



INTERIOR BOARD OF INDIAN APPEALS

Edwards, McCoy & Kennedy and Western Shoshone Business Council of the
Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs

18 IBIA 454 (09/24/1990)

Judicial review of this case:

Dismissed, *Western Shoshone Business Council v. Babbitt* (D.Utah)

Affirmed, 1 F.3d 1052 (10th Cir. 1993)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

EDWARDS, McCOY & KENNEDY
AND
WESTERN SHOSHONE BUSINESS COUNCIL
OF THE DUCK VALLEY RESERVATION

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-9-A

Decided September 24, 1990

Appeal from a decision declining to approve or disapprove an attorney contract.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Generally--Indians: Attorneys: Contracts

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

2. Indians: Federal Recognition of Indian Tribes: Generally--Indians:
Tribal Government: Generally

In determining whether an Indian group is an "Indian tribe" under statutes and regulations which do not define "Indian tribe," Department of the Interior officials are bound by the regulations in 25 CFR Part 83.

3. Indians: Federal Recognition of Indian Tribes: Generally--Indians:
Tribal Government: Constitutions, Bylaw, and Ordinances

Where the Secretary of the Interior has approved the constitution of an Indian tribe, no Department of the Interior official has authority to "recognize" a portion of the tribe as a separate tribal entity.

APPEARANCES: John Paul Kennedy, Esq., Salt Lake City, Utah, for appellants; Wayne C. Nordwall, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee; James Paiva, Tribal Chairman, for the Shoshone-Paiute Tribes of the Duck Valley Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Edwards, McCoy, & Kennedy and Western Shoshone Business Council of the Duck Valley Reservation seek review of a September 11, 1989, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director, BIA), returning a proposed attorney contract without action on the grounds that the contracting entity was not a Federally recognized Indian tribe. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

The Shoshone-Paiute Tribes (Tribes) of the Duck Valley Reservation are organized as a unified entity under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982), and have a constitution approved by the Secretary of the Interior on April 20, 1936. ^{1/} This tribal entity is the only such entity for the Duck Valley Reservation which is included in the Federal Register list of Indian tribes published in accordance with 25 CFR 83.6(b). ^{2/} See "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 53 FR 52829 (Dec. 29, 1988).

By letter of August 10, 1989, John Paul Kennedy, Esq., of appellant Edwards, McCoy & Kennedy, a law firm, submitted to the Superintendent, Eastern Nevada Agency, BIA, an attorney contract between the firm and the "Western Shoshone Business Council, for and on behalf of the Western Shoshone Tribe of the Duck Valley Reservation or such other organization standing in its place." The contract stated that its objectives were:

Objective Number One: Obtain beneficial title to the 1877 Duck Valley Reservation for the benefit of the Western Shoshone Indians now or in the future residing there.

Objective Number Two: Obtain federal recognition of the Western Shoshone Indians residing at the Duck Valley Reservation and obtain authority to govern the Western Shoshone 1877 Duck Valley Reservation.

Objective Number Three: Obtain for the Western Shoshone Tribe of the Duck Valley Reservation the right to receive future

^{1/} The Indians of the Duck Valley Reservation voted to accept the Indian Reorganization Act in an election held on Oct. 27, 1934. They adopted their present constitution in an election held on Mar. 21, 1936.

^{2/} 25 CFR 83.6(b) provides: "The Secretary shall publish in the Federal Register within 90 days after effective date of these regulations, a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs. Such list shall be updated and published annually in the Federal Register."

revenues for development and use of the 1877 Duck Valley Reservation.

Objective Number Four: Recover from the United States damages for trespasses committed on the 1877 Duck Valley Reservation, such trespasses committed in breach of the trust responsibilities of the United States, * * *.

Objective Number Five: Determine the rights and interests of the Western Shoshone Tribe of the Duck Valley Reservation in and to the Executive Order areas of 1886 and 1910 adjoining the 1877 Reservation. [3/]

(Contract at 2). Kennedy sought approval of the contract, stating:

We recognize that the BIA may take the position that the Western Shoshone Tribe is not federally recognized and thus Secretarial approval of this agreement is not required. We would point out to the Bureau, however, that the Executive Order Reservation of 1877 was set aside for this group and that the Western Shoshone Business Council is specifically mentioned in the Charter for the Shoshone-Paiute Tribe. In short, we believe that the Tribe has been recognized.

The Superintendent transmitted the contract to the Area Director by memorandum of August 21, 1989, recommending disapproval. The Area Director returned the contract to the Superintendent without action on September 11, 1989, stating: "Since this is not a federally recognized tribal entity, the contract is between private parties, which does not require Secretarial approval." (Emphasis in original.)

Appellants' notice of appeal was received by the Board on October 5, 1989. Briefs were filed by appellants, the Area Director, and the Tribes.

Jurisdiction

[1] In Welch v. Minneapolis Area Director, 17 IBIA 56 (1989), the Board held that it lacked jurisdiction over decisions of BIA Area Directors "approving, disapproving or conditionally approving" tribal attorney contracts because, under 25 CFR 88.1(c), those Area Directors' decisions are final for the Department of the Interior. The Board must consider whether the holding in Welch applies in this case, where the Area Director took none

3/ The original Duck Valley Reservation was set apart by Executive Order of Apr. 16, 1877, "as a reservation for the Western Shoshone Indians." By Executive Order of May 4, 1886, another tract was "set apart as an addition to the Duck Valley Reservation for the use and occupation of Paddy Caps band of Pi-utes and such other Indians as the Secretary of the Interior may see fit to settle thereon." By Executive Order of July 1, 1910, a third tract was added to the reservation.

of the actions listed in subsection 88.1(c), but instead declined either to approve or disapprove the contract.

As noted, the Area Director took none of the actions which 25 CFR 88.1(c) explicitly shields from administrative review. Further, the issue in this case, *i.e.*, whether appellant Western Shoshone Business Council is a tribal entity whose attorney contracts are subject to approval, is not the kind of issue which the drafters of the regulation would have anticipated as likely to arise in the attorney contract approval process. Clearly, considerations far different from those normally arising in attorney contract matters are involved here. Regulations removing the decisions of BIA officials from the usual administrative review process should be interpreted strictly to avoid the possibility of prejudicing the due process rights of potential appellants.

For these reasons, the Board concludes that this appeal does not fall within the scope of 25 CFR 88.1(c) and that the Board therefore has jurisdiction over it.

Discussion and Conclusions

Appellants argue that the Western Shoshones at Duck Valley have been recognized by the United States as a separate tribal entity since at least 1877. They contend that the Area Director's failure to take the historical evidence of this recognition into account renders his decision arbitrary and capricious. Further, appellants argue that the Federal Register list of Indian tribes published in accordance with 25 CFR 83.6(b) is not controlling on the question of whether a group is an Indian tribe and is therefore not binding in this case.

[2] In fact, however, both the Solicitor and this Board have held that the regulations at 25 CFR Part 83 are binding on the Department of the Interior as to which Indian entities may be considered Indian tribes under statutes and regulations which do not define the term "Indian tribe." See "Indian Tribal Status under the Bald Eagle Protection Act," Solicitor's Opinion M-36934, 88 I.D. 338 (1981); Northwest Computer Supply v. Acting Deputy to the Assistant Secretary - Indian Affairs (Operations), 16 IBIA 125 (1988). Neither the statutes claimed by appellants to require Secretarial approval of their contract, 25 U.S.C. §§ 81 and 85 (1982), nor the regulations governing approval of attorney contracts at 25 CFR Parts 88 and 89, contain a definition of "Indian tribe." Accordingly, because the "Western Shoshone Tribe of the Duck Valley Reservation" does not appear on the Federal Register list published in accordance with 25 CFR 83.6(b), both the Area Director and this Board are precluded from considering this group as an Indian tribe under the statutes and regulations concerning approval of tribal attorney contracts.

[2] Further, there is a second impediment to the relief appellant seeks here. The Secretary has already recognized and approved a constitution for a tribal entity which includes the Western Shoshones on the

