INDIANS OF THE QUINAULT RESERVATION, Appellant	:	Order Denying Motion to Dismiss and Setting Briefing Period for Amicus Curiae
v.	:	Docket No. IBIA 81-21-A
COMMISSIONER OF INDIAN AFFAIRS, Respondent	:	August 5, 1981

In a motion dated July 14, 1981, respondent Government seeks dismissal of the above-captioned appeal on two grounds. First, respondent submits that the Commissioner's decision at issue entailed the discharge of a discretionary function of the Secretary, thereby precluding the Board of Indian Appeals from exercising jurisdiction. Second, respondent contends that the Quinault Indian Nation is an indispensable party which cannot be joined in this proceeding without its consent.

With regard to respondent's first contention, it is correct that as a general rule "discretionary" decisionmaking of the Commissioner is not reviewable by the Board of Indian Appeals. See 25 CFR 2.19. 1/ The next question is whether the decision of the Commissioner which has been appealed to the Board was based on an interpretation of law or whether such decision was discretionary.

The appellant group in this case, known as "Indians of the Quinault Reservation," hereafter referred to as "IQR," appeals from a decision entered December 8, 1980, by the Commissioner of Indian Affairs denying IQR's request for assistance in the drafting and adoption of a

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1/ With the concurrence of the Bureau of Indian Affairs and the Solicitor's Office, an exception to this general rule was set forth in the recently revised regulations of the Board of Indian Appeals, published at 46 FR 7334 (Jan. 23, 1981), whereby the Board may accept jurisdiction over an appeal involving the discretionary authority of the Commissioner at the Commissioner's request. Id. at section 4.330(b). (The above regulation also permits the Secretary or Assistant Secretary for Indian Affairs to certify "discretionary" matters to the Board. This particular feature of the Board's new rules does not depart from what our regulations previously allowed. Thus, at 43 CFR 4.1(b)(2) (1980) it is stated: "The Board also decides such other matters pertaining to Indians as are referred to it * * * for exercise of review authority of the Secretary." See also 43 CFR 4.351 (1980).)

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constitution and bylaws. IQR alleges that it is entitled to the foregoing assistance under the provisions of section 16 of the Indian Reorganization Act (25 U.S.C. § 476 (1976)) and regulations found at 25 CFR Part 52.

The Board has carefully examined the Commissioner's December 8 decision as well as his earlier decision of April 7, 1980, in which the same or similar questions were addressed. Whether these are read as one or as separate decisions, the position of the Commissioner can be summarized as holding that IQR is not an eligible group to receive the specific assistance it seeks from the Department. We hold that the foregoing conclusion is a legal interpretation. Moreover, it has already been so characterized by the Commissioner and the Solicitor's Office in documents of record. 2/

Respondent refers to a previous Board decision, Guibord v. Commissioner of Indian Affairs and Lac Courte Oreilles Tribal Governing Board, 4 IBIA 77 (1975), in which the Board held it lacked jurisdiction to review certain actions taken by the Commissioner under 25 CFR Part 52 because the matters involved were committed to the Commissioner's discretion. Assuming that the Board's holding in Guibord was not incorrect, it nevertheless does not state that all actions taken by the Commissioner of Indian Affairs under authority of 25 CFR Part 52 are "discretionary" and "unreviewable."

The Board recognizes that there may be a point at which the Commissioner's power to act for the Secretary in advising and assisting "eligible groups" in drafting a governing constitution and bylaws (25 CFR 52.4) or in authorizing the calling of an election on the adoption of such documents (25 CFR 52.5) becomes a singularly "discretionary" function. 3/ But where, as here, a group of Indians has requested specific assistance from the Department under substantive regulations

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2/ For example, in his Dec. 8 decision the Commissioner stated to appellant:

"We call your attention to our April 7 decision. In a letter to you on that date, we informed you that the Secretary lacks legal authority to call an election to consider a proposed organizational document desired by your organization. Further, since your request is not from a tribal governing body, an authorized representative committee, or a petition from tribal members as required by 25 CFR 52.5, there is no basis for us to provide the kind of assistance mentioned in your letter."

See also memorandum of Acting Associate Solicitor, Division of Indian Affairs, to Commissioner of Indian Affairs, dated Mar. 18, 1980, which, following 10 pages of factual and legal analysis, advises the Commissioner that he lacks "legal authority to grant the petitioners' request."

3/ Pursuant to the provisions of section 4.337(b) of the Board's new rules, where the Board finds that one or more issues involved in an appeal require the exercise of discretionary authority of the Commissioner, "the Board shall refer these issues to the Commissioner for resolution."

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which authorize such aid to groups eligible therefor, it is a denial of procedural due process established by the Department for the adjudication of disputes for the Bureau to deny a group's request on legal grounds while labeling the result "discretionary" and "non-appealable." Respondent's first ground for dismissal of IQR's appeal is therefore denied. Whether or not IQR constitutes a group of Indians eligible to receive assistance in the drafting and adoption of a constitution and bylaws pursuant to 25 CER 52.4-52.5, is a legal issue cognizable by the Board.

Respondent's second ground for dismissal is also without merit. That the Quinault Indian Nation is a sovereign government which enjoys immunity from suit is well established. Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1979). Because the obvious objective of IQR is to establish an additional governing body on the Quinault Reservation, it is certainly true that the Quinault Indian Nation is an interested party to this proceeding. However, the Board has not been persuaded by respondent's motion that the Quinault Tribe is an "indispensable party" which must be joined to adjudicate the limited question before us, viz., whether IQR is an eligible group of Indians to receive organizational assistance from the Department.

Assuming, arguendo, that the Quinault Tribe satisfies all the requirements generally needed for recognition as an indispensable party, it is not incumbent on administrative tribunals to invoke traditional rules of joinder and of necessary or indispensable parties. National Licorice Co. v. NLRB, 309 U.S. 350 (1960). In fact, the Board has adjudicated other cases without the participation of the Quinault Tribe as a party where its interests were significant. See, e.g., Estate of Joseph Willessi, 8 IBIA 295, 88 I.D. 561 (1981). 4/

Based on the above, respondent's motion to dismiss this appeal is denied. The Quinault Tribe has requested and received permission to brief the merits of this case as amicus curiae. The tribe is hereby allowed 30 days from receipt of this order in which to file a brief on the merits. Upon receipt of such brief, this case will be ripe for decision.

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Wm. Philip Horton
Chief Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge

4/ In Willessi, as here, the Quinault Tribe requested and received permission to participate as amicus curiae. It is of course the policy of the Board to encourage participation by all interested parties in proceedings before it. See 46 FR 7334, 7336 (Jan. 23, 1981).

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