INTERIOR BOARD OF INDIAN APPEALS

Two Hundred and Seventy-One Enrolled Nooksak Indians v.
Northwest Regional Director, Bureau of Indian Affairs

61 IBIA 77 (07/09/2015)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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TWO HUNDRED AND SEVENTY-ONE ENROLLED NOOKSAK INDIANS, Appellants, v. NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Order Vacating Decision and Remanding Docket No. IBIA 15-063 July 9, 2015

Two Hundred and Seventy-One Enrolled Nooksack Indians[1] (Appellants) simultaneously appealed (1) to the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), from a January 13, 2015, decision of the BIA Puget Sound Agency Acting Superintendent (Superintendent) announcing his October 24, 2014, approval of Enrollment Ordinance 14-112 (Ordinance), enacted by the Nooksack Indian Tribe (Tribe); and (2) to the Board of Indian Appeals (Board), from a January 7, 2015, decision (Decision) of the Regional Director, which concluded, after an internal review requested by the Superintendent, that there was no legal reason to rescind the Superintendent's approval of the Ordinance and declaring that the Ordinance was effective on the date of the Superintendent's October 24, 2014, approval.

As a threshold matter, the Board ordered briefing from the parties on whether the Board has jurisdiction over Appellants' appeal. After considering the parties' arguments, we conclude that we have jurisdiction to review the Regional Director's procedural decision that the Superintendent's approval of the Ordinance was effective, impliedly deciding that BIA's appeal regulations did not apply to the Superintendent's decision. And on the merits, we conclude that the Regional Director's procedural decision was incorrect. BIA's appeal regulations plainly provide a right of appeal from the Superintendent's decision to the Regional Director, and the effectiveness of the Superintendent's decision was and remains automatically stayed. Therefore, based upon the same analysis by which we conclude we have jurisdiction over the appeal from the Decision, we also vacate that Decision and

[1] Appellants are individually listed in an appendix to the notice of appeal.

remand the matter to the Regional Director for consideration of Appellants' appeal to him from the Superintendent's approval of the Ordinance.

Background

As relevant to the underlying dispute in which this appeal arose, the Nooksack Tribe amended its Constitution in 2013 to eliminate a provision in the Constitution that had extended membership to "[a]ny persons who possess at least one-fourth degree Indian blood and who can prove Nooksack ancestry to any degree." Memorandum from Regional Director to Superintendent, Jan. 7, 2015 (Decision). On October 10, 2014, after an initial attempt to amend the Tribe's enrollment ordinance to make conforming changes and to adopt certain disenrollment procedures, the Tribal Council enacted Enrollment Ordinance 14-112.[2] *See* Tribe's Response, Mar. 23, 2015, at 2-3.

As directly relevant to this appeal, the Nooksack Constitution provides that "[t]he Tribal Council shall have the power to enact ordinances in conformity with this constitution, *subject to the approval of the Secretary of the Interior*, governing future membership in the tribe, including adoptions and loss of membership." Nooksack Const. art. II, § 2, *quoted in* Regional Director's Response, Mar. 2, 2015, at 1 (emphasis added). It is undisputed that the Ordinance is subject to this provision in the Tribe's Constitution. It is also undisputed that BIA's sole source of authority for reviewing and taking action on the Ordinance is this provision in the Tribe's Constitution. No Federal statute or regulation requires or separately provides for such review. But the Nooksack Constitution also contains no procedures governing BIA's review and action taken under Article II, Section 2.

Following the Tribe's enactment of the Ordinance, the Tribe submitted it to the Superintendent for review. On October 15, 2014, Appellants wrote to the Superintendent, arguing that the Ordinance was contrary to applicable law, including the Indian Civil Rights Act. Appellants' Response, Mar. 23, 2015, Ex. I (Letter from Galanda to Chambellan, Oct. 15, 2014). Appellants asked the Superintendent to disapprove the Ordinance. *Id*. On several occasions, Appellants also wrote to the Superintendent and Regional Director, among other officials of the Department of the Interior (Department), asking to be consulted on any review by BIA of the Tribe's Ordinance, or at least to be advised in writing if BIA was unwilling to consult. *See, e.g.*, Appellants' Response, Mar. 23, 2015, Ex. A (Letter from Roberts to Secretary of the Interior, Aug. 19, 2014).

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[2] Appellants challenged in tribal court the Tribal Council's first attempt to adopt disenrollment procedures following the constitutional amendment, and prevailed in part, leading to further amendments by the Tribal Council.

On October 24, 2014, without referencing Appellants' objections, the Superintendent sent a memorandum to the Regional Director advising him that the Superintendent had approved the Ordinance. Memorandum from Superintendent to Regional Director, Oct. 24, 2014 (Approval Memorandum). The Approval Memorandum appears to be an internal document that was not sent to the Tribe or to Appellants. However, the Superintendent also sent a letter to the Tribe's Chairman, informing him that the Ordinance had been reviewed and approved by the Superintendent on October 24, 2014, and stating that "[i]n accordance with the Nooksack Constitution, it will be forwarded for review by the Secretary of the Interior," the latter reference apparently referring to the transmittal to the Regional Director. Neither the Approval Memorandum nor the Superintendent's letter to the Tribe includes appeal rights.

On January 7, 2015, without addressing or acknowledging Appellants' objections, the Regional Director sent a memorandum to the Superintendent, in which he noted that the Superintendent had "reviewed and approved" the Ordinance, and then submitted it to the Regional Office "for further review." Decision. The Regional Director's memorandum states that "[t]his action" is authorized by the Tribe's Constitution, and briefly describes the circumstances under which the Ordinance was enacted, but does not contain any substantive analysis of the Ordinance. The memorandum concludes by stating that the Regional Office and the Office of the Solicitor had reviewed the Ordinance, "and find no legal reason to rescind your approval. Thus, the Ordinance is effective as of the date of your approval."

On January 13, 2015, the Superintendent sent a letter to the Tribe's Chairman informing him that the Regional Office had completed its review, that the Regional Director had found no legal reason "to rescind" the Superintendent's approval, and that, "[t]hus, [the Ordinance] is effective as of [October 24, 2014]," the date of the Superintendent's approval. The Superintendent's letter did not include appeal rights.

Appellants filed simultaneous appeals to the Regional Director (from the Superintendent's January 13, 2015, letter) and to the Board (from the Regional Director's January 7, 2015, memorandum). Appellants recognized that if no final decision had been made within BIA, an appeal to the Board would be premature, but sought to protect their appeal rights to the extent possible by filing appeals in both forums.[3]

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[3] Appellants contend that "it is obvious that the purpose of the Ordinance was to retroactively disenroll a specific group of targeted Nooksacks," Appellants' Response, Mar. 23, 2015, at 4, and that upon issuance of the Superintendent's January 13 letter, the Tribal Council "immediately recommenced disenrollment proceedings" by issuing notices to at least seven Appellants, *id*. at 5.

Upon receipt of the appeal, the Board ordered briefing on its jurisdiction to consider the appeal, noting that neither the Superintendent nor the Regional Director had included appeal rights in their decisional documents, and neither had identified the legal basis for stating that the Ordinance was effective as of the date of the Superintendent's approval. More specifically, the Board ordered the Regional Director to clarify whether his memorandum was intended to constitute final BIA action on the Ordinance, such that Appellants would have no further right of appeal within BIA:

> If the Regional Director contends that his Memorandum constituted final, but also non-appealable and effective, BIA action on the Ordinance, he shall state the legal grounds for that contention. Similarly, if the Regional Director contends that the Superintendent's decision to approve the Ordinance constituted final, non-appealable, and effective BIA action on the Ordinance, he shall state the legal grounds for that contention.

Pre-Docketing Notice and Order for Briefing on Jurisdiction, Feb. 12, 2015, at 2. The Board also ordered Appellants to address on what basis they contend the Board has jurisdiction to review a final BIA decision taking action to approve or disapprove a tribal ordinance when BIA is acting solely pursuant to authority granted to it in a tribal constitution. *Id*.

The Regional Director responded by clarifying that his memorandum was intended to constitute final BIA action in completing BIA's review of the Ordinance. Regional Director's Response at 3. According to the Regional Director, the Superintendent's subsequent letter to the Tribe merely confirmed "that the approval is final and the effective date of the Ordinance is October 24, 2014." *Id*. The Regional Director also initially took the position that the Decision is subject to appeal under 25 C.F.R. Part 2 (BIA's appeal regulations) and 43 C.F.R. §§ 4.330-4.340 (the Board's appeal regulations). The Regional Director suggested that BIA's failure to include appeal rights in any of its decisions was harmless error because Appellants had filed a timely appeal. *Id*. at 5.

As explained by the Regional Director, the Nooksack Constitution does not provide any process for BIA to follow in its review of tribal ordinances. As a matter of policy, BIA has followed a process based on procedures contained in other tribal constitutions that also provide for Secretarial review of tribal ordinances. As relevant to the process followed by BIA in the present case, those other tribal constitutions include language requiring a BIA superintendent to approve or disapprove a tribal ordinance within 10 days from receipt, and stating that if the superintendent approves the ordinance, it "shall thereupon become effective, but the Superintendent shall transmit a copy of the same . . . to the Secretary of the Interior, who may, within ninety (90) days from the date of its receipt by him rescind the said ordinance . . . ." Regional Director's Response at 4 (quoting Tulalip Const. art. VI, § 2). The Regional Director contends that following this process for reviewing

Nooksack ordinances is a reasonable policy and that the Superintendent "reasonably determined that the . . . Ordinance was effective the date he approved it, October 24, 2014." *Id*. at 5.

The Tribe argues that the Board lacks jurisdiction over this appeal because the Board has jurisdiction over appeals from decisions of BIA regional directors "issued under 25 CFR chapter 1," 25 C.F.R. § 2.4(e), and the Regional Director's Decision was not issued under those regulations, but resulted solely from the language in the Tribe's constitution making the ordinance subject to Secretarial approval. Tribe's Response, Mar. 23, 2015, at 4.[4] The Tribe contends that in February 2015, the Tribal Council passed a resolution construing the Nooksack Constitution's Secretarial approval requirement, and determining that it was fully satisfied and that the Ordinance is "fully effective." *Id*. at 3. In a footnote, the Tribe states that the Tribal Council determined that 25 C.F.R. § 2.6 (the automatic stay-of-effectiveness provision in BIA's appeal regulations) "did not apply to tribal purposes and did not exist when the Tribe adopted the requirement for [Secretarial] approval of the enrollment ordinance." *Id*. at 3 n.4.

Appellants argue that BIA's appeal regulations are broad enough to cover this appeal to the Board because the scope of those regulations broadly includes "decisions made by officials of the Bureau of Indian Affairs." Appellants' Response, Mar. 23, 2015, at 7 (citing 25 C.F.R. § 2.3(a)). Appellants also contend that the Board has routinely reviewed decisions of BIA regional directors that were made pursuant to authority granted to BIA only as a matter of tribal law, and not based upon any Federal statute or regulation. *Id*. at 8 (citing *Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director*, 36 IBIA 297 (2001); *White Mountain Apache Tribe v. Acting Phoenix Area Director*, 21 IBIA 151 (1992); *Ute Indian Tribe v. Phoenix Area Director*, 21 IBIA 24 (1991)).[5] According to Appellants, Board precedent thus dictates that we have jurisdiction to consider this appeal.

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[4] The Tribe also contends that Appellants lack standing to challenge BIA's approval of the Ordinance. *See id*. at 7-8. We leave that issue for the Regional Director to address on remand, in the context of Appellants' appeal to him on the merits of the Superintendent's approval. We are not convinced that Appellants lack standing to have the Board consider the present appeal to the extent it raises the issue of their procedural rights as potentially interested parties to have their appeal to the Regional Director addressed and decided by him, whether on the merits or otherwise.

[5] Appellants also cite *Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director*, 27 IBIA 163 (1995), as an example of the Board asserting jurisdiction over a BIA decision on a tribal enrollment determination. The Board's decision in Shakopee, however, was remanded to the Department, *Feezor v. Babbitt*, 953 F. Supp. 1 (D.D.C. 1996), and on remand, the Assistant Secretary – Indian Affairs concluded that the Board *lacked* jurisdiction

(continued…)

In reply to Appellants, the Regional Director changes course and now contends, consistent with the Tribe's arguments, that the Board lacks jurisdiction over the appeal because the Board's jurisdiction, as relevant here, is limited to reviewing decisions of regional directors made under the regulations in 25 C.F.R., and the Decision was made solely as a function of tribal law.[6] Regional Director's Reply Brief, May 29, 2015, at 8.

Discussion

The Board's jurisdiction is limited to the authority delegated to it by the Secretary of the Interior. *See* 43 C.F.R. § 4.1(b)(1). In relevant part, BIA's appeal regulations provide as follows:

> Except as provided in [25 C.F.R. § 2.3(b)], this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.[7]

25 C.F.R. § 2.3(a).

> The following officials may decide appeals:
> (a) An Area[8] Director, if the subject of the appeal is a decision by a person under the authority of that Area Director.
> . . . .
> (e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director . . . .

25 C.F.R. § 2.4.

(…continued)
because the time period granted to the Secretary by the Shakopee constitution for taking action had lapsed. In re Feezor v. Babbitt Remand, Feb. 2, 1999, at 7 (Assistant Secretary – Indian Affairs).

[6] Appellants moved to strike the Regional Director's reply as untimely and as impermissibly raising new arguments in a reply brief. The Board denied Appellants' motion to strike, but granted their motion in the alternative for leave to file a sur-reply.

[7] Section 2.3(b) provides that Part 2 "does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." No party contends that § 2.3(b) applies here.

[8] Area Directors are now designated "Regional" Directors.

The Board's regulations provide in relevant part that the Board decides appeals from final administrative actions or decisions of a BIA official "issued under 25 CFR chapter 1." 43 C.F.R. § 4.1(b)(1); *see* 43 C.F.R. § 4.330(a) (Board's regulations apply to appeals from BIA actions or decisions "issued under regulations in 25 CFR chapter 1"); *id*. § 4.331 (interested party may appeal from a final BIA decision "issued under regulations in title 25 of the Code of Federal Regulations").

Thus, the threshold question for the Board, in determining our jurisdiction, is whether the Regional Director's decision was issued "under regulations in 25 C.F.R. chapter 1." We conclude that it was. Contrary to the parties' characterization of the Decision, the Regional Director did not purport to approve the Ordinance or take any action by which it became approved by BIA. Instead, following procedures set out in BIA policy, the Regional Director concluded he had no basis to "rescind" the *Superintendent's* approval of the Ordinance. The Regional Director did, however, decide and declare that the Ordinance had become effective on October 24, 2014, the date of the Superintendent's approval. In so doing, the Regional Director also necessarily concluded that the Superintendent's decision was not appealable under Part 2. Otherwise, he would have recognized that as an appealable decision, the Superintendent's action was subject to the automatic stay-of-effectiveness provision in BIA's appeal regulations.[9] *See* 25 C.F.R § 2.6.

It is true, as the Regional Director argues, that the only reason the Regional Director reviewed the Ordinance was because the Tribe's Constitution required Secretarial review, but that was not the reason that the Regional Director declared the Superintendent's approval as being effective on the date of the Superintendent's action. In reaching that decision, the Regional Director was not relying on, or purporting to rely on, Nooksack tribal law. The Nooksack Constitution contains no procedures governing Secretarial review of an enrollment ordinance.[10] Instead, the Regional Director was relying solely on BIA policy, which was not based on Nooksack tribal law, but on language found in other tribes' constitutions.

We find unconvincing the Tribe's argument that because the general language in its Constitution making the Ordinance subject to Secretarial review predates BIA's appeal regulations, BIA's appeal regulations cannot apply to the Superintendent's action. Nothing in the general language of the Tribe's Constitution indicates any intent that decisions by a BIA superintendent would not be subject to an administrative appeal. And we are not

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[9] The Regional Director did not purport to make the Superintendent's decision effective immediately pursuant to 25 C.F.R. § 2.6(a).

[10] Thus, we need not decide the jurisdictional implications of more specific procedural language in a tribe's constitution governing Secretarial review.

convinced that the Tribe could preempt BIA's appeal regulations by declaring that the automatic stay in § 2.6—applicable to *BIA* action—"did not apply to tribal purposes." Tribe's Response, Mar. 23, 2015, at 3 n.4.

In our view, a BIA decision dismissing the applicability of a provision of 25 C.F.R. is a decision, albeit a negative one, that is made "under" 25 C.F.R., within the meaning of 25 C.F.R. § 2.4(e) and 43 C.F.R. § 4.330, because it is based on an interpretation of 25 C.F.R. Part 2. In this case, the Regional Director determined that a BIA policy that was not grounded in any language in the Nooksack Constitution trumped BIA's appeal regulations and allowed the Superintendent's decision to become effective, notwithstanding those regulations. That was a determination over which we have jurisdiction.[11]

On the merits of the Regional Director's decision, we conclude that the Regional Director erred. Although the Board's jurisdiction is prescribed with reference to decisions issued under 25 C.F.R., the Regional Director's jurisdiction to hear appeals is not so prescribed. Instead, a Regional Director is empowered to decide appeals "if the subject of appeal is a decision by a person under the authority of that [Regional] Director." 25 C.F.R. § 2.4(a). The Superintendent's decision, even though undertaken solely as a matter of tribal law, was a decision by a person under the Regional Director's authority, and thus it fell within the scope of BIA's appeal regulations, at least with respect to Appellants' right of appeal to the Regional Director. And because the Superintendent's decision was appealable, it was not immediately effective, but was instead subject to the automatic stay found in 25 C.F.R. § 2.6. In deciding otherwise, the Regional Director erred, and thus we vacate the Decision.

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 vacates the Decision and remands the

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[11] The Regional Director also argues that the Board lacks jurisdiction over the appeal because the Board lacks jurisdiction over enrollment disputes. Neither the Tribe nor Appellants argue that the dispute over BIA's approval of the ordinance is an enrollment dispute, within the meaning of the regulations. We are not convinced that because the subject of the Ordinance is enrollment and disenrollment, the Board is precluded from exercising jurisdiction to review the Regional Director's procedural determination regarding the effectiveness of the Superintendent's decision and appeal rights within BIA. We express no view, however, on whether the enrollment-dispute limitation, or any other limitation, on our subject matter jurisdiction, would preclude us from reviewing a decision of the Regional Director on Appellants' appeal from the Superintendent's decision.

matter to the Regional Director for consideration of Appellant's appeal to him from the Superintendent's decision approving the Ordinance.

I concur:

// original signed	//original signed
Steven K. Linscheid	Thomas A. Blaser
Chief Administrative Judge	Administrative Judge