



INTERIOR BOARD OF INDIAN APPEALS

Kaw Nation of Oklahoma v. Acting Southern Plains Regional Director,
Bureau of Indian Affairs

39 IBIA 73 (06/18/2003)

Related court case:

Kaw Nation v. Norton, 405 F. 3d 1317 (Fed. Cir. 2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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KAW NATION OF OKLAHOMA,	:	Order Docketing and Dismissing
Appellant	:	Appeals
	:	
v.	:	
	:	Docket Nos. IBIA 03-94-A
ACTING SOUTHERN PLAINS	:	IBIA 03-107-A
REGIONAL DIRECTOR, BUREAU	:	
OF INDIAN AFFAIRS,	:	
Appellee	:	June 18, 2003

On May 21, 2003, the Board of Indian Appeals (Board) received a notice of appeal from an Appellant which identified itself as the Kaw Nation of Oklahoma (Nation). The notice of appeal sought review of two decisions issued by the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), on March 17 and April 8, 2003. For the reasons discussed below, the Board docketed but dismisses both appeals.

The Nation has a self-governance compact under the Indian Self-Determination Act (ISDA). This controversy apparently began when four members of the Nation's seven-person Executive Committee voted to retrocede the Tribal Court program. On February 28, 2003, the Office of Self-Governance (OSG) informed the Nation that it was withholding the funding for the Tribal Court from the Nation's 2003 Annual Funding Agreement, and that it would reprogram those funds to BIA to defray the costs of operating a Court of Indian Offenses for the Nation. An appeal from that decision, dated March 26, 2003, is presently pending before the Interior Board of Contract Appeals as IBCA 4455A-2003.

On March 17, 2003, the Regional Director advised the Nation's Chairman that BIA had reassumed jurisdiction over civil and criminal matters arising within the Nation's jurisdictional area. The Regional Director stated:

This reassumption [1/] was effective February 28, 2003, with the determination of the Office of Self-Governance that the Nation had not assumed responsibility for the tribal court. As of that date, the Bureau of Indian Affairs will no longer recognize orders and decisions issued by the Kaw Nation Court. The Court of Indian Offenses for the Pawnee Agency * * * will exercise jurisdiction on behalf of the Nation in all matters that may arise after February 28, 2003, until other arrangements are made.

The Regional Director's April 8, 2003, letter was addressed to the Nation's Vice-Chairman and stated that BIA would not recognize the recall of two members of the Nation's Executive Committee, including the Vice-Chairman, because the Tribal Court issued its decision on those recalls after February 28, 2003.

Neither the March 17 nor the April 8, 2003, decision notified interested parties of any right of appeal within the Department.

On April 29, 2003, the Assistant Secretary - Indian Affairs (Assistant Secretary) published a "Notice of Intent to reassume judicial jurisdiction" in the Federal Register. 68 Fed. Reg. 22728 (Apr. 29, 2003). After recounting the background of this matter, the notice stated:

The Kaw Nation's retrocession and closing of its tribal court creates a jurisdictional vacuum. In order to protect lives, persons, and property of people residing within the Nation's jurisdiction, the Bureau of Indian Affairs must immediately reassume judicial jurisdiction within the Indian country of the Kaw Nation of Oklahoma until such time as the Nation reestablishes its court in accordance with 25 CFR 11.100(c). For this reason, effective April 29, 2003, the Bureau of Indian Affairs reassumes judicial jurisdiction for the Kaw Nation of Oklahoma.

68 Fed. Reg. 22728-29.

As noted above, the Board received Appellant's notice of appeal on May 21, 2003. It treated the notice as separate appeals from the March 17, 2003, and the April 8, 2003, decisions because different procedural regulations apply to the subject matter of each decision.

In an order dated May 22, 2003, the Board noted that an appeal from the February 28, 2003, OSG decision was pending before the Board of Contract Appeals. It gave interested

1/ Under ISDA, "retrocession" and "reassumption" are terms of art that have different meanings and that are governed by different regulations in 25 C.F.R. Part 1000, Subparts N and M, respectively. In broad and general terms, a "retrocession" is the voluntary return of a program, while a "reassumption" is ordered by the Secretary. See 25 C.F.R. § 1000.2 for the full definitions of these terms. As far as the materials before the Board show, this was a retrocession, not a reassumption.

parties until June 13, 2003, to advise it and the Board of Contract Appeals of how they believed the multiple appeals should be handled. In regard to the appeals pending before it, the Board also gave Appellant until June 30, 2003, to identify the individuals who authorized these appeals and gave all parties an opportunity to discuss the timeliness of the notice of appeal.

The Board has received responses to its question on how to proceed with these appeals from Appellant and the Regional Director.

However, on June 13, 2003, the Regional Director filed with the Board a copy of an order issued on June 6, 2003, by the United States District Court for the Western District of Oklahoma in Kaw Nation v. Norton, Case No. CIV-03-628-M. The Regional Director stated that he had not been aware of this order until counsel received a copy on June 12, 2003. In its order, the court held that the Assistant Secretary's April 29, 2003, Federal Register publication constituted "final agency action" for purposes of judicial review. Although the court denied a request for a temporary restraining order and preliminary injunction, it set the case for scheduling. The Regional Director argues that this order "would seem to make moot all past and current proceedings before this Board as well as before the [Board of Contract Appeals]." Regional Director's filing at 2-3.

The Board disagrees with the Regional Director's contention that the court's order makes the proceedings before it "moot." However, it finds that the District Court has asserted jurisdiction over matters pending before the Board after concluding that final agency action had been taken. Therefore, the Board must address the question of the effect of the court's finding that final agency action had been taken on the administrative proceedings before it.

The Board is aware that, by order dated June 16, 2003, the Board of Contract Appeals reaffirmed both its jurisdiction over OSG's February 28, 2003, decision, and the effectiveness of its prior orders in the proceeding before it. Much of that order is based on the application of the Contract Disputes Act. Because proceedings before this Board are not governed by the Contract Disputes Act, the Board of Contract Appeals' order does not assist the Board in considering the effect of the court's decision on the appeals pending before it.

The appeals before this Board arise because of OSG's February 28, 2003, decision. Although the Board of Contract Appeals has determined that the OSG decision is within its jurisdiction, both the March 17, 2003, and the April 8, 2003, decisions concern matters within

this Board's normal jurisdiction. ^{2/} Both decisions were issued prior to April 29, 2003, the date the District Court found that final agency action occurred. Under these circumstances, the Board believes that it could continue to assert jurisdiction over these appeals.

However, the Board is unable to determine that any benefit would accrue from its retaining jurisdiction. As far as the Board is aware, there is nothing precluding the District Court from considering the issues before the Board in the context of the case before the court. Moreover, it is at least arguable that, in addition to constituting "final agency action" as held by the court, the Federal Register publication should also be construed as the Assistant Secretary's affirmance of BIA's March 17 and April 8, 2003, decisions. Because the Assistant Secretary's notice was published in the Federal Register prior to the filing of an appeal with the Board, the only question would appear to be whether the Assistant Secretary had authority to affirm the decisions in her supervisory capacity over BIA. If it were held that the Federal Register publication was a decision by the Assistant Secretary, the Board would not have jurisdiction to review that decision, but the court would. See, e.g., Shawnee Tribe v. Assistant Secretary - Indian Affairs, 39 IBIA 4 (2003), and cases cited there.

The Board finds that no useful purpose will be served by its retaining jurisdiction over these appeals, but that doing so would clearly exacerbate an already confused and complicated matter. It is not necessary for the Board to have these cases before it in order for the court to obtain a decision or any other assistance it might determine that it wants from the Board. Furthermore, should the court disagree with the Board's dismissal of these appeals, it can easily order their reinstatement.

^{2/} Based on the information presently before it, the Board believes that the major questions that are before it involve matters of first impression under 25 C.F.R. Part 1000. Although the Board in no way attempts in this discussion to restrict the parties' right to develop their own arguments, it appears that these issues include, but are not limited to: (1) In light of 25 C.F.R. § 1000.334, which provides that a retrocession is "only effective on a date mutually agreed upon by the Tribe/Consortium and the Secretary, or as provided in the [annual funding agreement]," was the retrocession here effective prior to Mar. 17, 2003, the date of the first BIA decision before the Board that attempts to implement the retrocession? If the retrocession was not yet effective, did BIA err in issuing its decisions prior to the effective date of the retrocession? (2) What are the legal relationships, if any, among a retrocession, the effective date of a retrocession, and publication of a "notice of intent to reassume" in the Federal Register? and (3) What, if any, effect does 25 C.F.R. § 900.230 have in an appeal involving a retrocession? Subsec. 900.230(a), which is incorporated into Part 1000 by reference in sec. 1000.429, provides: "Indian tribes and tribal organizations shall continue performance of a contract during the appeal of any claims to the same extent they would had there been no dispute."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and the June 6, 2003, holding by the United States District Court for the Western District of Oklahoma, the Board docketed these appeals, but dismisses them without prejudice for the reasons discussed above.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Kathleen R. Supernaw
Acting Administrative Judge