INTERIOR BOARD OF INDIAN APPEALS

Nez Perce Tribe v. Northwest Regional Director, Bureau of Indian Affairs

36 IBIA 237 (07/30/2001)

United States Department of the Interior

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

NEZ PERCE TRIBE
v.
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 01-136-A Decided July 30, 2001

Referred to the Assistant Secretary - Indian Affairs.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   The consultation policy statements at issue in this appeal do not contain any standards by which to review whether the Bureau of Indian Affairs has "properly" consulted with an Indian tribe over a matter affecting that tribe.

APPEARANCES: Richard K. Eichstaedt, Esq., Lapwai, Idaho, for Appellant; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Regional Director; Eric Van Orden, Esq., Plummer, Idaho, for Intervenor.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Nez Perce Tribe seeks review of a May 2, 2001, decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning funding for the Northern Idaho Agency, BIA, and the Coeur d'Alene Field Office, BIA. For the reasons discussed below, the Board of Indian Appeals (Board) refers this matter to the Assistant Secretary - Indian Affairs under 43 C.F.R. § 4.337(b).

Factual Background

The Northern Idaho Agency is located in Lapwai, Idaho, on Appellant's reservation. The Agency previously served three tribes--the Kootenai Tribe of Idaho, Appellant, and the Coeur d'Alene Tribe (Intervenor). In 1992, BIA established a field office in Plummer, Idaho, on Intervenor's reservation, which served only Intervenor. The Plummer Field Representative reported to the Northwest Regional Office through the Northern Idaho Agency. Funding for the Plummer Field Office remained at the Northern Idaho Agency. In 1996, the Kootenai Tribe entered into the Self-Governance program and ceased receiving services from the Agency.

By letter dated July 27, 2000, Intervenor requested that the Plummer Field Representative be taken out from under the Northern Idaho Agency and placed directly under the Northwest Regional Office. 1/ The Regional Director's decision to make the organizational change is embodied in the May 2, 2001, letter that is the subject of this appeal.

Procedural Background

Appellant filed its notice of appeal on May 31, 2001. On June 18, 2001, the Board received a motion from Intervenor seeking to intervene in this proceeding. The Board gave other parties an opportunity to comment on the motion. No responses were received. Therefore, the Board now formally grants the motion to intervene.

After receiving and reviewing the administrative record, the Board questioned whether it had jurisdiction to review this matter because it appeared that the appeal involved a discretionary decision. 2/ Therefore, by order dated June 28, 2001, it asked for statements from the parties on the question of whether this appeal should be transferred to the Assistant Secretary - Indian Affairs (Assistant Secretary) under 43 C.F.R. § 4.337(b). 3/

By motion which the Board received on July 23, 2001, Appellant informed the Board that, on May 31, 2001 (the same day it filed its notice of appeal), at least one employee of the Northern Idaho Agency was notified that a reduction in force (RIF) was being conducted at the Agency based upon lack of funds. The employee was informed that the RIF would be effective August 4, 2001. Appellant requested that the Board stay the effectiveness of the RIF. Appellant stated that it had requested the same action from the Regional Director.

1/ It appears from the letter that it merely formalized a request that had been made earlier.

2/ 43 C.F.R. § 4.330 provides:

"(b) Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate:

* * * * * *

"(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

3/ 43 C.F.R. § 4.337(b) provides:

"Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary - Indian Affairs for further consideration."

On July 27, 2001, the Board received responses to its June 28, 2001, order from Appellant, the Regional Director, and Intervenor. The Regional Director and Intervenor contend that the appeal involves an exercise of discretion and should either be dismissed or referred to the Assistant Secretary; Appellant argues that the matter is properly before the Board.

Discussion and Conclusions

Appellant does not directly dispute that the ultimate decision to implement changes in the BIA organizational structure is discretionary. However, it argues that there are legal prerequisites to the exercise of that discretion which the Regional Director failed to follow and which the Board has jurisdiction to review. Specifically, at page 2 of its response to the Board's June 28, 2001, order, Appellant contends that its appeal is based on

> fundamental legal and procedural errors that are subject to review by the Board: (1) the failure of the Regional Director to properly consult with [Appellant]; (2) the failure of the Regional Director to provide any reasons or rationale for the decision or otherwise make a decision supported by the record; and (3) the failure of the Regional Director to follow requirements of the Bureau of Indian Affairs Manual.

Appellant's first allegation of error is based on the asserted failure of the Regional Director to consult properly with Appellant. In support of this allegation, Appellant refers to both Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000), and BIA's December 13, 2000, consultation policy, found at http://www.doi.gov/oait/g2gpolicy.htm (visited July 30, 2001), as well as to court cases which held that prior written consultation policies created a duty to consult with tribes as to issues affecting them. See Klamath Tribes v. United States, 24 Indian Law Rptr. 3017, 3020 (D. Ore. 1996); Lower Brule Sioux Tribe v. Deer, 911 F.Supp. 395, 401 (D.S.D. 1995).

The Regional Director cites other court cases in support of his argument that there is no private right to enforce the consultation policy statements against the Executive Branch. See Air Transport Association v. Federal Aviation Administration, 169 F.3d 1, 8 (D.C. Cir. 1999); Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 575 (9th Cir. 1998); Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Independent Meat Packers Association v. Butz, 526 F.2d 228, 234-36 (8th Cir. 1975). The Regional Director contends that the BIA consultation policy "is internal direction to [BIA] employees and does not create substantive or procedural rights enforceable by Appellant in this proceeding." Regional Director's July 27, 2001, Response at 5.

As Appellant notes, the argument has previously been made to the Board that consultation policy statements create enforceable rights. In Fort Berthold Land and Livestock Association v. Great Plains Regional Director, Bureau of Indian Affairs (Fort Berthold), 35 IBIA 266

(2000), the appellant contended that the Great Plains Regional Director failed in her responsibility to consult with the tribe prior to increasing a grazing rental rate on the Fort Berthold reservation. In addition to several consultation policy statements, the appellant cited Winnebago Tribe of Nebraska v. Babbitt, 915 F.Supp. 157 (D.S.D. 1996), and Lower Brule Sioux Tribe, supra. The Great Plains Regional Director contended that she had no duty to consult because the policy statements did not create an enforceable right. The Board stated:

> In contending that the directives do not create an enforceable duty to consult, the Regional Director misses one very salient point: The Board is not a Federal court, in which Appellant has sought to enforce an Executive Branch directive. Instead, it is part of the Executive Branch agency whose Secretary issued some of the directives under discussion and which directly answers to the President, who issued the remaining directives. While a Federal court may or may not read the various directives as establishing a right enforceable in Federal court, that does not answer the question of whether the Board, which speaks for the Secretary of the Interior, may conclude that consultation was required under the directives.

35 IBIA at 271.

Under the circumstances in Fort Berthold, which included the facts that the administrative record did not show any consultation whatsoever, even though the Regional Director argued that she had consulted with the tribe, and that the decision under review was vacated and remanded on other grounds, the Board suggested that "the Regional Director might wish to reconsider [on remand] whether the position taken in her answer brief is consistent with the Federal policy which was clearly articulated in the Presidential and Secretarial directives." Id.

Despite Appellant's assertion here that the Board held in Fort Berthold that "it may require that the BIA conduct meaningful consultation prior to making a decision that impacts tribes" (Appellant's July 27, 2001, Response at 4), the Board did not address the question of "meaningful consultation," and left open the question of whether it could order BIA to consult with a tribe when there was no evidence that any consultation had occurred.

In the present case, the Regional Director contends that Appellant was consulted, and his contention is supported by the administrative record. Appellant requested and received from the Board copies of those documents in the record which indicated that there was consultation. In its response to the Board's June 28, 2001, order, Appellant stopped short of arguing that no consultation actually occurred. Under these circumstances, any decision on whether the Regional Director erred in consulting with Appellant would turn on the quantity or quality of that consultation.

As previously noted, the Board does not have authority to review decisions committed to BIA's discretion. In determining whether a BIA decision is discretionary, the Board has applied the same standard as have the Federal courts; i.e., it has held that a discretionary decision is one in which there is "no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Griffith v. Acting Portland Area Director, 19 IBIA 15, 17 (1990), and cases cited there.

[1] The Board does not determine whether it has any authority to order BIA to consult with an Indian tribe in regard to a matter affecting that tribe when there is no evidence that any consultation occurred. It does hold that the consultation policy statements at issue here do not contain any standards by which to review whether BIA "properly" consulted with an Indian tribe. Therefore, because there is "no law to apply" in this situation, the Board lacks authority here to review the quantity and quality of BIA consultation.

Appellant also contends that the Regional Director failed to provide reasons for his decision and failed to comply with the requirements of the Bureau of Indian Affairs Manual (BIAM) in regard to the approval of organizational changes. No other party had the opportunity to address these issues because they were mentioned for the first time in Appellant's response to the Board's June 28, 2001, order.

The Regional Director argues generally: "Decisions related to locating, staffing, and funding offices of the Bureau of Indian Affairs are discretionary decisions. See, e.g., Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987). They do not involve the application of regulatory requirements or objective standards." (Regional Director's July 27, 2001, Response at 3). The Regional Director continues: "The decision to reorganize the BIA offices serving tribes in Northern Idaho, and allocate administrative funds between those offices is the epitome of a discretionary decision. It involves the evaluation of how best to accomplish the mission of the BIA and provide services to [Appellant] and [Intervenor]." (Id. at 5).

The Board agrees that BIA organizational decisions are discretionary. Appellant does not contend that they are not. Rather, it argues that there are standards guiding the exercise of that discretion; i.e., the BIAM provisions and the general requirement that a BIA deciding official articulate the reasons for a decision even when that decision is discretionary.

However, as the Board has previously held, it is not a court of general jurisdiction. It does not have authority to review all decisions issued by BIA. Rather, it has jurisdiction to review only those decisions over which the Secretary of the Interior has given it authority. Specifically, it has authority to review decisions issued under 25 C.F.R. Chapter I. See, e.g., Brewer v. Aberdeen Area Director, 29 IBIA 37, 38 (1996); Secrest v. Crow Tribe of Montana, 28 IBIA 98, 98-99 (1995), and cases cited there. Decisions to change BIA's organizational structure are

not made under regulations in 25 C.F.R. Chapter I. Furthermore, this matter has not been referred to the Board by the Secretary or the Assistant Secretary. See Brewer, supra. Therefore, the Board lacks jurisdiction over a decision altering BIA's organizational structure.

One final issue remains--Appellant's request that the Board stay the effectiveness of the RIF action. The Board denies this request. The Board does not have authority to review the underlying reorganization which resulted in the RIF notice. It furthermore does not have authority to review the RIF itself because such authority resides with the Merit Systems Protection Board under 5 C.F.R. Part 1201. 4/ The Board declines to take an action in regard to a matter over which it has no authority.

Under 43 C.F.R. § 4.337(b), the Board can either dismiss this appeal or refer it to the Assistant Secretary. The Board believes that the best course of action here is to refer the case to the Assistant Secretary.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is referred to the Assistant Secretary - Indian Affairs under 43 C.F.R. § 4.337(b) for review of the exercise of discretion committed to the Bureau of Indian Affairs.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

4/ As a side matter, the Board questions whether Appellant would have standing to challenge the RIF or its effective date.