



INTERIOR BOARD OF INDIAN APPEALS

Wichita and Affiliated Tribes v. Acting Southern Plains Regional Director,
Bureau of Indian Affairs

61 IBIA 286 (09/29/2015)



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

WICHITA AND AFFILIATED TRIBES,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 13-112
ACTING SOUTHERN PLAINS)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	September 29, 2015

The Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakoni) (Appellant or Tribe) appealed to the Board of Indian Appeals (Board) from a May 3, 2013, decision (Decision) of the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director concluded that the Secretary of the Interior is not authorized to issue a proposed Federal charter of incorporation for the Tribe’s business corporation, Wichita Business Development, Inc., pursuant to Section 17 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 477, because another provision of the IRA, 25 U.S.C. § 473, states that Section 17 shall not apply to certain tribes located in the State of Oklahoma, including Appellant.

Appellant argues that its exclusion from Section 17 of the IRA was repealed by the Oklahoma Indian Welfare Act (OIWA) of 1936, 25 U.S.C. § 501 *et seq.*, or that a 1990 amendment to the IRA directly extended Section 17 to the Tribe. We disagree. In order to incorporate as the Tribe proposes to do under the IRA, the Tribe must first incorporate pursuant to Section 3 of the OIWA, 25 U.S.C. § 503, which provides that a charter of incorporation issued under the OIWA may convey to the incorporated group any other rights or privileges secured to an organized Indian tribe under the IRA—including the right to incorporate under Section 17. And, while the requirements differ for tribal ratification of an OIWA corporate charter as compared to an IRA corporate charter, Appellant does not convince us that it was error for BIA to require the Tribe to satisfy the OIWA’s ratification requirements. Therefore, we affirm the Decision.

Statutory Framework

The Indian Reorganization Act of 1934, codified at 25 U.S.C. § 461 *et seq.*, represented a sea change in Indian policy by abandoning the policy of assimilation, halting the allotment process, and encouraging tribal development and self-determination. Section 17 of the IRA authorized the Secretary of the Interior (Secretary) to issue tribal charters of incorporation. 25 U.S.C. § 477.¹

When Congress enacted the IRA, Congress did not impose it on all tribes, but rather provided tribes with an opportunity to come under its provisions. The IRA was not to “apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary . . . , shall vote against its application.” *Id.* § 478. Congress also excluded tribes in the State of Oklahoma—which were not given an opportunity to vote regarding the IRA’s application—from several of the IRA’s provisions, including the sections dealing with self-government and corporate charters. *See id.* § 473; *see also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988) (“The legislative history reflects that one reason for the exclusion was that the tribes had made progress toward assimilation and it was thought best not to encourage return to reservations. The need for similar legislation for the Oklahoma tribes was to be explored further.” (footnote omitted)). The IRA explicitly provides that Section 17 “shall not apply to the . . . Wichita,” its members, or the members of other affiliated tribes.² 25 U.S.C. § 473.

Two years later, in 1936, Congress enacted the Oklahoma Indian Welfare Act, codified at 25 U.S.C. § 501 *et seq.*, which by its terms applies to all tribes in Oklahoma except as relating to Osage County. 25 U.S.C. § 508. Section 3 of the OIWA granted to “[a]ny recognized tribe or band of Indians residing in Oklahoma” the right to organize and to adopt a constitution and bylaws, and authorized the Secretary to issue to “any such

¹ All statutory references are to the current version, unless otherwise noted. In our decision, we refer to the two IRA and OIWA sections authorizing the issuance of corporate charters by the section numbers assigned to them in the original legislation, i.e., Section 17 of the IRA and Section 3 of the OIWA, as they are commonly known. We refer to other sections of the IRA and the OIWA according to their codification in the United States Code.

² The other Oklahoma tribes named for exclusion are the Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. 25 U.S.C. § 473. As originally enacted, § 473 stated that Sections 2, 4, 7, 16, 17, and 18 of the IRA (25 U.S.C. §§ 462, 464, 467, 477, 478) would not apply to the named Oklahoma tribes. Act of June 18, 1934, ch. 576, § 13, 48 Stat. 984, 986-87.

organized group a charter of incorporation.” *Id.* § 503. A charter issued by the Secretary under the OIWA “may convey to the incorporated group . . . any other rights or privileges secured to an organized Indian tribe under [the IRA].” *Id.* Section 3 of the OIWA also provides that a corporate charter “shall become operative when ratified by a majority vote of the adult members of the organization voting” and that “such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote.” *Id.*

While Section 17 of the IRA originally provided that an IRA charter of incorporation may be issued upon petition “by at least one-third of the adult Indians” and must be ratified “at a special election by a majority vote of the adult Indians living on the reservation,” 48 Stat. at 988, one of several 1990 amendments to the IRA expressly amended Section 17 to provide that a charter may be issued upon petition “by any tribe” and must be ratified “by the governing body of such tribe,” Pub. L. No. 101-301, § 3(c)(2), 104 Stat. 206, 207 (1990). At the same time, Congress also amended the IRA to add 25 U.S.C. § 478-1 and to modify § 473, which amendments we discuss further *infra* as they relate to Appellant’s arguments. Congress did not expressly amend Section 3 of the OIWA. In this appeal, Appellant argues that BIA should approve the Tribe’s proposed charter of incorporation as lawful under Section 17 of the IRA with ratification by the Tribe’s governing body.

Factual and Procedural Background

On November 27, 2012, the Tribe’s Executive Committee adopted a charter of incorporation (Charter) and resolved to request that the Secretary of the Interior issue the Charter to establish a business corporation “as authorized by 25 U.S.C. § 503 and 25 U.S.C. § 477.” Resolution No. 13-28 (Administrative Record (AR) Tab 1).³ On December 12, 2012, the Tribe submitted Resolution No. 13-28, and the attached Charter, to BIA for review and approval. *See* Memo from Regional Director to Field Solicitor, Feb. 7, 2013 (AR Tab 3). The proposed Charter provides that, after issuance by the Secretary, the Charter would become “operative when ratified by the governing body of the Tribe.” Charter, Nov. 27, 2012, at 2 (AR Tab 3). There is no dispute that the Tribe, in invoking the ratification language of Section 17 of the IRA in its proposed Charter, sought issuance of an IRA corporate charter and not an OIWA corporate charter.

By letter of May 3, 2013, the Regional Director informed the Tribe that the Secretary was “not authorized” to issue the Charter under the IRA and returned it “without

³ The Tribe was organized under a governing document approved by the Acting Commissioner of Indian Affairs on August 8, 1961. Wichita Governing Resolution (AR Tab 2); Decision, May 3, 2013, at 1 (unnumbered) (AR Tab 8).

action.” Decision at 1-2 (unnumbered). The Regional Director reasoned that § 473 explicitly excludes the Tribe from Section 17 of the IRA. *Id.* He also concluded that § 478-1, added to the IRA as part of the 1990 amendments, extended Section 17 of the IRA just “to those tribes which rejected the IRA.” *Id.* The Regional Director further expressed that while an IRA charter may be available to an Oklahoma tribe that has already been issued a charter of incorporation under Section 3 of the OIWA, the Tribe has neither requested nor received such an OIWA charter. *Id.* at 1-2 (unnumbered).

The Tribe appealed to the Board and included arguments with its notice of appeal. The Tribe also filed an opening brief, the Regional Director submitted an answer brief, and the Tribe filed a reply brief.

Discussion

I. Timeliness of BIA’s Answer Brief

Before we reach the substantive issues of this case, we must first resolve a procedural matter regarding the timeliness of BIA’s answer brief. Our order setting the briefing schedule established that BIA’s answer brief was to be filed “within 30 days from receipt of Appellant’s opening brief.” Order Setting Briefing Schedule, Aug. 7, 2013, at 2; *see also* 43 C.F.R. § 4.311(a) (providing an opposing party 30 days from receipt of the appellant’s brief to file an answer brief). The Tribe mailed its opening brief on September 18, 2013, and Departmental counsel avers that she received the brief on September 20, 2013. *See* Opening Brief (Br.), Sept. 18, 2013; Answer Br., Nov. 5, 2013, at 1. BIA filed its answer brief on November 5, 2013, which was 46 days after receipt of the opening brief. *See* 43 C.F.R. § 4.310(a)(1) (date of filing includes date of mailing); Certificate of Mailing, Nov. 5, 2013 (attachment to Answer Br.). In its answer brief, BIA requested that the brief be considered timely filed, upon the assumption that the 16 days during the Government shutdown of October 1 through October 16, 2013, were tolled. Answer Br. at 1.

In reply, the Tribe requested that the Board strike BIA’s brief as untimely filed. Reply Br., Nov. 22, 2013, at 1. The Tribe argued that although the Board may grant an extension of time when a request is filed within the time originally allowed for filing, pursuant to 43 C.F.R. § 4.310(d)(2), no such request was received here. *Id.* at 2. BIA then filed a motion for an order retroactively extending the time for filing its answer brief, and the Tribe opposed the motion. Motion for Order Retroactively Extending Time, Dec. 5, 2013; Response to Appellee’s Motion, Dec. 11, 2013.

The Tribe’s argument for denying BIA’s motion for a “retroactive” extension is supported by 43 C.F.R. § 4.310(d)(2). With respect to BIA’s alternative argument that the Government shutdown “tolled” its filing deadline, we need not decide that issue. “For

good cause the Board may grant an extension of time on its own initiative.” 43 C.F.R. § 4.310(d)(3). We find that the Government shutdown constitutes good cause for accepting BIA’s answer brief.

II. Merits

This appeal raises questions of law, which we review *de novo*. *Miles v. Southern Plains Regional Director*, 60 IBIA 257, 263 (2015). The appellant bears the burden of proving error in the regional director’s decision. *Id.*

On appeal, the Tribe argues that there are two primary and independent grounds for reversing the Regional Director’s decision: (1) properly interpreted, the OIWA incorporates the rights and privileges of Section 17 of the IRA; and (2) the 1990 amendments to the IRA make Section 17 of the IRA applicable to the Tribe. Opening Br. at 4. The Tribe argues that, under the Indian canon of construction, to the extent there is any ambiguity, the IRA and the OIWA should be liberally construed to benefit the Tribe. *Id.* at 6-8; Reply Br. at 4; *see also Baker v. Muscogee Area Director*, 19 IBIA 164, 173 (1991) (“[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (alterations in original) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985))) (internal quotation marks omitted)). We conclude that the Tribe has not met its burden to show error in the Decision. The IRA and the OIWA are unambiguous that the Secretary does not have authority to issue the Tribe its initial charter of incorporation under Section 17 of the IRA.

A. Whether the OIWA Incorporates Section 17 of the IRA

First, the Tribe argues that Section 3 of the OIWA “incorporates” IRA rights and privileges, and makes them applicable to Oklahoma tribes without any need for a Secretariially-issued OIWA charter of incorporation to convey such rights and privileges. Opening Br. at 4. The Tribe’s position is contrary to the express terms of the OIWA.

Under Section 3, an “[OIWA] *charter* may convey to the incorporated group . . . the right to . . . enjoy any other rights or privileges secured to an organized Indian tribe under [the IRA].”⁴ 25 U.S.C. § 503 (emphasis added). This provision is unambiguous that a

⁴ An OIWA charter need not convey any or all of the rights and privileges of the IRA, and instead the tribe may be selective. Appellant does not explain how, in the absence of an OIWA charter making a tribe’s selection, a tribe would do so.

charter issued under Section 3 is necessary to convey IRA rights or privileges to the Tribe as one of the Oklahoma tribes excluded from Section 17 of the IRA in § 473.⁵

The Tribe argues that a Federal court and the Department of the Interior's Solicitor have interpreted Section 3 as making applicable to Oklahoma tribes the rights and privileges that the IRA grants other tribes. Opening Br. at 8-9, 15-16. Specifically, the Tribe cites *Sac and Fox Nation v. Norton*, 585 F. Supp. 2d 1293, 1299 (W.D. OK 2006), and a 1952 Solicitor's Opinion,⁶ for the proposition that, following enactment of the OIWA, § 473 no longer excludes Oklahoma tribes from certain provisions of the IRA, including Section 17. *Id.* at 9, 16 & n.11. The Tribe misinterprets these authorities, which are consistent with the Regional Director's decision and our reading of Section 3.

In *Sac and Fox Nation*, the District Court explained that Section 3 grants Oklahoma tribes "an opportunity to claim any of the 'rights and privileges secured to an organized Indian tribe' under the Indian Reorganization Act . . . by adopting a charter of incorporation claiming such rights." 585 F. Supp. 2d at 1298 (quoting 25 U.S.C. § 503). The District Court found that the Sac and Fox Nation incorporated under the OIWA in 1987,⁷ and based on the charter provisions concluded that the Sac and Fox Nation had claimed under Section 3 of the OIWA those rights and privileges available to other organized tribes under the IRA. *See id.* at 1298; *see also id.* at 1299 n.10 (distinguishing *Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services*, 24 IBIA 209 (1993), on the grounds that the Seminole Nation did not adopt an OIWA charter and therefore did not have the additional rights afforded under the IRA).

The Tribe's interpretation of the Solicitor's Opinion is similarly flawed. In relevant part, the opinion concerned a proposed amendment to the charter of the Caddo Nation. The Tribe argues that the Solicitor determined that the Caddo Nation could enjoy the

⁵ Nor is there any clearly expressed legislative intent to the contrary. The legislative history states that the OIWA would "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]." H.R. Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936). In *Muscogee (Creek) Nation*, the D.C. Circuit Court of Appeals found this history "ambiguous at best" and "not clear" on whether the OIWA was intended to confer the same powers on the Oklahoma tribes as were conferred on other tribes by the IRA. 851 F.2d at 1446.

⁶ Sol. Op., "Proposed Amendments to the Charter, Constitution and By-Laws – Caddo Indian Tribe," M-36155, 61 I.D. 82 (1952).

⁷ Copies of the charter and related documents are included in the administrative record at Tab 4.

benefits of the IRA because it was “organized” under the OIWA. Opening Br. at 16. But that is not what the Solicitor determined, and, as relevant to this appeal, the essential fact in the opinion is that the Caddo Nation held a charter issued under Section 3 of the OIWA. *See* 61 I.D. at 83. Therefore, the opinion does not support Appellant’s argument that it can claim the rights and privileges of the IRA without an OIWA charter conveying such rights and privileges.

The Tribe also argues that another provision of the OIWA, which declares that “[a]ll Acts or parts of Acts inconsistent with the subchapter are repealed,” 25 U.S.C. § 509, should be construed as repealing § 473’s exclusion of Section 17 as inconsistent with the OIWA. Opening Br. at 6, 10. The Tribe argues that in *Muscogee (Creek) Nation*, the D.C. Circuit held that § 509 repealed the Curtis Act,⁸ which had abolished the tribal courts of the Creek Tribe. *Id.* at 10.

Section 509 is a general repealer clause, and thus any repeal would be by implication, which is generally disfavored. *Carciere v. Salazar*, 555 U.S. 379, 395 (2009) (“[A]bsent a clearly expressed congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.” (alterations omitted)). Unlike in *Muscogee (Creek) Nation*, where the D.C. Circuit found that the Curtis Act, which was applicable only to the Five Civilized Tribes of Oklahoma, conflicted with the intent of Congress in the OIWA that “all of the Oklahoma tribes were to have the same legal status,” 851 F.2d at 1445, we find no inconsistency between § 473 and Section 3 of the OIWA that would support an implied repeal of § 473. Indeed, Section 3 appears to be predicated on § 473 remaining in effect. For us to construe OIWA § 509 as repealing IRA § 473, thereby making the excluded IRA provisions applicable to Oklahoma tribes, would also nullify the plain language in Section 3 of the OIWA (§ 503) requiring the adoption of an OIWA “charter” to claim such IRA rights and privileges. It would be absurd to construe OIWA § 509 as repealing the clear command of OIWA § 503 when they are both part of the same law enacted at the same time.

B. Whether the 1990 Amendments to the IRA Extend Section 17 to the Tribe

Next, the Tribe argues that a 1990 amendment to the IRA, adding 25 U.S.C. § 478-1, directly makes Section 17 applicable to the Tribe. *See* Pub. L. No. 101-301, § 3(a), 104 Stat. 206, 207 (1990); Opening Br. at 4, 11-12; Reply Br. at 3-5. We disagree with the Tribe’s interpretation.

⁸ Act of June 28, 1898, ch. 517, 30 Stat. 495.

Section 478-1 of Title 25 provides that “[n]otwithstanding section 478 of this title, sections 462 and 477 of this title shall apply to—(1) all Indian tribes” 25 U.S.C. § 478-1(1).⁹ The Tribe argues that § 478-1 unambiguously makes Section 17 of the IRA (§ 477) directly applicable to “all Indian tribes,” including the Tribe. Opening Br. at 11; Reply Br. at 3. In a separate line of argument, the Tribe also argues that “a specific policy embodied in a later federal statute should control [the] construction of the [earlier] statute, even though it ha[s] not been expressly amended.” Opening Br. at 14 (alterations in original) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)) (internal quotation marks omitted). According to the Tribe, because § 478-1 and the 1990 amendment to Section 17 of the IRA (i.e., substituting governing body ratification for popular ratification) were enacted after the OIWA, and reflect a Congressional policy to “streamline” the charter process, “[b]y implication, inconsistent aspects of [Section 3 of the OIWA] regarding how an Oklahoma tribe may incorporate . . . were made irrelevant to the Tribe,” *id.* at 17.

The Regional Director responds that by its plain terms § 478-1 directly extends the corporate charter provisions of Section 17 to the Indian tribes that voted against the application of the IRA, and does not extend Section 17 to Oklahoma tribes. Answer Br. at 6. He argues that, if Congress had intended to make Section 17 directly applicable to tribes in Oklahoma, it could have easily stated in the 1990 amendments: “notwithstanding *Section 473 or Section 478.*” *Id.* at 6-7. We agree.

The phrase in § 478-1, “notwithstanding section 478”—the provision allowing those tribes subject to the IRA to vote against its application—when read as modifying “all Indian tribes,” gives meaning to the statutory language without creating conflict between § 478-1 and § 473. The Tribe’s interpretation would create a direct conflict between § 478-1 and the more specific § 473, which would nonetheless control. *See Peoria Tribe of Indians of Oklahoma v. Muscogee Area Director*, 27 IBIA 113, 119 (1995) (“It is a well established rule of statutory construction that, “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” (quoting *Morton v. Mancari*, 417 U.S. 535, 500-51 (1974))). And while Congress could have easily repealed § 473 in the manner described by the Regional Director, it did not do so.

Moreover, in addition to the two 1990 amendments on which the Tribe relies, at the same time Congress amended a third IRA provision, § 473—the section excluding Oklahoma tribes from certain provisions of the IRA—by removing reference to one IRA

⁹ Appellant does not argue that subsections (2) and (3) of § 478-1 are applicable, for which reason we do not discuss them.

provision but without removing the explicit exclusion of Section 17 to the Tribe. *See* Pub. L. No. 101-301, § 3(b), 104 Stat. 206, 207 (1990) (removing reference to § 462). The fact that Congress was clearly mindful of the specific provisions in § 473 concerning Oklahoma tribes, and did not remove the exclusion of Section 17 when it amended § 473, indicates that Congress intended to exclude Oklahoma tribes from Section 17 except as it may become applicable through a charter issued under Section 3 of the OIWA. This contradicts Appellant’s interpretation that § 478-1 effectively repealed the exclusion of Section 17 in § 473, and its position that the 1990 amendments to the IRA should be collectively construed as impliedly amending Section 3 of the OIWA.

C. Appellant’s Remaining Arguments

The Tribe also argues that the Regional Director’s decision requiring the Tribe to obtain an OIWA charter, including compliance with the popular ratification requirements, when other tribes may do so through governing body ratification under the IRA, is contrary to 1994 amendments to the IRA, Pub. L. No. 103-263, § 5(b), 108 Stat. 709 (codified at 25 U.S.C. § 476(f) and (g) (1994)). Opening Br. at 12-13; Reply Br. at 6.

In general, § 476(f) prohibits the Secretary from promulgating any regulation or making any decision that “classifies, enhances, or diminishes the privileges and immunities” available to a Federally recognized Indian tribe relative to other recognized tribes by virtue of their status as Indian tribes.¹⁰ 25 U.S.C. § 476(f).

The Regional Director responds, and we agree, that the Decision does not violate § 476(f), because it simply gives effect to the statutory scheme enacted by Congress, which compels different treatment of Oklahoma tribes as a group, as compared to other tribes. Answer Br. at 10. Subsections 476(f) and (g) do not prevent Congress from treating individual tribes, or groups of tribes, differently. As we have explained, the determination that the Tribe is barred from receiving an IRA charter, without first receiving a charter of incorporation under Section 3 of the OIWA, is dictated by the IRA and the OIWA.

Finally, while the Tribe points out that BIA issued the Comanche Nation an IRA charter, when it did not already have an OIWA charter, Opening Br. at 13; Reply Br. at 7, BIA concedes on appeal that this determination was an “oversight,” Answer Br. at 11-12.¹¹

¹⁰ For purposes of this decision, we will assume that the requirements for a tribe to ratify a corporate charter fall within the ambit of § 476(f).

¹¹ Documents pertaining to that charter are included in the administrative record at Tab 5. BIA explains that this oversight was only discovered during its consideration of Appellant’s proposed charter. Answer Br. at 12 n.3.

Whatever its vitality in light of BIA's acknowledgment of error,¹² we find no basis in the Comanche Nation's charter to uphold the Wichita and Affiliated Tribes's claim to entitlement to an IRA charter.

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 affirms the Regional Director's May 3, 2013, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

¹² The Board lacks jurisdiction in this appeal to review any BIA decisions regarding the charter issued to the Comanche Nation.