



INTERIOR BOARD OF INDIAN APPEALS

Village of Hobart, Wisconsin v. Acting Midwest Regional Director,
Bureau of Indian Affairs

53 IBIA 269 (7/19/2011)



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

VILLAGE OF HOBART, WISCONSIN,)	Order Vacating Decision and Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 11-058
ACTING MIDWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	July 19, 2011

The Village of Hobart, Wisconsin (Village), appealed to the Board of Indian Appeals (Board) from a December 16, 2010, decision (December 16 Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director agreed to take 5 parcels into trust for the Oneida Tribe of Indians of Wisconsin (Tribe). The 5 parcels are identified as tax parcel numbers HB-1695-10 (known as the former Barchacky property, F-433-2007-628) and consisting of 0.55 acre more or less; HB-1695-19 (known as the former Belongia property, F-433-2007-649) and consisting of 0.39 acre; HB-1493-A-42 (known as the former Darnutzer property, F-433-2007-644) and consisting of 0.34 acre; HB-1493-A-23 (known as the former Daul property, F-433-2007-655) and consisting of 0.33 acre; and HB-1695-20 (known as the former "Installation Services" property, F-433-2007-661) and consisting of 0.30 acre. All five properties are located in the Village of Hobart, Brown County, Wisconsin.

The Regional Director now moves the Board to remand this matter to her for further consideration. She does not state why she seeks remand nor does she provide a roadmap for her reconsideration of the Tribe's request to accept the parcels into trust status. The Village opposes the motion and argues that the Regional Director should be prevented from obtaining a remand in this appeal, the "decision should stand or fail as it currently

exists,” and the Regional Director should not have “endless opportunities to correct the errors illuminated by an opposing party.” Opposition Brief at 2. The Village maintains that it has expended time, effort, and money in opposing these five proposed fee-to-trust acquisitions and will now incur still further additional expenses if a new decision and record are generated as a result of the remand. The Village also suggests that the Regional Director’s motion is insufficient because she does not assert any reason or justification for her motion nor does she state what she intends to do on remand. The Village cites no support for any of its arguments. Last and in the alternative, the Village urges the Board to vacate the Regional Director’s decision in the event her motion for remand is granted.

We conclude that the Village has not met its burden of convincing us that the Regional Director’s motion should be denied. This burden is a heavy one for it is a hallmark of administrative law that, in the course of governmental decision making, agencies and officials should be able, without penalty, to revisit their decisions and, in the Village’s words, “have a ‘do over,’” Opposition Brief at 2, if the deciding official concludes that it is appropriate and prudent to do so. *See Eifler v. Office of Workers’ Compensation Programs*, 926 F.2d 663, 666 (7th Cir. 1991); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (“Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider. *Albertson v. FCC*, 182 F.2d 397, 399 (D.C.Cir. 1950).”). It is correspondingly rare that remand will be denied.

This Board, as a reviewing authority, possesses no independent authority to dictate to BIA how it should exercise its discretionary authority in determining whether to grant an application to take land into trust for a tribe. *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 48 IBIA 304, 305 (2009). If we were to conclude after review of the parties’ briefs in this appeal that, e.g., the record failed to support the Regional Director’s decision or that the Regional Director failed to consider the arguments of a party or consider the factors for accepting land into trust, we would not reverse the Regional Director, but would vacate the decision and remand the matter for further consideration in light of our decision. *See, e.g., Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187 (2008); *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, 36 IBIA 14 (2001). And even with respect to legal issues that the Board reviews de novo, a remand could further refine the issue, supplement the relevant evidentiary record, or even result in a decision on remand that makes it unnecessary for the Board to reach a particular legal issue.

Here, the Regional Director has not provided any reason for seeking remand, which she need not do, *Roberts County*, 48 IBIA at 305-06, nor is she required to state her intentions on remand. The Regional Director may conclude that she did not fully explain her consideration of the Tribe's request. Or she may conclude that she failed to consider one of the Village's arguments. Or, as the Village apparently fears, the Regional Director may supplement the record, and ultimately issue a new decision that still accepts the five parcels into trust.¹ And any one of these outcomes may be the direct result of "illumination" provided by the Village on appeal to this Board. But that is the function of administrative law: for the agency to afford due process to those who may be adversely affected by a government decision, to listen to and to consider their arguments, and, where appropriate, modify or discard a decision in response. Indeed, we expect the Regional Director to consider and address in her decision on remand the arguments raised by the Village in this appeal.

Finally, the Village asserts that it "*will* have to incur additional expenses briefing this case for a second time if remand is granted." Opposition Brief at 2 (emphasis added). The Village's argument is speculative and it assumes that the Regional Director will reach the same conclusion on remand. But even if that becomes the case, the added expense to an appellant is not a sufficient ground to deny a request from BIA to reconsider a decision. Moreover, because briefing is not yet complete in this appeal, the Village is spared the expense of considering and responding to the Regional Director's answer brief. And, potentially, the Village is spared the expense of future appeals should the Village have remained dissatisfied with the Board's decision of its appeal from the December 16 Decision.

Thus, the Village has not convinced us that the Regional Director's motion for remand should be denied. However, we do agree with the Village's alternate argument that the Regional Director's decision must be vacated. It is ordinarily the Board's practice to do so where BIA has requested a remand. *See Village of Hobart v. Midwest Regional Director*, 53 IBIA 221, 221 (2011).

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 Regional Director's December 16, 2010,

¹ If the Regional Director were to supplement the record, the Regional Director would be required to afford interested parties, including the Village, an opportunity to comment upon the supplemental documents. *See* 25 C.F.R. § 2.21(b); *South Dakota v. U.S. Dep't. of Interior*, ___ F.Supp.2d ___, 2011 WL 1303022, *10-*14 (D.S.D. Mar. 31, 2011).

decision is vacated, this matter is remanded to her for further consideration, and the Village's appeal is dismissed.²

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

² This remand affects only the decision to accept the five properties, identified above, into trust. The Village's appeals of other fee-to-trust land acquisitions decisions by the Regional Director remain pending before the Board. *See, e.g., Village of Hobart v. Acting Midwest Regional Director*, Docket Nos. IBIA 11-045, 10-107.