



INTERIOR BOARD OF INDIAN APPEALS

Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director,
Bureau of Indian Affairs

36 IBIA 297 (09/14/2001)



United States Department of the Interior

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

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, Appellant	:	Order Affirming Decision
	:	
	:	
	:	
v.	:	Docket No. IBIA 01-20-A
	:	
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	September 14, 2001

This is an appeal from a September 25, 2000, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), disapproving an amendment to the Constitution of the Turtle Mountain Band of Chippewa Indians (Tribe). For the reasons discussed below, the Board affirms the Regional Director's decision.

On December 21, 1999, the voters of the Tribe approved two proposed amendments to the Tribe's Constitution. On March 22, 2000, the Regional Director approved one of the amendments but disapproved the other. The disapproved amendment would have revised section 7 of Article IX, Powers of the Tribal Council, to read:

To administer any funds within the control of the Band; to make expenditures from available funds for tribal purposes, including salaries and expenses of tribal officials or employees. All expenditures of tribal funds under the control of the Tribal Council shall be authorized by resolution duly enacted by the Tribal Council in legal session and the amounts so expended shall be a matter of public record to the members of the Band at all reasonable times. No Elected Official shall directly administer, award, grant or handout tribally controlled funds to individual tribal members. Any violation of Article IX, Section 7 shall result in immediate removal indefinitely. [Language of amendment underscored.]

The Regional Director disapproved this amendment on the grounds that it would deprive elected officials of their right to due process in violation of 25 U.S.C. § 1302(8). ^{1/}

^{1/} This provision is part of the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302 provides: "No Indian tribe exercising powers of self-government shall) * * * (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

The Tribe appealed the disapproval to the Board. Pursuant to a motion for remand filed jointly by the Tribe and Regional Director, the Board vacated the Regional Director's March 22, 2000, decision and remanded the matter to her for further consideration. Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director, 35 IBIA 76 (2000).

Following remand, the Tribe presented arguments to the Regional Director as to why the amendment should be approved. Those arguments failed to persuade the Regional Director, who again disapproved the amendment, stating: "Because of our continuing concern that this proposed change does not protect the individual's right of due process, as required in the [ICRA], we must disapprove proposed Amendment 1." Regional Director's Sept. 25, 2000, Decision at 1-2.

The Tribe again appealed to the Board, contending: (1) Constitutional law does not mandate that due process be explicitly provided for in the amendment; (2) the Tribal Council and tribal members are aware that due process is required and intend to provide it; (3) the Tribe's Constitution already contains due process procedures; (4) due process will be provided by tribal ordinance; and (5) the Regional Director does not have authority to approve the Tribe's Constitutional amendments because the Tribe is not organized under the Indian Reorganization Act (IRA), 25 U.S.C. § 476.

In support of its first argument, the Tribe cites the impeachment provision of the Constitution of the United States, *i.e.*, Article II, section 4, which provides: "The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The Tribe contends that this provision, which authorizes removal from office, "does not directly reference the due process procedure to be applied." Tribe's Opening Brief at 2. In response, the Regional Director points out that the provision requires conviction before an official may be removed from office. Because conviction necessarily requires a hearing or trial, she contends, due process is specifically provided for in this provision.

The Tribe also cites a provision of its own Constitution, *i.e.*, the last sentence of Article VIII, section 2. This sentence, which was added by a 1997 amendment, reads: "Conviction of a felony is grounds for automatic removal of a district representative or other elected officer." The Regional Director argues that this provision, like the impeachment provision in the United States Constitution, provides due process through the process provided prior to conviction.

The Board rejects the Tribe's characterization of these two provisions as lacking any explicit reference to due process requirements.

The Tribe's third argument is related to its first argument and will be addressed next. In that argument, the Tribe contends that due process is already provided for in Article VIII, section 2, of its Constitution.

Article VIII, section 2, provides:

The Tribal Council shall enact ordinances which shall prescribe regulations, charges, and reasons for removal or recall of a district representative or officer. The grounds for removal, right of petition, and other factors shall be carefully framed to protect the interest of the [Tribe]. Conviction of a felony is grounds for automatic removal of a district representative or other elected officer.

The Regional Director argues that this provision does not overcome the flaw in the present amendment because it provides that the procedures for removal are to be designed to protect the interest of the Tribe, not the due process rights of the individuals being removed from office.

The Board accepts the premise that apparently underlies the Tribe's first and third arguments)) that due process need not be specifically mentioned in the amendment if it is clear from other provisions in the Constitution that due process must be provided with respect to actions taken under the amendment. However, the Board agrees with the Regional Director that the language of Article VIII, section 2, is not clear enough to ensure that due process would apply to removals under the amendment when the amendment calls for "immediate removal indefinitely."

There is another provision in the Tribe's Constitution which, although not cited by the Tribe, is arguably relevant here. That is the introductory language of Article IX: "The Tribal Council shall exercise the following powers, subject to any limitations imposed by this Constitution and Bylaws or the laws and regulations of the Federal Government: * * *." Limitations imposed by Federal law would, of course, include the due process requirements of the ICRA. Therefore, given the intended location of the amendatory language in Article IX, Powers of the Tribal Council, it might be argued that removal of elected officials under the amendment would be such a power and therefore subject to this limitation in the Tribe's Constitution.

However, the Tribe does not make that argument, and the primary provisions of the Tribe's Constitution concerning removal of elected officials appear in Article VIII, Referendum and Recall, rather than in Article IX. In light of the Tribe's silence on this point, the Board is reluctant to assume that the Tribe would construe the removal of elected officials as a power of the Tribal Council, rather than a power of the Tribe as a whole.

The Board finds no explicit guarantee of due process in the Tribe's Constitution that would apply to removals under the amendment. 2/

2/ There is, however, an explicit guarantee for judges subject to impeachment. Article XIV, section 5, provides:

In its second and fourth arguments, the Tribe contends that it is aware of the need to provide due process and intends to do so under an ordinance to be enacted by the Tribal Council. The Regional Director responds:

Such knowledge and intentions are to be commended. However, the review and approval by the BIA is review and approval of the language of the amendment. The BIA, on behalf of the Secretary, must make its determination based upon the face of the amendment, not good intentions or other ordinances or **proposed** ordinances.

Regional Director's Brief at 7.

Clearly, the Regional Director is correct in this regard. Although the Tribe has a draft ordinance, there is no guarantee that the ordinance will be enacted by the present Tribal Council or that, if enacted, it will not be repealed by a future Tribal Council. The Board finds that the Regional Director properly directed her review solely to the language of the amendment itself.

The Tribe's first four arguments all skirt the real problem with the amendment. That problem was identified in the Regional Director's first disapproval letter: "Our concern is with the phrase 'immediate removal indefinitely' * * * because it seems to deprive an elected official of the right to due process." Regional Director's March 22, 2000, decision at 2. The Board shares the Regional Director's concern with this language. The language conveys the clear impression that, despite the due process requirements of the ICRA, and any due process guarantees in the Tribe's Constitution or elsewhere in tribal law, removals under this amendment could be undertaken without reference to those requirements and guarantees. To the extent the amendment purports to make existing due process rights inapplicable to the situation it addresses, it conflicts with the ICRA.

The Tribe's fifth argument is that the Regional Director does not have authority to approve the Tribe's constitutional amendments because the Tribe is not organized under the IRA.

Article XIII, section 1, of the Tribe's Constitution provides: "This Constitution * * * may be amended by a majority of the qualified voters of [the Tribe] at an election called for that purpose; * * * but no amendment shall become effective until it shall have been approved by the Secretary of the Interior or his delegated representative."

fn. 2 (continued)

"(a) All judges of the judicial branch of government shall be subject to impeachment based only upon cause, as developed by the Judicial Board, only after due process of law is provided. The applicable standard shall be clear and convincing evidence."

The Tribe acknowledges the existence of this provision but contends: “[A]lthough the Tribe may have appeared to grant the secretary authority to approve by putting that provision in the constitution, it would only be effective upon the election to organize as an IRA tribe. [3/] The tribe itself cannot grant authority to the secretary.” Tribe’s Opening Brief at 5.

In Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, 17 IBIA 144 (1989), the Board held that tribes may make their ordinances subject to Secretarial approval, even though approval is not required by Federal law. 4/ The same is true with respect to Constitutional amendments. Although the Tribe is not subject to the IRA requirement for Secretarial approval of Constitutional amendments, it has established an approval requirement as a matter of tribal law.

To the extent the Tribe may be arguing that BIA and the Board must defer to the Tribe’s present interpretation of Article XIII, section 1, as ineffective to grant approval authority to the Secretary, the Board rejects that argument. In Fort McDermitt Paiute Shoshone Tribe, the Board stated:

BIA was required to interpret the tribe’s constitution in order to carry out the Department’s ordinance review responsibility under the constitution. In approving the constitution in 1936, the Secretary undertook the responsibility of reviewing tribal ordinances pursuant to the government-to-government relationship with the tribe. The Board holds that the Department has authority to interpret the tribe’s constitution with respect to the ordinance review obligations assumed by the Department.

17 IBIA at 147. The same analysis applies here. Pursuant to the obligations the Secretary assumed in approving the Tribe’s Constitution in 1959, BIA and the Board have authority to interpret Article XIII, section 1, of the Constitution. Under the plain language of that provision, Secretarial approval of the Tribe’s Constitutional amendments is required. Therefore,

3/ This statement is puzzling. The Tribe’s present Constitution was not adopted until 1959, long after the Tribe voted to reject the IRA. (The Tribe’s IRA election under 25 U.S.C. § 478 was held on June 15, 1935. See Theodore H. Haas, Ten Years of Tribal Government under I.R.A. 18 (United States Indian Service, 1947)).

4/ Congress has also recognized that tribal actions may be subject to Secretarial approval as a matter of tribal law, even where approval is not required by Federal law. In the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Congress amended 25 U.S.C. § 81 to remove certain Federal requirements for approval of tribal contracts. As amended by that Act, 25 U.S.C. § 81 provides: “(f) Nothing in this section shall be construed to) * * * (3) alter or amend any ordinance, resolution or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.”

until such time as the Tribe amends its Constitution to remove the approval requirement (and the Secretary approves that amendment), 5/ no amendment to the Constitution is effective until approved by the Secretary.

Under the Tribe's constitution, the Regional Director has both the authority and the responsibility to review the substance of the Tribe's Constitutional amendments and to make a determination as to whether those amendments would violate Federal law.

As discussed above, the Board agrees with the Regional Director's conclusion that the amendment would violate Federal law in that it would, on its face, deprive elected officials of the right to due process, a right which the ICRA requires tribes to provide.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's September 25, 2000, decision is affirmed. 6/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ In the only Board case to address this kind of amendment (i.e., one removing a requirement for approval of Constitutional amendments), the Board affirmed a BIA decision disapproving the amendment. Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, 24 IBIA 209 (1993).

6/ Arguments made by the Tribe but not discussed in this decision have been considered and rejected.