ZINKE & TRUMBO, LTD.; ENRON OIL & GAS CO.; QUINEX ENERGY CORP.;
WASATCH WELL SERVICE, INC.; GEOSCOUT LAND & TITLE CO.;
PAYNE LAND SERVICES; QUESTAR PIPELINE CO., ET AL.;
AND GARY-WILLIAMS ENERGY CORP. 1/
v.
PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-13-A, 95-22-A through 95-27-A, 95-38-A — Decided January 5, 1995

Appeals from a decision declining to rescind approval of a tribal ordinance.

Docketed and dismissed.

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 constitution establishes a time limit for Secretarial review, the Secretary lacks authority to act on the ordinance once the review period has expired.

1/ The docket numbers assigned to the individual appeals are as follows: Zinke & Trumbo, Ltd.--IBIA 95-13-A; Enron Oil & Gas Co.--IBIA 95-22-A; Quinex Energy Corp.--IBIA 95-23-A; Wasatch Well Service, Inc.--IBIA 95-24-A, GeoScout Land & Title Co.--IBIA 95-25-A; Payne Land Services--IBIA 95-26-A; Questar Pipeline Co., et al.--IBIA 95-27-A; Gary-Williams Energy Corp.--IBIA 95-38-A.

Additional appellants in Docket No. IBIA 95-27-A are: Mountain Fuel Supply Co., Wexpro Co., Celsius Energy Co., and Universal Resources Corp.

Two appellants failed to respond to an order to show cause issued by the Board. Their appeals have been dismissed separately. Murray v. Phoenix Area Director, 27 IBIA 102 (1995); Chevron Pipe Line Co. v. Phoenix Area Director, 27 IBIA 103 (1995).

One further appeal concerning the same matter has been addressed separately. Ute Distribution Corp. v. Phoenix Area Director, 27 IBIA 111 (1995).

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2. Board of Indian Appeals: Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Judicial System

Although the Board of Indian Appeals has jurisdiction over an appeal from a Bureau of Indian Affairs Area Director's approval of a tribal ordinance, it has authority to abstain in a case where it finds that primary jurisdiction lies with a tribal court.

APPEARANCES: John F. Waldo, Esq., and Thomas W. Bachtell, Esq., Salt Lake City, Utah, for all appellants; Gary G. Sackett, Esq., and William Rideout, Esq., Salt Lake City, Utah, for Questar Pipeline Co., et al.; James W. Greene, Esq., and Paul Rosswork, Esq., Denver, Colorado, for Gary-Williams Energy Corp.; William R. McConkie, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These appeals concern Ordinance 94-003 of the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). The ordinance, which requires the licensing of certain businesses on the reservation and imposes a business activity fee, was enacted by the Tribal Business Committee on July 6, 1994, and approved by the Superintendent, Uintah and Ouray Agency, Bureau of Indian Affairs (BIA), on July 15, 1994. On September 1, 1994, the Phoenix Area Director, BIA (Area Director), issued a decision declining to rescind the Superintendent's approval. Appellants appeal from the Area Director's decision.

Appellants' notices of appeal indicated that their primary objections were to the ordinance itself, although they also alleged that the ordinance was promulgated and approved improperly. It appeared from appellants' contentions that their appeals might be subject to the analysis employed in Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). In that case, the Board dismissed an appeal from BIA's approval of the Crow Tribal Railroad and Utility Tax Code, in deference to the primary jurisdiction of the Crow Tribal Court over challenges to the code. The Board furnished appellants in this case with copies of the decision in Burlington and ordered them to show why their appeals should not be dismissed under the principles discussed in that case.

Appellants filed responses contending that this case differs from Burlington in that no regulations or guidelines for approval of tribal ordinances were in place in that case, whereas here, BIA's approval was subject to the "Guidelines for Review of Tribal Ordinances Imposing Taxes on Mineral Activities" (Guidelines) issued by the Assistant Secretary - Indian Affairs on January 18, 1983. Under the Guidelines, appellants note, the approval or disapproval of an ordinance may be appealed pursuant to 25 C.F.R. Part 2. They contend that substantive review of an

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ordinance is required because the Guidelines direct the secretary to disapprove a tribal ordinance if he finds that it violates Federal or tribal law. They argue that, under the Guidelines, the Area Director's "review power is both broad and mandatory" and that "if the [Area] Director possesses such plenary power, then it must obviously follow that [the Board] possesses equally broad powers to review the [Area] Director's action" (Responses to order to Show Cause at 2). Appellants further contend that the Guidelines "do not permit discretionary abstention." Id.

As appellants point out, the Guidelines state that approval or disapproval of an ordinance may be appealed under 25 C.F.R. Part 2. This statement, however, is not a grant of any appeal right that would not otherwise exist. It simply acknowledges the usual rule that, absent a specific provision otherwise, BIA decisions are appealable under 25 C.F.R. Part 2. See 25 C.F.R. 2.3. Decisions approving or disapproving tribal ordinances are routinely appealed to the Board under Part 2, regardless of whether or not they are subject to the Guidelines. See, e.g., Burlington; White Mountain Tribe v. Acting Phoenix Area Director, 21 IBIA 151 (1992); Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24 (1991). The fact that such approvals or disapprovals are appealable to the Board, however, does not mean that the Board will necessarily have jurisdiction over every such appeal. Nor does it mean that the Board will be compelled to exercise its jurisdiction where it finds that it should defer to another forum. This is made clear in Burlington. Although, as noted above, the appeal in that case was taken under Part 2 and the Board acknowledged that it had jurisdiction, it found that it should not exercise that jurisdiction.

Appellants also contend that Board review of the Area Director's decision is mandated by the requirement in the Guidelines that the Secretary disapprove an ordinance which he finds violative of Federal or tribal law. 2/ Generally, the Board has jurisdiction to review an Area Director's decision for compliance with relevant regulations and standards. The question here, however, is not whether the Board has such jurisdiction. Rather, it is whether the Board should exercise such jurisdiction. Contrary to appellants' contention, the fact that the Assistant Secretary has enunciated review standards in the Guidelines does not preclude the Board from abstaining in a case where it finds abstention appropriate. 3/

2/ Section 1.6B of the Guidelines provides: "Grounds for Area Director's Disapproval. The Secretary will disapprove a tribal ordinance subject to these guidelines if he finds that: * * * (4) The ordinance violates federal or tribal law."

3/ It is possible that appellants believe the Board is under the authority of the Assistant Secretary - Indian Affairs and thus a part of the ordinance review process per se. That is not the case. The Board is a component of the Office of Hearings and Appeals, a separate office in the Office of the Secretary of the Interior, established to provide independent, objective review of decisions issued by the Department's various program offices.

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In Burlington, the Board observed that "[t]he Federal policy of respect for tribal courts, and of support for tribal self-government in general, counsels abstention by a Federal form in a case in which a tribal forum has primary jurisdiction." 25 IBIA at 80. In addition to the Federal cases discussed in Burlington, the more recent decision in Middlemist v. Secretary of the Interior, 824 F. Supp. 940 (D. Mont. 1993), aff'd, 19 F.3d 1318 (9th Cir.), cert. denied, 115 S. Ct. 420 (1994), also lends support to the Board's analysis.

In Middlemist, the plaintiffs sought to enjoin officials of the Confederated Salish and Kootenai Tribes from enforcing a tribal ordinance against them as non-members of the Tribes. 4/ They also sought to compel the Secretary to disapprove the ordinance as it applied to non-member activities. The district court held that the matter was a "reservation affair" and that the court must therefore defer exercising jurisdiction over it until the plaintiffs had exhausted their tribal remedies. The plaintiffs contended, inter alia, that exhaustion of tribal remedies was impossible because the tribal court lacked jurisdiction over the Secretary and other Federal defendants. The district court held:

> The exhaustion doctrine requires that a record be developed in tribal proceedings concerning the authority of the Tribal Council to promulgate and enforce Ordinance 87A. That issue is determinative of all of Plaintiffs' claims, including the correctness of the BIA's approval and subsequent funding of the ordinance. Therefore, the necessary record could be developed in Tribal Court without the presence of the Federal Defendants.

824 F. Supp. at 946-47.

Just as in Middlemist, the correctness of the Area Director's approval of ordinance 94-003 is an issue which is secondary to the central issue here, i.e., the validity of the ordinance. Middlemist is clearly consistent with the Board's decision to abstain in Burlington and provides additional authority for a similar course of action here.

[1] In addition to the factors discussed in Burlington, another factor which must be taken into consideration in this case is the provision

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fn. 3 (continued)
E.g., All Materials of Montana v. Billings Area Director, 21 IBIA 202, 211 (1992); Griff v. Acting Portland Area Director, 19 IBIA 14, 17-18 (1990). Thus the Board may, indeed must, make an independent determination as to whether to exercise its jurisdiction in this case.
4/ This was Ordinance 87A, the Tribes' Aquatic Lands Conservation Ordinance. The Tribes enacted the ordinance in 1985, and BIA approved it the same year. Apparently, BIA also provided the Tribes with funding to develop and implement the ordinance.

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of the Tribe's constitution (Constitution) concerning review of tribal ordinances. 5/ Article VI, section 2, of the Constitution provides:

> Manner of review. --Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten (10) days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the Tribal Business Committee of such action.

Because Secretarial review of this ordinance is authorized only by the Tribe's Constitution, and not by Federal law, it is the Constitution which sets the parameters of the Secretary's review authority. In this case, the Secretary's authority to rescind Ordinance 94-003 expired 90 days after July 6, 1994. Thus, even if the Board were to review the Area Director's decision on the merits, it could not, were it to find error in the decision, either rescind the ordinance itself or order the Area Director to rescind it. 6/ See Pawnee Tribe of Oklahoma v. ??? Area Director, 26 IBIA 284 (1994) (Where a tribal constitution includes a time limit for review of tribal ordinances, BIA lacks authority to revoke its approval once the period has expired).

[2] For the reasons discussed above and in Burlington, the Board finds that it has the authority to, and should, abstain from exercising its jurisdiction here. Abstention by the Board will enable appellants to

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5/ Ordinance 94-003 was subject to Secretarial review under Article VI, sections 1(h) and (1), of the Constitution.

Article VI, section 1(h) authorizes the Tribal Business Committee "[t]o levy taxes upon members of the [Tribe], and to require the performance of community labor in lieu thereof, and to levy taxes and license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Reservation."

Article VI, section 1(1) authorizes the Committee "[t]o safeguard and promote the peace, safety, morals and general welfare of the [Tribe] by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting nonmembers of the Reservation shall be subject to review by the Secretary of the Interior."

6/ The appeal provision of the Guidelines acknowledges this fact. Section 1.7 provides: "Approval or disapproval of an ordinance may be appealed pursuant to 25 C.F.R. Part 2. However, the Secretary may not approve or disapprove an ordinance outside the time limits, if any, in a tribal constitution."

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proceed promptly to Tribal Court, which has primary jurisdiction over the issues in these appeals. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, these appeals are docketed and dismissed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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