



## INTERIOR BOARD OF INDIAN APPEALS

Raymond Cross v. Great Plains Regional Director, Bureau of Indian Affairs

65 IBIA 89 (01/11/2018)

Petition for reconsideration denied:

65 IBIA 157

Judicial review of this case:

Complaint filed, *Cross v. Dep't of the Interior*, No. 4:18-CV-00220-CKJ  
(D. Ariz. Apr. 25, 2018)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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|                            |   |                                |
|----------------------------|---|--------------------------------|
| RAYMOND CROSS,             | ) | Order Docketing and Dismissing |
| Appellant,                 | ) | Appeal                         |
|                            | ) |                                |
| v.                         | ) |                                |
|                            | ) | Docket No. IBIA 18-022         |
| GREAT PLAINS REGIONAL      | ) |                                |
| DIRECTOR, BUREAU OF INDIAN | ) |                                |
| AFFAIRS,                   | ) |                                |
| Appellee.                  | ) | January 11, 2018               |

Raymond Cross (Appellant) appealed to the Board of Indian Appeals (Board) from an October 16, 2017, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director found that the Fort Berthold Agency Superintendent (Superintendent) did not err in responding to Appellant's request under 25 C.F.R. § 81.57 for the number of tribal members who must sign a petition to call a Secretarial election to amend the Constitution and Bylaws (Constitution) of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe). We conclude that the Decision does not constitute a "final administrative action or decision" by the Regional Director, which is a prerequisite to our exercise of jurisdiction. *See* 43 C.F.R. § 4.331. Therefore, we dismiss the appeal for lack of jurisdiction.

## Background

The Tribe's Constitution provides that the Secretary must call an election on any proposed amendment to the Constitution upon presentation of a petition "signed by one-third of the qualified voters." Decision at 1 (quoting Tribe's Constitution, Art. X<sup>1</sup>). Subpart F of Part 81, 25 C.F.R., establishes requirements for formulating and submitting a petition to request the Secretary to call a Secretarial election.<sup>2</sup> *See* 25 C.F.R. § 81.49.

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<sup>1</sup> The Tribe's Constitution is not attached to the Decision or Appellant's notice of appeal, and because we summarily dismiss the appeal for lack of jurisdiction, we have not ordered the administrative record.

<sup>2</sup> A Secretarial election is a Federal election held when a Federal statute or the terms of a tribal governing document require the Secretary of the Interior to conduct and approve an (continued...)

Under the regulations, a member of the tribe who is 18 years of age or older may sign a petition. *Id.* § 81.53. “Where the tribe’s governing document imposes additional requirements (other than age requirements) on who may petition, those requirements also apply.” *Id.* The spokesperson for the petitioners may ask the tribe or the Local Bureau Official, here, the Superintendent, how many signatures are required. *Id.* § 81.57(a)(1). Where the Local Bureau Official is asked how many signatures are required, he or she will “[c]ontact the tribal governing body to obtain the current number of tribal members, 18 years of age or older, to determine the number of tribal members who must sign a petition as required by the tribe’s governing document.” *Id.* § 81.57(a)(2)(i). The Local Bureau Official will notify the petitioner’s spokesperson how many signatures are required and that the number is valid for 180 days from the date of this notification. *Id.* § 81.57(a)(2)(ii).

In his Decision, the Regional Director found that the Superintendent satisfied § 81.57 in responding to Appellant’s request for the number of required signatures. Decision at 4-5. Appellant had argued before the Regional Director that the Superintendent relied on erroneous information provided by the Tribe and multiplied the total number of tribal members aged 18 or over by one-third, rather than by “one-third of the qualified voters” as required by the Tribe’s Constitution. According to Appellant, the Tribe’s Constitution distinguishes between “eligible voters,” who he claims are defined as members aged 18 or over, and “qualified voters,” which term, Appellant states, is undefined in the Constitution. Notice of Appeal, Nov. 15, 2017, at 3-5. As we understand Appellant’s argument, BIA should have found that some subset of adult members of the Tribe “eligible” to vote were also “qualified” to vote, and that the petitioners would only need to obtain signatures from one-third of that subset for a valid petition. In his Decision, the Regional Director stated that, because “qualified voters” is undefined in the Tribe’s Constitution, “it seems clear that to be qualified for purposes of signing a petition to request a Secretarial election, one must merely be a tribal member eighteen (18) years of age or older.” Decision at 4; *see also id.* (“Where the tribal constitution is silent, it does not supplant federal regulations.”).

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(...continued)

election to adopt, amend, or revoke tribal governing documents, e.g., a tribe’s constitution, or to adopt or amend tribal charters. 25 C.F.R. § 81.1; *see also* 25 U.S.C. § 5123. Revised regulations governing Secretarial elections and procedures for tribal members to petition for Secretarial elections, which are located in 25 C.F.R. Part 81 and combine former Parts 81 and 82, became effective on November 18, 2015. 80 Fed. Reg. 63094, 63094 (Oct. 19, 2015).

In this case, it is undisputed that Appellant has not submitted a petition for a Secretarial election. Had Appellant done so, additional procedures would apply. On the day the spokesperson submits the original petition to the Local Bureau Official, he or she will date stamp the petition to record the Official Filing Date and make copies for posting, for review by BIA, and for viewing by adult members of the tribe. 25 C.F.R. § 81.60(a). Within 1 week of the Official Filing Date, the Local Bureau Official will provide the spokesperson written acknowledgement of receipt of the petition, which will contain the Official Filing Date and the “exact number of signatures submitted on the petition.” *Id.* § 81.60(b)(1). The Local Bureau Official, with support from the Solicitor’s Office, will also identify if any petition provisions are or may be contrary to applicable law and provide written notice of any problems to the spokesperson. *Id.* § 81.60(c)-(d).

Within 45 calendar days of the Official Filing Date, the Local Bureau Official must confirm the petition has the required number of signatures, make recommendations concerning any signature challenges, and transmit the petition, challenges, and recommendations to the Authorizing Official, in this case, the Regional Director. *Id.* § 81.62(a). Within 60 calendar days of the Official Filing Date, the Authorizing Official must determine whether the petition complies with the requirements of Subpart F. *Id.* § 81.62(b)(1). The Authorizing Official will inform the spokesperson and the recognized tribal governing body, in writing, whether the petition is valid and provide the basis for that determination. *Id.* § 81.62(b)(2). The Authorizing Official will also include a statement that his or her decision “is a final agency action.”<sup>3</sup> *Id.* If the petition is determined valid for the purposes of calling a Secretarial election, it will be deemed a “tribal request” for purposes of Part 81, and the Authorizing Official will instruct the Local Bureau Official to call and conduct the Secretarial election. *Id.* § 81.62(b)(2)(i). If the petition is determined invalid, the Authorizing Official will notify the spokesperson that the petition was not valid and that a Secretarial election will not be called. *Id.* § 81.62(b)(2)(ii).

## Discussion

The Board is authorized to consider appeals from “a final administrative action or decision,” 43 C.F.R. § 4.331, of a BIA regional director, *see* 25 C.F.R. § 2.4(e). The Board is not authorized to consider an appeal from interim action by a BIA regional director, which even if characterized as a “decision,” is not a “final” action within the meaning of § 4.331. *Confederated Salish and Kootenai Tribes of the Flathead Reservation v.*

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<sup>3</sup> “Final agency action” means the Authorizing Official’s “approval or disapproval of a Secretarial election or acknowledgment of the tribe’s or petitioner’s withdrawal of a request for a Secretarial election, and is final for the Department [of the Interior].” 25 C.F.R. § 81.4 (definition of “Final agency action”).

*Northwest Regional Director*, 58 IBIA 197, 200 (2014). “[T]he word “final” denotes a dispositive decision on the substantive matter before BIA.” *Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Director*, 48 IBIA 241, 243-44 (2009).

In *Picayune*, the Board characterized the appellant’s appeal from the regional director’s letter excluding a site as an alternative to be considered in the environmental impact statement (EIS) related to a trust acquisition application, as an attempt to “seek[] an interlocutory appeal from an interim decision.” *Id.* at 243. The Board determined that the substantive matter on which BIA would take final administrative action was the approval or disapproval of the tribe’s fee-to-trust application, and not BIA’s selection of alternative sites to be considered in a draft EIS prepared to inform the trust acquisition decision. *Id.* at 244. In a case that more closely tracks the subject matter before us, the Board dismissed the appellant tribe’s challenge to BIA’s purported “approval” of draft language of a proposed constitutional amendment to be considered by voters at a Secretarial election, because BIA’s statement that the proposed language was not contrary to Federal law was, at best, a “procedural interim action” over which the Board lacked jurisdiction. *Confederated Salish and Kootenai Tribes*, 58 IBIA at 200-01. The Board explained that, to the extent BIA had any authority to do so, former Part 81 did not envision BIA making a final and appealable decision to approve language of a proposed amendment before an election has been held.<sup>4</sup> *Id.* at 200.

Concerning the appeal now before the Board, the regulations in Subpart F make clear that the “substantive matter” on which BIA will take action is the validation of a *petition* calling for a Secretarial election. *See* 25 C.F.R. § 81.62(b) (requiring the Authorizing Official to determine whether the petition complies with the regulations, inform the spokesperson for the petitioners and the tribe in writing whether the petition is valid, and state that this decision is a final agency action). In contrast, BIA’s response to Appellant’s request for a determination of the number of signatures of tribal members that would be required for a petition to be valid once submitted, *see id.* § 81.57(a)(2), is an interim action. As we explained as background, Subpart F does not envision BIA making a final decision on whether a petition is valid before a petition is submitted. Appellant purports to be the spokesperson for a group that intends to submit a petition, and has not yet submitted a petition.

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<sup>4</sup> The Board also noted that, to the extent the tribe intended to appeal BIA’s decision under former 25 C.F.R. Part 82 that the *petition* should be “acted on” by calling a Secretarial election, the Board would lack jurisdiction based on the language of finality contained in former § 82.10(b) (BIA’s “decision in such matters shall be final”). *Confederated Salish and Kootenai Tribes*, 58 IBIA at 199 n.4.

Principles of standing and ripeness reinforce our conclusion that the Regional Director's decision does not constitute a "final administrative action or decision" within the meaning of the Board's appeal regulations. It appears doubtful that the Regional Director's interim action regarding the number of required signatures, in the absence of a petition submitted by Appellant and a decision on the validity of such a petition, has resulted in an actual or imminent, concrete and particularized injury to Appellant, *cf. Northern Cheyenne Livestock Ass'n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 136 (2008) (requirements for standing), or that Appellant's argument could not be raised, in an appropriate forum, as part of a challenge to a decision on the validity of a petition.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board docketed but dismisses this appeal for lack of jurisdiction.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Thomas A. Blaser  
Chief Administrative Judge