INTERIOR BOARD OF INDIAN APPEALS

Phillip Del Rosa and Wendy Del Rosa v. Acting Pacific Regional Director, Bureau of Indian Affairs

51 IBIA 317 (06/29/2010)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

PHILLIP DEL ROSA AND WENDY DEL ROSA, Appellants,	)	Order Vacating Decisions
v.	)	
	)	Docket No. IBIA 10-064
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 29, 2010

Phillip Del Rosa and Wendy Del Rosa (Appellants) appealed to the Board of Indian Appeals (Board) from a January 29, 2010, decision (Decision) of the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which Appellants contend impermissibly intruded into internal tribal affairs by stating that BIA recognized a five-member General Council of the Alturas Rancheria (Tribe) in California. The Tribe's General Council effectively consists of the Tribe's entire voting membership,[1] and Appellants contend that it consists of seven members, including two individuals adopted into the Tribe in February of 2009. In June of 2009, the Superintendent of BIA's Northern California Agency (Superintendent) issued two decisions[2] accepting Appellants' contention

[1] The Tribe's Constitution provides that its governing body is the General Council, which consists of "all members who hold assignments on the rancheria and all other members who are eighteen (18) years of age or older. Each member of the general council is also a qualified voter." Tribe's Constitution art. IV, sec. 1. The Tribe also has a Business Committee, which holds certain enumerated powers, and consists of a chairman, vice-chairman, and secretary-treasurer, elected from and by the General Council. *Id*. art. IV, sec. 2; art. VII.

[2] The Superintendent's decisions were dated June 6 and June 19, 2009.

of a seven-member General Council. A three-member faction[3] of the Tribe appealed those decisions to the Regional Director.

In vacating the portions of the Superintendent's decisions recognizing a seven-member General Council, the Regional Director found that there was no pending matter requiring *any* Federal action for purposes of the government-to-government relationship with the Tribe. In the absence of any required Federal action, the Regional Director reasoned that there was no justification for the Superintendent to have made a decision on the tribal membership dispute. The Regional Director then purported to "remand" the dispute back to the Tribe's General Council, but — notwithstanding the fact that he had just concluded that there was no justification for a BIA decision on the membership issue — the Regional Director then identified the General Council as consisting of five individuals (i.e., excluding the adoptees).

We now vacate in full the decisions issued by the Superintendent and the decision issued by the Regional Director because the Regional Director has concurred in a suggestion offered by the Board that vacatur may be an appropriate remedy for extracting BIA from this tribal dispute when the government-to-government relationship did not require BIA to take a position on governance and membership issues. We reject Appellants' argument that by including the Superintendent's decisions in our vacatur, we are somehow implicitly taking sides in this tribal dispute and effectively "disenrolling" the two individuals who Appellants contend are full members of the Tribe.

Discussion

Following the Regional Director's decision, Appellants appealed to the Board, asking us to reinstate the Superintendent's recognition of the adoptions and a seven-member General Council. On receipt of the appeal, the Board suggested — given the apparent absence of any pending matter that required Federal action when *either* the Superintendent *or* the Regional Director issued their decisions — that an appropriate action by the Board might be to vacate *both* officials' decisions. The Regional Director and the Rose Faction

[3] The faction opposing Appellants in this dispute consists of Darren Rose, Jennifer Chrisman, and Joseph Burrell ("Rose Faction"). The Rose Faction takes the position that the two individuals adopted into the Tribe — Calvin Phelps and Donald Packingham — were only given honorary membership and that they are not qualified under the Tribe's constitution to become voting members of the General Council. Appellants contend that the two were adopted as full members.

support vacatur.[4] Appellants only support vacatur of the Regional Director's decision, reiterating their merits arguments that the Board should reinstate the Superintendent's decision, and contending that if we fail to do so, we will be intruding impermissibly into tribal affairs by effectively "disenrolling" the two individuals.

Although the Regional Director did not initiate the suggestion that this appeal might best be resolved by having his decision (and the decisions of the Superintendent) vacated (i.e., withdrawn), he concurs in that course of action. Thus, this case is now analogous to those cases in which BIA initiates a voluntary request to have a decision on appeal to the Board vacated and the matter remanded. As a general rule, the Board will grant a Regional Director's motion for a voluntary remand, which ordinarily is accompanied by an order of vacatur. See *Birdbear v. Acting Great Plains Regional Director*, 51 IBIA 273, 273 (2010), and cases cited therein. *See also United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 89 (2008) (when BIA requests a remand, the burden is on a party opposing the request to demonstrate compelling reasons why the request should not be granted). The present case differs only because, in the absence of any pending matter that required a BIA decision, there is no "matter" for us to remand after vacating BIA's decisions.

Appellants argue that "[s]hould the Superintendent's decision be vacated with the Regional Director's decision, the Board, similarly to the Regional Director in his decision, would be essentially treating the adoptions [of Phelps and Packingham] as if they never occurred, and also would be a decision constituting a failure to properly consider the appropriate mechanisms and procedures the Tribe has in place to resolve such disputes." *See* Appellants' Response to Acting Pacific Regional Director's Statement at 4. Appellants misunderstand the posture of this case and the effect of vacatur. Neither the Superintendent's decisions, nor the decision of the Regional Director, ever became effective. *See* 25 C.F.R. § 2.6; 43 C.F.R. § 4.314. An order of vacatur does not, as Appellants contend, have the effect of treating the adoptions as if they had never occurred. Instead, an order of vacatur treats BIA's decisions — neither of which has become effective — as if *they*

[4] The Regional Director expressly supports vacatur of his decision and expressly confirms that when the Superintendent issued his decisions there was no pending matter that necessitated Federal action. Appellants note that the Regional Director's response did not actually take a position on vacatur of the Superintendent's decisions. But we think the Regional Director's position to support complete vacatur is sufficiently clear in light of his confirmation that no Federal action was required and his own decision to vacate significant portions of the Superintendent's decisions.

had never occurred.[5] It leaves for another day a decision by BIA, if necessary, and only in the context of specific required Federal action, to wade into the tribal dispute, if it still exists. In that context, BIA may limit, reaffirm, alter, or reverse any statement made in the vacated decisions.[6]

As it turns out, after the Regional Director issued his decision, both factions apparently submitted Indian Self-Determination Act (ISDA) contract proposals to the Superintendent for approval. Recognizing that the pendency of this appeal divested BIA of jurisdiction to decide who constitutes the governing body of the Tribe, the Superintendent returned the proposals. *See* Letter from Superintendent to Darren Rose and Phillip Del Rosa, May 25, 2010.[7] Although this appeal has no "matter" to remand to BIA because there was no matter pending at the time BIA's decisions were issued, our decision will effectively return jurisdiction to BIA. That, in turn, will allow BIA, in the specific context of considering the ISDA proposals, to address tribal governance and membership issues, but only if and as necessary for taking action on the proposals. And, of course, BIA's pre-

---

[5] Ordinarily, the vacatur of a Regional Director's decision at the request or with the concurrence of the Regional Director would not even give rise to a question about whether to also vacate an underlying decision by a Superintendent because by operation of 25 C.F.R. § 2.6 and 43 C.F.R. § 4.314, the underlying decision would never have become effective. Our suggestion in this case of the possibility of vacatur of the decisions of both the Regional Director and the Superintendent was intended to ensure clarity in extracting BIA from this dispute in the absence of any justification for its involvement.

[6] It is unclear whether Appellants understand that a BIA decision concerning a tribal dispute must be premised on the need for some Federal action. *See George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009); *Wasson v. Western Regional Director*, 42 IBIA 141, 153-54 (2006). In responding to the Rose Faction's motion to dismiss, *see infra* note 8, Appellants appeared to contend that BIA, or the Department of the Interior, has some general and independent duty to serve as arbiter of a tribal dispute when a tribe cannot resolve the dispute on its own, even when no Federal action is otherwise required. That is not the law. But Appellants also, in opposing vacatur of the Superintendent's decisions, contend that such an action by the Board will somehow have the effect of failing to consider mechanisms and procedures that the Tribe has in place to resolve the dispute. To the contrary, our order of vacatur allows the Tribe to implement whatever mechanisms or procedures it may have in place for resolving its internal dispute.

[7] None of the parties informed the Board of these submissions until after the Superintendent returned the two contract proposals.

award action on an ISDA contract proposal is itself subject to the appeal rights to the Board provided in 25 C.F.R. Part 900, Subpart L.

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 vacates the Superintendent's decisions of June 6, 2009, and June 19, 2009, and the Regional Director's decision of January 29, 2010.[8]

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

[8] The Rose Faction moved to dismiss the appeal on the grounds that the Board lacks jurisdiction over enrollment disputes and that Appellants lack standing. Because we are vacating BIA's decisions with the concurrence of the Regional Director, the motion to dismiss filed by the Rose Faction is moot.