



INTERIOR BOARD OF INDIAN APPEALS

Mary Carol Jenkins, Carmon Murray, and Sonny Van v. Western Regional Director,
Bureau of Indian Affairs

42 IBIA 106 (01/06/2006)

Related Board case:
42 IBIA 117



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

MARY CAROL JENKINS, CARMON	:	Order Dismissing Appeal
MURRAY, and SONNY VAN,	:	
Appellants,	:	
	:	
v.	:	Docket No. IBIA 04-73-A
	:	
WESTERN REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	January 6, 2006

This is an appeal from a January 26, 2004 decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA) concerning Ordinance No. 03-004, enacted on October 28, 2003 by the Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). Appellants are individual members of the Tribe.

The BIA Uintah and Ouray Agency Superintendent (Superintendent) purported to approve Ordinance No. 03-004 on October 28, 2003, and Appellants appealed that decision to the Regional Director. ^{1/} While that appeal was pending, the Regional Director separately determined that the Superintendent's approval action was not needed and had no effect on the validity or invalidity of the resolution. Subsequently, the Regional Director dismissed the appeal, reiterating his conclusion that the Superintendent's action was without effect and stating that the Tribe has sole authority over the enactment of Ordinance No. 03-004. For the reasons discussed below, the Board dismisses this appeal.

^{1/} Mary Carol Jenkins, Sonny Van, and John Gamiochipi appealed the Superintendent's decision to the Regional Director. Appellants before the Board reflect that Mr. Gamiochipi has dropped out of the appeal process, and Ms. Murray has been added.

Background

The Tribe was organized in 1936 under the Indian Reorganization Act, from three bands of Ute Indians, the Uintah, Whiteriver, and Uncompahgre Bands. Band affiliation continues to have importance today. Appellants are members of the Uintah Band.

Under the Tribe's constitution, approved in 1937, the Tribe is governed by a Tribal Business Committee (Business Committee) comprised of six members, two each from the three bands within the Tribe. The tribal constitution addresses both the process through which Business Committee members are elected, and the process through which they can be expelled or recalled. The tribal constitution requires that some actions taken by the Tribe be approved by the Secretary of the Interior (Secretary), but not others. None of the constitutional provisions regarding the election or removal of Business Committee members expressly require Secretarial approval, or indicate any role for the Secretary or BIA to fulfill.

This appeal relates to a conflict within the Tribe. Appellants allege that four Business Committee members — namely Maxine Natchees, T. Smiley Arrowchis, O. Roland McCook, Sr., and Richard Jenks, Jr. — uncritically support the Tribe's financial planner, John Jurrius. Two other Business Committee members — Ronald J. Wopsock and Luke J. Duncan — apparently raised questions about Mr. Jurrius and in 2003 filed suit in Federal District Court, District of Utah, against various BIA officials, alleging a breach of fiduciary duties in connection with the oversight of transactions Mr. Jurrius entered into on behalf of the Tribe.

Article V, section 2 of the Tribe's constitution allows the Business Committee to expel individual members of the Business Committee "for neglect of duty or gross misconduct." On October 21, 2003, the four Business Committee members not involved with the Federal lawsuit used this provision of the Tribe's constitution to pass a resolution expelling the two Business Committee members who brought the suit.

When Appellants heard that this expulsion process was underway, a procedure they believed to be improper, they began circulating a petition to recall Maxine Natchees, one of their Uintah Band representatives, and Chairman of the Business Committee. ^{2/} Appellants

^{2/} The relevant provision of the Tribe's constitution that governs the recall process reads as follows:

Upon receipt of a petition signed by one-third of the eligible voters in any band calling for the recall of any member of the Committee representing such band, it shall be the duty of the Committee to call an election on such recall

(continued...)

assert that by late October 2003, they had sufficient names on such a petition to cause a recall election. Upon offering the petition to the Chairman, however, Appellants' petition was refused. 3/

Of particular significance to this appeal, on October 28, 2003, while Appellants were still gathering the signatures for a recall election, the four remaining members of the Business Committee enacted Ordinance No. 03-004, "To Amend Ordinance No. 93-06, [4/] As Amended, Governing Recall, Referendum and Elections of the [Tribe] Concerning the Recall Process." The new ordinance imposed a variety of requirements on persons petitioning to recall a Business Committee member.

Appellants maintain that this ordinance was passed with the intent of thwarting their recall effort, improperly keeping Chairman Natchees in office, and effectively amending the Tribe's constitution in a manner that substantively changes the rules for initiating a recall election, making the process much harder than originally envisioned.

After passing Ordinance No. 03-004, the Business Committee submitted it to the Superintendent for approval, which he provided. 5/ Two of the current Appellants, Mary Carol Jenkins and Sonny Van, together with John Gamiochipi, appealed that approval decision to the Regional Director. While their appeal was pending, and before they submitted a Statement of Reasons outlining the basis for their appeal, the Business Committee wrote to the Superintendent on December 17, 2003, taking the position that Ordinance No. 03-004 should not have been sent to BIA for approval at all. The Business Committee argued that Article IV of the Tribe's constitution reserved the regulation of the

2/(...continued)

petition. No member may be recalled in any such election unless at least thirty percent of the legal voters of the band which he represents shall vote at such election.

Tribe's Constitution, Article V, Section 3.

3/ The parties' accounts of this refusal differ, but the differences are not relevant for deciding this appeal.

4/ The parties in this case have not provided the Board with a copy of Ordinance No. 93-06.

5/ Appellants allege that the Superintendent's approval was provided in this case with "uncharacteristic alacrity" and was improperly influenced by a conflict of interest.

election process to the Tribe alone, and requested that the Superintendent vacate his approval and take no action on the ordinance.

Evidently this letter was transmitted to the Regional Director, because in a responding letter dated December 19, 2003, he determined that “the Superintendent’s approval action was not needed and had no effect on the validity or invalidity of the resolution.” The Appellants below then submitted their Statement of Reasons, dated December 22, 2003, apparently unaware that the Regional Director had already declared the Superintendent’s action to be without effect, *i.e.*, he had nullified the Superintendent’s purported “approval” of the ordinance. In their Statement of Reasons, Appellants — like the Tribe — contended that the Superintendent’s approval was not required for ordinances relating to tribal elections. Appellants sought various relief from the purported effects of the Superintendent’s approval of the ordinance.

On January 20, 2004, the Tribe moved to have the Regional Director vacate the Superintendent’s approval of Ordinance No. 03-004, and dismiss the appeal before him. Without waiting for a response from Appellants, the Regional Director dismissed the appeal in a decision dated January 26, 2004, “on the grounds that the Tribe has sole authority over Ordinance No. 03-004 and must resolve any disputes arising from the passage of that ordinance, and that the Superintendent’s purported approval had no effect on the validity or invalidity of the ordinance.” January 26, 2004 Decision at 2.

Appellants appealed the Regional Director’s decision to the Board. The Board’s initial review indicated that it might not be able to hear the appeal, either because the Appellants lacked standing, or because the relief Appellants requested was not within the Board’s jurisdiction, or both. Correspondingly, on March 8, 2004, the Board issued a Pre-Docketing Notice, Order Concerning Timeliness, Order to Show Standing, and Order to Show Cause that required Appellants to show how they have standing to bring this appeal, and how the Board has jurisdiction to grant Appellants’ requested relief. 6/ Both Appellants and the Tribe have briefed their positions on these matters to the Board. 7/

6/ Given the threshold nature of these issues, the Board has not required the Regional Director to submit the administrative record until these issues are resolved.

7/ For simplification, we will refer to Appellants’ Response to Order to Show Standing and Order to Show Cause as “Appellants’ Response,” and Appellants’ Response to Ute Indian Tribe’s Reply to Appellants’ Response to Order to Show Cause and Order to Show Standing as “Appellants’ Reply.”

Discussion

As already mentioned, during the original appeal from the Superintendent's approval of Ordinance No. 03-004, and before the Appellants below submitted their Statement of Reasons, the Business Committee essentially retracted its earlier request that the Superintendent approve Ordinance No. 03-004. The Regional Director then issued the letter to Chairman Natchees dated December 19, 2003, in which he found the Superintendent's approval action to be without effect. ^{8/} With the Tribe's request for approval effectively withdrawn, and the Superintendent's approval nullified, the Regional Director dismissed Appellants' appeal by declaring the Superintendent's action to be without effect. We could easily see his decision to be based upon mootness.

The main point of Appellants' appeal to the Board, however, appears to be that the Regional Director also denied what he described as "further request[s]" for relief. All of those requests were either based on the alleged effects of the Superintendent's action, or were not directly related to the Superintendent's action at all, but were instead other actions that BIA supposedly could have taken. For the same reasons discussed in Wopsock v. Western Regional Director, 42 IBIA 117 (2006), we do not construe the Regional Director's decision as one that actually decided any issues beyond whether or not the Superintendent had authority to approve Ordinance No. 03-004. His denial of the further relief Appellants requested merely acknowledged that by nullifying the Superintendent's action, no further relief was warranted or required from BIA. The nature of the further relief Appellants requested not then being a matter of concern to BIA, and given the fact that he had determined that BIA had no role to play with respect to Ordinance No. 03-004, he understandably directed Appellants to address their additional concerns to the Tribe.

In keeping with our views in Wopsock, we find that the only grievance Appellants properly had on appeal before the Regional Director was rendered moot by his decision. The other matters Appellants wanted the Regional Director to address were either likewise

^{8/} Appellants characterize this exchange of correspondence as "*ex parte* communications" during the appeal before the Regional Director. See, e.g., Appellants' Notice of Appeal at 13. Unlike appeals pending before the Board, see 43 C.F.R. § 4.27(b), there is no express prohibition against *ex parte* communications during appeals pending before a Regional Director, although notice and opportunity-to-comment requirements may apply. See 25 C.F.R. § 2.21(b). But even if we were to suppose the Regional Director's decision not to have been issued in strict accordance with 25 C.F.R. § 2.21(b), the error was harmless. The Regional Director's decision letter specifically frames the issue as an appeal from the Superintendent's approval of Ordinance No. 03-004. By nullifying that action, the Regional Director granted Appellants relief in accordance with their appeal.

rendered moot by his decision, or else not properly within the scope of the appeal in the first place. Even assuming, however, that Appellants could demonstrate that the Regional Director should have done more than merely nullify the Superintendent's action, the Board concludes that the Appellants lack standing to raise those issues. ^{9/}

The Board issued its March 8, 2004 Pre-Docketing Notice, Order Concerning Timeliness, Order to Show Standing, and Order to Show Cause with some doubt that Appellants could demonstrate either standing to pursue this appeal, the authority of the Board to grant the relief they requested, or both. We have said previously:

Although the Board, as an executive branch forum, is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing and where claims have not become moot. See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308, 310 (2005), and cases cited therein.

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), the Supreme Court held that, to satisfy Article III's standing requirements, a person must show (1) he has suffered an "injury in fact," that is, an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See Cheyenne River Sioux Tribe, 41 IBIA at 310.

Brown v. Navajo Regional Director, 41 IBIA 314, 317 (2005).

Appellants base their standing in this matter on the Superintendent's approval of Ordinance No. 03-004, several alleged injuries resulting from that approval, and a patchwork of Federal laws that they claim give them the right to directly address those injuries. But there is no suggestion anywhere that, absent the Superintendent's action in purporting to approve Ordinance No. 03-004, they would have an identifiable Federal

^{9/} We resolve this appeal on the basis of standing rather than mootness, in part because we decide it without the benefit of the full administrative record, and because the only issue expressly briefed was standing.

action or decision upon which to bring this appeal. 10/ It appears then that Appellants fail to appreciate the overwhelming significance of the Regional Director's decision, which nullified the Superintendent's purported approval. Once BIA's action on the ordinance was eliminated, the only remaining cause of Appellants' alleged injury was the ordinance itself, the validity or invalidity, effectiveness or ineffectiveness of which was purely a tribal matter, unrelated to any BIA action.

Appellants nonetheless contend that the Regional Director was obliged to intervene to correct the injuries they have supposedly suffered as a consequence of the ordinance. That contention brings us to the second element from Lujan. Appellants' alleged "injury in fact" — the abridgement of Appellants' right under the Tribe's constitution to recall one of their band's Business Committee representatives — is not due to any action by BIA officials. It is the result of the independent actions of elected tribal officials.

To avoid this clear problem and its effect on their standing, Appellants claim their appeal is not about "challenging BIA's determination that it does not have the authority to review a tribal ordinance," but about "challenging the failure of the Superintendent [and Regional Director] to enforce federal law, to wit: the Indian Reorganization Act * * * and the Indian Civil Rights Act * * *." Appellants' Reply at 3. 11/

A generalized grievance (such as challenging the failure of BIA officials to enforce Federal law) cannot support standing. See, e.g., Lujan, 504 U.S. at 573-74. 12/ A more particular citation to the Indian Reorganization Act, 25 U.S.C. § 476 et seq. (IRA) does not secure standing for the Appellants, either, because they still state a generalized grievance. In addition, we have already held that the IRA does not impose on the Secretary or BIA a specific trust duty mandating a general investigation into tribal internal affairs. See

10/ Appellants freely admit that "[t]he Superintendent's approval of Ordinance No. 03-004 was merely the vehicle by which the appellants were able to raise the larger issues * * * i.e., the BIA's continuing recognition and support of a governing body that is out of control * * *." Appellants' Notice of Appeal at 9.

11/ This appeal concerns only the January 26, 2004 decision of the Regional Director. The Board is not obliged to consider, and will not consider, claims the Appellants raise involving actions or inactions of the Superintendent.

12/ "We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." Lujan, 504 U.S. at 573-74.

Burnette v. Assistant Secretary – Indian Affairs, 10 IBIA 464, 464-65 n.1 (1982) (disapproving an earlier case, St. Pierre v. Commissioner, 9 IBIA 203 (1982), that suggested otherwise). Even Appellants' specific reference to 25 U.S.C. § 476(d)(2) does not help them establish standing. Section 476(d)(2) concerns what happens if the Secretary fails to either approve or disapprove a proposed constitution and bylaws or amendments within a 45 day period. We see no connection between the purpose of that provision, or anything else in the IRA, and Appellants' standing to raise claims in this case concerning a tribal ordinance. 13/

Similarly, there is nothing in the Indian Civil Rights Act, 25 U.S.C. § 1302 et seq. (ICRA), that provides a basis for Appellants to claim standing in this case. To the contrary, ICRA claims generally are confined to tribal fora, and are not heard at all before the Board. See, e.g., Amundsen v. Minneapolis Area Director, 28 IBIA 1, 2 (1995) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) and Mosay v. Minneapolis Area Director, 27 IBIA 126 (1995)). The only exceptions recognized by the Board thus far have been where the alleged ICRA violation arises in the context of a tribal leadership determination that BIA is forced by circumstances to consider, see, e.g., Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992); United Keetoowah Band of Cherokee Indians v. Muskogee Area Director, 22 IBIA 75, 83 (1992), and in the context of a constitutional amendment or ordinance over which BIA has approval authority. See also Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, 38 IBIA 244, 248-49 (2002) (BIA lacked decision-making authority over tribal disenrollment action, notwithstanding alleged ICRA violations); Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director, 36 IBIA 297, 302 (2001) (BIA properly disapproved a constitutional amendment that would deprive elected officials of due process, in violation of ICRA). None of those exceptions apply here.

The Regional Director's January 26, 2004 decision merely nullified the Superintendent's purported approval of Ordinance No. 03-004. It was not a tribal

13/ Appellants unsuccessfully attempt to characterize Ordinance No. 03-004 as the functional equivalent of an amendment to the Tribe's constitution, thus supposedly bringing it within the scope of IRA provisions. Ordinance No. 03-004 does not purport to be a constitutional amendment. On its face, it is labeled an ordinance. As such, it does not change the Tribe's constitution, and remains subordinate in legal status to the Tribe's constitution. Moreover, the Tribe has specifically taken the position that Ordinance No. 03-004 requires no action whatsoever from BIA, a position completely at odds with any argument that this law could somehow be construed as a constitutional amendment. In accordance with Article X of the Tribe's constitution, amendments to the Tribe's constitution can be effected only through a Secretarial election.

leadership determination, nor does anything Appellants allege lead us to believe that the Regional Director was obliged by unavoidable circumstances in this case to make a determination about the authority of the Tribe's leadership. Ordinance No. 03-004 did not require Secretarial or BIA approval, either. ^{14/} And even if the Regional Director should have made some determination concerning the Tribe's leadership, or some other exception would have allowed the Regional Director or the Board in this case to hear an ICRA claim, Appellants have cited no case in which individual tribal members have been accorded standing to raise an ICRA matter before the Board.

In particular, the Greendeer and Keetoowah cases offer Appellants no support for their claim of standing. In Greendeer, the appellant was a member of a tribal business committee, whose authority to act was directly implicated by BIA's decision concerning the tribe's leadership. In Keetowah, another tribal leadership decision, appellants were the tribe itself and two candidates for office. In neither case was an individual member of the tribe, affected no more than any one of a great number of other individuals indirectly impacted by BIA's decision, allowed to pursue an appeal that could affect the recognized governance of the tribe. In fact, in Keetowah, which Appellants cite repeatedly in their discussion of ICRA, we expressly denied an individual tribal member, who was not even a candidate for office, standing to participate as a party. See Keetoowah, 22 IBIA at 76-77 n.2.

We correspondingly see no support under the facts of this case for Appellants' contention that ICRA had, or should have had, any bearing upon the Regional Director's decision about how to address the Superintendent's purported approval of Ordinance No. 03-004, and we see no authority under ICRA supporting Appellants' standing in this case.

In summary, we find no basis for Appellants' contention that the injury they claim to have suffered was caused by the Regional Director, or that by Federal law he was somehow obliged to address it. Rather, Appellants' injury appears to have been caused solely by elected officials from Appellants' own Tribe. Thus, Appellants fail to establish the second element of standing, as articulated in Lujan.

We reach the same result under a different line of cases. The Board has specifically discussed standing where there is a danger of unduly interfering with internal tribal matters:

^{14/} See Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24, 28 (1991) ("After careful review of Articles IV and V and Article VI, section 1, of the tribal constitution, the Board agrees with the Area Director's statement and finds no basis for a determination that the Ute Indian Tribe's ordinances concerning election procedures, including recall election procedures, are subject to Secretarial review.")

[T]he Board's decisions in this area are grounded in the Federal policy of respect for tribal self-government. See, e.g., Feezor [v. Acting Minneapolis Area Director], 25 IBIA 296, 298 (1994)]. In furtherance of this policy, the Board has recognized that individuals whose primary complaint is with a tribal enactment belong in a tribal forum rather than before this Board. E.g., Hunt [v. Aberdeen Area Director], 27 IBIA 173, 178 (1995)]. At the same time, the Board recognizes that a tribe whose enactment is the subject of a BIA decision has a right to appeal the BIA decision to the Board. E.g., Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163 (1995). The Board uses the term "standing" to describe the distinction between appellants who are entitled to pursue an appeal of a particular BIA decision before the Board and those who are not so entitled.

Williamson-Edwards v. Acting Minneapolis Area Director, 29 IBIA 261, 262 (1996).

Appellants cannot seriously deny that their primary complaint is with a tribal enactment, Ordinance No. 03-004. Three of their four revised requests for relief are aimed at invalidating Ordinance No. 03-004. 15/ Their fourth request for relief, which asks the Board to declare the Tribal Business Committee to be unlawfully constituted until there has been a recall election, 16/ is clearly outside the scope of any relief that could be granted in an appeal reviewing a decision concluding that BIA action concerning Ordinance No. 03-004 is unnecessary and inappropriate.

In summary, we find that the Appellants have not demonstrated that they have standing to bring this appeal. We also find unavailable all of Appellants' requests for relief, even after they have been modified to largely abandon the equitable relief and damages initially requested. Appellants must pursue any grievance they may have concerning Ordinance No. 03-004 and the recall of Chairman Natchees within the Tribe itself. 17/

15/ Appellants ask us to reverse the Superintendent's approval of Ordinance No. 03-004, declare Ordinance No. 03-004 to be an unlawful attempt to amend the Tribe's constitution, and declare Ordinance No. 03-004 to be an unlawful deprivation of Appellants' constitutional rights. Appellants' Response at 4-5.

16/ Id. at 5.

17/ Any arguments not specifically addressed in this case have been considered and rejected.

Conclusion

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 Board dismisses this appeal for lack of standing and lack of jurisdiction to provide the relief requested.

I concur:

// original signed
David B. Johnson
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge