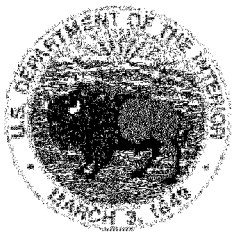

INTERIOR BOARD OF INDIAN APPEALS

Chehalis Tribe et al. v. Portland Area Director, Bureau of Indian Affairs

34 IBIA 100 (09/13/1999)

United States Department of the Interior

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

CHEHALIS TRIBE ET AL.
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-113-A Decided September 13, 1999

Appeal from a Cooperative Agreement between the Bureau of Indian Affairs and the Quinault Indian Nation.

Dismissed.

1. Indians: Indian Self-Determination and Education Assistance Act: Generally

   An Indian tribe is not required to obtain the approval of other tribes to a proposed Indian Self-Determination Act contract simply because members of the other tribes reside within the proposed service area. 25 C.F.R. § 900.8(d)(1).

2. Indians: Indian Self-Determination and Education Assistance Act: Generally

   The Indian Self-Determination Act does not give an individual Indian landowner an explicit or implicit right to file an administrative appeal from the award of a Self-Determination contract or Self-Governance compact, even though the individual's property would receive services under the contract or compact.

APPEARANCES: Dennis J. Whittlesey, Esq., Washington, D.C., for Appellants; Colleen Kelley, Esq., Office of the Regional Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Richard Reich, Esq., Taholah, Washington, for the Quinault Indian Nation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This appeal challenges a May 29, 1998, document titled "Cooperative Agreement between the Department of the Interior, Bureau of Indian Affairs and the Quinault Indian

Nation for the Transition Operation of Trust Land Forest Management and Realty Services" (Cooperative Agreement). Appellants are the Chehalis Tribe, 1/ the Chinook Tribe, the Cowlitz Tribe, the Hoh Indian Tribe, the Quileute Tribe, the Shoalwater Bay Tribe, and the Quinault Allottees Association. 2/ For the reasons discussed below, the Board dismisses the appeal.

Background

The Cooperative Agreement was signed by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), and the President of the Quinault Indian Nation. It provides in Article I, STATEMENT OF OBJECTIVES:

> A. Authority: This Cooperative Agreement is entered into under the authority of the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 [(ISDA)], as amended by Pub. L. 103-413 (25 U.S.C. § 450 et seq.) [3/], the 1834 Act (25 U.S.C. § 48) and the Snyder Act (25 U.S.C. § 13) on the part of the BUREAU OF INDIAN AFFAIRS and under the authority of Article V, Section 3(a) of the Constitution of the Quinault Indian Nation on the part of the QUINAULT INDIAN NATION.
>
> B. Purpose: The purpose of this Agreement is to establish a BUREAU OF INDIAN AFFAIRS Field Station at Taholah to transition the functions remaining at the Olympic Peninsula Agency of the BUREAU OF INDIAN AFFAIRS to the QUINAULT INDIAN NATION. During the initial term of this Cooperative Agreement, the day to day management and operation of the Trust Land Forest Management and Realty Services will be relocated to Taholah, Washington. The QUINAULT INDIAN NATION will

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1/ This Tribe is also known as the Confederated Tribes of the Chehalis Reservation, the name by which it appears on BIA's published list of "Indian Entities Recognized and Entitled to Receive Services from the United States Bureau of Indian Affairs," 63 Fed. Reg. 71941, 71942 (Dec. 30, 1998), and by which it participated in two Federal court cases cited below.

2/ The Makah Tribe joined in the Notice of Appeal in this case but later withdrew from the appeal.

3/ Pub. L. No. 103-413, titled the "Indian Self-Determination Act Amendments of 1994," made a number of amendments to ISDA and established the Tribal Self-Governance program as a permanent program. Act of Oct. 25, 1994, 108 Stat. 4250 (1994 Act).

Compact [4/] all funding associated with these functions except for salaries and employee benefit compensation which will allow the staff of the Olympic Peninsula Agency of the BUREAU OF INDIAN AFFAIRS who are affected by the QUINAULT INDIAN NATION'S assumption of these functions an opportunity to maintain their status as federal employees during the term of this Agreement.

C. Benefits Derived:

1. This Cooperative Agreement will enable the QUINAULT INDIAN NATION to assume overall management and day to day operation of important and technical trust related services in an orderly manner and to have those services performed by personnel from the BUREAU OF INDIAN AFFAIRS already trained in the performance of these functions.

2. This Cooperative Agreement will allow personnel currently employed by the BUREAU OF INDIAN AFFAIRS to retain their status as federal employees for the term of this Agreement, during which time they will train employees of the QUINAULT INDIAN NATION to perform the function in Trust Forest Management and Realty.

Discussion and Conclusions

In their notice of appeal, Appellants stated that members of the Appellant Tribes and members of the Quinault Allottees Association own interests in trust land on the Quinault Reservation. They raised numerous objections to the Cooperative Agreement and contended that the action of the Area Director in signing it "will cause harmful consequences to the majority of tribes and individual Indians who hold trust resources that are affected by that action." Notice of Appeal at 1.

Appellants were advised that, during briefing on the merits, they would be required to show that they have standing to bring this appeal. All parties have addressed this threshold question.

Standing of Appellant Tribes

Appellants contend that "the appellant tribes have legal rights at the Reservation equal to those of the Quinault Tribe." Appellants' Opening Brief at 15. On this basis, they contend,

4/ The Quinault Indian Nation has a Self-Governance compact.

the Appellant Tribes are "indispensable parties to any contract for forest management and realty services at the Reservation." Id. 5/ The Area Director and the Quinault Indian Nation contend that the Appellant Tribes do not have standing here.

Appellants offer extensive legal and historical arguments in support of their position, as does the Quinault Indian Nation in support of its opposing position. The Board considered similar arguments in Estate of Peter Alvin Ward, 19 IBIA 196, 98 I.D. 14 (1991), appeal dismissed, Quileute Tribe v. Lujan, No. CV-91-558-JCC, 1992 WL 605423 (W.D. Wash. Aug. 28, 1992), aff'd 18 F.3d 1456 (9th Cir. 1994). Ward concerned the question of whether fractional interests in trust land on the Quinault Reservation could escheat to the Quileute Tribe under 25 U.S.C. § 2206, which provided for escheats to a tribe within whose reservation the interests were located or to whose jurisdiction the interests were otherwise subject. 6/

In Ward, the Board held that, for purposes of section 2206, the Quinault Indian Nation was the only tribe with governmental authority over the Quinault Reservation. 19 IBIA at 208, 98 I.D. at 21. The Board based its conclusion upon evidence that the Department of the Interior, Congress, and the Federal courts have recognized the authority of the Quinault Indian Nation over the Quinault Reservation. Three years after it decided Ward, the Board reaffirmed that decision in Estate of Sharon Lee Bennett, 26 IBIA 279 (1994).

Most of the history and caselaw discussed by the parties to this appeal pre-dates Ward and was considered by the Board in that case. Appellants present no fresh analysis of that earlier material and no persuasive argument that the Board was wrong in Ward. Therefore, the Board finds no need to address the earlier material.

Events subsequent to Ward, and discussed by the Quinault Indian Nation here, are consistent with the conclusion reached in Ward. In Confederated Tribes of the Chehalis Indian Reservation v. Washington, 96 F.2d 334 (9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit rejected an argument that the Chehalis and Shoalwater Bay Tribes were entitled to share in Quinault treaty fishing rights. The court found, inter alia, that Halbert v.

5/ Two of the Appellant Tribes, the Chinook Tribe and the Cowlitz Tribe, are not Federally recognized at this time. In light of its conclusion that none of the Appellant Tribes have standing here, the Board finds it unnecessary to consider lack of Federal recognition as a factor affecting the standing of these two tribes.

6/ Both the original and revised versions of sec. 2206 have now been held unconstitutional. Babbitt v. Youpee, 519 U.S. 234, 117 S.Ct. 727 (1997); Hodel v. Irving, 481 U.S. 704 (1987).

United States, 283 U.S. 753 (1931), 7/ did not support the Tribes' claim to tribal fishing rights because it "was concerned only with allotment and addressed the rights of individual Indians, not tribal rights." 96 F.3d at 340. See also Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991) ("The authorities cited by the appellants involve only the adjudication of individual member's rights. See Halbert * * * (members of affiliated tribes are among those entitled to allotments on the Quinault Reservation)"). 8/

Halbert is a case upon which Appellants rely heavily in this appeal to support their claim to tribal rights in the Quinault Reservation. It clearly appears that the Ninth Circuit, at least, has rejected Appellant's interpretation of Halbert.

In the years since Ward was decided, Congress has again addressed the authority of the Quinault Indian Nation))most significantly, as concerns this case, in connection with enactment of the 1994 Act. That Act incorporated provisions of H.R. 3508, titled the "Tribal Self-Governance Act of 1994." 9/ The House Report on H.R. 3508 states:

> Some owners of trust allotments located on the Quinault Indian Reservation have expressed concern that this legislation will: (1) Allow the United States to contract away its trust responsibility with respect to allotments held for individual Indians; and (2) expand the governmental authority of the Quinault Indian Nation over such allotments. To remedy their concerns, they have suggested several amendments which the Committee has declined to adopt. The Committee did adopt its own amendment to further clarify the trust concerns.
>
> Section 406 of the Committee Amendment expresses the Committee's intent that nothing in the bill is intended or should be construed to diminish the Federal trust responsibility to individual Indians, Indian tribes, or individual trust allotment owners. The Committee expects that the Secretary will fully

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7/ In Halbert, the Supreme Court held that individuals of Chehalis, Chinook, and Cowlitz ancestry were entitled to allotments on the Quinault Reservation. Halbert was one of several cases considered by the Board in Ward.

8/ This latter case was pending before the Ninth Circuit when Ward was decided. See 19 IBIA at 201, 98 I.D. at 17. It concerned a challenge to the Department's recognition of the Quinault Indian Nation as the sole governing authority for the Quinault Reservation. The Ninth Circuit affirmed the district court's dismissal of the case for failure to join the Quinault Indian Nation.

9/ See 140 Cong. Rec. H.11141 (Oct. 6, 1994).

> investigate any credible allegation involving a claimed breach of the United States' trust responsibility and take appropriate corrective action where necessary.
>
> With respect to the concern over governmental authority, the Quinault Indian Nation, like every other Federally recognized Indian tribe, possesses governmental authority over all trust land and both members and non-member Indians within its territorial jurisdiction. The Committee Amendment does not expand, diminish, or otherwise affect the governmental authority of the Quinault Indian Nation, as the Federally recognized governing tribe of the Quinault Indian Reservation, or that of any other Indian tribe.

H.R. Rep. No. 653, 103d Cong., 2d Sess. 13 (1994). This statement is strong evidence that Congress continues to take the position that the Quinault Indian Nation is the tribe with governmental authority over the Quinault Reservation.

Appellants have produced no post-Ward evidence in support of their position and, as noted above, have not demonstrated that the Board's analysis of the pre-Ward evidence was in error.

The Board reaffirms its conclusion in Ward that the Quinault Indian Nation is the only tribe with governmental authority over the Quinault Reservation. Accordingly, the Board finds that the Appellant Tribes do not have any governmental authority over the Quinault Reservation and thus have no governmental interests that would be affected by the Cooperative Agreement.

The Area Director states that none of the Appellant Tribes own land within the Quinault Reservation and that none of the Appellant Tribes' trust resources would be managed under the Cooperative Agreement. Appellants do not dispute this statement. The Board therefore finds that the Appellant Tribes do not have any property interests that would be affected by the Cooperative Agreement.

[1] Appellants contend, however, that the Appellant Tribes have a statutory right to be consulted concerning the Cooperative Agreement because some of their members own interests in trust land on the Quinault Reservation. For this contention, they rely on 25 U.S.C. § 450b(l), which requires that, "in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant."

This approval requirement has been interpreted in the ISDA regulations in 25 C.F.R. Part 900, which were the product of extensive negotiations between tribes throughout the

country, the Department of the Interior, and the Department of Health and Human Services. 25 C.F.R. § 900.8(d)(1) provides:

> If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve. However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area.

The Appellant Tribes are not located within the Quinault Reservation. 25 C.F.R. § 900.8(d)(1) indicates that approval of the Cooperative Agreement by the Appellant Tribes is not required simply because some of their members reside on the Quinault Reservation.

The Quinault Reservation is not unique in having residents and/or landowners who are members of tribes other than the governing tribe of the reservation. To require the approval of those other tribes to an ISDA contract concerning reservation trust resources would prove extremely burdensome, if not unworkable. More importantly, such a requirement would undermine the governing tribe's authority over its own reservation and would thus be antithetical to the self-determination goals of ISDA.

The Board concludes that no approval of the Cooperative Agreement by the Appellant Tribes is required under 25 U.S.C. § 450b(l).

Appellants have failed to show that the Appellant Tribes have any governmental or property interests in the Quinault Reservation. They have also failed to show that there is any statutory requirement for approval of the Cooperative Agreement by the Appellant Tribes. Thus, they have failed to show that the Appellant Tribes have any legally protected interest that would be affected by the Cooperative Agreement.

The Board concludes that the Appellant Tribes are not "interested part[ies] affected by a final administrative action or decision of a [BIA] official," 43 C.F.R. § 4.331, and thus lack standing to bring this appeal.

Standing of Quinault Allottees Association

Appellants contend that the Quinault Allottees Association has standing here on the basis of the trust relationship between the United States and the individual landowners who are members of the association. Because that relationship was judicially confirmed in Mitchell v. United States, 463 U.S. 206 (1983), Appellants contend, "it is beyond dispute that the allottees

and their representative organization * * * have standing to contest actions of the United States to contract with the Quinault Tribe for the management of forest trust lands and realty services." Appellants' Opening Brief at 17.

As the Area Director notes, the immediate impact of the Cooperative Agreement will be minimal because trust services will continue to be performed by BIA employees, albeit in a new location on the Quinault Reservation. It seems clear that the landowners would have no standing to object to a mere move or reorganization of a BIA office. See Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1986) (The Hoopa Valley Tribe had no property right in the location of a BIA office on its reservation and so could not prevent a move of that office).

The Cooperative Agreement, however, contemplates the ultimate transfer of responsibility for trust services to the Quinault Indian Nation. It is that expected transfer which the Quinault Allottees Association claims as a basis for standing to challenge the Cooperative Agreement. For purposes of this decision, the Board construes the Cooperative Agreement as providing for the transfer of trust functions to the Quinault Indian Nation.

There clearly is a trust relationship between the United States and the individual Indian landowners on the Quinault Reservation. The same is true for all individual Indians for whom the United States holds land in trust. Under the Quinault Allottees Association's theory of standing, any individual Indian landowner would apparently have standing to challenge, not only an agreement like the one at issue here, but also any ISDA contract or Self-Governance compact which included the management of that individual's trust property.

Congress has repeatedly expressed its intent to preserve the trust responsibility with respect to programs carried out under ISDA contracts or Self-Governance compacts. Several provisions of the 1994 Act reflect this concern, as does the legislative history. See, e.g., the above-quoted excerpt from H.R. Rep. No. 653. Relevant provisions of the statute include the following: 10/

• 25 U.S.C. § 458ff(b), which provides: "Nothing in [ISDA] shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments."

• 25 U.S.C. § 458cc(b), which provides: "Each [Self-Governance] funding agreement shall)) * * * (9) prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, and other laws."

10/ All provisions of the 1994 Act are cited to the United States Code.

• 25 U.S.C. § 458cc(d), which provides:

> [Self-Governance f]unding agreements negotiated between the Secretary and an Indian tribe shall include provisions))
>
> (1) to monitor the performance of trust functions by the tribe through the annual trust evaluation, and
>
> (2) for the Secretary to reassume a program, service, function, or activity, or portions thereof, if there is a finding of imminent jeopardy to a physical trust asset, natural resources, or public health and safety.

• 25 U.S.C. § 450l(a), which requires that a model agreement be incorporated into all ISDA contracts, to include the following provision, which is set out in 25 U.S.C. § 450l(c), subsec. 1(d):

> Obligation of the United States.))
>
> (1) Trust responsibility.))
>
> (A) In general.))The United States reaffirms the trust responsibility of the United States to the _____ Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.
>
> (B) Construction of Contract.))Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

• 25 U.S.C. § 450m which, as amended by the 1994 Act, authorizes reassumption of programs contracted under ISDA for "gross negligence or mismanagement * * * in the management of trust fund [sic], trust lands or interests in such lands" and emergency reassumption in the case of "an immediate threat of * * * imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands."

As these provisions demonstrate, Congress has taken the trust responsibility seriously. Its concern, however, has not caused it to prohibit the contracting of trust services, even trust services to individuals. To the contrary, Congress explicitly authorized tribes to provide trust services to individual Indians under both ISDA contracts and Self-Governance compacts.

The model agreement required by 25 U.S.C. § 450l includes the following provision:

> Trust services for individual Indians.))
>
> (A) In general.))To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

25 U.S.C. § 450l(c) subsec. 1(c)(4).

As to Self-Governance compacts, 25 U.S.C. § 458cc(g)(4) provides: "Funds for trust services to individual Indians shall be available under an agreement entered into under this section only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the tribe." See also H.R. Rep. No. 653 at 12:

> The Committee has included language in the Amendment to ensure that Indian tribes may negotiate for the provision of trust services to individual Indians in the same manner as the Secretary currently provides those services to individual Indians. The Committee intends self-governance Indian tribes to be able to provide trust services to individual Indians pursuant to the terms of the annual funding agreement. In these instances, the self-governance tribes would stand in the shoes of the Secretary. The Committee recognizes that in these instances the Secretary retains a residual responsibility to those individual Indians pursuant to his trust responsibility.

These various provisions make it clear that, in the 1994 Act, Congress struck a balance between the self-determination goals of ISDA and preservation of the trust responsibility))that is, Congress authorized the contracting of trust services but made the tribes' contract performance subject to monitoring and the possibility of reassumption of the programs by BIA.

In a still-extant provision of the original ISDA, enacted in 1975, Congress authorized the Secretary to decline a proposed ISDA contract on the grounds that "adequate protection of trust resources is not assured." 25 U.S.C. § 450f(a)(2)(B). There is no suggestion in the original ISDA or any of its amendments, however, that Congress intended to authorize individual Indian landowners to challenge the award of ISDA contracts or Self-Governance compacts on such grounds. The regulations promulgated to implement ISDA also fail to provide for challenges by individuals, see 25 C.F.R. Part 900, Subpart L, indicating that the Department of the Interior has not construed ISDA to authorize such challenges.

In Martin v. Billings Area Director, 19 IBIA 279, 98 I.D. 200 (1991), the Board held that a subcontractor could not appeal under 25 C.F.R. Part 2 from an action taken by a tribe under its ISDA contract. As in this case, no such appeal right was specified in ISDA. In reaching its conclusion in Martin, the Board relied in part upon Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), in which the Supreme Court considered whether Congress intended in the Indian Civil Rights Act (ICRA) to create a Federal cause of action for its enforcement, beyond the habeas corpus remedy specified in the Act. The Supreme Court stated:

> Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." * * *
>
> * * * * * * *
>
> Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with [25 U.S.C.] § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government.

436 U.S. at 62-64. The Court held that only the remedy of habeas corpus, specified in the ICRA, was available to enforce the Act.

In this case, it is perhaps arguable that the goal of preserving the trust responsibility would be furthered by allowing individuals to challenge an ISDA contract or Self-Governance compact which provides for contracting of trust services. It is abundantly clear, however, that such challenges would undermine the self-determination objectives of ISDA, as well as its specific, time-limited declination procedures. See 25 U.S.C. § 450f.

[2] The balance struck by Congress would be disturbed if the Board were to recognize a right in individual landowners to challenge the award of ISDA contracts and Self-Governance compacts by means of administrative appeals. The same is true with respect to agreements, such as the Cooperative Agreement at issue here, which contemplate the eventual transfer of responsibility for trust services to a tribe.

The question here is perhaps more properly described as one concerning the Board's jurisdiction over this appeal, insofar as it was filed by the Quinault Allottees Association, than as one concerning the standing of that organization or its members. In any case, however, it is clear that the appeal of the Quinault Allottees Association must be dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed for lack of standing as to the Appellant Tribes and is dismissed for lack of jurisdiction as to the Quinault Allottees Association.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge