



INTERIOR BOARD OF INDIAN APPEALS

Michael Chosa v. Midwest Regional Director, Bureau of Indian Affairs

46 IBIA 316 (03/25/2008)

Reconsideration denied:

47 IBIA 50



# 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

MICHAEL CHOSA,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 06-9-A
MIDWEST REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	March 25, 2008

Michael Chosa (Appellant) seeks review of a September 9, 2005, decision of the Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), denying Appellant’s protest to a Secretarial election held on July 26, 2005, for the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin (Tribe).<sup>1</sup> Appellant, who was a qualified voter within the meaning of 25 C.F.R. Part 81, claims that the voter eligibility and registration criteria violated 25 U.S.C. § 476 and improperly denied the right to vote to certain persons other than Appellant. He also claims that an insufficient number of informational meetings were held. We conclude that Appellant has failed to allege sufficient grounds for protesting the election or to adduce substantiating evidence in support of his claims, as required by 25 C.F.R. § 81.22. Therefore, we affirm the Regional Director’s decision.

## Background

In November 2003, the Tribe’s Council requested BIA to conduct a Secretarial election to amend the Tribe’s Constitution to add a new article establishing a tribal

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<sup>1</sup> Appellant claims that his appeal is directed to the Secretary of the Interior (Secretary) and seeks correction of the caption to reflect the same. Under the regulations governing challenges to Secretarial elections, the challenge is filed “with the Secretary through the officer in charge.” 25 C.F.R. § 81.22. As explained by the Regional Director in his sur-reply, the “officer in charge” of the election was the Regional Director. *See also id.* § 81.2(t) (defining “Secretary” as “the Secretary of the Interior *or his/her authorized representative.*” Emphasis added.).

judiciary.<sup>2</sup> In accordance with the Tribe's request, a Secretarial election was scheduled for July 26, 2005. Persons eligible to vote in the election were the adult members of the Tribe who had been residing on the Tribe's reservation for at least one year prior to the date of the scheduled election *and* who had registered to vote in the election. The residency requirement was based on a 1982 amendment to the Tribe's Constitution, which had been adopted in a Secretarial election and approved by the Secretary.<sup>3</sup> By letter dated June 10, 2005, the Secretarial Election Board notified potential voters of the upcoming election and provided tribal members with a packet of election material. The material included the voter eligibility criteria, the need to register to vote in advance of the election, the text of the proposed amendment to the Tribe's Constitution, and other information relating to the July 26 election. In particular, tribal members were informed that the deadline for registering to vote was June 30, 2005.

The Secretarial election took place as scheduled on July 26, 2005. According to the record, Appellant both registered to vote and voted in the election. The Election Board reported that 16 persons were turned away from the polling place because they had not registered to vote.<sup>4</sup> The Election Board also reported that 194 tribal members registered to vote, 6 of whom requested absentee ballots. According to the record, the complete list of registered voters was posted at BIA (Great Lakes Agency) and at the William Wildcat, Sr., Community Center. On Election Day, 91 ballots were cast (including 3 absentee ballots). The amendment passed by a vote of 53 to 38.<sup>5</sup>

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<sup>2</sup> A Secretarial election is a Federal election conducted by BIA, acting pursuant to authority delegated to BIA by the Secretary. *See* 25 U.S.C. § 476; 25 C.F.R. § 81.1(s); *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999).

<sup>3</sup> Article VIII of the Tribe's Constitution, which governs the method of amending the Constitution, was ratified in 1974. According to the Regional Director, Article VIII was amended in 1982 (Amendment No. XIV). Decision at 1-2. He suggests that Article VIII was amended to add the residency requirement. *Id.* at 2.

<sup>4</sup> The record does not indicate whether any of these 16 persons would have otherwise been qualified to vote in the election.

<sup>5</sup> Pursuant to the Tribe's Constitution, amendments to the Constitution are ratified by majority vote at a Secretarial election at which there is a minimum voter turnout of 30% of the total number of registered voters. Tribe's Constitution, Art. VIII. The voter turnout for the July 26 election was 47% (91 ÷ 194 (total ballots cast ÷ total number of registered voters)).

Following the election, Appellant filed a timely protest, claiming that (1) BIA did not follow the “letter of the law” in conducting the Secretarial election; (2) tribal members living off the reservation unlawfully were prohibited from voting; (3) pre-election voter registration conflicted with tribal custom; and (4) there should have been more than one “informational meeting” to explain the Secretarial election and the ballot. Letter from Appellant to Secretary, July 26, 2005, at 1.<sup>6</sup> By decision dated September 9, 2005, the Regional Director rejected Appellant’s protest to the election on the grounds that Appellant did not present any evidence substantiating his allegations, as required by 25 C.F.R. § 81.22. The Regional Director also concluded that the election properly was held in accordance with the procedures at 25 C.F.R. Part 81. This appeal followed.

The Regional Director submitted a brief in response to Appellant’s notice of appeal. Appellant responded to the Regional Director’s brief and the Regional Director submitted a sur-reply. The Board of Indian Appeals (Board) accepted the sur-reply, to which Appellant was permitted to and did submit a response.

## Discussion

### 1. Summary<sup>7</sup>

In his notice of appeal, Appellant renewed the three challenges to the Secretarial election that he made to the Regional Director: Voter eligibility impermissibly was limited to adult tribal members residing on the reservation; the requirement of registering in advance to vote is not consistent with tribal practice and custom, for which reason

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<sup>6</sup> Apart from his challenges to the voter eligibility criteria and voter registration, Appellant did not identify how the Regional Director failed to follow the “letter of the law.”

<sup>7</sup> The Regional Director moves for summary affirmance of his decision because Appellant did not submit an opening brief or set forth arguments in his notice of appeal in opposition to the Regional Director’s decision. *See Mandan v. Acting Great Plains Regional Director*, 40 IBIA 206, 207 (2005). We decline to affirm on these grounds. Attached to Appellant’s notice of appeal was a copy of his appeal to the Regional Director. Appellant sought an extension of time from the Board to prepare a formal Statement of Reasons, to which the Board responded by stating that Appellant’s notice of appeal and attachments were accepted as his statement of reasons. Pre-Docketing Notice and Order Concerning Statement of Reasons, Oct. 14, 2005, at 2. We recognize that Appellant may have construed the Board’s order as accepting his previously raised legal arguments for consideration without the need for another brief. Therefore, we will address the merits of Appellant’s arguments.

otherwise eligible voters failed to register and were precluded from voting; and an inadequate number of informational meetings were held. We reject each of Appellant's arguments for the reasons set forth below.

Appellant also raises two new arguments in his reply brief to the Board that were not first presented to the Regional Director. First, Appellant claims that 25 U.S.C. § 476(a)(1) requires a majority vote of all tribal members before a candidate or ballot measure in a Secretarial election has prevailed; second, Appellant contends that tribal members have not been provided with the actual results of the election, “[o]nly the voting results were posted.” Appellant’s Reply Brief at 1. The Board need not consider arguments that are raised for the first time in a reply brief, *see County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 208 n.11 (2007), and we see no reason to depart from this rule today. Therefore, we decline to consider Appellant’s belated arguments.<sup>8</sup>

## 2. Voter Eligibility

Appellant argues that voter eligibility was impermissibly limited in the Secretarial election to adult tribal members residing on the Tribe’s reservation. Appellant claims that the Tribe’s constitutional amendment defining eligibility to vote was invalidated by Congress when it amended the Indian Reorganization Act (IRA), 25 U.S.C. § 476, in 1988. In that amendment, Congress removed language referring to “adult Indians residing on [a reservation]” and left in place a requirement, designated subsection 476(a), that constitutions, bylaws, and amendments be adopted by majority vote of the adult members of a tribe, with no reference to residency. We disagree with Appellant that this portion of the 1988 amendment invalidated the Tribe’s eligibility requirement because, in another portion of the same legislation, Congress expressly stated that its amendments to the IRA were not to be applied to any tribal constitution or amendment previously ratified and approved.

Our analysis of this issue begins with Appellant’s correct assertion that the Tribe, which voted to reorganize under the IRA in 1936, is subject to the requirements of the IRA. *See generally Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1977). The IRA prescribes Secretarial elections, which are conducted pursuant to

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<sup>8</sup> Appellant is referred to the decision of the Eighth Circuit in *Shakopee Mdewakanton Sioux Community v. Babbitt*, 107 F.3d 667, 670 (8th Cir. 1997), where the court held that, in a Secretarial election conducted under 25 U.S.C. § 476, “majority vote” means “a majority of [those] who voted.”

section 476 and its implementing regulations, 25 C.F.R. Part 81. Relevant to our decision, the Part 81 regulations were amended in December 1980, *see* 46 Fed. Reg. 1,668 (Jan. 7, 1981), to add the following provision:

For a reorganized tribe to amend its constitution and bylaws, only members who have duly registered shall be entitled to vote; provided, that registration is open to the same class of voters that was entitled to vote in the Secretarial election that effected its reorganization, *unless the amendment article of the existing constitution provides otherwise.*

25 C.F.R. § 81.6(d) (emphasis added). Thereafter, in 1982, the Tribe held a Secretarial election to amend Article VIII of its Constitution. The Secretary approved the amendment to Article VIII in September 1982. In relevant part, Article VIII now states:

Amendments to this Constitution and Bylaws may be ratified and approved in the same manner as this Constitution and Bylaws. Whenever the Tribal Council by a vote of eight (8) members shall consider an amendment necessary such amendment shall be sent to the Secretary. . .to call an election. If at such election the amendment is adopted by a majority vote of the adult members of the Tribe, *residing on the reservation at least one (1) year prior to the date of the election*, . . . [of] which at least thirty (30) percent. . . shall vote, such amendment shall be submitted to the Secretary. . . .

Tribe's Constitution, Art. VIII (emphasis added).<sup>9</sup>

Subsequently, in 1988, Congress amended section 16 of the IRA, by removing language referring to “adult Indians residing on [a reservation],” retaining language requiring a “majority vote of the adult members of the tribe,” and making several other changes. Pub. L. No. 100-581, 102 Stat. 2938, § 101 (1988), codified at 25 U.S.C. § 476(a). As a result of the 1988 amendments, section 476 no longer contains any reference to residency. Notably, in section 103 of the same legislation, Congress also expressly provided that “[n]othing in this Act is intended to amend, revoke, or affect any tribal constitution, bylaw, or amendment ratified and approved prior to this Act.” *Id.* at § 103, *reprinted at* 25 U.S.C. § 476 notes.

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<sup>9</sup> Although it is not entirely clear, it appears that the italicized language was the subject of the 1982 amendment.

Appellant does not dispute the voter eligibility criteria set out in Article VIII of the Tribe's Constitution. He argues only that 25 C.F.R. § 81.6(d) and the eligibility criteria in Article VIII were invalidated by Congress in 1988 when Congress amended section 476. However, both parties in this appeal failed to acknowledge that the 1988 amendments to the IRA contained not only the specific amendment that Appellant claims invalidates the Tribe's voter eligibility criteria but an equally important provision in which Congress expressly declined to have the IRA amendment construed to invalidate pre-existing amendments to tribal constitutions that were already ratified and approved. As a result of section 103 of the 1988 amendments, we do not construe subsection 476(a) as overriding the Tribe's previously-adopted constitutional provision regarding voter eligibility, even assuming (without deciding) that Appellant's interpretation of subsection 476(a) is otherwise correct. Thus, we conclude that the criteria for voting in the Tribe's Secretarial election in 2005 properly was governed by Article VIII of the Tribe's Constitution.<sup>10</sup>

### 3. Voter Registration

Appellant argues that the requirement of registering in advance to vote in the Secretarial election is not in keeping with tribal custom and disenfranchises otherwise eligible voters. He contends that the IRA does not require voters to register and, therefore, registration cannot be required for Secretarial elections. Appellant errs. The regulations implementing the IRA specifically require voters to register in advance of the election.

Secretarial elections, although held for tribal governance purposes, nevertheless are Federal elections. *See* 25 C.F.R. § 81.1(s); *Carr v. Midwest Regional Director*, 46 IBIA 127, 128 n.2 (2007). Except where Federal law provides a role for tribal law as part of the Secretarial election procedures, Secretarial elections are conducted in accordance with Federal law. *See* 25 U.S.C. § 476; 25 C.F.R. Part 81. Such elections are both the substantive and procedural responsibility of the Secretary of the Interior to conduct. *Thomas*, 189 F.3d at 667.

Pursuant to that responsibility and the authority granted by Congress, the Secretary duly prescribed regulations governing the conduct of Secretarial elections in 1964. *See* 29 Fed. Reg. 14,359 (Oct. 17, 1964). Such regulations have the full force of law and are binding on the Secretary. *Gallegos v. Anadarko Area Director*, 20 IBIA 36, 37 (1991). As

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<sup>10</sup> We also note, too, that Appellant did not submit evidence substantiating his voter eligibility claim, as required by 25 C.F.R. § 81.22. Because we reject Appellant's legal argument, we need not decide what type of evidence might otherwise have been necessary to warrant a new election, if a class of voters had improperly been denied voter eligibility.

originally drafted, the regulations did not require voters to register in advance of a Secretarial election. In 1967, the regulations were amended to add a voter registration requirement. 32 Fed. Reg. 11,777, 11,778 (Aug. 16, 1967). Voter registration has remained a part of the regulations for the past 40 years and currently appears at 25 C.F.R. § 81.11(a) (“Only registered voters will be entitled to vote, and all determinations of the sufficiency of the number of ballots cast will be based upon the number of registered voters.”). Subsection 81.11 also authorizes and prescribes registration by mail and requires tribal members to be informed in advance of the need to register. 25 C.F.R. § 81.11(a). Voter registration must close at least 20 days prior to the election. *See Id.* § 81.11(a)(4) and (b); *see also id.* § 81.12.

We agree with the Regional Director that the Election Board for the Secretarial election was required to and did comply with section 81.11. Election materials, including information concerning voter registration, were sent out to the adult tribal members on June 10, 2005, and the material informed tribal members that they needed to register to vote no later than June 30, 2005. The fact that tribal elections may not require voters to register in advance of tribal elections plays no role in the conduct of a Secretarial election.

For the above reasons, we affirm the Regional Director’s decision that the Secretarial election properly required voters to register in advance of the election pursuant to 25 C.F.R. § 81.11.<sup>11</sup>

#### 4. Informational Meetings

Appellant also challenged the Tribe’s cancellation of one of two “informational meetings” that apparently were scheduled to inform voters about the Secretarial election. Although such meetings are certainly commendable, Appellant concedes that neither tribal or Federal law require such meetings, and we know of no such laws. Therefore, we affirm the Regional Director’s decision that the lack of informational meetings did not affect the validity of the election.

### Conclusion

For the reasons set forth above, we find no basis for invalidating the Secretarial election held for the Tribe on July 26, 2005.

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<sup>11</sup> Again, we note that Appellant failed to substantiate his claims by showing that there were otherwise qualified voters who would have voted but did not register in advance of the election.

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 affirms the Regional Director's decision.

I concur:

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// original signed  
Debra G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge