THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION TRIBAL DISTRICT COURT

HALL, et al. v. TRIBAL BUSINESS COUNCIL, et al.

No. 95C000069 (Ft. Bert. Dist. Ct., Jan. 5, 1996)

Summary

The District Court of the Three Affiliated Tribes of the Fort Berthold Reservation orders the tribal business council to meet in special session to consider appeals of grazing range unit applications and further orders that any member of the council who has a range unit application or who has an immediate family member who has a range unit application may not participate in the consideration of appeals and outlines the procedures for conducting the appeal for each contested range unit.

Full Text

Before POMMERSHEIM, Special Judge

Memorandum Opinion and Order

I. Introduction

The plaintiffs in this action filed a complaint against the defendants on June 6, 1995. The gravamen of their complaint focused on the actions and procedures employed by the tribal business council in awarding unit grazing leases in early 1995 for the five year period to run from 1995-2000. The plaintiffs' causes of action are grounded in alleged denials by the defendants of due process and equal protection under the Indian Civil Rights Act of 1968.[1] The plaintiffs sought a temporary restraining order[2] and a preliminary injunction against the defendants. Plaintiffs' request only for injunctive relief is largely

[1]Section 25 U.S.C. 1302(8) provides "that no Indian tribe in exercising powers of self-government shall...deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

[2]This request was subsequently withdrawn as essentially moot once the range units were actually awarded by the Three Affiliated Tribes Business Council and approved by the Bureau of Indian Affairs.

attributable to the remedial limitation set out in the Three Affiliated Tribe's Constitution.[3] On June 28, 1995 the defendants filed an answer as well as a motion to dismiss. The motion to dismiss challenged the adequacy of plaintiffs' pleadings[4] as well as the legal applicability and/or sufficiency of the due process and equal protection claims.

A period of (documentary) discovery ensued. The hearing on the motion to dismiss was held on September 15, 1995 and each side was allowed to call one named party witness to testify in order to amplify and/or clarify statements contained in their affidavits submitted with the original pleadings. The named plaintiff was Mr. Tex Hall and named defendant was tribal council representative, Mr. Austin Gillette. Both sides filed written briefs in support of their position on the motion to dismiss and also provided oral argument to the court at the motion hearing.

II. Issues

Defendants' motion to dismiss raises three essential issues. They are:

A. Whether plaintiffs' complaint lacks the requisite specificity under Rule 8 of the Federal Rules of Civil Procedure to survive a motion to dismiss;

B. Whether plaintiffs' complaint fails to state a claim upon which relief may be granted with regard to the claim of the denial of equal protection under the Indian Civil Rights Act of 1968; and

C. Whether plaintiffs' complaint fails to state a claim upon which relief may be granted with regard to the claim of the denial of due process under the Indian Civil Rights Act of 1968.

III. Discussion

Each issue will be discussed in turn.

A. Specificity

Plaintiffs' complaint enumerates and alleges three significant claims for relief. They are essentially:

(1) That the absence of appeal rights or the inadequacy of same deny plaintiffs due process of law under the Indian Civil Rights Act of 1968;

(2) That grazing unit leases were awarded by defendants to 'unqualified' applicants thereby denying plaintiffs due process of law under the Indian Civil Rights Act of 1968; and

(3) That the award of grazing unit leases by the defendants to themselves or 'family members' denies plaintiffs equal protection of the law under the Indian Civil Rights Act of 1968.

The prayer for relief requests injunctive relief against the defendants.

Federal Rule of Civil Procedure 8(a)(2)[5] requires only that an affirmative pleading consist of "a short and plain statement of the claim showing that the pleader is entitled to relief." The courts and leading commentators[6] have most often described this very general statement to require brevity, clarity, the avoidance of technicalities and providing the opposing party with fair notice of the nature and basis of the claim and a general indication of the type of litigation involved. Clearly, interpretation and application of this standard involves a good deal of judicial discretion that must be wisely used.

In light of the text of Rule 8(a)(2) and the relevant commentary, how do the plaintiffs' averments in their complaint fair? They are certainly brief enough, but they are seldom stellar in their clarity or precision. For example, in claim for relief number one, at paragraph five, plaintiffs aver fraud on the part of defendants. Yet there are absolutely no facts (or law) pled to substantiate this bold—perhaps even provocative—allegation. This chimera cannot stand and therefore any claim—if indeed there actually is one—for relief based on fraud is hereby dismissed with prejudice. It is too undifferented and too raw for judicial consideration.

Having said this, however, it must be noted that the rest of the complaint and here I specifically refer to the due process and equal protection claims is adequately pled. These claims contain both a theory of relief (*i.e.,* deprivation of due process and equal protection) and a sufficient factual substratum (*i.e.,* failure to provide adequate appeal rights, erroneously awarding lease units to members of the council and/or their family members). The prayer for relief, itself, while somewhat undeveloped, is nevertheless legally sufficient. It requests injunctive relief against defendants; namely that defendants be enjoined from administering or providing 'payments' to or from the BIA for those range units. Therefore, with the exception noted above, the plaintiffs' complaint shall *not* be dismissed because it does comply with the pleading requirements of Rule 8.

B. Equal Protection

The plaintiffs claim that the award of range units by defendants to either themselves or "family members" violates the equal protection guarantee set out in the Indian Civil Rights Act at 25 U.S.C. § 1302(8).[7] In the context of a motion to dis-

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[3]Art. VI, § 3(b) of the Three Affiliated Tribe's Constitution provides:

> The people of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council has in a specific instance violated that Act.

[4]Presumably under Rule 8(a) of the Federal Rules of Civil Procedure which provides, in relevant part:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Defendants, however, do not cite Federal Rule 8 but prefer to cite Rule 8 of the North Dakota Rules of Civil Procedure which likely employs similar language.

[5]Federal Rules of Civil Procedure govern in the absence of any on point rules contained in the Three Affiliated Tribes' Rules of Civil Procedure. *See* this court's order of September 5, 1995, particularly footnote one which states, "The Three Affiliated Tribes Tribal Code provides in ch. 1, § 2.5 that '(1) The laws and treaties of the United States shall be the applicable law in the Courts where they apply to the Three Affiliated Tribes or Fort Berthold Indian Reservation as a matter of federal law or where incorporated by reference in this code.' In light of the paucity in the tribal code on discovery (see ch. 2 § 7), the Court shall look for appropriate guidance from the Federal Rules of Civil Procedure and the attendant case law."

For purposes of consistency, the Federal Rules of Civil Procedure shall govern all aspects of this litigation unless they conflict directly with any tribal rule of civil procedure.

[6]*See, e.g.*, Wright, Miller, & Marcus, *Federal Practice and Procedure: Civil 2d* § 1215 (1994), at 136-56.

[7]*See* note 1 *supra* at 1.

miss, similar to a motion for summary judgment (Rules 12b and 56(c)), the appropriate legal standard is whether the record, when viewed in the light most favorable to the non-naming party (here the plaintiffs) shows that the party moving for dismissal (or summary judgment) is entitled to dismissal as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. (1991)).

Plaintiffs' equal protection claim is not premised on any allegation of deprivation of equality by tribal government classification—the classic *de jure* discrimination—but rather a deprivation attributable to a failure to classify and hence resulting in *de facto* discrimination. Specifically, plaintiffs claim that the award of any grazing unit by defendants to themselves or "family members" is a deniAL of equal protection because the defendants failed to create a necessary classification, that is the exclusion of themselves and family members from this process.

This theory of plaintiffs is wholly untenable as a matter of law. Plaintiffs cite no case law in support of their somewhat novel theory of relief. Regardless, the claim fails. Plaintiffs do not demonstrate (or even assert) some necessary rudiments for their equal protection claim.

The legal nub here is what is the appropriate legal standard by which to evaluate defendants alleged failure to classify. Again, plaintiffs have nothing to say about this in either their complaint or brief in opposition to dismiss. Nevertheless, it is generally recognized that equality can be denied when government fails to classify with the result that its rules or programs do not distinguish between persons who, for equal protection purposes, should be regarded as differently situated.[8] As the Supreme Court noted in *Jenness v. Fortson*, "sometimes the greatest discrimination can be in treating those that are different as though they were exactly alike."[9] Despite this possibility, it remains true that the alleged failure to distinguish between tribal members and tribal members on the council and their family does not invoke either burdening fundamental rights[10] or suggesting prejudice against racial or other minorities[11] and therefore does not require strict (or even intermediate) scrutiny.

The basic equal protection test outside the above categories and therefore the relevant test for the case at bar is the basic requirement of minimum rationality. Most often this test has been described as requiring courts to "reach and determine the question whether the classifications are reasonable in light of its purpose...."[12] And within this broad framework, courts have been remarkably deferential to challenged legislation.[13]

The challenged ordinance of the Three Affiliated Tribes, Resolution 94-40-DSB, simply makes eligible *all* tribal members to participate as applicants for the award of a range unit lease. This is clearly reasonable on its face. It makes not only rational, but eminent good sense to consider *all* tribal members equally eligible at the threshold for the award of use of an important tribal asset such as land. In fact, the opposite result of barring tribal council members and their families from eligibility would most likely violate equal protection as creating categories unfairly treating individuals similarly situated. To act otherwise, would also potentially dissuade likely applicants from running for public (tribal) office.

This, of course, does not mean that the *process* for awarding leases itself might not be flawed, but that concern is not an equal protection matter. The category—or more accurately the absence of any classification—used by the tribe does not and cannot give rise to an equal protection claim and therefore the equal protection claim is dismissed without any basis in law or fact.

C. Due Process

Analysis of the issue of due process proves a more complicated undertaking. The task of parsing this question raises a series of intricate sub-issues and parts. These include:

1. Whether the challenged grazing unit resolution is deficient for failing to provide substantive due process.

2. Whether any procedural due process is, in fact, due under these circumstances and if so,

A) Whether it has been provided, and

B) Whether if it was provided, was it adequate.

1. Substantive Due Process

As noted by leading commentators, since the beginning of the nation, justices of the Supreme Court have suggested that they had an inherent right to review the substance of legislation (in terms of both its ends and means) enacted by either Congress or state legislatures. This notion and the appropriate legal standard of analysis has waxed and waned through constitutional history. Yet it is presently clear that substantive due process claims are often regarded as analogous to equal protection claims in the legal rubrics used by courts to assess their validity. This is particularly true when, as in the instant case, the central challenge involves a claim of improper classification or more precisely, a failure to classify in the first instance. Since there are no fundamental rights or racial categories involved, the appropriate analytical lens is the rational basis test. And as noted above, the challenged resolution survives such scrutiny. Therefore any claim based on substantive due process (despite the absence of any use of this precise language by plaintiffs) is hereby dismissed with prejudice.

2. Procedural Due Process

Despite the absence of any viable equal protection or substantive due process challenge, there remains the issue of whether plaintiffs are entitled to any procedural due process and if so, whether it was afforded to them. Due process in its procedural context—whether under the fifth and fourteenth amendments to the U.S. Constitution or the Indian Civil Rights Act at 25 U.S.C. § 1302(8)—generally guarantees that an individual shall be accorded a certain "process" if they are deprived of life, liberty, or property. When the power of government—including tribal government—is used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action.[14]

The threshold question here is whether plaintiffs have been deprived of "life, liberty or property." The focus is whether plaintiffs have any property right—cognizable under the Indian Civil Rights Act of 1968—relative to the tribal review and award (in conjunction with the Bureau of Indian Affairs) of tribal grazing unit leases. There is no doubt that the award of a unit grazing lease constitutes "property" for purposes of the due process guarantee as set out in the Indian Civil Rights Act of 1968. A leasehold interest is clearly a property right under any

[8]Lawrence Tribe, *American Constitution Law* 1438 (2d ed. 1987).

[9]403 U.S. 431, 442 (1971).

[10]Such as interstate travel, equal voting opportunity, and equal litigation opportunity. *See, e.g.*, Tribe, *supra* note 8 at 1451-64.

[11]*Id.* at 1463-82.

[12]*McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

[13]Tribe, *supra* note 8, at 1440-41.

[14]John Nowak and Ronald Rotunda, *Constitutional Law* 487 (4th ed., 1991).

definition of the term. Admittedly, that is not quite the case we have here. Plaintiffs claim a property interest, not based on the actual award (and subsequent impairment) of unit grazing leases, but on the failure to provide due process for those applicants who were *not* awarded unit grazing leases in the first instance.

In this regard, most courts have focused on the notion of "entitlement." That is are plaintiffs "entitled" to the government benefits—as defined by local law—as long as they comply with the appropriate requirements. Again, this is an easy question when the "entitlement" has been awarded (not the case here), but more difficult when the plaintiff is simply an applicant for, rather than a recipient of, the government entitlement. Such interests are sometimes referred to as mere "expectancies" without the necessary "present enjoyment."[15]

In the context of Indian land—specifically the tribal and individual trust land that make up range units—such land is clearly a critical tribal resource. As such, tribal member applicants for grazing units leases have more than a mere "expectancy" in potential awards. They do not, obviously, have an ultimate "entitlement" to a unit lease, but they do have the right, vis-á-vis the precious tribal resource, to be treated culturally and legally with dignity and appropriate fairness. Plaintiffs, as tribal members, are entitled to due process. Such a view comports not only with the lineaments of due process under the Indian Civil Rights Act of 1968, but also the traditions of dignity and fairness that are central to the history of the Three Affiliated Tribes.

Having decided that due process applies to the procedure utilized in the allocation of grazing unit leases, the question becomes what due process, if any, was provided and lastly, if any was provided, is it sufficient as a matter of law? Plaintiffs claim none was provided despite the specific promises and representations of the defendants to the contrary, while defendants claim that nothing was specifically promised in this situation, but that a "traditional" (tribal) form of due process was available and plaintiffs simply never availed themselves of the procedure to freely place themselves on the agenda for any tribal council meeting to make their concerns known. The parties agree and the relevant testimony supports a conclusion that the tribal business council did not provide any kind of a *special* meeting to hear concerns of plaintiffs or others who were denied range units.[16] Regardless of the promise of any *individual* defendant or tribal business council representative relevant to a special meeting, such a promise or representation without more has no status as the law or policy of The Three Affiliated Tribes.[17] There is no evidence in the record (at least at this point) that demonstrates that the tribal council ever considered such action, much less authorized it.

Due process, particularly in the civil (as opposed to the criminal) context, contains two broad constitutive elements: notice and the opportunity to be heard. It is also significant to note in this regard that the courts have generally held that due process (and equal protection) clauses of the Indian Civil Rights Act of 1968 need not mirror the exact same substantive content of these clauses under the fifth and fourteenth amendments to the U.S. Constitution.[18] Nevertheless, it is generally required that (procedural) due process be grounded in some *factual* dispute.[19] This requirement is clearly met in the case at bar. For example plaintiffs allege that some defendants did *not* meet the requirements relative to permissive debt loads and/or possessing sufficient numbers of cattle as called for by the tribal grazing resolution.[20]

The guarantee of due process, while recognizing different situations may call for different procedures, has consistently required fair and impartial means. One element of fairness and impartiality has been the standard that decision makers have no pecuniary interest or otherwise be competitors of the aggrieved party.[21] The potential problem here is therefore apparent. May the tribal council in its capacity as the actual decision makers in hearing claims of a denial of due process fairly discharge its responsibility when some of its members *may* have a direct pecuniary or competitive interest vis-à-vis an individual (aggrieved) claimant for the very same lease unit awarded to a member of the council? Of course, it is well to note that tribal approaches to this problem face significant technical and fiscal constraints not otherwise apparent in the federal context and there are, likely, other ways of avoiding the potential problem. Although this issue is not directly raised in the motion to dismiss, it nevertheless is one that is likely to be confronted in any future proceeding.

The element of notice that inheres in the concept and guarantee of due process is not subject to precise definition. Rather it varies with circumstance. As noted by the Supreme Court, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."[22] Relevant here, of course, is likely to be the level of general and actual awareness of the alleged tribally sanctioned "traditional" due process that is not (apparently) envisioned to require the tribal government to provide anyone with specific, individual notice.

In the area of deprivation of governmental benefits, the Supreme Court has most often used a balancing test to determine whether the individual interest merits a specific procedure in view of its cost to the government and society in general.[23] This balancing test is particularly appropriate in the tribal context which, as noted above, is subject to unique constraints of

[15]*See, e.g.*, the discussion in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Lying v. Payne*, 476 U.S. 926 (1986).

[16]*See, e.g.*, the minutes of the Regular Tribal Business Council Meeting of February 9, 1995 (at p. 14) in which Mr. Gillette refers to a "memo which he sent out from the Natural Resources Committee, wherein he states that a Special Council Meeting will be held specifically to address the grazing issue in regards to all the discrepancies that the Fort Berthold Livestock Association is concerned with." However, the minutes do not indicate that any proposal for a special meeting was actually voted on. *See also* the minutes of the Regular Tribal Business Council Meeting of March 9, 1995 (at pp. 9-10) at which some aggrieved applicants (not apparently any of the Plaintiffs) were heard. Needless to say, the picture that emerges is less than pristine in its clarity.

[17]*See, e.g.*, art. III, § 2 of the Three Affiliated Tribe's Constitution and Bylaws which states: "Special meetings may be called by the Chairman or by any three Councilmen who shall notify all members of the council at least twenty-four (24) hours before the time of convening such meeting unless a majority of the Council approves a shorter call in an emergency."

[18]*See, e.g., Tom v. Sutton*, 533 F.2d 1101 [3 Indian L. Rep. e-21] (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 [2 Indian L. Rep. No.1, p. 6] (8th Cir. 1975).

[19]*See, e.g., Codd v. Velger*, 429 U.S. 624 (1977); *Pearson v. Dodd*, 429 U.S. 396 (1977).

[20]*See* Resolution 94-40-DSB which states, for example, in relevant part, that "Qualified applicants can secure an allocation of grazing privileges; provided the applicant owns 40% of the livestock to be grazed on the unit with an approved plan to reach 80% ownership of carrying capacity within three (3) years."

[21]*See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

[22]*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also* the decision of this court in *Arrowhead Well Servicing, Inc. v. Three Affiliated Tribe's Tribal Employment Rights Office*, (Civil No. 1-93-A04-05, May 18, 1995).

[23]Nowak and Rotunda, *supra* note 14 at 548-54.

fiscal resources and institutional development. In addition, it is important to insure that the tribal sovereign has the opportunity to *fully* articulate why the process (if any) that it provides comports favorably with the kind of balancing test suggested here. That is, a kind of balancing subtle to nuance and local adaptation and not the broad replicative strokes of federal standards. Also, a balancing that recognizes that the process due to an aggrieved *applicant* as compared to an aggrieved range unit *permittee* or *lease holder* may well be different.

By way of summary, tribal applicants for range unit leases are entitled to due process under the Indian Civil Rights Act of 1968. The lineaments of such due process include the basic elements of fairness, notice, and an appropriate balancing of individual and (tribal) government interests to determine the adequacy of the procedure provided. The facts pertinent to these elements are barely discernible at this stage of the litigation and shall be appropriately developed at a trial on the merits.

Two other matters bare mention at this time. This action is not (and the parties have not argued to the contrary) barred by the doctrine of sovereign immunity. The Three Affiliated Tribal Constitution contains an express—albeit limited— waiver of sovereign immunity. At art. VI § 3(b), the constitution states:

> The people of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council has in a specific instance violated that Act.

Note, however, that this waiver also explicitly limits potential remedies to *injunctive* relief only. Therefore the plaintiffs, if they prevail on the merits, will be entitled only to said relief and the court will be so limited in this regard.

In addition, it is noted that Bureau of Indian Affairs is not a named party in this lawsuit and whatever relief, if any, administrative or otherwise, that might be available, here (or elsewhere) against it is not currently before this court and the Bureau of Indian Affairs is not—at least at this point in the litigation—considered an indispensable party.[24]

IV. Conclusion

Based on this above discussion, the plaintiffs' complaint (with the exception of the fraud allegation) is not dismissed for lack of the required specificity; plaintiffs' equal protection claim is dismissed in its entirety, and plaintiffs' (procedural) due process claim is not dismissed and shall be promptly set for trial.

It is so ordered.

Order

Pursuant to this court's memorandum opinion and order of October 19, 1995 that determined that the plaintiffs in this matter are entitled to due process in accord with the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), the court specifically orders the implementation of the following to comply with the above cited opinion and order:

1. That the Tribal Business Council of the Three Affiliated Tribes will meet in a special session to consider the appeals, written or otherwise, of each plaintiff, in regard to each range unit for which any plaintiff submitted a written application to the tribal business council prior to February 13, 1995, and which was not allocated as an entire unit to an individual plaintiff, as per the attached list; (Appendix A [*omitted*])

2. That the plaintiffs through their counsel will be provided at least ten (10) days written notice of the special meeting.

3. That any council member who has applied for any range unit for which one or more of the plaintiffs applied, or who has an "immediate family member" who applied for any range unit in which one or more of the plaintiffs applied, will not participate in any way concerning the decision of the tribal business council on the appeal of that plaintiff or plaintiffs of the initial decision made by the council about that range unit. The phrase "immediate family member" includes mother, father, son, daughter, sister, brother and in-laws of the same degree; and

4. That the tribal business council will use the following procedure when conducting the appeal for each contested range unit:

> (a) Each plaintiff will be allowed sufficient time to present relevant information, in the form of written documents and/or oral testimony, with or without an attorney, about their application and the reasons why his or her application should be reconsidered as improperly denied.
>
> (b) Regarding each appeal, the tribal business council will consider only such information that was available at the time of the initial consideration of the range unit applications.
>
> (c) The tribal business council may, either during or after the presentation to it of the appeals by any or all of the plaintiffs, request from, or consider relevant information presented to it by, the individual or individuals to whom the range unit was initially allocated. Such information shall be limited in scope as specified in subparagraph (b), above.

It is so ordered.

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[24] *See, e.g.*, Federal Rule of Civil Procedure 19.