BOARD OF INDIAN APPEALS
OFFICE OF HEARINGS AND APPEALS

NOOKSACK INDIAN TRIBE, Appellants/Interested Party, vs. DIRECTOR, PORTLAND AREA INDIAN HEALTH SERVICE, Appellee.	Docket No. IBIA 17-045 NOOKSACK INDIAN TRIBE'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE **DEADLINE FOR RESPONSES TO MOTIONS: 5/12/2017**

I. INTRODUCTION

On February 21, 2017, the Nooksack Indian Tribe ("Tribe") appealed the Indian Health Service's ("I.H.S.") declination of its most recent Annual Funding Agreement ("AFA") proposal. The proposed intervenors ("the 271"), as they have done in a number of forums, misrepresent the facts and attempt to confuse the issues before this ALJ in an effort to delay the effective date of their disenrollment with the Tribe, which is an issue that is not before this ALJ.

The 271, who are composed primarily of individuals previously disenrolled by the Tribe because they were erroneously enrolled or illegally enrolled with two tribes simultaneously, moved to intervene pursuant to 43 C.F.R. § 4.313(a). The proposed

intervenors claim that resolution of whether the I.H.S. properly declined the Tribe's most recent AFA will "directly affect [their] health and welfare." The 271's claim is inaccurate and the 271 cannot demonstrate they are an "Interested Party" pursuant to 25 C.F.R. Part 2. As such, the 271's motion must be denied.

II. RELEVANT FACTS

In June of 2016, the Tribe disenrolled four individuals, several of whom are members of the 271, because they were simultaneously enrolled with another tribe, in violation of the Nooksack Constitution and laws. Later in the 2016, after several years of litigation, the Tribe disenrolled many individuals of the 271. In late-November 2016, the Tribe's General Manager notified Tribal Departments of the disenrollments and instructed the Directors and Managers to review individual program rules concerning eligibility for services to determine whether those persons disenrolled continued to qualify for services and to take such actions as are necessary. As a result, the Tribe's Clinic served 108 individuals with a Notice of Discontinuation of Services following the Clinic's review of its patient registration files[1]. Of the 271 claiming an interest in this current appeal, a vast majority of the 271 never registered with the Tribal Clinic, nor received health care services from the Tribe or its Clinic. Following service of the Notices of Discontinuation of Services, no one has come forward with additional (or different) information to establish eligibility for services with the Tribal Clinic. Further, the Tribal Council has not reversed any of its resolutions disenrolling any of the 271. Since service of the Notices, none of the individuals served have received services from the Clinic or attempted to re-register as a patient.

[1] For every individual served a Notice of Discontinuation of Services from the Tribal Clinic, the individual registration file at the Clinic contained only a verification of enrollment through the Nooksack Indian Tribe as proof of eligibility for services.

Also during 2016, Tribal staff worked with the I.H.S. staff to develop the Tribe's proposed AFA. Although staff agreed to the terms and the Tribe approved the AFA, the I.H.S. ultimately declined the proposed AFA on January 19, 2017. Nevertheless, the I.H.S. continued to fund the Tribe in accordance with the Parties' 2011 AFA and applicable law; and, the Tribe's Clinic continued providing health care services to eligible beneficiaries properly registered as patients with the Tribe's Clinic.

III. LAW AND ARGUMENT

The Supreme Court has often emphasized that a lawsuit is not a forum for the airing of interested onlookers' concerns, nor an arena for public-policy debates. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 473, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). The 271 attempt to interject its public-policy debate into this appeal and its motion for intervention pursuant to 43 C.F.R. Part 4, Subpart D must be denied because neither Subpart D, nor any of the provisions of 25 C.F.R. Part 900 or any of the regulations for the Office of Hearings and Appeals, allow for intervention in this matter. See https://www.doi.gov/oha/organization/dchd/dchd_regs. This appeal concerns a declination of the Tribe's AFA, a matter governed by 25 C.F.R. Part 900 and 43 C.F.R. Part 4, Subpart B. While Subpart B permits appearance as amicus curiae, the 271 do not appear in such capacity, rather, the 271 attempt to intervene pursuant to inapplicable regulations for which they still do not qualify.

Although the applicable regulations do not allow for intervention, within the Interior Board of Indian Appeals' regulations, intervention is limited to those who are an "Interested Party" as defined within 25 C.F.R. Part 2. *Reindeer Herders Association v. Juneau Area Director*, 23 IBIA 28 (1992). An "interested party" means any person whose interests could

be adversely affected by a decision in an appeal. 25 C.F.R. § 2.2. To be "adversely affected" within the meaning of the regulations, as construed by the Board, a party must have "suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest." *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 267-268; *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 19 (2008)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A moving party bears the burden of establishing its standing to appeal. *Biegler v. Great Plains Regional Director*, 54 IBIA 160, 163 (2011). Here, the 271 cannot demonstrate that they are an "interested party" and their motion must be denied.

A. The 271's Alleged Injury Was Not Causally Connected To The Declination Of The AFA.

This ALJ must deny the motion to intervene because this appeal will have no effect on the 271's alleged injury; that is, the previously issued discontinuation of health care services issued by the Tribal Clinic. The sole issue on appeal herein is whether the Secretary improperly declined the Tribe's proposed AFA, not whether the 271 are members of the Tribe or improper recipients of tribal services.

The 271 must demonstrate that the declination of the AFA caused them injury, which they cannot. For an appellant to show that the I.H.S decision injured them, the alleged injury must be causally connected with or fairly traceable to the actions of I.H.S. and not caused by the independent action of a third party. *See Skagit County v. Northwest Regional Director*, 43 IBIA 62, 71 (2006)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Causation is demonstrated when the alleged injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third

party. *Lujan*, 504 U.S. at 560-61. *Skagit County*, 43 IBIA 62. *See also Little Six, Inc. v. Minneapolis Area Director*, 24 IBIA 50 (1993)("quarrel is not really with the Area Director's approval of the amendment [of the Tribe's Corporate Code], but rather is with the Community's enactment of it").

The IBIA has frequently found that an interested onlooker failed to meet its burden of demonstrating that it was an "interested party." For example, in *Skagit County v. Northwest Regional Director*, found that the County was not injured by the Director's approval of a fee-to-trust application, but the County's injury, if any, would be the result of tribal development of the property. *Skagit County*, 43 IBIA at 8. The speculative injury, which would result from the tribal action, was not causally connected or fairly traceable to the actions of the Department of the Interior.

Similarly, in *Anderson v. Great Plains Regional Director*, the IBIA dismissed a landowner appeal of the Director's declination to intervene on behalf of the landowner with regards to a tribe's allocation of grazing permits. 52 IBIA 327 (2010). In Anderson, tribal law provided for tribal preferences in the allocation of tribal grazing permit. *Id.* Following the application of the preference, the Bureau of Indian Affairs would issue permits based upon the tribal allocation of preferences. *Id.* The landowner-applicant, who was denied a permit, took issue with the tribal action. On appeal, the IBIA found that the injury, if any, was fairly traceable to the tribal actions, not the action (or inaction) of the Bureau. *Id.*

Here, the 271's motion must be denied because the Secretary's declination of the Tribe's AFA is not causally connected of fairly traceable to the 271's alleged injury – the discontinuation of health care services from the Tribal Clinic. The Tribal Council disenrolled the 271. The disenrollment of the 271 is a matter of internal tribal concern and a sovereign

right held by the Tribe. The discontinuation of certain tribal services, specifically health care services, following the disenrollment is also a matter of tribal concern, subject to Tribal law. The IBIA lacks jurisdiction to appeal the Tribal Council's disenrollment decision, and the subsequent actions concerning the provision of services to certain disenrolled members. Hunt v. Aberdeen Area Director, 27 IBIA 173, 179 (1995). Because the 271's alleged injuries are the result of tribal actions not appealable to the IBIA, the 271 fail to demonstrate their injury is fairly traceable to the Secretary's declination of the AFA. As such, the 271's claimed interests effected by the outcome of this appeal are insufficient for the purposes of establishing a right to intervention pursuant to 25 C.F.R. § 2.2.

B. The 271 Lack Any Actual, Imminent, Concrete And Particularized Injury To A Legally Protected Interest.

In order to obtain intervention status, the 271 must demonstrate that their interests could be adversely affected by a decision in an appeal. 25 C.F.R. § 2.2. To be "adversely affected" within the meaning of the regulations, as construed by the Board, a party must have "suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest." *DuBray*, 48 IBIA at 19 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To analyze the "significant protectable interest" element, the court employs the following framework:

> An applicant has a "significant protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant. The "interest" test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the "interest" test directs courts to

> make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

In re Estate of Ferdinand E. Marcos Human Rights Litig., 536 F.3d 980, 984-85 (9th Cir. 2008) (*quoting S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 802 (9th Cir. 2002)).

To justify intervention, the plaintiff's requested remedy must have a "direct, immediate, and harmful effect[]" on the proposed intervenor's legally protectable interest. *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998). Any remedy in this case would affect only the relationship between the Tribe and the I.H.S., and would not directly affect the 271 because the 271 cannot establish "an interest that is protected under some law" that this ALJ may enforce.

The 271's claim to a "significant protectable interest" is contingent upon their ability to maintain that they are eligible beneficiaries for Indian health care services. The 271's sole claim to eligibility for services was membership within the Tribe. The Tribe disenrolled the 271, the Tribal Council is the final decision-maker in that process, and no appeals were had. "Federal courts do not have jurisdiction to resolve tribal law disputes. . . These disputes are within the exclusive jurisdiction of the Community's tribal court." *Smith v. Babbitt*, 875 F. Supp. 1353, 1362 (D. Minn. 1995); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985).

The 271's Tribal membership and their claim of I.H.S.-funded health care benefits from the Tribal Clinic are not the subject matter of this appeal. The subject matter of this appeal is simply, the declination of the Tribe's proposed AFA. Even if this ALJ were to uphold the declination of the proposed AFA as proper, the disenrollment of the 271 still stands, and the Tribe's Notice of Discontinuation of Services still remains effective, and the I.H.S's previous payments to the Tribe to assist in operations costs still exist. This ALJ cannot compel the

Tribe to recognize the 271 as enrolled members of the Tribe, nor to mandate services to ineligible persons.

The Tribe's membership decisions and disenrollment decisions are a fundamental attribute of its sovereignty and they are immune from review by the BIA or this Court. *Montana v. U. S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) ("Indian tribes retain their inherent power to determine tribal membership"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (Tribe's right to determine who is, and is not, a member, is immune from review by a federal court); *Williams v. Gover*, 490 F.3d 785, 790 (9th Cir. 2007) (tribe had the power to squeeze the plaintiffs out, because it has the power to define its own membership; did not need the BIA's permission).

Given the 271's claim interest in I.H.S.-funded health care services relies upon their membership in the Nooksack Indian Tribe (or another tribe), and the Tribe disenrolled the 271, the 271 lack any known, continuing claim to I.H.S.-funded health care services. As such, the 271 lack any "significant protectable interest", which would permit this ALJ to grant their motion to intervene.

C. The Alleged Interests of the 271 Will Not be Impaired and They Have Other Means to Protect Their Alleged Interests

A lawsuit that would *affect* the intervenors' interests may not *impair* them if they have "other means" to protect their interests. *State ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) (emphasis in the original), *citing United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Here, the 271 concede that they have pursued, and are pursuing other remedies against the Tribe. In their Motion, the 271 cite to some of these proceedings.

The 271 have filed multiple actions in the Nooksack Tribal Court, the Whatcom County Superior Court, U.S. District Court, and before the IBIA. (*See* generally Motion to Intervene, at 8. Although largely unsuccessful, the 271 have demonstrated other means to protect their interests, and thus their interests would not be impaired by non-intervention in this proceeding.

Showing that a significant protectable interest would be impeded requires more than a showing of a collateral estoppel effect. *BP W. Coast Prods., LLC v. Shalabi*, 2012 U.S. Dist. LEXIS 193093, at *5-6 (W.D. Wash. Feb. 23, 2012), *citing Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996). The fact that decision in the Tribe's favor in this case may be an adverse precedent to any legal claims which may be alleged by the 271 in their other cases do not satisfy the requirement of being adversely affected by the Secretary's decision to decline the proposed AFA, nor this ALJ's decision to reverse the Secretary's decision. *Blocker v. Bd. of Educ.*, 229 F. Supp. 714, 716 (E.D. N.Y. 1964), *citing Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 81 S. Ct. 1309, 6 L.Ed.2d 604 (1961); *Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962).

Dated this 19th of April 2017.

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CERTIFICATE OF SERVICE

I, Sue Gearhart, declare as follows:

I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with the Nooksack Indian Tribe, Office of Tribal Attorney, counsel of record for the Appellants.

On 20 day of April, 2017 I mailed the following documents:

TRIBE'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

To the following, via certified mail, U.S. Mail, postage prepaid and return receipt requested:

For Filing:
Departmental Cases Hearings Division
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And to:

Bree Black Horse, Movant
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The foregoing statement is made under penalty of perjury under the laws of the state of Washington and the Nooksack Indian Tribe and is true and correct.

DATED this 20 day of April, 2017.

Sue Gearhart

Sue Gearhart, Legal Assistant