



INTERIOR BOARD OF INDIAN APPEALS

Robert S. McKay v. Pacific Regional Director, Bureau of Indian Affairs

40 IBIA 26 (06/01/2004)

Reconsideration denied:
40 IBIA 53



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

ROBERT S. MCKAY,
Appellant,

v.

PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee.

: Order Dismissing Appeal
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: Docket No. IBIA 02-56-A
:
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: June 1, 2004

Appellant Robert S. McKay, appearing pro se, seeks review of a December 28, 2001, decision by the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director found that an intratribal dispute within the Dry Creek Rancheria of Pomo Indians of California (Tribe) had been resolved by the Tribe and that an appeal before him was moot. For the reasons discussed below, the Board of Indian Appeals (Board) concludes that Appellant lacks standing to bring this appeal, and also that this appeal is moot.

The events underlying this matter took place between April and September 2001, and involved efforts by members of the Tribe to remove authority from the Tribe's Board of Directors, recall all incumbent officers on that Board, and create an Interim Board of Directors pending a special election to fill the "recalled" officers' positions. Appellant contends that those efforts were successful, that he is Chairman of the Interim Board, and that the Regional Director erred by not recognizing the Interim Board as the legitimate executive body of the Tribe.

Under the Tribe's Articles of Association, the Board of Directors is the executive council of the Tribe, with authority to implement ordinances, resolutions, and other directives passed by the Tribal Council, and to represent the Tribe in dealings with other governments. Articles of Association of the Dry Creek Rancheria, Art. VII. The Board of Directors consists of a Chairman, Vice-Chairman, Secretary-Treasurer, and two delegates, elected from the membership of the Tribal Council. Id. Art. IV. The Tribal Council is the governing body of the Tribe and consists of the entire tribal membership eighteen years of age or over. The Tribal Council has authority to delegate powers to the Board of Directors and also to create temporary or permanent committees as it deems necessary. Id.

On April 29, 2001, the Tribal Council held a regular semiannual business meeting. During the meeting, tribal members who were dissatisfied with the Tribe's incumbent Board of Directors ^{1/} introduced a resolution to immediately divest the Board of Directors of all authority and, in turn, to vest that authority in a new five-person "Governing Tribal Committee." The resolution provided that the "interim Governing Committee" was vested with all of the power and authority of the Board of Directors, until a recall election could be held in November 2001, following a nomination meeting in August 2001. During a vote or attempted vote on the measure, the Chairman of the incumbent Board of Directors announced that the meeting was adjourned. Despite this, a group of tribal members, led by Appellant, continued the meeting in order to complete the vote. Appellant's record of the meeting states that the resolution was adopted.

During May 2001, the interim committee convened several additional meetings for the tribal membership, to conduct tribal business and to continue the efforts to recall the incumbent Board. The incumbent Board sent letters to the membership objecting to those meetings and taking the position that the incumbent Board of Directors was still vested with its constitutional authorities and that no interim governing committee had any authority to convene Tribal Council meetings or to exercise the incumbent Board's authority.

On the morning of June 2, 2001, the interim committee convened a meeting for the general membership with the purpose of voting to recall the incumbent Board of Directors. At that meeting, those tribal members who were in attendance voted to recall all of the members of the incumbent Board of Directors. The same group then elected an "Interim Board of Directors" (Interim Board), with Appellant as Chairman. The Interim Board was to serve until a special election would take place later in the year to elect replacements to fill out the unexpired terms of the "recalled" Board of Directors.

On the afternoon of June 2, 2001, the incumbent Board of Directors convened a meeting of the Tribal Council. According to the minutes of that meeting, a motion was made and passed to declare void any actions taken within the Tribe that purported to recall the incumbent Board of Directors or that purported to form an interim government.

On June 4, 2001, the Interim Board wrote to the BIA Superintendent, Central California Agency, and – based on the "recall" actions that took place in the June 2 morning meeting – asked BIA to recognize the Interim Board as the Tribe's new legitimate executive body. In letters dated June 20 and 22, 2001, the Superintendent declined to grant the Interim

^{1/} In this decision, we use the term "incumbent Board of Directors" or "incumbent Board" to refer to the Tribe's Board of Directors as it was constituted prior to the events and controversy in 2001 that led to this appeal. The incumbent Board of Directors was elected in November 2000, in a regular biennial tribal election.

Board's request, declined to have BIA resolve the internal tribal dispute, and instead referred the matter back to the Tribe for resolution by the Tribal Council.

On June 30, 2001, the Interim Board convened another meeting for the tribal membership, at which those tribal members in attendance approved a resolution to certify the June 2 morning meeting recall vote and to certify the membership of the Interim Board. The June 30 resolution states that "the Tribal Council hereby authorizes and directs the Interim Board of Directors and the Tribe's attorneys to take all actions reasonably necessary to implement and secure compliance with this Resolution."

On July 2, 2001, the Interim Board, represented by counsel and purportedly on behalf of the Tribe, appealed the Superintendent's June 22 decision to the Regional Director. The Interim Board contended that the Superintendent had improperly declined to recognize the Interim Board.

On September 8, 2001, while its appeal was pending before the Regional Director, the Interim Board convened a meeting and held a special election to replace the "recalled" Board of Directors for the remainder of the incumbent Board's term, which was to expire following the next regular biennial tribal election in November 2002. At the September 8 meeting, the tribal members in attendance elected Appellant as "Chairperson" of the Tribe, and other individuals to fill the positions of Vice-Chairperson, Secretary-Treasurer, and members-at-large. 2/

On September 29, 2001, the incumbent Board of Directors convened a semiannual Tribal Council meeting. 3/ At that meeting, the tribal members in attendance voted to approve official minutes of the April 29 meeting. Those minutes, as approved at the September 29 meeting, reported that the April 29 meeting was adjourned during a "hostile takeover." The minutes did not report the meeting as having continued following the incumbent Chairman's adjournment, nor did they report any vote on a resolution to remove authority from the incumbent Board and to create an interim governing committee.

2/ The special election on September 8, 2001, appears to reflect an accelerated schedule from what was anticipated in the April 29 resolution. The April 29 resolution provided that the interim governing committee would create a "cooling off" period until a recall election would be held the last Saturday in November 2001.

3/ The Tribe's Articles of Association provide for regular semiannual meetings of the Tribal Council in April and September of each year. Special meetings may also be called by the Chairman or by any two members of the Board of Directors. Articles of Association of the Dry Creek Rancheria, Art. V.

On December 28, 2001, the Regional Director decided the appeal brought by the Interim Board from the Superintendent's decision. The Regional Director concluded that the Tribal Council had repudiated the April 29 resolution to oust the incumbent Board of Directors, thereby resolving the intratribal dispute and rendering moot the Interim Board's appeal. The Regional Director concluded that the actions taken by the Tribal Council on June 2, 2001, in the afternoon meeting, and on September 29, 2001, at the semiannual Tribal Council meeting, were in accordance with tribal law and consistent with legal and policy principles that intratribal disputes should be resolved in tribal forums.

Appellant, as "Chairman, Interim Board of Directors," but without being joined by other members of the Interim Board, and acting *pro se*, appealed the Regional Director's December 28, 2001, decision to the Board of Indian Appeals. Appellant's opening brief represented that his appeal was "brought by the Tribe, acting through its governing body, the Tribal Council." As the source of authority for pursuing the appeal, Appellant cited the resolution approved at the June 30, 2001, meeting convened by the Interim Board. That resolution purported to authorize "the Interim Board of Directors and the Tribe's attorneys" to take all actions reasonably necessary to implement the resolution recalling the incumbent Board of Directors. In his opening brief, Appellant contended that, contrary to what the Regional Director concluded, neither the June 2, 2001, afternoon meeting nor the September 29, 2001, semiannual Tribal Council meeting, made the controversy moot because both were illegally convened by the "recalled" Board of Directors. According to Appellant, the incumbent Board had no authority after April 29, 2001, to convene such meetings, and therefore any actions by tribal members at those meetings were without effect.

In opposition to Appellant's opening brief, the Board received a brief purportedly filed on behalf of the Tribe itself as the "real party in interest." The brief in opposition contended that the dispute had been resolved internally by the Tribe, as evidenced not only by the Tribal Council's actions relied upon by the Regional Director, but also by subsequent events further demonstrating that there no longer existed a live controversy within the Tribe over the attempted recall of the Board of Directors in 2001.

On September 16, 2003, the Board issued an order requesting further briefing on whether the issues raised in this appeal had been resolved. Appellant submitted additional documents to demonstrate that a live controversy continues to exist within the Tribe. Opponents who earlier had filed the brief in opposition to Appellant also responded, contending that this appeal is moot because no controversy continues to exist regarding the events of 2001.

Upon review of the record and the supplemental submissions, the Board concludes that this appeal should be dismissed for lack of standing and as moot. The Board first considers Appellant's standing to bring the appeal.

When an appellant seeks to pursue an appeal on behalf of a tribe or a tribal entity, the appellant must demonstrate that it has authority under tribal law to bring the appeal. See Yeahquo v. Southern Plains Regional Director, 36 IBIA 11, 12 (2001) (appellants produced no evidence that the tribe had authorized them to bring the appeal on the tribe's behalf); Shoshone-Bannock Tribal Tax Commission v. Acting Portland Area Director, 30 IBIA 185, 186 (1997) (tribal tax commission not authorized by tribal law to appeal BIA approval of tribal ordinance).

Appellant here specifically contends that he is pursuing this appeal on behalf of the Tribe. It is clear from the record and his pleadings that he seeks to vindicate the Tribal Council, as the governing body of the Tribe, in asking this Board to declare valid the 2001 actions to oust the incumbent Board of Directors, and to declare that the Interim Board of Directors should be recognized as the current legitimate tribal executive body.

The sole authority on which Appellant relies to pursue this appeal is the June 30, 2001, resolution, approved at a meeting convened by the Interim Board. That resolution, however, only purports to authorize the Interim Board – not the Chairman of the Interim Board individually – to take all actions reasonably necessary to implement and secure compliance with the resolution purporting to ratify the recall vote that took place on the morning of June 2, 2001. In contrast to the appeal taken by the Interim Board as a whole to the Regional Director, Appellant was not joined in this appeal by other members of the Interim Board. Nor did he submit any evidence that the Interim Board authorized him to file this appeal. The only authorization on which Appellant relies to bring this appeal falls short of demonstrating that the Tribal Council even arguably authorized him, acting individually and without the Interim Board, to pursue this appeal on behalf of the Tribe. Therefore, Appellant has not demonstrated that he has standing to bring this appeal.

Although this case could be dismissed solely on the basis of Appellant's lack of standing, the Board considers it appropriate to also address whether this case is moot, as an alternative jurisdictional ground for dismissal. Under the circumstances, addressing the mootness issue reinforces and provides additional factual context to the Board's conclusion that Appellant has failed to demonstrate standing to pursue this appeal on behalf of the Tribe. We conclude that Appellant has failed to demonstrate that a live controversy exists within the Tribe regarding the events of 2001. 4/

4/ Whether this appeal before the Board of Indian Appeals is moot is an issue that is distinct from whether the Interim Board of Director's appeal was already moot when the Regional Director issued his decision on December 28, 2001. Because we dismiss this appeal for lack of standing and as moot, we express no views whether the Regional Director was correct in concluding that the Interim Board's appeal to him was moot on December 28, 2001.

In response to the Board's September 16, 2003, order requesting briefing on whether the issues underlying this appeal had by now been resolved within the Tribe, Appellant submitted numerous documents suggesting that the tribal membership may continue to be divided over a variety of issues, including tribal membership, the eligibility of incumbent members of the Board of Directors to hold office, and the propriety of actions taken by the incumbent Board of Directors. None of the documents, however, suggests that a live controversy continues to exist over the specific subject matter of this appeal, namely, the actions that took place in 2001 to oust the incumbent Board of Directors and to replace it with an Interim Board. None, for example, refers to the Interim Board in the present tense, or to Appellant as Interim Chairman. Appellant has submitted no evidence that an Interim Board of Directors has continued to function, or has even attempted to function, or to convene meetings attended by tribal members, following the Regional Director's December 28, 2001, decision.

Appellant contends that his appeal cannot be moot because another appeal is pending before BIA regarding the results of the Tribe's November 2002 biennial election of its Board of Directors. Relying on Villegas v. Sacramento Area Director, 24 IBIA 150 (1993), Appellant argues that as long as there is a dispute concerning the 2002 election for Board of Directors, his appeal concerning the 2001 dispute cannot be moot. Under the specific circumstances presented by this case, we disagree.

In Villegas, consistent with prior holdings, the Board held that a subsequent "valid tribal election renders moot questions concerning prior tribal leadership." 24 IBIA at 151 (quoting Pinoleville Indian Community Governing Council v. Sacramento Area Director, 22 IBIA 176, 182 (1992)). The Board did not hold, however, that a subsequent valid or undisputed tribal election is the *exclusive* means by which a dispute concerning tribal leadership may be rendered moot. Tribes may have other mechanisms for resolving political disputes.

In the present case, as discussed above and based on the submissions to the Board, it appears that at least after the Regional Director's decision on December 28, 2001, there is no evidence that the Interim Board sought to function or to convene meetings of the tribal membership. Instead, the Tribe's membership – including Appellant – attended, participated in, and conducted business at meetings convened by the incumbent Board of Directors, which were not challenged as "illegal" based on the events that took place in 2001. To the extent that a dispute may exist over the results of the November 2002 election, Appellant has not shown that the status quo, as it existed prior to the November election, reflected a continuing dispute over the events that took place in 2001 to establish an Interim Board and recall the incumbent Board of Directors. We also note that although Appellant relies on the existence of an appeal from the November 2002 election to support his argument that this appeal is not moot, Appellant withdrew his candidacy for office (Vice-Chairman) in the November 2002 election and did not himself appeal the election's results. Cf. Forrest v. Sacramento Area Director, 18 IBIA 372 (1990) (appeal in which appellant sought to be recognized as Chairperson was moot).

