by the Commission is to be developed by the Secretary, after consultation with the affected tribe(s), and presented to Congress. The Board cannot accept the argument that the Tribe is the sole entity with authority to determine how it will use the Commission's award.

Neither the Distribution Act nor the implementing regulations specifically address modifications to an approved plan. However, the Distribution Act provides that "all use and distribution of funds appropriated" to satisfy a judgment of the Commission must be in accordance with its provisions. See 25 U.S.C. § 1401(a) (emphasis added). The Board finds the conclusion inescapable that, if such a plan can be modified., it cannot be modified without adherence to all of the requirements of the Distribution Act, including the requirements of a Secretarial hearing and Congressional review. Accordingly, it holds that the Tribe's proposed amendment to its distribution plan cannot be approved without following all of the procedures established in 25 U.S.C. §§ 1402-1405. 10/

The Secretary is charged with the responsibility for ensuring the legality and appropriateness of a tribe's plan before submitting the plan to Congress. See 25 U.S.C. § 1403. The Area Director objects to the Tribe's burial plan proposal because he contends that the plan's implementing regulations allow judgment funds to be used for the benefit of persons who are not enrolled tribal members. The Area Director states that he has information that the Tribe is enrolling children adopted by tribal members whether

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10/ In *Prairie Band of Potawatomi Indians v. Acting Anadarko Area Director*, 17 IBIA 97 (1989), the Board implicitly upheld the right of that tribe to modify the use of the tribal program portion of its judgment fund distribution plan. The plan approved for the Prairie Band of Potawatomi Indians under the Distribution Act provided:

"Section 5. Prairie Band Potawatomi of Kansas. The funds for the programming 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. Such plans as proposed by the tribal council shall be brought before the General Council 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 40567, 40568 (Sept. 8, 1933)). In contrast to the approved plan under review in the present appeal, the plan for the Prairie Band of Potawatomi Indians specifically provided that, with the approval only of the Secretary, the Band could reprogram the 20 percent set-aside funds.

or not the adopted children meet the enrollment criteria established in Section III of the Tribe's Constitution and Tribal Ordinance No. 1. The Area Director argues that, although the Tribe has the right to determine its membership for tribal purposes, the Secretary is responsible for ensuring that judgment fund awards are properly distributed.

The Tribe does not contend that non-enrolled members will never receive benefits under the Burial Fund proposal. Rather, it argues that these benefits, which it calls "spillover benefits," are an accepted fact in many programs intended for the benefit of Indians, such as the BIA's Housing Improvement Program, the housing program of the Department of Housing and Urban Development, and the Department of Agriculture's Commodity Food Distribution Program. The Tribe contends that even the Area Director's proposed alternative plan would still benefit non-enrolled spouses and other dependents. <sup>11/</sup> The Tribe argues, however, that, whether an enrolled member is the decedent or the survivor, the enrolled member still benefits from the Burial Fund program.

As quoted supra in footnote 5, the rules and regulations developed by the Tribe for implementation of the burial fund program state that the program's purpose "is to provide a stipend of \$500.00 in memory of the departed tribal member or spouse." (Emphasis added.) This statement of the program's purpose suggests that the program was originally envisioned as benefitting the decedent, not the survivors.

The Area Director's proposal would provide funds only when the decedent was a tribal member, and is, therefore, consistent with the purpose statement in the rules. The Tribe's explanation of the program on appeal moves away from the statement of purpose in the rules by contending that the financial burden of a death is an additional reason for the program. The Tribe thus suggests that the beneficiaries of the program may be the decedent, the survivors, or both.

[2] In other contexts, the Board has cited the Federal Government's commitment to tribal sovereignty in holding that the Department should "seek to avoid unnecessary interference with tribal self-government" when exercising review functions which intrude into the area of self-government. Cheyenne River Sioux Tribe v. Aberdeen Area Director, 24 IBIA 55, 62 (1993). See also Wheeler v. U.S. Department of the Interior, 811 F.2d 549, 553 (10th Cir. 1987); Ute Indian Tribe v. Phoenix Area Director, 21 IBIA 24 (1991). Even though the Department is required to review a particular tribal determination, it should tailor its decision so as to be as unintrusive as possible.

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<sup>11/</sup> As quoted supra, the Area Director's suggested alternative called for "provid[ing] that \$500 would be paid to the family member that was responsible for the burial expense and the upkeep and maintenance of the gravesite for the Ottawa Tribal member who was buried in the Ottawa Cemetery."

Although the Distribution Act may not be totally compatible with the present Federal policy of respect for tribal sovereignty and self-determination, the Department cannot ignore that policy in implementing the statute. Therefore, as in other instances in which the Department's legitimate review functions intrude into the area of self-government, the Department's review here should be as unintrusive as possible.

The Board finds that the Tribe's explanation of its Burial Fund program on appeal shows that, whether or not the decedent is an enrolled tribal member, one or more enrolled tribal members can be considered beneficiaries under the program. Although the Department might not totally agree with this determination, or even with the Tribe's decision to alter its approved plan, the Tribe should be allowed to request that its approved plan be modified in accordance with its wishes unless the requested modification is clearly illegal or otherwise impermissible under the Distribution Act. The Board finds that the Tribe's Burial Fund program proposal, as explained during this appeal, is not clearly illegal or otherwise impermissible under section 1403. The explanation on appeal, however, is not consistent with the statement of purpose in the rules and regulations for implementing the proposal. The purpose statement must, therefore, be revised to reflect the explanation/expansion which the Tribe has set forth on appeal. If so modified, the proposal is a sufficient basis for the Secretary to initiate the procedures in 25 U.S.C. §§ 1403-1404. 12/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's August 18, 1992, decision is affirmed in part, and reversed in

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12/ Section 1403 was amended in 1983. The section now provides:

"(b) In preparing a plan for the use and distribution of the funds of each Indian judgment, the Secretary shall, among other things, be assured that--

"(5) a significant portion of such 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: Provided, That in the development of such plan the Secretary shall survey past and present plans of the tribe for economic development, shall consider long range benefits which might accrue to the tribe from such plans, and shall encourage programing of funds for economic development purposes where appropriate."

It appears that this section requires the Secretary at least to consider whether the funds which the Tribe seeks to reprogram could beneficially be used for economic development purposes.

part. This matter is remanded to the Area Director for implementation of this decision.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge