



## INTERIOR BOARD OF INDIAN APPEALS

Gina Howard, et al. v. Acting Pacific Regional Director, Bureau of Indian Affairs

55 IBIA 240 (08/29/2012)

Denying reconsideration of:  
55 IBIA 192



# 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

GINA HOWARD, et al.,	)	Order Denying Reconsideration
Appellants,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-128-1
ACTING PACIFIC REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 29, 2012

On July 18, 2012, the Board of Indian Appeals (Board) dismissed an appeal filed by Appellants<sup>1</sup> in which they challenged two decisions issued on February 24, 2012, and June 7, 2012, both by the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA). 55 IBIA 192. The Regional Director declined to “render any decision” on the action by the Executive Committee of the Pala Band of Mission Indians

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<sup>1</sup> Appellants are Gina Howard, Luanne Moro, Ronald D. Allen, Jr., Kelly L. Peterman, Charles Allen, Jr., Nikki Harris, Mikki Graber, Vikki Oxley, Shawn Thomas Rogers, Jeanne Durso, Daniel Durso, Robert J. Morris, Misty Morris, Ray Morris, Monique Early, Melissa Hunter, Mary Montoya, Robert I. Ruppert, Justin M. Ruppert, David Guaytano Riggs, Jr., Ronald “J.R.” E. Riggs, Jr., Raymond J. Bozigian, Ben Johnson, Gordon L. Johnson, Joey Pink, Kalcie J. Ontiveros, Kirsten T. Ontiveros, Brittney L. Luthers, John A. Randolph, Jr., and minors Marki Ontiveros, Piper Ontiveros, Johnathan A. Torres, Joshua Torres Cuevas, Tara P. Torres, Janette T. Lewis, and Jason A. Lewis.

In their petition for reconsideration, Appellants purport to “add,” as new appellants, Cheryl I. Majel, Joseph Harris, Matthew Pink, Jessica Florez, Julieanne Pink, Geoffrey M. Johnson, Debra Wirth, and Maria Vivanco. We construe this “notice” as a motion to amend Appellants’ original filing, and the motion is denied. The appeal filed by the original appellants has been dismissed by the Board, and, by this decision, it is not being reconsidered. Therefore, there is no appeal to which “new appellants” may be added and the issue of adding new appellants is moot.

(Band) to disenroll Appellants as tribal members.<sup>2</sup> We dismissed the appeal for lack of jurisdiction because the Board's regulations expressly withhold authority from the Board to adjudicate tribal enrollment disputes, unless the matter has been referred to it by the Secretary of the Interior (Secretary) or the Assistant Secretary-Indian Affairs (Assistant Secretary), which it has not. *See* 43 C.F.R. § 4.330(b)(1).

Appellants seek reconsideration of our dismissal, and argue three grounds for doing so. First, Appellants argue that before dismissing their appeal, the Board should have permitted Appellants to brief the issue of the Board's jurisdiction. They contend that the Board has jurisdiction to determine whether the Regional Director properly determined that *he* lacked jurisdiction to decide the merits of the tribal enrollment dispute before him. Thus, Appellants argue that the Board has authority to review procedural determinations by the Regional Director even if we lack authority to review the merits determination. Next, Appellants claim that by denying, on jurisdictional grounds, their request for relief on the merits of their enrollment dispute, the Regional Director himself created the extraordinary circumstances necessary for the Board to grant reconsideration, which circumstances were exacerbated, they argue, by the Board's dismissal of their appeal. Finally, Appellants urge the Board to adopt a "rule of lenity" to undertake a review of the Regional Director's decisions and "help stem the rapidly spreading unjustified tribal disenrollment disease." Petition for Reconsideration (Petition) at 15. As we explain below, Appellants' arguments simply do not overcome our lack of jurisdiction over tribal enrollment disputes, which is itself not disputed by Appellants.

The Board's standard for reviewing petitions for reconsideration is well-established: Reconsideration will be granted only in extraordinary circumstances. 43 C.F.R. § 4.315(a); *Keane v. Northwest Regional Director*, 51 IBIA 235 (2010); *Gardner v. Acting Western Regional Director*, 46 IBIA 105 (2007); *Jacobs v. Great Plains Regional Director*, 43 IBIA 272 (2006).

We first address a mischaracterization of the Board's decision by Appellants. Appellants assert that in dismissing their appeal, the Board "affirms" the decisions of the Regional Director to decline to decide the merits of Appellants' claims. Petition at 7-8. Appellants err. The Board dismissed Appellants' appeal because the Board lacks subject matter jurisdiction over their appeal. In doing so, we took no position on the merits of the Regional Director's decisions.

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<sup>2</sup> Notwithstanding his decision to decline to render a decision, the Regional Director did recommend to the Band that it continue to recognize Appellants as tribal members.

Turning to Appellants' arguments for reconsideration, Appellants first contend that the Board is not asked to decide the merits of their disenrollment, only the merits of the Regional Director's decisions that *he* lacks jurisdiction or authority to decide the dispute. Appellants argue that nothing precludes the Board from reversing the Regional Director's decisions on this procedural ground and remanding the matter to him for *his* decision on their disenrollment. Appellants cite no law for this proposition and the Board knows of no precedent for assuming jurisdiction over the procedural issues in a case where the Board's governing regulation expressly withholds jurisdiction over the substantive merits of the case. Especially here, where appellate jurisdiction over the substantive merits may rest with the Assistant Secretary, *see, e.g.*, 25 C.F.R. § 62.10, we decline to exercise jurisdiction over the Regional Director's conclusion that he has no authority or jurisdiction to issue a decision.<sup>3</sup>

Next, Appellants argue that they have shown extraordinary circumstances: The Regional Director declined to exercise jurisdiction over their disenrollment dispute yet issued a recommendation to the Band to reenroll them that, according to Appellants, was predicated on faulty grounds.<sup>4</sup> This error, argue Appellants, was compounded by the Board's decision to dismiss their appeal. But, "extraordinary circumstances," as used in 43 C.F.R. § 4.315(a), which governs petitions for reconsideration, does not refer per se to the merits of an appellant's claim or appeal, but to such circumstances that would call into question the merits of the Board's decision in an appeal. For example, in *Mize v. Northwest Regional Director*, 51 IBIA 298 (2010), the Board granted reconsideration when a factual finding material to the Board's decision to dismiss the appeal proved to be wrong; in *Welch v. Minneapolis Area Director*, 17 IBIA 56 (1989), reconsideration was granted on a showing that the Board lacked jurisdiction to enter its underlying decision. In each of these grants of reconsideration, the extraordinary circumstances related to the Board's underlying decision. In dismissing Appellants' appeal, the Board did not reach the merits of the Regional Director's decisions. We held that we lack jurisdiction over the subject matter of Appellants' appeal: Appellants' disenrollment. And we referred the matter to the Assistant Secretary for his consideration, which Appellants overlook in their Petition. *See* 55 IBIA at 195. Consequently, whether we view the merits of the Regional Director's decision as extraordinary is irrelevant.

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<sup>3</sup> We express no opinion on whether the Assistant Secretary has jurisdiction over an appeal from the Regional Director's decisions. That determination is for the Assistant Secretary to make in the first instance.

<sup>4</sup> Appellants maintain that in recommending to the Band that Appellants' tribal membership be reinstated, the Regional Director relied on a tribal constitution that Appellants contend was not adopted in accordance with tribal law.

Nothing in Appellants' petition for reconsideration demonstrates any error in our decision: Appellants do not dispute the Board's conclusion that it lacks jurisdiction over tribal enrollment disputes, nor do Appellants contest the Board's referral of their appeal to the Assistant Secretary. We decline to adopt a "rule of lenity" if for no other reason than the absence of any authority to override the very regulation that governs the reach of the Board's jurisdiction. This regulation clearly and expressly states that we may not exercise jurisdiction over tribal enrollment disputes. *See* 43 C.F.R. § 4.330(b)(1).<sup>5</sup>

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 denies reconsideration of 55 IBIA 192.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>5</sup> Section 4.330(b) states in relevant part, "Except as otherwise permitted by the Secretary or the Assistant Secretary. . . , the Board shall not adjudicate: (1) Tribal enrollment disputes."