LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-6-A Decided May 8, 1990

Appeal concerning the deadline established for updating a tribal roll for purposes of distributing a judgment fund.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indians: Generally

In appeals filed under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

APPEARANCES: Debbie Swanson, Chairperson, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Little Shell Tribe of Chippewa Indians of Montana 1/ seeks review of a June 6, 1989, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning the deadline established for updating appellant's roll pursuant to the Pembina Chippewa Judgment Fund Distribution Act of December 31, 1982, P.L. 97-403, 96 Stat. 2022. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The Pembina Chippewa Judgment Fund Distribution Act was passed to provide for the award of judgment funds in U.S. Claims Court Docket Nos. 113, 191, 221, and 246. Under the Act, the award was to be distributed among the Turtle Mountain Band of Chippewa Indians, the Chippewa Cree Tribe of the Rocky Boy's Reservation, the Minnesota Chippewa Tribe, appellant, and certain nonmember Pembina descendants. The Act stated that 80 percent of

1/ Appellant is currently not recognized by the Federal Government as an Indian tribe. It has an acknowledgement petition pending pursuant to 25 CFR Part 83.

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appellant's share of the judgment fund was to be distributed as per capita payments to enrolled members of appellant, and 20 percent was to be held in trust and invested by the Secretary for the benefit of appellant's members. The 20 percent retained portion was specifically tied to action on appellant's pending acknowledgement petition.

By letter dated May 20, 1989, appellant, apparently for the first time, raised certain objections concerning the updating of its tribal roll to the Area Director. Appellant questioned whether a portion of its share of the award had been used by the Turtle Mountain Agency, BIA, to prepare appellant's roll; the authority of the Turtle Mountain Agency to establish a deadline for updating its roll; and whether the Turtle Mountain Band was enrolling certain of appellant's members who had already participated in the award as its members.

The Area Director responded by letter dated June 6, 1989. He stated that the Turtle Mountain Agency had not used any funds from the award; the enrollment deadline had been established by appellant, not by BIA; and he was not aware that any of appellant's members were being enrolled in the Turtle Mountain Band, but would investigate the matter further if appellant supplied additional information. The Area Director indicated that his response concerning the establishment of the enrollment deadline was subject to appeal to this Board.

The Board received appellant's notice of appeal on July 10, 1989. On July 27, 1989, it received notification that the Assistant Secretary - Indian Affairs was assuming jurisdiction over the appeal pursuant to 25 CFR 2.20(c) and 43 CFR 4.332(b). 2/ Accordingly, on July 27, 1989, the Board notified the parties of the assumption of jurisdiction and transmitted all documents relating to the appeal to the Assistant Secretary.

On October 10, 1989, the Board received a letter from appellant asking it to reassume jurisdiction over the appeal. The Board issued an order on October 11, 1989, making a preliminary determination that it had jurisdiction under 25 CFR 2.20(e), 3/ and requesting the record. The Board's jurisdiction was not challenged and the record was transmitted to it. Pursuant to the Board's November 28, 1989, notice of docketing, both appellant and the Area Director filed additional briefs.

2/ 25 CFR 2.20(c) provides in part:

"In accordance with the provisions of § 4.332(b) of Title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary - Indian Affairs shall have authority to decide to:

"(1) Issue a decision in the appeal * * * ."

43 CFR 4.332(b) tracks the language of 25 CFR 2.20(c).

3/ Section 2.20(e) states: "If the Assistant Secretary * * * does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction."

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Discussion and Conclusions

The primary question raised in this appeal is whether BIA or appellant established the December 31, 1983, deadline for applying for membership in appellant. Through its present Chairperson, appellant contends that a representative of the Turtle Mountain Agency mandated the 1983 deadline: "[T]he cut-off date for Little Shell enrollment was set for December 31, 1983, by the Turtle Mountain Agency. Please refer to the attached copy of the Little Shell Minutes of September 10, 1983. The Tribal Council acted on the pre-meeting direction given by Ruth Brunelle" (May 20, 1989, Letter at 1-2). The referenced council minutes show that the Tribal Council voted to reopen the enrollment until December 31, 1983, 4/ before Ms. Brunelle, identified as the Turtle Mountain Agency Tribal Operations Officer, spoke. The minutes recite that Ms. Brunelle "stated the purpose of her presence was to ask that the enrollment be reopened until the last of December 1983" (Minutes of Sept. 10, 1983, at 2). The minutes further show that appellant's present Chairperson was not a member of the Tribal Council until she was nominated, elected, and installed during the September 10, 1983, council meeting.

The minutes of the October 8, 1983, council meeting show, at page 3, that in response to questions concerning whether appellant was doing a new enrollment,

> Mr. [Howard] Paul [, Tribal Council Member,] did not know where the rumor started that the tribe was doing a new enrollment. They just reopened the enrollment for base enrollment until December 30, [sic] 1983. It was first closed in July of 82. The government said no that the Tribe had to go to the end of the year and not in the middle of a year. That is why the reopening of the enrollment began.

[1] In an appeal filed under 25 CFR Part 2, the appellant bears the burden of proving that the decision appealed is erroneous. Kahan v. Acting Muskogee Area Director, 18 IBIA 180 (1990); Cheepo v. Acting Sacramento Area Director, 18 IBIA 131 (1990). The decision at issue here is the Area Director's conclusion that the enrollment deadline was established by appellant. Thus, appellant bears the burden of proving that it did not establish the deadline.

The Board has carefully reviewed the council minutes and the statement of appellant's present Chairperson. The minutes indicate that BIA believed the enrollment should be reopened, should run to the end of a year, and should run to the end of 1983. The statement of appellant's present Chairperson is not supported by other evidence. There is no basis for a finding that BIA mandated the 1983 deadline or refused to allow appellant to set a later deadline. Since the evidence supports the conclusion that the

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4/ Appellant's tribal roll, which was being developed for purposes of its acknowledgement petition, had previously been closed as of July 1, 1982.

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enrollment deadline was established by appellant, not by BIA, appellant has failed to carry its burden of proof.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's June 6, 1989, decision is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

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