



INTERIOR BOARD OF INDIAN APPEALS

Pawnee Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs

26 IBIA 284 (10/24/1994)



United States Department of the Interior

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

PAWNEE TRIBE OF OKLAHOMA

v.

ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-95-A

Decided October 24, 1994

Appeal from a decision declining to recognize the Pawnee tribal court.

Reversed and remanded.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Where Secretarial review of tribal legislation is required by a tribal constitution, but not by Federal law, the Secretary's review authority is only as broad as the tribal constitution provides. Thus, where the Secretary has approved tribal legislation within the review period specified in the constitution, he has no authority to revoke his approval once the period has expired.

APPEARANCES: Perry L. Glantz, Esq., and Marily Nixon, Esq., Denver, Colorado; G. William Rice, Esq., and Gregory H. Bigler, Esq., Cushing, Oklahoma, for appellant; Kathleen R. Supernaw, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Pawnee Tribe of Oklahoma seeks review of a March 10, 1994, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to recognize the Pawnee tribal court. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him for further action, as described below.

Background

Appellant is organized under a 1938 Constitution adopted pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988), and approved by the Assistant Secretary of the Interior. In 1982, appellant adopted an amendment to its Constitution, adding a new section (d) to Article II. The amendment was approved by the Acting Area Director.

Article II, section (d), provides in part:

Jurisdiction and Powers of the Pawnee Business Council.

* * * * *

(ii) The Pawnee Indian Tribe of Oklahoma is empowered to establish a Law and Order and Judicial System to protect peace, safety, health and welfare of the members of the tribe; provided the concept of separation of the Executive and Judicial powers is maintained. Once the Pawnee Tribe has ratified an ordinance authorizing the establishment of these systems, it shall be the duty of the Pawnee Tribal Business Council to provide the necessary staff support for its implementation.

(iii) All law and order ordinances adopted by the Pawnee Business Council pursuant to this Article shall be subject to the approval of the Secretary of the Interior or his designated representative, provided, however, that if said ordinance is not approved or disapproved by him within 90 days of its receipt by him, the enactment shall automatically become effective.

(iv) This constitution and By-Laws, and the laws and ordinances enacted by the Pawnee Business Council shall be the supreme law of the Pawnee Indian Tribe and all persons subject to its jurisdiction: however, the Pawnee Business Council shall exercise its power consistent with the provisions of this constitution and by-laws, and applicable federal law.

In July 1984, the Pawnee Business Council enacted a law and order code, providing for, inter alia, the establishment of a tribal court. The code was submitted to the then Area Director for approval. The Area Director required that certain changes be made. In November 1984, the Business Council amended the code to incorporate the changes and, on December 5, 1984, the Area Director approved the Code as amended.

The tribal court began operation in April 1985. In November 1985, the Business Council determined that the court was unable to function effectively because of the lack of court rules and procedures and the lack of sufficient funds. It therefore requested that "the CFR Court under the jurisdiction of the Bureau of Indian Affairs, Pawnee Agency, enforce the Pawnee Tribal Law and Order Code until such time as the Pawnee Business Council can obtain adequate funding to properly re-establish the Pawnee Tribal Court System in an effective and ongoing basis" (Resolution No. 85-92, Nov. 2, 1985). In December 1985, the Superintendent, Pawnee Agency, BIA, notified the CFR court that it was to enforce the Pawnee code on a temporary basis. 1/

1/ Apparently, the CFR court did not begin enforcing the code immediately. In an Apr. 19, 1988, memorandum to the Superintendent, an Assistant Area Director stated:

In 1990, appellant sought to withdraw from the CFR court system in order to contract with the Sac and Fox Nation for the provision of judicial services to appellant and its members. In connection with this effort, the Business Council evidently adopted the Sac and Fox Nation's code of laws. In an April 23, 1991, letter to appellant, the Area Director discussed appellant's proposal, stating that, under Article II, section (d) (ii), of its Constitution, appellant must submit its proposed new court system to a vote of the tribal membership.

Appellant abandoned its attempt to contract with the Sac and Fox Nation. However, in May 1993, it renewed its effort to withdraw from the CFR court system, this time with the intent of re-establishing its own court system. By Resolution 93-26, dated May 27, 1993, the Business Council enacted a law and order and judicial code. It also sought the transfer of all Pawnee cases then pending before the CFR court to the re-established tribal court. Apparently, appellant did not submit the new code to BIA for approval.

On December 17, 1993, the Business Council enacted Resolutions 93-76, 93-77, and 93-78, appointing a public defender, a prosecutor, and a judge for the tribal court. Each resolution states: "The Pawnee Tribe has a Law and Order Code adopted July 25, 1984 and approved by the Secretary of the Interior on December 5, 1984; * * * said Law and Order Codes [sic] establish a Pawnee Tribal Court for the Pawnee Tribe of Oklahoma."

The tribal court began operation without formal BIA approval. On March 10, 1994, the Area Director informed appellant of his position concerning the court. His letter states:

The Pawnee Business Council by Article II(d) (iii) is empowered to adopt a Law and Order Ordinance which includes the establishment of a tribal court, or a separate ordinance establishing a tribal court system. However, Article II(d) (ii) requires the ratification of any ordinance providing for a judicial system. It appears to be a meaningless requirement if the Business Council has the sole authority in such matters and cannot be so reasonably construed. Also the words "Pawnee Tribe" rather than "Pawnee Business Council" are used in this part purposefully.

fn. 1 (continued)

"The Pawnee Tribe established a tribal court and implemented the attached Law and Order Code but financial problems caused a rescission of the tribal court back to the CFR Court system. This action, however, did not rescind the approved tribal Law and Order Code. Where the code speaks to the appointment or removal of judges and number of judges, those sections are not applicable to the CFR Court; the violations section[s] of the code are Pawnee tribal law approved for use in the CFR Court. * * * Although the court has received the code, there appears to have been uncertainty as to its being implemented in the CFR Court. We do not see any reason it cannot be used in the CFR Court."

Although Section 2(d) (ii) specifically states that “the Pawnee Indian Tribe of Oklahoma is empowered to establish . . . a Judicial System . . . “once the Pawnee Tribe has ratified such an ordinance, “it shall be necessary for the Pawnee Business Council to provide the necessary staff support for its implementation.” This language makes a clear distinction between the tribe (the membership) and the Business Council.

This distinction is found again in Section 2(d) (iii) which specifically grants the Business Council authority to enact law and order ordinances. This section makes no reference to establishing a judicial system. Law and order ordinances govern criminal violations and penalties and civil causes of action; judicial ordinances create tribal courts; these codes are not synonymous, particularly when so clearly distinguished.

I cannot recognize a Pawnee Tribal Court or release CFR Court jurisdiction or funds unless the tribal court is established by the ratification of the membership as provided for in the Constitution and By-laws of the Pawnee Indians of Oklahoma. The Pawnee Business Council is urged to present the establishment of a tribal judicial system to its voting membership.

I note, however, that the constitution and by-laws do not provide for referendum elections, except under the narrow scope of constitution Article V § 2(b); [2/] the membership also does not have constitutionally authorized meetings in which it may take actions. It appears then necessary to amend the tribal constitution to provide for such a mechanism to ratify the subject ordinance or to delete the requirement for ratification in Article II Section 2(d) (ii). Until this lack in the governing document is corrected, no judicial system can be legitimately established. [Omission in original.]

(Area Director's Mar. 10, 1994, Letter at 1-2).

Appellant appealed this letter to the Board. Both appellant and the Area Director filed briefs. 3/

Discussion and Conclusions

During the original briefing period for this appeal, neither party addressed what the Board considered to be a critical factor--i.e., whether

2/ This section authorizes referendums on certain questions concerning tribal membership and tribal claims under treaties.

3/ Appellant filed an objection to the administrative record prepared by the Area Director, contending that a number of relevant documents were missing. The supplemental documents submitted by appellant are accepted and added to the record, as are the additional documents submitted by the parties with their briefs.

or not the 1984 law and Order code is still in effect. The administrative record likewise failed to provide a definitive answer to this question. Therefore the Board requested appellant to advise the Board of the status of the 1984 code. It also offered the Area Director an opportunity to address the question.

Appellant's response indicates that the 1984 code is still in effect. The Area Director contends, however, that it does not matter whether or not the code is still in effect. He argues that BIA's 1984 approval was given in error and therefore may be corrected under the Area Director's authority to correct erroneous interpretations of law. Further, he contends, BIA has the authority to interpret appellant's constitution where necessary to carry out the government-to-government relationship with appellant or to ensure that the rights of appellant's members are protected under the Indian Civil Rights Act.

The Area Director cites a number of Board decisions, as well as other authority, for the proposition that BIA may change an administrative interpretation of law provided it sets forth a reasonable basis for the change. To be sure, several Board decisions have embraced this principle. *E.g.*, Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169 (1993), and cases cited therein. None of those decisions, however, concerned a case in which the alleged erroneous interpretation resulted in BIA's approval of a tribal code.

[1] BIA's authority to review and approve tribal legislation normally derives from tribal law. *E.g.*, Kerr-McGee Corp. v. Navajo Area Director, 471 U.S. 195 (1985); Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). ^{4/} That is the case here. When the Area Director approved appellant's law and order code in December 1984, he acted solely under authority of Article II, section (d) (iii), of appellant's Constitution. ^{5/} This provision gives the Secretary power to approve or disapprove a law and order ordinance within a period of 90 days from his receipt of the ordinance. Once that period has passed, the Constitution makes clear, the Secretary no longer has any authority to act

^{4/} In a few cases, Secretarial approval of tribal ordinances is required by Federal statute. *E.g.*, 25 U.S.C. § 2205(a) (1988) (descent and distribution of trust or restricted land); 25 U.S.C. § 2206(c) (1988) (distribution of escheatable interests in trust or restricted land).

^{5/} Under Federal regulations in effect in 1984, and those in effect today, tribal codes must be approved by the Secretary if they are to be enforced in a CFR court. 25 CFR 11.1(e) (1984); 25 CFR 11.100(e) (1994). At the time appellant's code was approved in Dec. 1984, approval was required only by tribal law because the code was then intended for enforcement in tribal court. When, in Nov. 1985, appellant sought to have its code enforced in CFR court, the code became subject to the Federal regulation. However, assuming that an additional approval was given in 1985 for CFR court purposes, as the Assistant Area Director's 1988 memorandum suggests, that approval extended only to the substantive portions of appellant's code, not to the portion establishing the tribal court. *See n. 1, supra.*

on the ordinance. 6/ A necessary consequence of this limitation is that Secretarial approval given during the 90-day period cannot be revoked after the period has expired. 7/

Although the Area Director argues here in terms of correcting past administrative error, and does not explicitly contend that he has authority to revoke the 1984 approval, any "correction" in this case would have the effect of a revocation. Therefore, the Board finds that the Area Director lacks authority either to revoke or to "correct" the earlier approval.

Appellant's 1984 code establishes a tribal court system. That code remains in effect as approved by BIA in 1984, because appellant has not repealed it, and the Area Director lacks authority to revoke the earlier BIA approval. Accordingly, the Area Director must recognize appellant's tribal court as validly established under the 1984 code.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's March 10, 1994, is reversed. This matter is remanded to him with instructions to assist appellant in completing the steps necessary for withdrawal from the CFR court. 8/

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

6/ Thus, if the Secretary fails to act within the 90-day period, the ordinance goes into effect.

7/ BIA is bound by the terms of the Secretarial review provision in appellant's constitution, including the time limit for review. Cf. Estate of Peter Alvin Ward, 19 IBIA 196, 205-07 (1991), appeal dismissed, Quileute Indian Tribe v. Lujan, No. C91-558C (W.D. Wash. Aug. 28, 1992), aff'd, 18 F.3d 1456 (9th Cir. 1994); Edwards, McCoy and Kennedy v. Acting Phoenix Area Director, 18 IBIA 454 (1990), appeal dismissed, Western Shoshone Business Council v. Babbitt, (D. Utah), aff'd, 1 F.3d 1052 (9th Cir. 1993) (Departmental officials are bound by a tribal constitution approved by the Secretary).

8/ In light of this holding, the Board finds it unnecessary to consider the merits of the parties' arguments with respect to the correct interpretation of appellant's Constitution.

In accordance with the Federal policy favoring tribal self-determination, the Board refrains from interpreting a tribal constitution unless there is a clear necessity to do so. E.g., Decorah v. Minneapolis Area Director, 22 IBIA 98 (1992).