



INTERIOR BOARD OF INDIAN APPEALS

United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional
Director, Bureau of Indian Affairs

47 IBIA 87 (06/04/2008)

Related case:

*United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region
Bureau of Indian Affairs*, Decision of the Assistant Secretary - Indian Affairs
(June 24, 2009)



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

UNITED KEETOOWAH BAND OF)	Order Vacating Decision and
CHEROKEE INDIANS IN)	Remanding
OKLAHOMA,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-68-A
EASTERN OKLAHOMA REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	June 4, 2008

The United Keetoowah Band of Cherokee Indians in Oklahoma (Tribe) appealed to the Board of Indian Appeals (Board) from an April 7, 2006, decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Tribe submitted an application to the Regional Director to accept into trust for the Tribe a 76-acre tract of land, which the Tribe presently owns in fee, located in Sec. 8, T. 16 N., R. 22 E., Indian Meridian, in Cherokee County, Oklahoma. The Regional Director denied the application, relying on her discretionary authority over trust acquisition decisions. Briefing for the Tribe's appeal to the Board was completed in September of 2006. On May 5, 2008, the Board received from the Regional Director a request to have the matter remanded to her for further consideration. The Tribe concurs in the Regional Director's request to give the matter additional consideration.

The request for a remand is opposed, however, by the Cherokee Nation (Nation), which filed a brief in this appeal in support of the Regional Director's decision. In its brief on the merits, the Nation supported the Regional Director's decision as an exercise of her discretionary authority, but also argued that the Regional Director, as a matter of law, could have properly rejected the Tribe's application on the ground that the Nation's consent is required for the trust acquisition and no such consent has been given.¹ In response to the

¹ This legal position of the Nation and the fact that the 76-acre parcel is located within the Nation's former reservation boundaries apparently form the basis for the Nation's claim to be an interested party in this matter. The Board assumes, solely for purposes of this decision, that the Nation is an interested party with respect to the merits of a BIA or Departmental decision regarding the Tribe's trust acquisition application.

Regional Director's request for a remand, the Nation argues that the Regional Director's request comes too late in the proceedings, that no intervening court decision or statutory change has occurred to warrant such an "extraordinary curtailment of the current appeal," and that a remand would be an inefficient use of the parties' and the Board's resources. Cherokee Nation's Response to Appellee's Request for Remand at 1. We question whether the Nation even has standing to oppose a remand, but even if it does, we find none of its arguments convincing. Therefore, we grant the Regional Director's request, vacate her April 7, 2006, decision, and remand the matter for further consideration.

With respect to the Nation's standing to object to the remand, we note that the Nation identifies no right or legally protected interest that it has to force these proceedings to continue or to preclude BIA from reconsidering a decision issued in response to an application submitted by another tribe. The Nation may well be an interested party with respect to a decision on the merits of whether to approve or deny the Tribe's application, but it does not follow that a remand and continuance of the proceedings before BIA adversely affect the Nation in any legally cognizable sense, nor does the Nation's brief in opposition to a remand suggest otherwise. Thus, we question whether the Nation even has standing to oppose the Regional Director's request.

But even assuming that the Nation does have standing to oppose a voluntary remand, its arguments against such a remand in this case are not convincing. The Nation first contends that the Board should deny the Regional Director's request for a remand because her request comes too late — nearly two years after briefing on the appeal was concluded. In support of its argument, the Nation cites several Board cases in which the Board granted a BIA request for a voluntary remand, and in each case the remand was granted shortly after the appeal was filed or during briefing. See, e.g., *Yakama Nation v. Northwest Regional Director*, 43 IBIA 190 (2006); *Guimont v. Acting Great Plains Regional Director*, 40 IBIA 47 (2004). The Nation does not, however, cite any Board decisions that *refused* to grant a BIA request for a voluntary remand based on the length of time that an appeal had been pending before the Board.

In the present case, although briefing was completed in September of 2006, the Board has not yet begun consideration of the merits of this appeal. In addition, the Regional Director's decision in this case was based largely if not entirely on the exercise of discretion.² In matters involving BIA's discretionary authority, the Board lacks authority to

² The Tribe argued that in certain respects, the Regional Director's decision was based on an incorrect interpretation of the trust acquisition regulations, 25 C.F.R. Part 151, but both the Regional Director and the Nation disagreed with the Tribe and argued that the Regional Director relied on the exercise of her discretionary authority.

dictate what decision BIA should reach. *See Kent v. Northwest Regional Director*, 45 IBIA 168 (2007). Thus, regardless of the length of time that an appeal has been pending, if BIA requests a remand in order to further consider a decision that was issued based on its discretionary authority, a refusal by the Board to remand arguably improperly interferes with authority reserved to BIA. We disagree with the Nation's implied argument that the Regional Director has a burden to justify a remand at this late stage in the proceedings. On the contrary, if BIA wishes to give additional consideration to a decision, we think that the burden is on a party opposing a remand to demonstrate compelling reasons why a remand should *not* be granted by the Board.

The Nation argues next that the Regional Director's request should be denied because "no intervening court decision or statutory change has occurred to warrant such an extraordinary curtailment of the current appeal." Cherokee Nation's Response to Appellee's Request for Remand at 1. The Nation fails to cite any authority for the proposition that an intervening court decision or statutory change is *required* before the Board may grant a request from BIA for a voluntary remand, and thus we reject this argument.

As its third argument, the Nation contends that a remand would not serve the interests of judicial efficiency or economy, but will only delay resolution of contested legal issues that will ultimately need to be resolved by the Board. According to the Nation, if, on remand, the Regional Director again denies the Tribe's application to have the land taken into trust, the Tribe will likely again appeal to the Board. On the other hand, if the Regional Director grants the Tribe's application, the Nation will appeal. That may well be the case, but what the Nation fails to acknowledge is that the issues that "ultimately" may need to be resolved by the Board (if this matter does come before the Board again) may differ depending on what new decision BIA issues — in its outcome, its supporting record, and its rationale. In this respect, a remand may well serve the Board's interest in administrative efficiency and economy by avoiding the possibility of issuing what could in effect be an advisory opinion on certain issues. *Cf. Wind River Resources Corp. v. Acting Western Regional Director*, 43 IBIA 1, 2 (2006) (Board does not issue advisory opinions).

Undoubtedly, the Nation prefers to have the current proceedings continued, rather than risk the possibility that the Regional Director might, on remand, reach a different decision. But as we have already noted, the Nation has no legal right to force these proceedings to continue. And of course, if BIA decides, on remand, to approve the Tribe's trust application without the Nation's consent, the Nation's legal arguments presented in its brief in this appeal will have to be fully considered and addressed by BIA.

Indeed, it is far from clear that the "central legal questions" that the Nation wants the Board to resolve would even be addressed by the Board in these appeal proceedings.

Cherokee Nation’s Response to Appellee’s Request for Remand at 2-3. In its opposition to a remand, the Nation argues that “the core issues in dispute are questions of law.” *Id.* at 2. In its brief on the merits, however, the Nation offered a different view by joining BIA in arguing that the Regional Director’s decision was proper as an exercise of discretion and that the decision was made “as if the Cherokee Nation’s consent were not at issue.” Answer Brief of Cherokee Nation at 6. Thus, what may well be the underlying “ultimate” issue for the Nation — whether the Nation’s consent is a legal prerequisite to the Department taking land into trust for the Tribe if the land is within the former boundaries of the Nation’s reservation — is not an issue that the Nation previously suggested needed to be addressed by the Board to decide this appeal.

In summary, we conclude that the Nation, as the opposing party to a voluntary remand and assuming that it has standing to oppose the remand request, has failed to satisfy its burden to show that the remand request should not be granted. To the contrary, a remand will allow the Regional Director to consider and fully address, as appropriate, both discretionary and legal issues relating to the Tribe’s request, including those issues and arguments raised in this appeal that may not have been clearly or fully discussed in the April 7, 2006, decision.

Having fully considered the Nation’s opposition, the Board grants the Regional Director’s request for a remand. On remand, the Regional Director shall address, as necessary and appropriate to support her new decision, the arguments that were raised by the parties in their briefs on appeal to the Board.

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 Regional Director’s April 7, 2006, decision and remands the matter to her for further consideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge