



INTERIOR BOARD OF INDIAN APPEALS

Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Northwest
Regional Director, Bureau of Indian Affairs

58 IBIA 197 (02/20/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CONFEDERATED SALISH AND)	Order Docketing and Dismissing
KOOTENAI TRIBES OF THE)	Appeal
FLATHEAD RESERVATION,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 14-034
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 20, 2014

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribe) appealed to the Board of Indian Appeals (Board) from a September 20, 2013, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In the Decision, the Regional Director found that a petition for a Secretarial election submitted under 25 C.F.R. Part 82 by The People’s Voice, Inc. (People’s Voice), was valid. The Decision informed People’s Voice that its proposed language to amend the Tribe’s Constitution, with “minor” changes made by BIA, will be the subject of a Secretarial election called and authorized by the Northwest Regional Office of BIA. Decision at 1-2. The Tribe, through its Tribal Council, appealed to the Board, challenging the language of the proposed amendment.

We conclude that the portion of the Decision challenged by the Tribe, which addresses the language of the proposed amendment, does not constitute final and appealable action by the Regional Director, which is a prerequisite to our exercise of jurisdiction under 43 C.F.R. § 4.331. Therefore, we dismiss the appeal for lack of jurisdiction.

Background

The Tribe’s Constitution specifies that upon presentation of a petition signed by one-third of the qualified voters, members of the Tribe, the Secretary must call an election on any proposed amendment to the Constitution. Regional Director’s Answer, Ex. A (Constitution and Bylaws of the Confederated Salish and Kootenai Tribes, Art. X, § 1).

Part 82 of 25 C.F.R. provides procedures for the submission of petitions to BIA requesting a Secretarial election to amend a tribal constitution. *See* 25 C.F.R. § 82.2.¹

People's Voice submitted a petition to BIA requesting that a Secretarial election be held on a proposed constitutional amendment that would allow for the recall of tribal council members. Decision at 1. The Regional Director reviewed the petition pursuant to 25 C.F.R. Part 82, which requires BIA to determine the validity of the signatures on a petition, the adequacy of the number of signatures, and the propriety of the petitioning procedure, and to decide whether the petition "shall be acted upon." 25 C.F.R. § 82.10(a) and (b). If BIA concludes that a petition warrants action, the petitioning group and the tribe must be informed and BIA's "decision in such matters shall be final." *Id.* § 82.10(b). The procedures for implementing an action initiated by BIA's acceptance of a petition "will be determined in accordance with pertinent directives and regulations." *Id.*

In the present case, the Regional Director examined the sufficiency of the petition and found that it was valid and should be acted upon. Decision at 1. In addition, the Regional Director noted that People's Voice had submitted proposed language for the constitutional amendment, which BIA had in turn submitted to the Solicitor's office for review.² The Regional Director stated that BIA had "made minor changes" to the language and found that the proposed language "would not be contrary to any applicable federal laws." Decision at 1. The Regional Director did not cite any regulatory provision in connection with BIA's review and changes to the proposed language.

After concluding that the petition was valid and that the proposed language (at least with BIA's changes) would not be contrary to Federal laws, the Regional Director stated that the proposed language would be submitted to the membership of the Tribe at a Secretarial election called and authorized by the Northwest Regional Office. *Id.* at 1-2. Appellant appealed the Decision to the Board, challenging the language of the proposed amendment and arguing that it is vague and overbroad, violates due process, and conflicts with existing sections of the Tribe's Constitution. Notice of Appeal at 4-8.³ Appellant does

¹ A Secretarial election is a Federal election conducted by BIA acting pursuant to authority delegated to BIA by the Secretary of the Interior. *See* 25 C.F.R. Part 81.

² It is unclear whether the petition itself included proposed language. Section 82.6 of 25 C.F.R. provides, among other things, that "each sheet of a petition must set forth at least a summary of the objectives of the petitioners."

³ Appellant also objected to language in the Decision that the vote would be held "in the near future," which Appellant argued would conflict with tribal elections scheduled to take place in November and December of 2013. Notice of Appeal at 8-9; *see* 25 C.F.R.

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not challenge the Decision with respect to the Regional Director’s findings that the petition itself was valid and sufficient under 25 C.F.R. Part 82 to warrant action and the calling of a Secretarial election.

Upon receipt of the appeal, the Board issued an order to show cause, which directed Appellant to address whether the Decision constitutes a “final,” and thus appealable, decision of the Regional Director, *see* 43 C.F.R. § 4.331; and whether Appellant has standing to bring the appeal. Order to Show Cause, Nov. 7, 2013 (OSC), at 1-3. Appellant contends that the Decision effectively is final because “at this point there can be no other action to alter or clarify the flawed language that will be the subject of the election prior to the vote,” and as such, an appeal to the Board is the only forum available to Appellant “to appeal the Regional Director’s approval of the proposed amendment.” Appellant’s Response to OSC at 4. In response, the Regional Director argues that dismissal of the appeal is required for a reason not identified in the OSC: Part 82 makes BIA actions on a petition “final.” Regional Director’s Answer at 2 (citing 25 C.F.R. § 82.10(b), quoted *supra* at 198).

Discussion

We first reject the Regional Director’s argument that 25 C.F.R. § 82.10(b) bars us from considering the appeal, because Appellant’s claim does not arise under Part 82. While § 82.10(b) provides that a BIA regional director’s decision is final on the “matters” described in Part 82, those “matters” pertain to action on a petition’s sufficiency, e.g., the validity of signatures, the adequacy of the number of signatures, and the propriety of the petitioning *procedure*, and a determination whether the *petition* warrants action based on a review of such matters. In this appeal, the Tribe is not appealing from the final decision of the Regional Director on the sufficiency and validity of the petition, or the calling of a Secretarial election, in and of itself. Instead, the Tribe seeks review of the Regional Director’s purported “approval” of language for the proposed amendment and the decision to hold a Secretarial election “using the language of the proposed amendment that the BIA apparently modified and subsequently approved.” Appellant’s Response to OSC at 3.⁴

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§ 81.2(d) (“As much as possible, Secretarial elections shall be scheduled so as to avoid their being held at the same time as *tribal* elections in order to avoid . . . confusion . . .”). The postponement in scheduling a Secretarial election due to this appeal appears to have rendered this objection moot.

⁴ The Tribe’s Notice of Appeal was ambiguous in setting forth its claim, and arguably could have been construed, at least in part, as arising under Part 82, to the extent that the Tribe was contending that the allegedly defective language of the proposed amendment precluded

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None of the matters described in § 82.10 involve BIA’s substantive review and action on the language of a proposed amendment. Thus, the language of finality in Part 82, and the Board decisions relied on by the Regional Director,⁵ do not apply to this case, and we conclude that Part 82 does not present a jurisdictional bar to the appeal.

It does not follow, however, that we *do* have jurisdiction. The Board is authorized to consider appeals from “a final administrative action or decision,” 43 C.F.R. § 4.331, of a BIA regional director, *see* 25 C.F.R. § 2.4(e). OSC at 2. The Board is not authorized to consider a procedural interim action by a BIA regional director, which even if characterized as a “decision,” is not a “final” action. *See Pueblo of San Felipe v. Southwest Regional Director*, 58 IBIA 44, 45-46 (2013) (dismissing appeal from BIA regional director’s request for a boundary resurvey because a final determination would be issued in the future).

The Decision cites no authority or regulatory provision under which BIA undertook to review, offer its views, or make any “decision” on the proposed language to be included on the ballot for a Secretarial election. It may be that the review was conducted under 25 C.F.R. § 81.4. Part 81 (unlike Part 82) contains procedures for holding a Secretarial election, and includes a provision for BIA to offer advice and assistance “to any tribe in drafting . . . an amendment,” which might include providing assistance to a petitioning group. *See* 25 C.F.R. § 81.4. But § 81.4 does not envision BIA making a *final* and appealable decision to approve language of a proposed amendment before an election has been held. In fact, it is not clear what, if any, authority BIA has to determine what language should appear on the ballot.⁶

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a decision by the Regional Director under § 82.10(b) that the *petition* should be “acted upon” by calling a Secretarial election. Although we do not construe the Tribe’s appeal, as clarified by its response to the OSC, to arise under Part 82, to the extent the Tribe intended otherwise, we would agree with the Regional Director that we lack jurisdiction based on the language of finality contained in § 82.10(b).

⁵ *See* Regional Director’s Answer at 2 (citing *Johnson v. Acting Principal Deputy Assistant Secretary – Indian Affairs*, 42 IBIA 216 (2006); *Allison v. Acting Superintendent, Eastern Nevada Field Office*, 39 IBIA 71 (2003); *Split Family Support Group v. Northwest Regional Director*, 36 IBIA 5 (2001)).

⁶ *See* Appellant’s Response to OSC, Ex. 1 (Letter from Scott Keep, Office of the Solicitor, to Suzanne R. Schaeffer, Esq., Dec. 26, 2005, at 1 (“If a proposed amendment appears to be contrary to Federal law, the Department must notify the Tribe of such and give the Tribe an opportunity to correct it before calling the election. The Department will in any event call the election.”)). Thus, even if we were to conclude that we have jurisdiction over this appeal, it appears doubtful at best that we would have authority to grant the Tribe the

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In the OSC, the Board noted that under Part 81, a regional director's authorization that a Secretarial election be held does not constitute either approval of election results or substantive final approval of a proposed amendment, if the amendment is adopted by the voters. OSC at 2 (citing 25 C.F.R. § 81.24(a)). In response, none of the parties disputed the Board's interpretation of Part 81. Although the Decision includes the Regional Director's view that the language of the proposed amendment is not contrary to Federal law, we construe that as at most a preliminary and informal determination, subject to final action by BIA following an election (if the proposed amendment is adopted).

Whether the language that will appear on the ballot for the Secretarial election, which presumably has been agreed to by People's Voice as the petitioning group, could or "should" be further revised, and whether or not BIA could or should have consulted with the Tribe in the context of its technical review of the language, we are not convinced that BIA's views on the language, as expressed in the Decision, constitute final and appealable action, within the meaning of 43 C.F.R. § 4.331. Thus, we conclude that we lack jurisdiction over the appeal.

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 docketed but dismisses this appeal.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

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relief it requests—an order “that the language of the proposed amendment be significantly redrafted so there will be clear and unambiguous standards for petition and recall that do not conflict with other sections of the [Tribe’s] Constitution and Bylaws.” Notice of Appeal at 3.