INTERIOR BOARD OF INDIAN APPEALS

Walter Rosales, et al. v. Sacramento Area Director, Bureau of Indian Affairs

32 IBIA 158 (04/22/1998)

Related Board cases:
34 IBIA 50
34 IBIA 125
Reconsideration denied, 39 IBIA 12

Related Federal case:
Rosales v. United States, 477 F. Supp. 2d 119 (D.D.C. 2007)
Affirmed, No. 07-5140 (D.C. Cir. Mar. 27, 2008)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WALTER ROSALES ET AL.
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-7-A, 97-45-A Decided April 22, 1998

Appeal from a decision concerning recognition of tribal leaders for the Jamul Indian Village.

IBIA 97-7-A dismissed; IBIA 97-45-A affirmed in part, reversed in part, and remanded.

1. Indians: Tribal Organization: Generally--Indians: Tribal Powers: Generally

   Under the Act of May 31, 1994, Pub. L. No. 103-263, sec. 5(b), 108 Stat. 709, codified at 25 U.S.C. § 476(f) and (g) (1994), Congress has eliminated all distinctions between "historic" and "created" Indian tribes.

2. Indians: Enrollment/Tribal Membership--Indians: Tribal Government: Elections--Indians: Tribal Government: Officers

   In the absence of a tribal determination of its membership, neither the tribe nor the Department of the Interior is in a position to know whether only tribal members voted and/or were elected to tribal office in a tribal election.

APPEARANCES: Patrick D. Webb, Esq., San Diego, California, for Appellants Walter Rosales et al.; Eugene R. Madrigal, Esq., Temecula, California, for Raymond Hunter et al.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Walter Rosales, Jane Dumas, Sarah Aldamas, Val Mesa, Joe Comacho, and Karen Toggery seek review of various actions and inactions of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), relating to leadership disputes within the Jamul Indian Village (Village). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses Docket No. IBIA 97-7-A as moot; affirms in part and reverses in part the decision in Docket No. IBIA 97-45-A; and remands this matter for further action in accordance with this decision.

Docket No. IBIA 97-7-A

Appellants filed Docket No. IBIA 97-7-A under 25 C.F.R. § 2.8, which provides procedures for making the failure of a BIA official to issue a decision the subject of an appeal. Appellants sought review of the Area Director's failure to act on their appeal from three decisions issued by the Superintendent, Southern California Agency, BIA (Superintendent), on December 5, 1994; August 3, 1995; and August 4, 1995.

On October 10, 1996, after Docket No. IBIA 97-7-A was filed, the Area Director issued a decision affirming the Superintendent's decisions. Appellants objected to the Area Director's issuance of that decision, arguing that he lacked authority to issue a decision after the matter had been appealed to the Board. At page 1 of an October 24, 1996, order, the Board stated:

> While the Board does not condone the Area Director's action in issuing a decision while an appeal was pending before the Board, it also does not believe any real purpose will be served by ignoring the existence of the October 10, 1996, decision. Accordingly, because that decision affirms the Superintendent's decisions which appellants initially appealed, the Board will treat appellants' original notice of appeal as also being an appeal from the October 10, 1996, decision. This ruling does not in any way limit the issues which appellants may raise during this appeal.

Apparently, Appellants did not receive the Board's October 24, 1996, order before filing a separate appeal from the Area Director's October 10, 1996, decision. Appellants' second appeal was assigned Docket No. IBIA 97-45-A, and was consolidated with Docket No. IBIA 97-7-A.

After further consideration, the Board finds that Appellants have received the relief they sought in Docket No. IBIA 97-7-A; i.e., a decision from the Area Director on their appeals from the Superintendent's decisions. It therefore severs Docket Nos. IBIA 97-7-A and IBIA 97-45-A, and dismisses Docket No. IBIA 97-7-A as moot.

Docket No. IBIA 97-45-A
Background

The Village was organized in 1981 under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1994), 1/ as a community of half-bloods. See 25 U.S.C. § 479:

> The term "Indian" as used in [the IRA] shall include all persons of Indian descent who are members of any recognized

---

1/ All further citations to the United States Code are to the 1994 edition.

> Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. [Emphasis added.]

The materials submitted to the Board by Appellants 2/ show that 20 individuals signed a petition seeking to organize the Village under the IRA, and that BIA found 23 individuals eligible to vote on the proposed constitution. 3/ Of those 23 individuals, 16 voted in an election held on May 9, 1981, concerning the adoption of a constitution under the IRA (constitutional election). The vote was 16 to 0 in favor of the constitution. The constitution was subsequently approved by the Acting Deputy Assistant Secretary - Indian Affairs (Operations) on July 7, 1981.

In summary, the Village's constitution provides that the governing body is "the general council composed of all qualified voters of the village who are eighteen (18) years of age or older" (Art. IV, sec. 1); the general council elects an executive committee from its members (Art. IV, sec. 2); "[a]ll enrolled members of Jamul Village who are eighteen (18) years of age or older shall be entitled to vote in tribal elections" (Art. V, sec. 3); "[a] candidate for a position on the executive committee must be a qualified voter of Jamul Village eighteen (18) years of age or older" (Art. V, sec. 4); and "[t]hirty percent (30%) of the qualified voters shall constitute a quorum at all meetings of the general council" (Art. XI, sec. 3). Article III of the constitution restricts membership in the Village to persons who have at least 1/2 degree California Indian blood quantum.

2/ Although the Area Director provided the Board with the administrative record, consisting of those materials which were reviewed in issuing the decision under review, most of the background information relevant to an understanding of the Village's situation is taken from documents submitted by Appellants. It is clear that even those materials are not complete.

3/ The 23 individuals found eligible to vote were: Henry Aldamos, Sarah C. Aldamos, Tony Camacho, Isabel Cuero, Lupe J. Cuero, Mary A. Cuero, Ramona E. Cuero, Seraphile Helen Helm Cuero, Vivian C. Flores, Gerald Mesa, Leslie A. Mesa, Robert Mesa, Valentine Mesa, William C. Mesa, Eugene Meza, Kenneth A. Meza, Edward Rosales, Joe Luther Rosales, Manuel Rosales, Reginold S. Thing, Carlene A. Toggery, Marie A. Toggery, and Gennie M. Walker.

The petition was signed by some persons who were apparently determined not to be eligible to vote on the constitution. Those persons include "W.J. Rosales," who may or may not be Appellant Walter Rosales, and "Raymond Hunter" (Hunter).

The constitution also shows that a "Walter J. Rosales" was a member of the Election Board.

The events leading up to this appeal began on August 16, 1994, when a faction of the Village lead by Appellant Jane Dumas (Dumas) presented a petition seeking the recall of four tribal officials elected in 1992: Hunter, Chairman; Marcia Goring-Gomez, Committee Member; Mary Alveraz, Committee Member; and Lee Shaw-Conway, Secretary-Treasurer. 4/ In a September 3, 1994, election held by the Dumas faction, the four officials were recalled, and new officials were elected. The new officials elected were Dumas, Chairman (Dumas had been elected Vice-Chairman in the 1992 election); Joe Comacho, Vice-Chairman; Karen Toggery, Secretary-Treasurer; Adolph Thing, Committee Member; and Mary Sanchez, Committee Member.

On December 5, 1994, the Superintendent declined to recognize the results of the September 3, 1994, recall election on the grounds that the election violated the Village's constitution. He further held that BIA would continue to recognize the officials elected in the 1992 tribal election. The Superintendent's failure to include appeal information in this decision tolled the time for filing an appeal. 25 C.F.R. § 2.7(b).

The two factions held separate elections on June 17, 1995. 5/ On August 3, 1995, the Superintendent recognized the results of the election held by the Hunter faction. On August 4, 1995, he declined to recognize the results of the election held by the Dumas faction. Appellants appealed to the Area Director, who, on October 10, 1996, affirmed the Superintendent's decisions.

Appellants sought review of the Area Director's decision. Briefs were filed on appeal by Appellants and by the Hunter faction, which has

---

4/ Article IV, sec. 2, of the Village's constitution provides that "[t]he executive committee shall select a secretary-treasurer to assist them in the administration of tribal affairs. The secretary-treasurer may or may not be a member of the Jamul Indian Village, but shall not be entitled to vote as an officer." It appears, however, that the position of secretary-treasurer has been treated as an elected position.

5/ Both factions also took other actions in the name of the Village. On May 5, 1995, the Hunter faction adopted a resolution identifying members of the Village, and on June 3, 1995, it adopted an ordinance regulating the 1995 election. The Dumas faction adopted an enrollment ordinance on Nov. 19, 1994, and established a tribal court and elected a tribal judge on July 15, 1995. On Dec. 1, 1995, that tribal court entered a default judgment against the four officials who were the subjects of the 1994 recall election and two other individuals. Among other things, the judgment found that those individuals were not tribal members.

On Jan. 31, 1995, Dumas also filed suit in Federal court against the recognized Hunter government. Jamul Indian Village v. Hunter, Civil No. 95-0131-R (BTM) (S.D. Calif.). The court dismissed the case on June 21, 1995, and denied reconsideration of the dismissal order on Dec. 20, 1995.

submitted its filings in the name of the Village. 6/ The Area Director did not file a brief.

Discussion and Conclusions

Although the immediate question raised in this appeal concerns tribal leadership, the Board finds that that question cannot be resolved without first addressing the more fundamental question of tribal membership. In addressing the Village's membership, the Board exercises the inherent authority of the Secretary to correct a manifest injustice or error. 43 C.F.R. § 4.318.

Normally, a tribe has the inherent right to determine its own membership. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); Jamul Indian Village v. Hunter, supra, June 21, 1995, slip op. at 15 ("This Court will not usurp the Tribe's authority to determine who is an Indian and who is a member of the Tribe"); Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163, 171-72 (1995), remanded on other grounds, Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C. 1996). In this case, however, because the Village organized as a half-blood community under the IRA, BIA was responsible for making the initial determination of who was eligible to be a tribal member based on who possessed the requisite 1/2 degree blood quantum to vote on an IRA constitution. Cf. Alan-Wilson v. Sacramento Area Director, 30 IBIA 241, recon. denied, 31 IBIA 4 (1997) (BIA was responsible for making the initial determination of who was eligible to reorganize a tribal government for the Cloverdale Rancheria of Pomo Indians). As mentioned above, BIA found 23 individuals eligible to vote in the Village's constitutional election.

The materials submitted by Appellants strongly suggest that BIA never actually made and/or verified blood quantum determinations. On December 16, 1980, the Commissioner of Indian Affairs wrote to the Superintendent noting, among other things, that not all of the 23 individuals who had been found eligible to vote in the constitutional election could show the required 1/2 degree blood quantum. Despite this concern, the constitutional election was held, and BIA thereafter approved the Village's constitution, acquired land in trust for it, and recognized it as

---

6/ Appellants also purported to represent the Village when they filed their Notice of Appeal. In its Oct. 24, 1996, order, the Board stated that "[t]he Village will not be shown as an appellant because the identity of those individuals who should be recognized as the governing body of the Village is the central question in this appeal."

For the same reason, the group headed by Hunter is deemed to have made its filings on behalf of the Hunter faction, rather than on behalf of the Village.

an entity eligible to receive services from BIA. See Indian Tribal Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982).

Questions about the Village's membership persisted after the constitutional election. At pages 1-2 of a December 22, 1992, letter to Carlene Tesam concerning the 1992 Village election, the Superintendent stated:

> The Jamul Executive Committee is very much aware of the need to formulate a membership roll. This process has been complicated because of our inability to determine degrees of Indian blood for most of the members. * * *
>
> * * * * * *
>
> The [BIA] recognizes that it is the tribe's inherent right to determine its own membership. My staff is available to provide technical assistance to the Executive Committee on this complicated process.

On July 1, 1993, the Director, Office of Tribal Services, in BIA's Central Office (OTS Director), wrote to the Area Director concerning a proposal to amend the Village's constitution to lower the blood quantum for membership from 1/2 to 1/4 degree. The proposed amendment had been submitted by Hunter, who was then recognized as the Village Chairman. The OTS Director stated:

> In 1986, Jamul Village requested assistance from the [BIA] in constructing a membership roll. However, because of the difficulties encountered this has not been possible. * * * [P]ersons on the 1972 California Judgment Roll cannot be used as a base roll since that roll was only a descendency payment roll and did not require a minimum blood degree. * * * The origin and correctness of the 1972 roll cannot be verified. The 1972 California records were retrieved by Agency personnel and there are no available records including probate records that contain blood degrees for any of the Jamul people.
>
> * * * * * *
>
> * * * [W]e understand that the Area Director has disavowed the validity of blood degrees for the 23 family charts submitted to the Commissioner on April 23, 1975, because no records in fact exist which would document the blood degree of any Jamul Indian. In other words, the BIA is unable to document conclusively that the 23 individuals [found eligible to vote in the constitutional election] possessed one-half degree California Indian blood * * *. The origins of the family tree charts are unknown. * * * Thus, it appears that the BIA may

> have prematurely recognized the Village as a half-blood Indian community and mistakenly extended Federal services and benefits to its members.

July 1, 1993, Memorandum at 1-2.

On November 24, 1993, the Area Director responded: "Research of our records reveals that enrollment documents regarding the base members are incomplete or unavailable and therefore cannot be used to substantiate the blood degrees." The original, or "base," members of the Village were the 23 individuals found eligible to vote in the constitutional election.

In addition to the problems in calculating the blood quantums of the original 23 members, it appears that the Village's ability to determine its future membership was hampered by the Department's distinction between "historic" and "created" tribes. On July 1, 1993, the OTS Director informed Hunter that the proposal to lower the blood quantum requirement for membership to 1/4 degree would jeopardize the Village's status as a Federally recognized tribe because the Village was a "created" tribe. The OTS Director stated:

> You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with [BIA] means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. * * * Representatives of the Village opted to seek recognition as a half-blood community even though they were aware of the limitations that result from organizing as a half-blood Indian community.

July 1, 1993, Letter at 2. The OTS Director continued:

> It has been the longstanding policy of [BIA] to require that organizational documents adopted by half-blood communities contain a membership requirement of one-half degree Indian blood or more. Consistent with the intent of [25 U.S.C. § 479], the Department of the Interior has over the more than 50 years since the passage of the IRA interpreted [25 U.S.C. § 479] to mean that those who seek recognition as a half-blood Indian community and subsequently organize under the IRA are forever restricted in their membership. In other words, once a half-blood Indian community, always a half-blood community. Therefore, the Village's proposal to lower the blood quantum from one-half degree California Indian blood to one-quarter

> or more degree is contrary to applicable Federal law and if adopted we would disapprove the constitution or any amendment that contained such language or intent. Any departure from the limitations imposed by [25 U.S.C. § 479] could jeopardize the Village's continued right to Federal recognition and the rights of its members to Federal benefits and services.

Id. at 4.

[1] The distinction which the Department had drawn between "historic" and "created" tribes was addressed by Congress in the Act of May 31, 1994, Pub. L. No. 103-263, sec. 5(b), 108 Stat. 709, which added subsections (f) and (g) to 25 U.S.C. § 476. These subsections provide:

> (f) Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> (g) Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In discussing this act in a July 13, 1994, memorandum to the Assistant Secretary - Indian Affairs, the Department's Solicitor stated that the amendment was intended to end the distinction which had been drawn since at least 1936 between the powers of "historic" and "created" tribes. In a September 9, 1994, memorandum to BIA officials, the Assistant Secretary stated: "Basically, this Act represents an 'equal footing' doctrine for Tribes in that they all have the same sovereignty and political relationship with the United States regardless of the means by which they were recognized or the method of their governmental organization." 7/

It is possible that the Village's membership problem has been allowed to continue because no one was certain what action should be taken in light

---

7/ An appeal concerning Hunter's submission of a second proposal to amend the Village's constitution to lower the blood quantum for tribal membership, apparently submitted after the enactment of this Act, is currently pending before the Board. See Rosales v. Sacramento Area Director, Docket No. IBIA 98-9-A.

of the questions about the blood quantums of the original members and the resulting concern that the Village may have been improperly recognized. However, the Village's status is no longer a question for resolution by the Department. The Federally Recognized Indian Tribe List Act of 1994, Pub.L. No. 103-454, sec. 103, 25 U.S.C. § 479a note, took effect on November 2, 1994. In passing this Act, Congress made it emphatically clear that the Department lacks authority to withdraw recognition of an Indian tribe, and that only Congress has such authority. See H.R. Rep. No. 781, 103rd Cong., 2nd Sess. 2-4, reprinted in 1994 U.S.C.C.A.N. 3768-3770. Therefore, unless at some time Congress acts to "derecognize" the Village, the Village is a Federally recognized Indian tribe which, under new subsections (f) and (g) of 25 U.S.C. § 476, has all of the same rights and authorities as every other recognized Indian tribe, including the right to define its own membership. With the Village's status thus clarified, its members may have an opportunity which has not previously existed to develop membership criteria tailored to their particular situation.

No party to this appeal has submitted any evidence that the original 23 members of the Village ever admitted new members in accordance with Article III, section 1, of the Village's constitution. Thus, it is possible that the only members of the Village at this time are those of the original 23 members who are still living and who have not relinquished their membership in the Village. If the original 23 members have, in fact, admitted new members, they have the responsibility to show that such action was taken in accordance with the constitution and to provide BIA with an up-to-date list of tribal members.

[2] A determination of who is a tribal member must, however, precede any determination of who is a tribal leader. Without knowing who is a tribal member, neither the Village nor the Department is in a position to know whether a tribal election was conducted in accordance with the constitution; i.e., whether only tribal members voted in that election (Art. V, sec. 3) and whether only tribal members were elected to office (Art. V, sec. 4).

The materials before the Board show that persons who were not among the original 23 members have participated in the Village's government, perhaps from the time the Village was first recognized. Clearly, tribal leadership disputes began soon after the Village was recognized, and those disputes frequently centered on the question of who was a tribal member for purposes of voting and/or holding tribal office. See, e.g., Superintendent's Letters of Apr. 29, 1987, to Valentine Mesa; of Sept. 2, 1987, to Vivian Flores; and of Dec. 22, 1992, to Carlene Tesam. These letters show that, at least until 1987, BIA questioned whether persons voting in tribal elections and/or on tribal business were tribal members, but they do not show that BIA consistently asked the same question about persons elected to tribal office.

In regard to the leadership issue presented in this appeal, the Board finds that neither the Hunter faction nor the Dumas faction has shown that

voting in its elections was restricted to tribal members, or that only tribal members were elected to tribal office in its elections. Thus, neither faction has shown that its elections conformed to the Village's constitution. The Board concludes that, in the absence of proof that only tribal members voted and/or were elected to office in any of the three elections at issue in this appeal, Departmental recognition of the results of any of the elections would violate the Village's constitution. It therefore affirms that part of the Area Director's October 10, 1996, decision which declined to recognize the results of the 1994 recall election and of the 1995 tribal election held by the Dumas faction, and reverses that part of the decision which recognized the results of the 1995 tribal election held by the Hunter faction. 8/

The Board is aware that this decision will continue the Village's leadership controversy. In effect, the decision reinstates the officers elected in the 1992 tribal election, which is the last election that is not before the Board in this appeal. The Board notes, however, that Appellants dispute BIA's statement that the 1992 election was uncontested, and that the 1992 election may suffer from the same problems as do the 1994 recall election and 1995 tribal elections.

Another tribal election was held on June 21, 1997, with a run-off election for Chairman being held on July 19, 1997. The Superintendent recognized the results of that election on October 6, 1997. The Board requested position statements from the parties on whether the 1997 tribal election mooted these appeals under Board precedents that a valid tribal election held during the pendency of an appeal from a prior leadership dispute moots the earlier appeal. See, e.g., Villegas v. Sacramento Area Director, 24 IBIA 150 (1993). The Hunter faction argued that the 1997 election was valid and mooted these appeals. Appellants contended that the election was not valid for the same reasons as they raised in this appeal, and further asserted that they had not been informed that BIA had recognized the results of that election and that they were not given appeal rights. Appellants stated that they appealed the Superintendent's recognition of the results of the 1997 election to the Area Director when they

---

8/ Appellants contend that the Department must defer to the default judgment entered by the tribal court established by the Dumas faction. The Board agrees that it has held that the Department should defer to tribal resolution of election disputes. See, e.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996); John v. Acting Eastern Area Director, 29 IBIA 275 (1996); Bucktooth v. Acting Eastern Area Director, 29 IBIA 144, 149 (1996), and cases cited therein. It concludes here, however, that the Department cannot defer to a decision issued by the Dumas court because there is no evidence that that court was established by tribal members in accordance with Art. VIII, sec. 1(e), of the Village's constitution.

Once the Village has resolved its membership issue, it might wish to consider designating or creating a tribal forum for the resolution of future election disputes.

learned of the Superintendent's decision. To the best of the Board's knowledge, the appeal from the 1997 election is still pending before the Area Director, probably awaiting the issuance of this decision.

The possible problems with these two additional elections highlight the seriousness of the failure to resolve the Village's underlying membership controversy. Without such resolution, the Village has not had, and will not have, a solid foundation upon which to build a stable government.

In the meantime, however, BIA and other Federal agencies need to know the identity of the persons with whom they can deal on a government-to-government basis. The materials before the Board show that the Village is participating in several Federal grant and/or contract programs. That participation could be placed in jeopardy if the Village's leadership remains disputed. Expeditious attention by the Village's members to its membership and leadership issues would therefore appear to be of paramount importance.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Docket No. IBIA 97-7-A is dismissed as moot. The Sacramento Area Director's October 10, 1996, decision at issue in Docket No. IBIA 97-45-A is affirmed in part and reversed in part. This matter is remanded to the Area Director with a request to assist the Village's actual members in addressing their membership and leadership problems in light of this decision. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ All motions not previously addressed are hereby denied.