INTERIOR BOARD OF INDIAN APPEALS

Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, Bureau of Indian Affairs

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United States Department of the Interior

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

INTERIM AD HOC COMMITTEE OF THE KAROK TRIBE

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE,

BUREAU OF INDIAN AFFAIRS

IBIA 84-32-A Decided January 8, 1985

Appeal from a decision of the Sacramento Area Director, Bureau of Indian Affairs, denying applications for Core Management and Jobs Bill grants.

Docketed; affirmed as modified.

1. Administrative Procedure: Administrative Review--Bureau of Indian Affairs: Administrative Appeals: Generally

   Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

2. Board of Indian Appeals: Jurisdiction

   The Board will exercise its jurisdiction in a matter appealed to it under 25 CFR 2.19(b) only after an appellant has filed with it a notice of appeal, request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing the notice of appeal is, under 43 CFR 4.310(a), the date the notice is mailed.

3. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

4. Board of Indian Appeals: Jurisdiction--Secretary of the Interior

   By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

5. Indians: Federal Recognition of Indian Tribes: Recognition

   Federal recognition of Indian tribes is governed by 25 CFR Part 83, which places such recognition within the purview of the Assistant Secretary for Indian Affairs, subject to review by the Secretary. Therefore, the Board of Indian Appeals does not have authority to review cases involving recognition of Indian tribes.

APPEARANCES: Mary J. Risling, Esq., Eureka, California, for appellant; Scott Keep, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On May 14, 1984, the Board of Indian Appeals (Board) received a notice of appeal from the Interim Ad Hoc Committee of the Karok Tribe (interim committee) (appellant), which notice was mailed on May 10, 1984. Appellant sought review of an October 11, 1983, decision of the Sacramento Area Director, Bureau of Indian Affairs (BIA) (appellee), that refused to consider

appellant's applications for Fiscal Year 1983 Core Management and Jobs Bill grants. This appeal is hereby docketed under the above case name and number. For the reasons discussed below, the Board holds that the appeal must be dismissed.

Background

From documents submitted by BIA, it appears that the Karok Tribe (tribe) began efforts in 1978 to receive Federal recognition. The BIA determined that the aboriginal subentities of the tribe consisted of three communities located at Happy Camp, Orleans, and Siskiyou (Yreka). On June 15, 1978, after reviewing a BIA report finding that the three Karok communities jointly met the requirements for Federal recognition, the Assistant Secretary for Indian Affairs (Assistant Secretary) advised appellee that there would be a basis on which to deal with the Karoks as a tribe when they provided a clear explanation of their governing process and of the internal relationships between the three substitutes. On March 7, 1979, at BIA's request, the three subentities of the tribe met and adopted a resolution creating the interim committee. The committee was composed of two representatives from each of the subentities. The BIA determined, by letter dated March 26, 1979, that the Karoks would be dealt with through the interim committee while they were formulating their governing documents.

A constitutional drafting committee was subsequently elected, again with representatives from each of the three subentities. The BIA advanced money to this committee for use in drafting a constitution. A representative

from the BIA Branch of Tribal Relations met with the committee in June and in August of 1979 to provide technical assistance in drafting a constitution.

A proposed constitution was prepared. On January 29, 1980, the drafting committee submitted the proposal to the Secretary with the request that an election be called on the proposal. On November 15, 1980, the election was authorized. This authorization lapsed without an election having been held. On February 20, 1981, a request for additional time to hold an election was granted, but this time also lapsed. A third authorization was granted on June 18, 1981, but was suspended on August 18, 1981, when BIA learned that the land at Orleans had not been signed over to the tribe.

BIA subsequently learned that the Happy Camp and Orleans subentities proposed to exclude the Siskiyou subentity from participation in the tribe. This action was apparently based on the fact that a small number of individuals who were members of the Siskiyou subentity were not Karoks. This fact had been recognized from the beginning of the negotiations for Federal recognition, and these individuals had been excluded from participating in the selection of representatives to either the interim committee or the constitutional drafting committee. It was also understood from the beginning that they would not be eligible for membership in or services from the Karok Tribe after Federal recognition.

Both appellee and BIA headquarters therefore took the position that the tribe's total exclusion of the Siskiyou community was improper because Federal recognition was in part based on the existence of all three related subentities. The tribe was advised orally and by letter dated May 6, 1983,

that BIA would not allow the exclusion of the Siskiyou subentity and would not recognize any action taken by the interim committee until the Siskiyou community was restored.

In 1983 appellant submitted the two fiscal year 1983 grant applications that are the basis for this appeal. On October 11, 1983, appellee refused to consider this appeal on the grounds that the interim committee was not the recognized governing body of the Karok Tribe. An appeal taken from this decision was filed with the Commissioner of Indian Affairs in early January 1984. The appeal was supplemented on February 10, 1984. By letter dated February 22, 1984, the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary) confirmed receipt of the appeal and indicated that a decision would be rendered shortly.

A notice of appeal under 25 CFR 2.19(b) was received by the Board on May 14, 1984. The notice requested review by the Board because no decision had been rendered by BIA within 30 days. In such circumstances, section 2.19(b) authorizes the Board to decide the appeal.

By order dated May 21, 1984, the Board made a preliminary determination that it had jurisdiction in this matter and requested the administrative record. On June 8, 1984, the Board received a letter from appellant stating that on May 25, 1984, it had received a letter decision that was signed by the Assistant Secretary on May 16, 1984. This May 16, 1984, letter is part of the record before the Board. It purports to uphold appellee's decision, but on the grounds that appellant was not the validly constituted

representative of the Indian groups that had petitioned for Federal recognition because of appellant's total exclusion of the Siskiyou subentity. Appellant argues that the May 16, 1984, decision should not be given effect because its appeal was already properly before this Board.

On June 13, 1984, the Board issued an order requesting the Office of the Solicitor to clarify the status of the case; to send the Board a copy of the Assistant Secretary's May 16, 1984, letter; and to brief the Board on the issue of jurisdiction. The Board received a statement from the Deputy Assistant Secretary on July 9, 1984, and a motion to dismiss on jurisdictional grounds from the Office of the Solicitor on July 16, 1984. Appellant requested and was granted an opportunity to respond to the motion to dismiss. Appellant's opposition to the motion was received by the Board on August 31, 1984. On November 13, 1984, appellee filed a reply to appellant's opposition to the motion to dismiss.

Discussion and Conclusions

This appeal raises several significant procedural issues. The first issue is the time at which the Board acquires jurisdiction over a case under 25 CFR 2.19(b), which states: "If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

The administrative review functions of the vacant office of the Commissioner of Indian Affairs were delegated to the Deputy Assistant Secretary by

memorandum signed by the Assistant Secretary on May 15, 1981. In an internal BIA memorandum dated May 27, 1981, from the Chief, Division of Management Research and Evaluation, to the Acting Executive Assistant to the Acting Deputy Assistant Secretary, it was stated that, under the delegation memorandum, because the Deputy Assistant Secretary had replaced the Commissioner, his decisions were subject to the review provisions set forth in 25 CFR Part 2. The Board has consistently followed that interpretation of the delegation. See cases cited, infra. Normal BIA review procedure is, therefore, that appeals from decisions of BIA Area Directors are decided by the Deputy Assistant Secretary. In this context, the Board has held that when the Deputy Assistant Secretary fails to issue a decision in a matter appealed to him within the 30-day period established by section 2.19, the Board acquires jurisdiction over the appeal. See Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 91 I.D. 43 (1984); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983); Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983); Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982).

[1] The Board has upheld the authority of the Assistant Secretary 1/ to issue personally the decision in any administrative appeal. See, e.g., dismissal orders in Chasteen v. Anadarko Area Director, 11 IBIA 209 (1983); Siemion v. Assistant Secretary for Indian Affairs, 11 IBIA 37 (1983). When the Assistant Secretary issues a decision under these circumstances, he is performing the administrative review functions established in 25 CFR Part 2.

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1/ Although the Assistant Secretary's primary responsibility is to supervise BIA, that position is, as appellee notes, not located within BIA.

Under 25 CFR 2.19, an appellant is entitled to a decision in an administrative appeal from an Area Director's decision within 30 days from the time the matter is ripe for decision. Therefore, when the Assistant Secretary, pursuant to 25 CFR Part 2, undertakes consideration of an appeal that would normally have been decided by the Deputy Assistant Secretary, he is subject to the 30-day restriction set forth in section 2.19.

[2] Because the Board does not have independent knowledge of when the 30-day period under section 2.19 expires, and because an appellant may still wish to have its case decided by the Deputy Assistant Secretary, even though the 30-day period has expired, the Board has held that it will not exercise its jurisdiction unless and until it is formally requested to do so by the appellant. Wray, supra; Urban Indian Council, supra. Under the regulations and in accordance with Board precedent, the Board has jurisdiction to decide the appeal at any time after the expiration of the 30-day period established in section 2.19. The Board will, however, exercise that jurisdiction only after an appellant has filed with it a notice of appeal, a request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing is the date the notice of appeal is mailed. The exercise of Board jurisdiction in this matter, therefore, dates from May 10, 1984, the date of filing of appellant's notice of appeal to the Board.

[3] The second question thus becomes whether the Assistant Secretary, acting for BIA, had authority to issue a decision in this case after a notice of appeal had been filed with the Board. In its order requesting clarification of the status of this case, the Board asked for discussion of Apache

Mining Co., 1 IBSMA 14, 85 I.D. 395 (1978), which was decided by the Interior Board of Surface Mining and Reclamation Appeals. The Surface Mining Board there stated:

> For a considerable period of time it has been the declared policy of the Department that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction of the matter until that jurisdiction is restored by disposition of the appeal by the appellate body. Audrey I. Cutting, 66 I.D. 348 (1959); Utah Power & Light Co., 14 IBLA 372 (1974).
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> Considering the obvious chaos that would result if two different offices of the Department were to exercise simultaneous jurisdiction over the same persons and subject matter, this Board sees no reason to deviate from the departmental policy. Consequently, the Board holds that OSM [the program office] was without jurisdiction to act on the matter after the appeal was taken except to advise the Board of why the Board should or should not grant or deny the relief requested. Under this rule the letter of May 23, 1978, denying the application for excess tonnage was a nullity. The other letter of the same date in which OSM admitted error in regard to the denial which is the basis of the appeal herein, will be treated as a confession of error and a motion to grant the appellant relief.

1 IBSMA at 15, 85 I.D. at 395-96.

The problem noted in Apache Mining, namely, the confusion that would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter, is present in the instant case. 2/ The Assistant Secretary's May 16, 1984, decision was issued after the section 2.19(b) notice of appeal had been filed with the Board and, according to appellant, after notification to BIA that a notice of appeal was being filed with the Board.

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2/ Neither this Board nor the Surface Mining Board in Apache Mining was merely restating the general proposition that the effect of a decision is suspended pending appeal. 43 CFR 4.21. Both Boards were clearly addressing the potential for conflicting exercise of jurisdiction.

Under the precedent of Apache Mining, a decision issued by BIA after a notice of appeal has been filed with the Board is a nullity. The Assistant Secretary would have authority to render a decision in this matter, once an appeal had been properly brought to the Board, only if his decision were made in the exercise of the Secretary's reserved authority under 43 CFR 4.5. 3/

In order to be better informed on this issue, the Board requested in its June 13, 1984, order that the Office of the Solicitor discuss the Secretary's assumption of jurisdiction in Rose v. Anadarko Area Director, 12 IBIA 130 (1984).

[4] In Rose, and also in Indians of the Quinault Reservation v. Commissioner of Indian Affairs, 9 IBIA 81 (1981), the only two cases of this Board in which the Secretary has assumed jurisdiction, the Secretary specifically informed the Board in writing that he was assuming jurisdiction. Both the Board and the parties were thus apprised of the status of the appeal. 4/ The Board does not hold that this is the only possible procedure through which the Secretary may exercise his reserved authority. The Board notes, however, that this, or a similar procedure designed to give full notice to

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3/ Section 4.5 states in pertinent part:

"(a) Secretary. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

"(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the office, and render the final decision in the matter after holding such hearing as may be required by law."

4/ Similarly, in the Estate of Orrin John, Docket No. IBIA 84-22, the parties and Board were informed in writing of the Secretary's decision not to grant a petition requesting him to assume jurisdiction over a case pending before the Board.

the Board and to all parties of the status of the matter, avoids the problems noted in Apache Mining that might result from the simultaneous exercise of jurisdiction by two offices. Such duplication could cause unnecessary embarrassment to the Department and would not serve the public interest.

In the present case there is no evidence in the record before the Board that the Secretary ever assumed jurisdiction over this appeal under section 4.5. Assuming, arguendo, that the Assistant Secretary can exercise the Secretary's reserved authority, 5/ the Assistant Secretary neither discusses nor refers to section 4.5 in his decision. Because there is no evidence that jurisdiction over this matter was ever assumed under section 4.5, the Board was the only office within the Department possessing jurisdiction to decide the appeal at the time the Assistant Secretary issued his decision. 6/

From its review of the record in this appeal, 7/ the Board concludes that appellee's stated reason for declining to contract with appellant cannot

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5/ The Board is not aware of any prior holding or other authority to the effect that the general delegation of authority to the Assistant Secretary in 109 DM 8.1 in and of itself permits him to exercise the authority reserved to the Secretary under 43 CFR 4.5.

6/ Appellee argues that this decision would create a hiatus in jurisdiction, with no office having authority to issue a decision until an appeal was filed with the Board. This contention is clearly incorrect under the Board's holdings, discussed infra. Because the Board will not exercise its jurisdiction until the appellant requests it to do so, BIA, or the Assistant Secretary acting for BIA, retains authority to issue a decision until an appellant has filed a request for the Board to exercise its jurisdiction. Although requested to do so, the Board has specifically declined to hold void a BIA decision issued after the expiration of the 30-day period but before a request was filed for the Board to exercise its jurisdiction. Wray, supra.

7/ Although the Board does not have the official administrative record in this matter, the Deputy Assistant Secretary indicated in a July 3, 1984, letter to the Board that the materials provided to the Board by appellant under

stand. The parties agree that BIA had previously dealt with appellant as the governing body of the Karok Tribe and as a contracting authority, and it had actually awarded appellant other contracts. In his May 16, 1984, letter, the Assistant Secretary also recognized that by its course of dealing with appellant, BIA was estopped from asserting this argument.

This conclusion, however, does not resolve the underlying controversy. The Assistant Secretary apparently decided in 1983 that appellant had improperly excluded the Siskiyou subentity from participation in the tribe. 8/ This determination was communicated to appellant orally and in writing on May 6, 1983. Appellant was informed that BIA would not recognize any action it took until the Siskiyou community was restored as a tribal constituent. The Assistant Secretary reaffirmed this decision in his May 16, 1984, letter.

[5] The Assistant Secretary's finding involves a determination of whether appellant is the validly constituted representative of the Indian groups that were found to be eligible for Federal recognition as the Karok Tribe. Federal recognition of Indian tribes is governed by 25 CFR Part 83. Although not cited by the parties, Part 83 places decisions relating to Federal recognition of Indian tribes within the purview of the Assistant Secretary. Final review authority lies with the Secretary. The Board is not part of the recognition process.

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fn. 7 (continued)
25 CFR 2.11 constituted the essential administrative record. Other enumerated documents in the record were attached to that letter. The Board has reviewed these documents as well as the materials provided in the course of proceedings before it.

8/ This exclusion appears in Resolution 83-29, approved by the interim committee on June 8, 1983.

The Board therefore takes official notice of the Assistant Secretary's determination that because appellant was not the validly constituted representative of the Indian groups that sought Federal recognition as the Karok Tribe, BIA would not deal with appellant unless and until the Siskiyou community was brought back into the tribe. 9/ Consequently, the Board will apply the Assistant Secretary's determination in this appeal. As presently organized, appellant does not represent all of the Indian groups determined by the Assistant Secretary to be necessary for Federal recognition of the Karok Tribe, and it may not apply for BIA assistance. 10/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by this opinion.

//original signed
Anne Poindexter Lewis
Administrative Judge

We concur:

//original signed
Bernard V. Parrette
Chief Administrative Judge

//original signed
Jerry Muskrat
Administrative Judge

9/ This determination is not, as appellant alleges, an interference with a tribe's rights of self-determination, but rather constitutes a preliminary issue in the decision as to whether a tribe exists.

10/ This decision is without prejudice to whatever rights appellant may have under Part 83 to seek reconsideration of this decision by the Assistant Secretary, or review by the Secretary, or to seek judicial review of this determination. Appellee states that appellant has already filed suit in the United States District Court for the Eastern District of California seeking review of, among other things, the decision at issue here. See Coyote Valley Band v. United States, Civs-84-0482-MLS. Appellee states that in that case, appellant alleges exhaustion of administrative remedies based upon the Assistant Secretary's May 16, 1984, decision. Jurisdictional allegations of a party to a lawsuit, of course, neither create jurisdiction in a forum that does not have it, nor destroy it in a forum that does.