



INTERIOR BOARD OF INDIAN APPEALS

Arthur J. Welmas, et al. v. Sacramento Area Director, Bureau of Indian Affairs

24 IBIA 264 (10/20/1993)



# United States Department of the Interior

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

ARTHUR J. WELMAS and LINDA STREETER DUKIC

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-141-A

Decided October 20, 1993

Appeal from a finding that the Bureau of Indian Affairs had no authority to review sanctions imposed against members of the Cabazon Band of Mission Indians by the Band.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Tribal Power:  
Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under 25 CFR Chapter I. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

2. Indians: Enrollment/Tribal Membership

The Department of the Interior generally lacks authority to review sanctions imposed by a tribe against a tribal member. Under limited circumstances set forth in 25 CFR 62.4(a) (3), the Department may review tribal disenrollment decisions. However, the Board of Indian Appeals declines to adopt a theory of "constructive disenrollment" in order to invoke section 62.4(a) (3), when the tribal governing documents authorize sanctions less than disenrollment under the disenrollment provisions.

3. Indians: Civil Rights: Indian Civil Rights Act of 1968

The Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), is not an independent grant of jurisdiction to the Department of the Interior to scrutinize tribal actions when those actions do not otherwise require Departmental approval or other involvement.

4. Indians: Lands: Tribal Lands--Indians: Trust Responsibility

In a matter concerning the use and/or distribution of funds generated from tribal lands, the Bureau of Indian Affairs' trust responsibility is to the tribe.

APPEARANCES: Barry A. Fisher, Esq., Los Angeles, California, for appellants; William M. Wirtz, Esq., Office of the Regional Solicitor, Sacramento, California, for the Area Director; Glenn M. Feldman, Esq., Phoenix, Arizona, for the Cabazon Band of Mission Indians.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Arthur J. Welmas and Linda Streeter Dukic seek review of a February 19, 1992, letter from the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that the BIA had no authority to review sanctions imposed against appellants by the Cabazon Band of Mission Indians (Band). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellants are enrolled members of the Band. Welmas is a former Tribal Chairman. Appellants are outspoken opponents of the Band's present leadership. They have protested what they believe is domination of that leadership by non-Indians, and have apparently criticized at least some of the Band's economic enterprises and the way in which profits from those enterprises are used. Materials in the administrative record and included with the filings of the parties suggest that the Band's members are deeply divided between the present leadership and a faction composed of appellants and their supporters, with some members wavering between the two groups.

As part of their opposition to the present leadership, appellants attempted to call three emergency General Council meetings in March 1991. The Band's elected leaders did not attend these meetings on the advice of counsel. Actions allegedly taken at the meetings included the removal from office of the elected leaders, and the firing of several non-Indian tribal employees. The Cabazon Business Committee adopted a resolution on March 27, 1991, expressing its position that the meetings called by appellants and their supporters were not lawfully called and that any action taken at the meetings was invalid.

BIA was informed of the internal controversy by letters from both Dukic and the Band's General Council. A March 28, 1991, letter from the Superintendent, Southern California Agency, BIA (Superintendent), to Dukic also indicated that BIA was aware of concerns about the Band's political stability in "the business community and the public in general." Materials submitted during the course of this appeal suggest that the dispute was discussed in local newspapers.

By letters dated May 1 and 3, 1991, Welmas and Dukic, respectively, were notified that the Business Committee had established a special committee to investigate charges against them. Although the charges were identified, the only sanctions mentioned were that Welmas' tribal pension was being stopped and he was required to return the car provided to him by the Band, and both appellants were prohibited from playing bingo in the tribal bingo parlor.

On July 16, 1991, the General Council adopted resolutions sanctioning both appellants. One resolution found that Welmas “did knowingly and willingly violate the terms and conditions or obligations of the Articles of Association of the Cabazon Band, to the detriment of the Band” and “did knowingly engage in other misconduct as to seriously reflect on the dignity and integrity of the Band.” Welmas was barred from participating in tribal affairs, deprived of his right to vote on tribal matters, and made ineligible to receive any tribal benefits, all for a period of 10 years; and was fined \$50,000. Another resolution made the same findings against Dukic, and imposed the same sanctions, except that the sanctions against her were to remain in effect for 20 years.

During this same period of time, the California Department of Transportation negotiated a right-of-way across tribal land for the extension of State Highway 86. The total payment apparently exceeded \$1.1 million. By letter dated April 17, 1991, the Band requested that 25 CFR 169.14 1/ be waived, and "the consideration be paid directly to the \* \* \* Band at the time the right-of-way application is filed" (Letter at 1). Noting that there were at least two precedents for such a waiver, the Band continued: "It is important to the \* \* \* Band to receive the money now, since it has been our experience that the map and application approval process is a lengthy one that could take a year or more. The Band has a number of important purposes to which this money would be put, and money received now is certainly worth more economically than money received later." Ibid. On May 8, 1991, the Superintendent authorized direct payment to the Band for the right-of-way.

Part of the funds received for the right-of-way were paid in equal per capita payments of \$35,000 to each adult member of the Band. The per capita shares that would have been paid to appellants were retained by the Band. Following the July 16, 1991, General Council meeting, these shares were applied to the fines assessed against appellants.

Alleging that the sanctions amounted to disenrollment and violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (1988), 2/ and that BIA had violated its trust responsibility to them by allowing the Band to deprive them of their shares of the right-of-way payment, on July 24, 1991,

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1/ Section 169.14 provides:

“At the time of filing an application for right-of-way, the applicant must deposit with the Secretary the total estimated consideration and damages, which shall include consideration for the right-of-way, severance damages, damages caused during the survey, and estimated damages to result from construction less any deposit previously made \* \* \*. The amounts so deposited shall be held in a ‘special deposit’ account for distribution to or for the account of the landowners and the authorized users and occupants of the land. \* \* \* Amounts deposited to cover consideration for the right-of-way and severance damages shall be disbursed upon the granting of the right-of-way.”

2/ All further references to the United States Code are to the 1988 edition.

appellants sought intervention by the Superintendent under 25 CFR Part 62, Enrollment Appeals. On November 23, 1991, the Superintendent declined to intervene.

Appellants appealed this decision to the Area Director, who, by letter dated February 19, 1992, affirmed the Superintendent's decision. The Area Director stated:

At issue is the Band's action to place sanctions on appellants \* \* \*. These sanctions which do seem to be extreme, rest outside of the federal government's jurisdiction, and lies exclusively with the Band. The [BIA] lacks jurisdiction even though the sanctions taken by the Band may have adverse consequences for [appellants] as the Band claims that the appellants have not lost their membership with the Band. The sanctions placed upon the Band members are purely internal tribal matters that involve no BIA action and/or approval.

This is not a Part 62 appeal because your appeal does not meet the test as an adverse enrollment action since the BIA did not make the determination as to enrollment or disenrollment of the appellants and furthermore the appellants have not been removed from tribal membership rolls, only barred from tribal affairs and benefits. Article 6 A. 4. of the Cabazon Articles of Association, which is the [Band's] governing document, provides that the General Council has exclusive power to enact ordinances governing membership. The Cabazon code provides that the superintendent's approval be sought on disenrollment resolutions; however the code is not the Band's governing document as specified in 25 C.F.R. 61.2(b)(2). [3/] The BIA has not agreed to do this and lacks statutory or regulatory responsibility to do so. The Department of the Interior has long recognized that the Tribes shall determine their own membership, including the power to grant, deny, and qualify membership, as that is one of the basic powers of tribes.

The Indian Civil Rights Act, 25 U.S.C. section 1302, does not give BIA the authority to intervene in internal tribal matters so to protect tribal autonomy and self government activities. (See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)).

The jurisdictional issue based on federal trust responsibilities related to the distribution of tribal trust funds derived from a May 1991 sale of a right-of-way from reservation lands is not applicable. This payment was made directly to the Band pursuant to a waiver from the BIA that was requested by the Band. Therefore, these funds were not in the control of the BIA so they

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3/ The Area Director appears to have abandoned this position on appeal.

were not being held in trust and no longer under the jurisdiction of the BIA.

Appellants appealed to the Board. Following initial briefing on jurisdiction, the Board determined on June 30, 1992, that appellants raised one issue over which it clearly had jurisdiction, *i.e.*, whether BIA had violated its trust responsibility to appellants regarding the right-of-way payment, and a second argument over which there might be Departmental jurisdiction, *i.e.*, whether 25 CFR Part 62 allows the Department to review the sanctions imposed on appellants under a theory of "constructive disenrollment." These issues were briefed by appellants, the Area Director, and the Band.

### Discussion and Conclusions

[1] The Board begins its analysis of the sanctions imposed against appellants with the fact, admitted by appellants, that the sanctions were imposed by the Band's General Council. As part of the Department of the Interior, the Board is not a court of general jurisdiction, and has only that authority delegated to it by the Secretary. It has been delegated authority to review actions taken by BIA under 25 CFR Chapter I. It does not have general authority to review actions taken by duly constituted tribal governing bodies. *See, e.g., Blaine v. Aberdeen Area Director*, 21 IBIA 173 (1992); *Thompson v. Eastern Area Director*, 17 IBIA 39 (1989).

Furthermore, the sanctions resulted from an intra-tribal dispute. The Board has held that, even though it might otherwise have jurisdiction, when a matter is essentially an intra-tribal dispute, it will refrain from exercising that jurisdiction in favor of resolution through appropriate tribal forums. *See, e.g., Little Six, Inc. v. Minneapolis Area Director*, 24 IBIA 50 (1993); *Naranjo v. Albuquerque Area Director*, 23 IBIA 291, *recon. denied*, 24 IBIA 32 (1993).

The Board thus concludes that the sanctions imposed against appellants are not a matter over which it would normally have jurisdiction.

Appellants attempt to overcome this conclusion by arguing a theory of "constructive disenrollment" and violation of ICRA in regard to the sanctions in general, and violation of the Federal trust responsibility to them in regard to the right-of-way payment.

Under their "constructive disenrollment" theory, appellants contend that the actions taken against them were based on section 2-205 of the Cabazon Code, which deals with disenrollment; the actual findings against them repeat the disenrollment criteria; and the severity of the sanctions imposed deprive them of all attributes of tribal membership. <sup>4/</sup> They argue

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<sup>4/</sup> Citing *United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75 (1992), appellants argue that the Board has already recognized the significance of tribal membership and the protections that should be afforded whenever tribal membership is at issue. *See also Afroyim v. Rusk*, 387 U.S. 253 (1967); *Trop v. Dulles*, 356 U.S. 86 (1958). They contend

that section 2-207 of the Cabazon Code and 25 CFR 62.4(a) (3) authorize the Secretary to review the actions taken against them. Section 2-207 provides:

Every resolution of disenrollment shall be transmitted to the Superintendent, Southern California Agency, Bureau of Indian Affairs, Riverside, California for the approval of the Secretary of the Interior. In the event such approval is not obtained, the resolution of disenrollment shall still be effective as to all those rights and privileges of membership which the Cabazon Band of Mission Indians may lawfully revoke.

25 CFR 62.4 states:

(a) A person who is the subject of an adverse enrollment action may file or have filed on his/her behalf an appeal. An adverse enrollment action is:

\* \* \* \* \*

(3) The \* \* \* disenrollment of a tribal member by a tribal committee when the tribal governing document provides for an appeal of the action to the Secretary.

The Band does not dispute that the proceedings against appellants were conducted under the authority of section 2-205, but instead argues that the sanctions were imposed under section 2-206, which provides for sanctions less than disenrollment. Section 2-206 states:

No disenrollment shall be applied against the member except by a resolution of the General Council, adopted by a two-thirds majority of the members present and voting, and based upon the charges and evidence presented at the hearing. No other sanction shall be applied against the member except by a resolution of the General Council, adopted by a majority of the members present and voting, and based upon the charges and evidence presented at the hearing. The resolution shall clearly indicate whether it provides for disenrollment, or for any lesser sanction which is deemed just under the circumstances. Any resolution adopted pursuant to

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fn. 4 (continued)

that "[d]isenrollment is even more severe than denaturalization, because it cuts the individual off not only from attachments to a sovereign, but from the roots of a cultural heritage going back to time immemorial" (Opening brief at 8).

The Board agrees that deprivation of tribal membership is a significant matter. Despite appellants' suggestions to the contrary, however, this is the beginning of the inquiry, not the end. Because of the importance of tribal membership, the Board allowed appellants the opportunity to brief their "constructive disenrollment" argument. Appellants bear the burden of proving the merit of that argument.

this section shall be personally served upon the member or sent to him by registered mail, return receipt requested.

[2] The Board cannot accept appellants' "Constructive disenrollment" theory under the facts of this case. Appellants argue that the severity of the sanctions makes them the functional equivalent of disenrollment. However, the Band's code, in both sections 2-206 and 2-207, recognizes and authorizes sanctions less than actual disenrollment to be imposed in proceedings taken under the disenrollment provisions. Section 2-206 allows such lesser sanctions to be imposed based on a simple majority vote; section 2-207 provides that if a tribal vote to disenroll is not approved by the Secretary, it will still be effective for the imposition of all lesser sanctions within the Band's power. Although the Code does not address the precise nature of sanctions less than disenrollment, the Board assumes that there may be instances, such as the present one, where the sanctions may be quite severe. However, appellants remain on the tribal role, and are still entitled to all Federal services given to Indians because of their status as Indians. They have been neither disenrolled nor "constructively disenrolled." 5/

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5/ With its answer brief, the Band submitted a copy of a resolution adopted on Aug. 21, 1992. The resolution states:

"NOW THEREFORE BE IT RESOLVED by the Cabazon General Council as follows:

"1. Section 2-206 of the Cabazon Tribal Code clearly distinguishes between the disenrollment of a member and other, lesser sanctions which can be imposed under that Section.

"2. For purposes of Sections 2-206 and 2-207 of the Cabazon Tribal Code, the term 'disenrollment' was intended to and does mean the process by which a tribal member's name is formally and permanently removed from the Cabazon Membership Roll maintained under Section 2-106 of the Cabazon Tribal Code.

"3. Sections 2-206 and 2-207 of the Cabazon Tribal Code do not include and made no provision for the concept of 'constructive disenrollment.' Under Cabazon Tribal law, a member has not been 'disenrolled' unless his name has been formally and permanently removed from the Cabazon Roll.

"4. Under Section 2-207 of the Cabazon Tribal Code, the only 'resolution of disenrollment' that must be submitted to the Superintendent \* \* \* is a resolution by which a member has been formally disenrolled; that is, a resolution under which that member's name would be formally and permanently removed from the Cabazon Roll. A resolution imposing 'any lesser sanction' under Section 2-206 of the Cabazon Tribal Code is not a 'resolution of disenrollment' within the meaning of Section 2-207."

The Board has stated on many occasions that it will defer to a tribe's reasonable construction of its own governing documents. See, e.g., United Keetoowah Band, 22 IBIA at 80; Reese v. Minneapolis Area Director, 17 IBIA 169, 173 (1989). Here, however, the Band's interpretation is entitled to considerably less deference because it was adopted not only after the filing of the present appeal, but also after the Board issued an order requesting briefing on the exact issues that are addressed in the resolution.

The Department's regulations allow an appeal from "the disenrollment of a tribal member by a tribal committee when the tribal governing document provides for an appeal of the action to the Secretary." Because the sanctions imposed on appellants, although severe, did not rise to the level of disenrollment, neither the Band's governing documents nor the Department's regulations provide a basis for Departmental intervention in this matter.

Appellants appear to contend that, even if they were not disenrolled, ICRA provides an independent basis for Departmental review of the sanctions. They allege that the sanctions deprive them of freedom of speech, which is guaranteed to them under 25 U.S.C. § 1302(1). That section provides: "No Indian tribe in exercising powers of self-government shall \* \* \* make or enforce any law \* \* \* abridging the freedom of speech."

The Board has held that when BIA is responsible for recognizing or approving a tribal action, it cannot ignore ICRA's requirements. Thus, for example, BIA "has the authority and the responsibility to decline to recognize the results of a tribal election when [it] finds that a violation of ICRA has tainted those results." Naylor v. Sacramento Area Director, 23 IBIA 76, 80 (1992). See also Greendeer v. Minneapolis Area Director, 22 IBIA 91, 97 (1992); United Keetoowah Band, *supra*. In those cases, however, the Department already had jurisdiction to take action in a matter, as, for example, in overseeing the government-to-government relationship with a tribe. Appellants ask the Board to conclude that ICRA is an independent grant of authority to the Department to review tribal actions over which it does not otherwise have jurisdiction.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court examined the question of whether ICRA granted authority to the Federal courts to review alleged violations of its provisions. The Court stated that "[t]wo distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" 436 U.S. at 62. The Court continued that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other." 436 U.S. at 64. It noted that tribal forums, both judicial and non-judicial, had been recognized as competent law-applying bodies.

Although the Court concluded that ICRA was not an independent grant of authority to the Federal courts, it did not decide the question of whether ICRA granted such authority to the Department. It mentioned, however, that "Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency." 436 U.S. at 68. The amendment would have provided:

Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian

of a right or freedom established and protected by this Act may be reviewed by the Secretary of the Interior upon his own motion or upon the request of said Indian. If the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. \* \* \*

(436 U.S. at 68-69 n.26).

[3] Based upon the discussion in Santa Clara Pueblo, the Board concludes that Congress specifically rejected the Departmental jurisdiction that appellants here urge the Board to find. It declines to hold that ICRA authorizes the Department to scrutinize tribal actions not otherwise properly within its jurisdiction.

Therefore, the Board holds that there is no right to Departmental review of the sanctions imposed upon appellants by the Band, and concludes that this case need not be referred to the Assistant Secretary - Indian Affairs.

Appellants' second argument is that BIA breached its trust duty to them regarding the right-of-way payment. They argue that BIA's duty "runs to the membership of the \* \* \* Band as a whole -- not to the Band minus two invidiously disfavored members." Opening brief at 12. Appellants contend that BIA should not have allowed the payment to go to the Band "without imposing \* \* \* conditions on or monitoring \* \* \* the use or dispersal of the funds arising from the trust lands." Ibid.

[4] Appellants' argument assumes that BIA owed a trust duty in this matter to the individual members of the Band. However, the right-of-way payment arose from the sale of an interest in tribal land, and was therefore tribal money. It is well established that an individual tribal member "has no right against the tribe to any specific part of tribal property, absent a federal law or treaty granting vested rights to individual members" and that "[o]rdinarily tribal members have no vested right to tribal funds until they have received payment, or the funds have been credited to them." F. Cohen, Handbook of Federal Indian Law 605-06 (1982 ed.). See The Cherokee Trust Funds, 117 U.S. 288, 308 (1886), concerning a claim against certain Cherokee tribal funds:

The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all Cherokees, but that does not mean that each member has such an interest, as a tenant in common, that he could claim a pro rate proportion of the proceeds of sales made of any part of them.

The Board concludes that BIA's trust duty in this matter was owed to the landowner, *i.e.*, the Band as a political entity, not to the individual tribal members. See, *e.g.*, Gullickson v. Aberdeen Area Director, 24 IBIA 247 (1993) (holding that, in the sale of trust land, BIA's trust duty is to

the owner of the land, not to either the tribe or another tribal member who were potential purchasers of the land); Smith v. Acting Billings Area Director, 18 IBIA 36 (1989). Accordingly, it rejects appellants' argument that BIA breached a trust duty owed to them concerning the right-of-way payment.

However, in order to give appellants the benefit of every doubt, the Board will address their argument. Appellants contend, without citation to any authority, that if the payment had been deposited with BIA, BIA "could then have properly carried out its trust by distributing the per capita shares itself to each member of the tribe" (Reply brief at 13).

The Board requested a statement from the Area Director as to how the right-of-way payment would have been handled if the funds had been deposited with BIA. The Area Director responded:

In this case, had the funds been deposited with the BIA, the funds would have been disbursed to the Tribe (landowner) upon fulfillment of the conditions in the regulations. The regulations provide no choice, the language is mandatory. Once the conditions have been met the Secretary is without discretion, he must disburse the funds to the landowner.

(Appellee's Further Motion for Reconsideration at 3-4). As the Area Director indicated, the conditions established in the regulations concern the adequacy of the compensation and damages.

Appellants' argument is not supported by 25 CFR Part 169, which contemplates that funds deposited with BIA for a right-of-way shall be disbursed to the landowner when the right-of-way is approved. Here the landowner was the Band. If the payment had been deposited with BIA, it would have been disbursed to the Band upon fulfillment of the conditions established in the regulations. The Board finds nothing in the regulations authorizing BIA to make per capita payments to tribal members from right-of-way funds held for a tribe.

Furthermore, the Board is not aware of, and appellants have not cited, any authority under which BIA can dictate or restrict how a tribe uses and/or distributes tribal funds under the circumstances of this case, whether those funds were initially deposited with BIA or were paid directly to the tribe. Even if the Board were to assume that BIA owed a trust duty to individual tribal members in regard to a tribe's use and/or distribution of tribal funds, appellants have failed to show that BIA had authority to grant the relief they requested, *i.e.*, that BIA could have imposed conditions on or monitored the Band's distribution of the right-of-way payment.

The Board concludes that BIA did not owe a trust duty to appellants in regard to the right-of-way payment and that, even assuming there was such a duty, appellants have not shown that BIA had authority to take the action they requested. 6/

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6/ The Board requested briefing from the Area Director concerning whether the Superintendent's action in waiving 25 CFR 169.14 was an ultra vires

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 19, 1992, decision of the Sacramento Area Director is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge

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fn. 6 (continued)

action in violation of 230 DM 3.2(C). Because of its holding that BIA's trust duty in this case was to the Band, rather than to appellants as tribal members, the Board finds that whether the action was ultra vires is irrelevant to this decision. The Band, as the person to whom the trust duty was owed, has not questioned the propriety of the waiver of the regulation. The Area Director's motion for reconsideration of the Board's briefing order is hereby granted.

The Board notes that appellants first questioned the Superintendent's waiver of the regulation in their reply brief, while previously they had questioned only the fact that the waiver was given without placing restrictions on the Band's authority to disburse per capita payments; and that even if there had been a breach of trust based upon an ultra vires action, the Board is without jurisdiction to grant appellants the relief they request, which is, in effect, money damages against BIA and/or the Band. See U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991); Dawn Mining Co. v. Portland Area Director, 20 IBIA 50 (1991); Price v. Portland Area Director, 18 IBIA 272 (1990).