INTERIOR BOARD OF INDIAN APPEALS

Coyote Valley Band of Pomo Indians, Coyote Valley Tribal Council, John Feliz, Jr., Patrick Naredo, Candace Lowe, Kelli Jaynes, Melinda Hunter, John Feliz, Sr., and Richard H. Campbell v. Acting Pacific Regional Director, Bureau of Indian Affairs

54 IBIA 320 (04/18/2012)

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

COYOTE VALLEY BAND OF POMO INDIANS, COYOTE VALLEY TRIBAL COUNCIL, JOHN FELIZ, JR., PATRICK NAREDO, CANDACE LOWE, KELLI JAYNES, MELINDA HUNTER, JOHN FELIZ, SR., AND RICHARD H. CAMPBELL, Appellants,	)	Order Vacating Decisions
v.	)	Docket No. IBIA 12-046
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	April 18, 2012

This appeal involves a tribal governance dispute within the Coyote Valley Band of Pomo Indians (Tribe) and, more specifically, decisions issued by the Bureau of Indian Affairs (BIA) taking sides in the tribal dispute.[1] The BIA decisions were issued in response to a demand from one faction of the Tribe that BIA recognize the ouster of certain incumbent tribal officials. At no time has BIA identified, as justification for taking sides in the tribal dispute, any required BIA action that prompted BIA's intervention and adjudication of issues of tribal law at the time of BIA's decisions.

We vacate BIA's decisions because in issuing them, BIA acted contrary to well-established precedent forbidding such intrusion into tribal affairs in the absence of required Federal action. It is well within BIA's authority to monitor tribal governance disputes, gather information, solicit input from tribal factions, provide neutral assistance to facilitate resolution of a dispute if desired by the parties, and be prepared to issue a decision when some Federal action is required. But, as relevant to this case, BIA must refrain from taking

[1] The BIA Central California Agency Superintendent (Superintendent) issued a decision dated June 24, 2011, which was then affirmed by the BIA Acting Pacific Regional Director (Regional Director) in a decision dated November 15, 2011 (Decision). This appeal is from the Regional Director's Decision.

sides and from issuing a decision, i.e., intervening in the dispute, until some specific Federal action by BIA is both necessary and requires that BIA identify a tribal representative.

Background

The individual appellants who challenge the Decision in this appeal are or were incumbents in all but one of the elected positions on the Tribal Council or General Council who purportedly were ousted by General Council action declaring their seats vacant.[2] The individuals on the Tribal Council whose seats were declared vacant were Appellants John Feliz, Jr. (Chairman) and Candace Lowe (Secretary), in a December 2010 General Council meeting; and John Feliz, Sr. (Historian), Patrick Naredo (Vice Chairman), Kelli Jaynes (Treasurer), and Melinda Hunter (Council Member at Large), in a May 2011 special General Council meeting, at which the General Council's Chief (Richard H. Campbell) purportedly was ousted as well.[3] Appellants dispute the validity of the General Council's actions. The sole Tribal Council member whose seat was not declared vacant by the General Council was Keith Lemieux, Jr., Council Member-at-Large, who then appointed Correy Alcantra as Vice-Chairman of the Tribe and Jamie Naredo (Naredo) as Secretary.[4]

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[2] The Board's caption of the case and the identification of any individuals in their claimed tribal official capacity shall not be construed as expressing any views on the merits of the underlying dispute, on any individual's status or authority, or on the authorization for filing an appeal on behalf of the Tribe or Tribal Council.

The Tribe operates under a "Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians" (Governing Document), enacted by the General Council on October 4, 1980. *See* AR Tab VI, 1. By its terms, the Governing Document was to become effective when ratified by a majority of voters in a special election called by the Secretary of the Interior and when approved by the Secretary, neither of which apparently occurred. Nevertheless, the Tribe apparently accepts the Governing Document as governing its operations.

[3] The Tribal Council consists of a Chairman, Vice Chairman, Secretary, Treasurer, Historian, and, apparently, two Members-at-Large. The General Council consists of all tribal members 18 years of age or older. Governing Document art. V, sec. 1 (AR Tab VI, 1). The General Council elects a Chief of the General Council, also known as its President, who presides over General Council meetings and exercises other authorities under the Governing Document. *See id.*, art. V, secs. 3 & 4.

[4] The minutes from the May 2011 General Council meeting state that Lemieux announced that he would call a special election to fill the remaining positions, but it does not appear that he did so. *See* AR Tab V, 72 at 5 (unnumbered).

On May 22, 2011, Alcantra wrote a letter to the Superintendent advising him of the General Council's actions, stating: "We are letting the BIA know of our actions in order to insure a smooth transition of tribal government." Letter from Alcantra to Superintendent, May 22, 2011 (AR Tab VI, 67). Alcantra continued: "We are informing you for you to notify anyone seeking clarification. Whether it be the [National Indian Gaming Commission], Bank, Investors, the Sheriff or anyone else." *Id*. Alcantra also stated that the government-to-government relationship between the Tribe and the United States requires that the United States "be able to identify properly those elected tribal officials who serve as the interface between the two governments." *Id*. In one of the General Council resolutions approved at the May 2011 meeting, which Alcantra enclosed, the General Council "demand[ed]" that BIA acknowledge the actions taken at that meeting. Resolution No. 05212011-4, May 21, 2011, at 2 (unnumbered) (AR Tab V, 68).

On June 24, 2011, the Superintendent responded to Alcantra's letter and to the resolution demanding that BIA acknowledge that Appellants' seats on the Tribal and General Council had been declared vacant. The Superintendent began by stating that "[t]o pursue the Federal-tribal relationship, [BIA] must be assured that it is dealing with a legally constituted governing body." Superintendent's Decision at 1. The Superintendent did not explain what he meant by to "pursue" the Federal-tribal relationship, nor did he identify any matter before him that required Federal action. The Superintendent then provided an extensive analysis of tribal law, eventually concluding that the actions by the General Council declaring Appellants' seats vacant were valid and that Alcantra should be recognized as Vice Chairman, Naredo as Secretary, and Lemieux as Council Member-at-Large (collectively, the Alcantra Council).[5]

Appellants appealed to the Regional Director. In that appeal, the Superintendent contended that his decision "was based on the General Council's resolution requesting BIA acknowledgment." Memorandum from Superintendent to Regional Director, Aug. 17, 2011, at 1 (AR Tab V, 34). He noted that the Tribal Council and General Council had been "unable to reach a mutual agreement" and that the Tribe was in a constant state of turmoil, which had been ongoing since 2004, if not earlier. *Id*.

The Regional Director affirmed the Superintendent's decision. After stating that the Department of the Interior "has both the authority and the responsibility to interpret tribal

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[5] Although not relevant to our disposition of this appeal, we note as a factual matter that the Superintendent incorrectly described Resolution No. 05232011-1, which confirms Lemieux's appointments of Alcantra and Naredo, as a General Council resolution. *Compare* Superintendent's Decision at 7 *with* Resolution No. 05232011-1 (AR Tab V, 66). In fact, Resolution No. 05232011-1 is a Tribal Council resolution, signed by Lemieux, Alcantra, and Naredo, as the newly-constituted 3-member Tribal Council.

law when necessary to carry out the government-to-government relations with the Tribe," Decision at 2, and after providing his own extensive analysis of tribal law, the Regional Director agreed with the Superintendent's decision to recognize the Alcantra Council. In support of the Superintendent's authority to issue a decision, the Regional Director interpreted the General Council resolution demanding that BIA recognize the General Council's actions as a specific delegation of tribal authority to BIA to issue a decision.[6] The Regional Director found that the Superintendent's action was consistent with that delegation of tribal authority to BIA "and consistent with [the Superintendent's] responsibility to interpret Tribal law when necessary to carry out government-to-government relations with the Tribe." Decision at 6.

Although the Regional Director affirmed the Superintendent's decision to recognize the Alcantra Council, he found no exigent circumstances to justify granting a request by Alcantra to place the Superintendent's decision into immediate effect. *Id*. at 8. He also limited his decision by stating that BIA would recognize the Alcantra Council "for the next 90 days, for the limited purpose of carrying out government-to-government relations and conducting a special election in accordance with Tribal Law." *Id*. The Regional Director did not identify any Federal action that was required for carrying out government-to-government relations with the Tribe, nor did he explain why a BIA decision was necessary for the Tribe to conduct a tribal election under tribal law.

Appellants appealed the Decision to the Board, and upon receipt of the appeal, the Board asked for briefing on two threshold issues: (1) will this appeal be moot on February 13, 2012 (i.e., 90 days after the date of the Decision); and (2) what, if any, Federal action necessitated BIA's recognition decision? On February 10, 2012, the Board received a motion from Appellants to dismiss their own appeal as moot on the grounds that the 90-day period provided in the Decision had expired by its own terms and that the Tribe had conducted an intervening election in December 2011 that had resolved the dispute.[7] The parties briefed the threshold issues and Appellants' motion for dismissal.

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[6] The Regional Director relied on the article in the Governing Document titled "Review and Approval of Enactments," which provides specific procedures for the enactment of *laws* by the *Tribal* Council, and which provides that the *Tribal* Council may submit a tribal *law* to BIA for review, comment, and approval. *See* Decision at 6; Governing Document art. VIII, sec. 3 (AR Tab VI, 1).

[7] Although Appellants moved to dismiss the appeal as moot, they also sought to have an order of dismissal accompanied by an order vacating the underlying BIA decisions, which would effectively grant them the substantive relief they sought through the appeal.

The Regional Director argues that because the effectiveness of the Decision was automatically stayed by operation of law, *see* 25 C.F.R. § 2.6, the next-90-days language should be construed as a 90-day period that would be triggered when the Decision becomes effective, i.e., by action or a decision of the Board. Based on this reasoning, the Regional Director argues that the appeal is not moot because the 90-day period has not yet begun to run. On the second issue, the Regional Director concedes that there was no request for Federal action that prompted the Decision,[8] but argues that a current 3-year Indian Self-Determination and Education Assistance Act (ISDA) contract with the Tribe created "ongoing" Federal action that prompted the Decision. In explaining this "ongoing" Federal action, the Regional Director refers to the requirements of ISDA for BIA to take action upon a request by a tribe to enter into an ISDA contract, the general obligation of BIA to maintain consultation with tribal governments, and an annual obligation to consult on the development of BIA's budget. While not identifying any request from the Tribe, either for approval of an ISDA document or for consultation, that preceded BIA's decisions in this case, the Regional Director submitted to the Board a February 17, 2012, request from the Tribe, through Feliz, Jr., as Chairman, to renew the Tribe's annual funding for its ISDA contract.

In response to the Board's order for briefing on the threshold issues, Alcantra argues that BIA "had an obligation to maintain the government to government relationship." Letter from Alcantra to Board, Feb. 26, 2012, at 2 (unnumbered).[9] According to Alcantra, "[e]verything is based on the [S]uperintendent['s] decision to recognize my tribal council," because third parties look to BIA's decision to decide whom they will recognize. *Id*. On the issue of mootness, Alcantra argues that the Regional Director "should have never included 90 days" in the Decision. *Id*. at 3. In response to Appellants' argument that this appeal has been rendered moot by an intervening tribal election, Alcantra contends that "BIA wanted my tribal council to conduct those elections and we were not allowed to do so." *Id*. at 3. According to Alcantra, "[t]he ex-tribal council still in authority was not suppose[d] to have elections and they did anyway." Letter from Alcantra to Board, Mar. 8, 2012, at 1. Alcantra asks "[h]ow can things be moot when I am not recognized by the

[8] The Regional Director states that there was no "new" request for Federal action that prompted the Decision, but does not identify any "old" and pending request for Federal action that prompted the Superintendent's or Regional Director's decisions.

[9] Alcantra filed responses *pro se*, and does not indicate that he is responding on behalf of the Alcantra Council.

BIA, the tribal council, the election service or the courts?" Letter from Alcantra to Board, Mar. 25, 2012, at 1.[10]

Discussion

Regardless of what the Regional Director may have intended by including the next-90-days language, we vacate the Decision. If the Regional Director actually intended his next-90-days language to mean any, but no particular, 90-day period, to be triggered whenever the Board might place the Decision in effect, the Decision was arbitrary and capricious. The Decision recognized the Alcantra Council for a 90-day period, but the Regional Director now contends, in effect, in order to defeat mootness, that any 90-day period will do. The Regional Director did not ask the Board to place the Decision into effect, and he specifically found that no exigency required placing the Superintendent's decision into effect in November 2011. Moreover, the fact that the effectiveness of BIA's decision is automatically stayed would not prevent the Tribe from conducting elections or otherwise moving forward to resolve its dispute. Thus, in the absence of any explanation from the Regional Director for why recognition of the Alcantra Council should occur for a 90-day period, but need not occur at any particular time, and apparently should take effect at that unspecified time without regard for intervening tribal events, e.g., an intervening election, the Decision is arbitrary and capricious.[11]

If, on the other hand, we were to construe the next-90-days language to mean that the Regional Director intended his decision to be short-term and interim, beginning on the date the Decision issued, this appeal would be moot, but we would still vacate BIA's

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[10] Alcantra states that he has been banned from the Tribe's reservation by a state court restraining order. The reference to "the election service" apparently refers to Indian Dispute Resolution Services, Inc., which apparently conducted a tribal general election on December 6, 2011, which Appellants contend rendered this appeal moot.

[11] Although the Regional Director attempts to argue that the meaning of his next-90-days language should be determined by looking at the regulations — i.e., the automatic stay found in 25 C.F.R. § 2.6 — it is telling that the Regional Director did not submit an affidavit to the Board to simply clarify, as a factual matter, what he intended by including that language. The Regional Director does not contend that he actually considered the effect of this regulatory language when he included the next-90-days language. *Cf. Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 328-29 (2009) (Eastern Regional Director interpreted her own interim recognition, for 6 months, decision to mean 6 months from the date of her decision, and moved to dismiss appeal as moot when the 6-month period expired).

decisions to make clear that they had never taken effect and may not be relied upon as constituting effective BIA action recognizing the Alcantra Council. The Regional Director has simply failed to identify any required Federal action that prompted BIA's decisions.

The Decision expressly declares that BIA has authority and a responsibility to determine whom to recognize as a tribe's representatives when necessary for the government-to-government relationship. But in neither the Decision nor in this appeal has the Regional Director provided an example of BIA action that was "necessary" — at the time of BIA's decisions — to carry out the government-to-government relationship and to serve as the predicate for BIA's intrusion into this tribal dispute. Indeed, the Regional Director himself found insufficient justification to place the Superintendent's decision into immediate effect, and while necessity and urgency are not synonymous, the absence of any urgency 5 months after the Superintendent's decision only underscores that neither the Superintendent nor the Regional Director even attempted to identify any required BIA action that justified issuance of the decisions.

We reject the Regional Director's argument that any time BIA has an ISDA contract with a tribe, that contract creates an ongoing relationship that gives BIA carte blanche to intervene in internal tribal matters, including tribal government disputes. Whether or not the government-to-government relationship with a tribe is characterized as an "ongoing relationship," it still consists of discrete actions, not all of which may be required under Federal law, not all of which are time-critical, and not all of which require interacting with tribal officials involved in a particular dispute.[12]

When a tribe is involved in an internal governance dispute, and BIA takes sides in that dispute, BIA is intruding in the tribe's internal affairs. Whether that intrusion is justified depends on whether some Federal action is required that necessitates a decision by BIA recognizing one or more of the tribe's representatives. No Federal law or regulation requires or authorizes BIA, on an ongoing basis, to assure itself in the abstract that it has identified the properly constituted government of a tribe. And as we have previously held, BIA does not have some general and independent duty to serve as arbiter of tribal disputes for the convenience of a tribe or for third parties dealing with a tribe. *See Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 138, 143-44 (2011); *Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317, 320 n.6 (2010).

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[12] For example, not all interaction between BIA and a tribe regarding the tribe's administration of an ISDA contract, e.g., through which tribal staff provide certain services to tribal members, requires a determination of the tribe's political leadership.

If no BIA action is required, BIA is not obligated to recognize *any* tribal government. *See George v. Eastern Regional Director*, 49 IBIA 164, 186 (2009). In those circumstances, in the interest of respecting and promoting self-determination, BIA should remain neutral regarding a tribal dispute. The Regional Director has recognized this principle in other cases, but failed to adhere to it in the present case. *See, e.g., Del Rosa*, 51 IBIA at 318 (Regional Director vacated a decision by the BIA Northern California Agency Superintendent because there was no pending matter requiring Federal action for purposes of the government-to-government relationship); *cf. Alturas Indian Rancheria*, 54 IBIA at 140 (issuance of a recognition decision in the absence of required BIA action was contrary to both Board precedent and the Regional Director's own practice at other times).

ISDA may require BIA to act on a request for approval of an ISDA document from a tribe, but the Regional Director did not produce or identify any such request as the foundation to justify issuance of the decisions in this case. Similarly, if the Regional Director believed that consultation with the Tribe was required on a particular issue, ISDA-related or otherwise, the Board would expect that at least one of BIA's decisions would have identified that consultation requirement, or that the Regional Director would have identified it on appeal. Finally, with respect to holding a tribal election, nothing in the Governing Document or other tribal or Federal laws requires BIA to authorize, supervise, or conduct the Tribe's elections.[13] The Regional Director addressed the "need" for his decision only in generalities. Thus, we are left with BIA decisions that were issued without any specific need evident in the record.[14]

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[13] We recognize that Alcantra apparently views BIA's recognition decision as necessary to legitimize his Council conducting a tribal election. But the Tribe has inherent authority to conduct its own elections without BIA's imprimatur.

[14] BIA's reliance on its authority to issue a recognition decision *when necessary* for government-to-government purposes, in the absence of any showing of such necessity, is sufficient to vacate the decisions. Thus, we need not address whether BIA would have had authority, in the absence of any government-to-government justification, to adjudicate the tribal dispute based on a purported delegation by the General Council. We note, however, that the Decision's interpretation of the General Council's demand that BIA recognize its actions as a "delegation" to BIA to adjudicate the dispute is questionable at best. For example, the Regional Director's apparent reliance on a provision in the Governing Document pertaining to the *Tribal* (not General) Council's procedures for enacting laws appears to be misplaced. We are aware of no precedent in which the demand by one faction

(continued...)

Conclusion

We vacate the Regional Director's Decision, and the underlying Superintendent's decision, because although BIA has the authority and responsibility to interpret tribal law *when necessary* to carry out government-to-government relations with a tribe, neither the Superintendent nor the Regional Director have identified a single Federal action that necessitated BIA's recognition decisions. And the additional purpose identified by the Regional Director — conducting a tribal election — was a tribal prerogative that undoubtedly did not require any decision by BIA, *see Poe v. Pacific Regional Director*, 43 IBIA 105, 113 (2006), nor does the Regional Director argue otherwise.

After this appeal was filed, and after the Board ordered briefing on the threshold issues, the Regional Director submitted to the Board a request from Feliz, Jr., on behalf of the Tribe, to enter into an annual funding agreement for the Tribe's ISDA contract for 2012. That request is dated February 17, 2012, thus post-dating the Decision by 3 months. While the ISDA request from the Tribe did not and cannot serve as the justification for issuance of either decision underlying this appeal, our disposition of this case will return jurisdiction to BIA to take action on Feliz, Jr.'s request. *Cf. Del Rosa*, 51 IBIA at 320 (vacating recognition decisions that were made without any required BIA action; Board's disposition returned jurisdiction to BIA to act on subsequent ISDA request).[15]

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[14](...continued)
of a tribe to be recognized, in the midst of a tribal dispute, has been construed as a tribal "delegation" to BIA to adjudicate the dispute independent of any Federal source of authority or obligation and independent of a tribal constitution or law that was previously approved by BIA. *Cf. Wandrie-Harjo v. Southern Plains Regional Director*, 54 IBIA 167, 170 & n.3 (2011) ("A demand for recognition, standing alone, cannot form the basis for requiring BIA to do so.").

[15] In considering the ISDA funding request, the Regional Director may not, as suggested in his brief, simply amend the Decision to remove the 90-day limitation and supplement the record with the ISDA contract as the authority for having issued the Decision. The February 17, 2012, request may provide the required basis for a new BIA recognition decision, but that decision must be based upon the underlying ISDA authorizing resolutions and must fully consider Appellants' contention that a tribal election conducted in December 2011, in which Alcantra apparently did not run for office, renders the present dispute moot.

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 decisions of the Regional Director and the Superintendent.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge