



INTERIOR BOARD OF INDIAN APPEALS

Joe Kennedy, Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, John Doe, and
John Roe v. Pacific Regional Director, Bureau of Indian Affairs

60 IBIA 94 (03/11/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| JOE KENNEDY, GRACE GOAD, |) | Order Dismissing Appeal |
| ERICK MASON, PAULINE ESTEVES, |) | |
| MADELINE ESTEVES, JOHN DOE, |) | |
| AND JOHN ROE, |) | |
| Appellants, |) | |
| |) | Docket No. IBIA 14-082 |
| v. |) | |
| |) | |
| PACIFIC REGIONAL DIRECTOR, |) | |
| BUREAU OF INDIAN AFFAIRS, |) | |
| Appellee. |) | March 11, 2015 |

Joe Kennedy, Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, John Doe, and John Roe (collectively, Appellants), seek review by the Board of Indian Appeals (Board) of a January 6, 2014, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), authorizing a Secretarial election to be held for the Timbisha Shoshone Tribe (Tribe), pursuant to 25 U.S.C. § 476 and in accordance with the procedures in 25 C.F.R. Part 81, on a proposed Constitution for the Tribe. The Board dismisses Appellants’ appeal for lack of standing.

Background

Appellants challenge the Decision on the grounds that it initiated a Secretarial election without pre-determining voter eligibility requirements,¹ thus “causing” an election to be held in which eligible voters would not be allowed to vote and ineligible voters would be allowed to vote.² The Board placed the Decision into immediate effect because of

¹ Appellants contend that tribal membership requirements are determined by the Tribe’s 1986 Constitution. Opening Brief (Br.), July 21, 2014, at 9. Intervener Tribe contends that by its own terms, the 1986 Constitution never became effective because it was never ratified through a Secretarial election. Tribe’s Answer Br., Aug. 19, 2014, at 4.

² Appellants are enrolled tribal members and, except for John Doe and John Roe, who were minors at the time of the Secretarial election, were registered to vote in the election. Notice (continued...)

substantial questions as to whether the Decision was a final BIA decision and whether Appellants have standing to challenge the Decision, and due to the likelihood that disruption or confusion might occur if the appeal interfered with the conduct of the impending election.³ The Board expressly stated that BIA had “full authority to implement th[e] Decision in accordance with 25 C.F.R. Part 81”—the Federal regulations governing Secretarial elections. Order Making Decision Effective at 3 n.4. The Secretarial election was held as scheduled on March 29, 2014, and the proposed Constitution was ratified. *See* Letter from Assistant Secretary – Indian Affairs (Assistant Secretary) to Regional Director, May 12, 2014, at 1, 7 (Assistant Secretary’s Decision).

In these appeal proceedings, the parties briefed the issues of whether Appellants have standing; whether the Regional Director’s authorization to hold a Secretarial election, standing alone, was a final appealable decision under 43 C.F.R. § 4.331; and whether the Assistant Secretary’s subsequent approval of the results of the election divested the Board of jurisdiction.⁴

Appellants filed an opening brief. The Tribe and the Regional Director each filed an answer brief, and Appellants filed a reply brief.

We now dismiss the appeal for lack of standing.⁵ The Regional Director’s authorization put in motion the process for holding an election on the proposed

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of Appeal, Mar. 12, 2014, at 2. Appellants contend that Doe and Roe are eligible to vote pursuant to the Tribe’s 1986 Constitution but were not allowed to register. *Id.*

³ Pre-Docketing Notice, Order Denying Stay and Placing Regional Director’s Decision into Effect, and Order for Administrative Record, Mar. 21, 2014, at 2-3 (Order Making Decision Effective). For purposes of its order, the Board assumed, without deciding, that the Decision was a final BIA decision that was appealable under 43 C.F.R. § 4.331, and subject to automatic stay, *see* 25 C.F.R. § 2.6, 43 C.F.R. § 4.314.

⁴ In his decision, the Assistant Secretary expressed an “expectation that, in light of today’s decision—a final agency decision approving the outcome of the Timbisha Shoshone Secretarial election—the [Board] will find that there is no longer a dispute over which it has jurisdiction.” Assistant Secretary’s Decision at 2 n.2.

⁵ Assuming that the Decision was a “final” administrative action or decision subject to review by the Board pursuant to 43 C.F.R. § 4.331, we are not convinced that the Assistant Secretary’s decision on the *outcome* of the Secretarial election divested the Board of jurisdiction over, or rendered moot, review of the Regional Director’s decision to authorize

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Constitution, in accordance with Federal law, i.e., 25 C.F.R. Part 81. Decision, Jan. 6, 2012, at 1-2 (unnumbered) (Administrative Record Tab C). Appellants have no legally protected interest that was adversely affected by a decision that purports to do no more than authorize such an election. The “injury” that Appellants allege was “caused” by the Regional Director’s authorization decision is premised entirely on construing the Decision as authorizing an election to be held in *violation* of Federal law—i.e., without regard for the requirements and procedures of Part 81. And to the extent Appellants claim standing based on actions taken by BIA or the Assistant Secretary in *implementing* the Decision to hold an election in accordance with Federal law, those actions are outside the scope of this appeal and any injuries caused thereby cannot serve as the basis for standing to challenge the Decision, which was limited in scope.

Discussion

In order to have a right to appeal to the Board, Appellants must demonstrate that they have standing. See 25 C.F.R. § 2.2 (definitions of “Appellant” and “Interested party”); 43 C.F.R. § 4.331 (Who may appeal); *Friends of Our Pyramid Lake Reservation v. Western Regional Director*, 55 IBIA 272, 273 (2012).

To evaluate standing, the Board follows the elements of judicial standing articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 292 (2014). First, an appellant must show that he or she has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest. *Lujan*, 504 U.S. at 560. In doing so, an appellant must assert his or her own legal rights and interests, and cannot bring a claim on behalf of the rights and interests of others, e.g., rights that may belong to other tribal members or to the tribe as a whole. See *Thompson v. Great Plains Regional Director*, 58 IBIA 240, 241 (2014); *Friends*, 55 IBIA at 273-75; *Wadena v. Midwest Regional Director*, 47 IBIA 21, 27 (2008); *Bullcreek v. Western Regional Director*, 40 IBIA 191, 194 (2005). “Tribal members, as individuals, . . . do not have standing to bring an action based on a personal assessment of what is or what is not in the best interests of the tribe.” *Bullcreek*, 40 IBIA at 194. Thus, we held in *Friends* that distrust of the tribal governing body, disagreement with BIA’s decision to authorize a Secretarial election, and

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the election in the first place. See Regional Director’s Answer Br., Aug. 20, 2014, at 6-9. The reasoning strikes us as circular.

belief that the election results may harm the tribe, is insufficient for tribal members to demonstrate standing to appeal the decision authorizing the election.⁶ 55 IBIA at 274-75.

The second element of standing is that the injury must be traceable to the BIA decision that is challenged, and not to some independent action of a party not before the Board. *See Lujan*, 504 U.S. at 560. Third, the injury must be capable of redress by a favorable decision of the Board. *See id.* at 561. Appellants in this case satisfy none of the elements of standing.

The Regional Director contends that Appellants' disagreement is with the Tribe's request for the Secretarial election and the Regional Director's authorization of the election itself, and that, as such, *Friends* compels us to find that Appellants lack a legally protected interest that is adversely affected by the Decision. Regional Director's Answer Br. at 5. Appellants dispute that characterization, arguing that the appeal "is not about the legitimacy of the request for the election, the wisdom of the content of the proposed Constitution *or even [BIA's] approval of the request for the election.*" Reply Br. at 1-2 (emphasis added). But the Decision to authorize the election was required once BIA accepted the Tribe's request. *See* 25 C.F.R. § 81.5 (BIA "shall authorize" the calling of an election when it receives a request that conforms to the regulations). The Decision neither granted nor denied any right that Appellants (or any other individuals) would have to vote in the election. It did, however, make clear that the election was to be held "in accordance with" Federal law, i.e., 25 C.F.R. Part 81, and thus cannot reasonably be construed as "injuring" Appellants' voting rights by authorizing non-members to vote. Decision at 2 (unnumbered); *see* 25 C.F.R. §§ 81.6 (entitlement to vote), 81.1(k) (definition of "member").

According to Appellants, however, injuries to their voting rights, and rights as tribal members, are traceable to the Decision because it "irreversibly initiates a federal election

⁶ In the Board's order making the Decision effective, the Board advised Appellants—who, except for Doe and Roe, contend that they served as members of the "last lawfully elected Tribal Council elected between 2008-2010," Notice of Appeal at 1—that in July 2011 the Assistant Secretary recognized an election in which five other people were elected to the five-member Tribal Council and that the Board lacks jurisdiction to review that decision of the Assistant Secretary. Order Making Decision Effective at 3 n.3; *see Cherokee Nation v. Acting Eastern Oklahoma Regional Director*, 58 IBIA 153, 161 (2014) (decisions of Assistant Secretary generally not subject to Board review). Appellants do not dispute that the Board's determination of whether they have standing is properly based on whether they have standing as individual tribal members. *See* Opening Br. at 5 (arguing that Appellants have standing "[a]s individual tribal members"); Reply Br., Sept. 18, 2014, at 6 ("Appellants have standing as individual voters . . .").

without any further means or process for the Agency to determine whether the election complies with federal law governing voter eligibility.” Notice of Appeal at 2 (emphasis added). Appellants posit that the Decision effectively would have authorized “a 16 year old Russian national with no previous connection to the Tribe” to be eligible to vote, if his or her name somehow appeared on a list created by the Tribal Council, and the Election Board and BIA would be powerless to accept a challenge to the eligibility of that individual. Reply Br. at 15. Appellants’ argument wholly ignores the procedures and requirements of Part 81, and the likelihood of an injury to them resulting from the Decision is wholly speculative, to put it charitably.

Discarding the chaff of Appellants’ mischaracterization of the effect of the Decision, we agree that our decision in *Friends* is dispositive: Appellants’ asserted injuries arising from and caused by the Decision are speculative and hypothetical.⁷ Appellants conflate the Decision to authorize the election—the subject of this appeal—with events and decisions that occurred after and separate from the authorization, and which are outside the scope of the Decision and this appeal.

Appellants attempt to bootstrap onto their appeal from the Decision to hold a Secretarial election a challenge to the final conduct of that election. Appellants’ complaints with the implementation and outcome are outside the scope of an appeal from the Decision to authorize an election in accordance with Federal law. And to the extent they contend the election was *not* held in accordance with Federal law—*i.e.*, was held *contrary* to the Decision—their remedy lies in challenging the election itself, not the Decision to authorize it.

In support of their contention that the Regional Director is accountable for ensuring that the election “is conducted in a lawful manner,” Reply Br. at 5-6, including voter eligibility determinations, Appellants rely on *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 906 F. Supp. 513, 520-21 (D. Minn. 1995), *aff’d*, 107 F.3d 667

⁷ At the time Appellants filed the appeal, the election had not occurred. After the election, the Assistant Secretary rejected as a matter of law Appellants’ claim that the eligible voter pool should have included certain minors such as Doe and Roe (and we are bound by his determination, *see Cherokee Nation*, 58 IBIA at 161), and found that a majority of the eligible voters who are acceptable to Appellants voted to adopt the proposed Constitution. Assistant Secretary’s Decision at 4-5. Appellants assert that the Decision “discouraged legitimate potential voters” from voting, Reply Br. at 21, but provide no evidence. And Appellants’ contention that the Decision “inevitably opens the door” to voting by non-members and giving such voters Federal benefits reserved for tribal members, and reducing Appellants’ benefits, Opening Br. at 7, appears speculative at best.

(8th Cir. 1997). But *Shakopee* held that the Secretary has post-election authority, under 25 C.F.R. § 81.22, to review eligibility determinations made by an election board, and to order a recount or a new election if warranted. 906 F. Supp. at 521. If anything, *Shakopee* directly *undermines* Appellants’ argument that by authorizing an election to be held in conflict with Federal law, the Regional Director “irreversibly initiate[d] a federal election without any further means or process for the Agency to determine whether the election complies with federal law.” Notice of Appeal at 2.

Appellants’ alleged injuries are not traceable to the Decision, which was properly limited to authorizing a Secretarial election to be held in accordance with Part 81.⁸

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 Appellants’ appeal.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁸ As noted, the Assistant Secretary heard Appellants’ challenge to the outcome of the Secretarial election, which included Appellants’ arguments that the Election Board erred in its eligibility determinations, and he rejected that challenge. *See* Assistant Secretary’s Decision at 4-6. Contrary to Appellants’ arguments, the Assistant Secretary undoubtedly had authority to decide the election dispute, because even if this appeal might otherwise have divested BIA of jurisdiction, the Board made clear that BIA had “full authority” to implement the Decision, and by extension the Assistant Secretary had authority to take action to culminate that process. Order Making Decision Effective at 3 n.4. And because the Board lacks jurisdiction to review the Assistant Secretary’s decision, *see Cherokee Nation*, 58 IBIA at 161, the Board could not grant the relief that Appellants seek—“to declare this election invalid,” Opening Br. at 6—on the particular grounds asserted by Appellants in this appeal, which they contend do not involve the legitimacy of the request for the election or BIA’s approval of the request for the election itself, *see supra* at 97. Thus, Appellants also fail to meet the redressability element of standing.