INTERIOR BOARD OF INDIAN APPEALS

Committee to Organize the Cloverdale Rancheria Government, Javier Martinez, Sarah Goodwin, Lenette Laiwa-Brown, Gerad Santana, and John Trippo v. Acting Pacific Regional Director, Bureau of Indian Affairs

55 IBIA 220 (08/06/2012)

Related Board case:
52 IBIA 124

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

COMMITTEE TO ORGANIZE THE CLOVERDALE RANCHERIA GOVERNMENT, JAVIER MARTINEZ, SARAH GOODWIN, LENETTE LAIWA-BROWN, GERAD SANTANA, AND JOHN TRIPPO, Appellants,	)	Order Affirming Decision in Part and Vacating in Remaining Part
	)	Docket No. IBIA 10-122
v.	)	
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	August 6, 2012

In this appeal, the Committee to Organize the Cloverdale Rancheria Government (Committee), Javier Martinez, Sarah Goodwin, Lenette Laiwa-Brown, Gerad Santana, and John Trippo (collectively, Appellants)[1] contend that the Bureau of Indian Affairs (BIA) was required, at their request, to issue a decision addressing the merits of an internal governance dispute within the Tribe. We hold that BIA correctly declined to do so because there was no Federal action required at the time from BIA that would have necessitated a decision on the tribal dispute. But while we affirm that conclusion reached by BIA, we vacate the remainder of the BIA decisions at issue in this appeal,[2] because they not only strayed beyond the confines of noninterference in the tribal dispute, but contain dicta that was unsupported, misleading, or incorrect as a matter of law.

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[1] The individual appellants contend that they are the lawful members of the Tribal Council of the Cloverdale Rancheria of Pomo Indians of California (Tribe).

[2] *See* Letter from BIA Acting Pacific Regional Director (Regional Director) to John M. Peebles, Esq., June 3, 2010 (Decision); Letter from BIA Central California Agency Superintendent (Superintendent) to John M. Peebles, Esq., June 19, 2009 (Superintendent's Decision).

Background

The Tribe is among several Indian Rancherias in California that were improperly terminated in the 1950s and 1960s, and then restored to Federal recognition through settlement of the *Tillie Hardwick* class action litigation in 1983.[3] The underlying tribal dispute involves a conflict between Appellants and a tribal council led by Patricia Hermosillo as Chairperson. The Hermosillo-led council (Council) was first established and elected in a 1996 election, which was reaffirmed by the Tribe's members in 1997 as their interim governing body.[4] The Area (now Regional) Director recognized that council "as the rightful governing body" of the Tribe, and that decision was affirmed by the Board. *Alan-Wilson v. Acting Sacramento Area Director*, 33 IBIA 55, 56 (1998).[5] Since then, BIA apparently has conducted government-to-government relations with the Council, including the execution of Indian Self-Determination and Education Assistance Act (ISDA) contracts between the Tribe and BIA.

Appellants contend that the Tribe's members elected the Council in 1996 only as an interim governing body; that the Tribe's government was not "organized" until a Committee-sponsored election was held in 2008 because, until then, the Tribe had not organized under authority contained in the Indian Reorganization Act (IRA), *see* 25 U.S.C. § 476; and that only members of the *Tillie Hardwick* class are eligible to organize the Tribe. The Council disputes Appellants' premise that the Tribe was not organized and that its membership remains limited to the members of the *Tillie Hardwick* class. The Council contends that the Tribe's election of the Council in 1996 constituted the organization of a tribal government, and that nothing required or requires the Tribe to organize under the IRA. The Council also contends that the Tribe expanded its membership in 2003, that the Tribe's membership adopted a constitution in 2007, and that the Committee-sponsored election in 2008 to adopt a constitution was invalid.[6]

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[3] *See* Order Approving Entry of Final Judgment in Action and Stipulation for Entry of Judgment, *Tillie Hardwick v. United States*, No. C-79-1710SW (N.D. Cal. Dec. 22, 1983).
[4] At the time, the individuals who were eligible to vote in the election for a tribal council were the Cloverdale members of the *Tillie Hardwick* class.
[5] It is unclear, and not relevant to our disposition of this appeal, whether the composition of the Council has changed since 1996, e.g., by elections or otherwise. Solely for purposes of this order, the Board treats the Council as the same as, or having continuity from, the tribal council elected in 1996 and recognized by BIA in 1997 as the Tribe's governing body. *See Alan-Wilson*, 33 IBIA at 56.
[6] The Council contends that notice was given in 2003 to members of the *Tillie Hardwick* class concerning the proposed expansion of the Tribe's membership, and that only members of the *Tillie Hardwick* class were permitted to vote on that issue.

Both the Committee and the Council sought to have BIA recognize their respective constitutions as having been validly adopted by the Tribe. The Superintendent concluded that there was no Federal action required of BIA at the time that necessitated a decision from him on the validity or invalidity of the proffered tribal constitutions. *See* Superintendent's Decision at 2; Letter from Superintendent to Patricia Hermosillo, Chairperson, June 19, 2009, at 2.

The Committee appealed to the Regional Director, who affirmed the Superintendent's decision, finding that the record did not reflect that there was any Federal action pending before the Superintendent that would require the Superintendent to identify individuals in the Tribe with authority to act on behalf of the Tribe to carry out the government-to-government relationship with BIA. Decision at 5. The Regional Director also opined, however, that only members of the *Tillie Hardwick* class would be eligible to vote on a tribal governing document, while finding that the Committee had not documented whether only class members had participated in the Committee-sponsored constitutional election. The Regional Director concluded by stating that "[b]ased on [BIA's 1997] decision, the BIA since 1998 continues the government-to-government relationship with the [Council]." *Id*. at 6.

On July 6, 2010, Appellants filed this appeal. On July 9, 2010, Appellants submitted a request to the Regional Director to "modify" the Tribe's existing ISDA contract with BIA "to accurately reflect the current duly-authorized governing body and duly elected officials" of the Tribe. Letter from Javier Martinez to Acting Regional Director, July 9, 2010.[7]

Arguments on Appeal

Appellants present two issues to the Board. First, "did the Regional Director err when he decided that in the absence of a request for separate [F]ederal action, it was not necessary or appropriate for the BIA to determine whether or not to recognize the results of the [Committee-sponsored 2008 and 2009] elections?" Opening Br. at 3. Appellants argue that the "ongoing, continuous and bilateral relationship" between the Tribe and BIA,

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[7] Appellant individuals contend that they were elected to a new Tribal Council in an election held in 2009 pursuant to the 2008 constitution. *See supra* note 1.

After submitting the July 9 request to modify the Tribe's existing ISDA contract, Appellants asked the Regional Director to "reconsider and amend" the Decision, in light of the July 9 request, even though this appeal was pending and Appellants knew that the Regional Director lacked jurisdiction to act on their request. *See Committee to Organize the Cloverdale Rancheria Government v. Pacific Regional Director*, 52 IBIA 124 (2010) (dismissing appeal from inaction).

consisting of "a series of numerous discrete actions," provided both the necessary basis and a sufficient one to require BIA to issue an official determination on Appellants' request that their elections be recognized by BIA. *Id*. at 10. As an "example" of the type of Federal action that must be undertaken, Appellants rely on their post-decisional July 9, 2010, request to the Regional Director to modify the Tribe's ISDA contract as the type of Federal action requiring a BIA decision on the Tribal government dispute. *Id*. at 11.

The Regional Director did not file an answer brief.[8] The Council, answering Appellants' first argument, argues that BIA properly refrained from intervening in the dispute.

The second issue presented by Appellants on appeal is whether the Regional Director erred in finding that BIA had insufficient evidence to determine whether the participants in the Committee-sponsored elections were members of the *Tillie Hardwick* class. Opening Br. at 2. As noted earlier, the Council disputes the premise of the second issue presented by Appellants, arguing that the relevant class of eligible voters for tribal elections consists of the Tribe's current membership, which the Council contends was expanded in 2003 and is no longer limited to *Tillie Hardwick* class members.

Appellants and the Council also suggest that, notwithstanding the limited scope of the issues raised in the appeal, the Board consider resolving additional issues pertaining to the tribal dispute. *See* Tribe's Opposition to Appellants' Opening Brief at 1-2; Appellant's Reply Brief at 2.

Discussion

I. The Regional Director Correctly Concluded that a BIA Decision on the Tribal Dispute was not Required nor Appropriate.

The Superintendent and Regional Director properly declined the Committee's request to issue a decision on the validity of the constitution adopted in the Committee-sponsored election because the Committee's request, standing alone, did not provide a justification for BIA to intrude into internal tribal affairs. As we recently held, "BIA must refrain from taking sides and from issuing a decision, i.e., intervening in [an internal tribal government] dispute, until some specific Federal action by BIA is both necessary and requires that BIA identify a tribal representative." *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320, 320-21 (2012); *see also Pueblo de San Ildefonso*

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[8] After briefing concluded, the Regional Director filed a motion to expedite consideration of the appeal, which the Board denied. *See* Order Denying Expedited Consideration, Feb. 1, 2011.

Council of Principally v. Acting Southwest Regional Director, 54 IBIA 253, 258-60 (2012); *Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 138, 138-39 (2011). In each of those cases, the Board vacated decisions in which BIA had strayed from the correct approach that BIA adopted in the present case. In those cases, we concluded that BIA's decisions were "contrary to well-established precedent forbidding [BIA's] intrusion into tribal affairs in the absence of required Federal action." *Coyote Valley*, 54 IBIA at 320, 327 ("If no BIA action is required, BIA is not obligated to recognize *any* tribal government.").

Appellants do not identify any matter that was pending before BIA at the time they asked BIA to recognize the Committee-endorsed constitution. Instead, Appellants argue that the "ongoing" government-to-government relationship consists of numerous discrete actions, which, taken together, justify and require BIA to issue a decision on the tribal dispute. But it is telling that Appellants fail to identify a single discrete action that was required of BIA at the time they asked BIA to issue a decision on the validity of their constitution. Notably, the only example provided by Appellants of a separate request that arguably might justify or require BIA action is Appellants' July 9, 2010, request for BIA to modify the Tribe's ISDA contract. But Appellants' *post-decisional* request cannot serve as the predicate to either require or justify an *earlier* decision by BIA on the internal tribal dispute. The record before the Superintendent and the Regional Director contained no matter that required Federal action, and thus, on the record before them, BIA was correct in declining the Committee's request to decide the merits of the internal dispute.[9]

Appellants complain that it makes no sense to require BIA to refrain from acknowledging the Tribe's organization or its officials without a simultaneous request for separate Federal action. Appellants suggest that a request for BIA to recognize tribal officials "evades review because the predicate federal action has already taken place or, worse, is awaiting resolution of the leadership dispute." Opening Br. at 11-12 & n.2. The suggestion that the matter evades review because the predicate Federal action has already taken place is without merit. With exceptions not relevant here, the effectiveness of a BIA decision is automatically stayed, unless made effective by the decision maker to whom an appeal may be filed or by expiration of the appeal period in the absence of an appeal. *See* 25 C.F.R. § 2.6. We see no reason why a decision on the predicate Federal action and the decision on the disputed tribal issue (if such a decision is necessary for purposes of taking that action) cannot be considered simultaneously on appeal, just as they must be decided together by BIA. And we disagree that it is "worse" for BIA to refrain from intruding into internal tribal affairs until it must act on a separate matter that requires Federal action, than

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[9] We note that Appellants brought an action in Federal court seeking to have their July 9 ISDA contract modification proposal deemed approved. The court dismissed their claims with prejudice. *See Cloverdale Rancheria v. Salazar*, 2012 WL 1669018, at *8 (N.D. Cal. May 11, 2012).

to give a tribe the maximum opportunity, and the responsibility, to resolve an internal tribal dispute by itself.

As we recently observed, "[i]t 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." *Coyote Valley*, 54 IBIA at 320. None of those activities intrude on tribal sovereignty and self-governance, yet they allow BIA to act when necessary. We reject Appellants' argument that it "makes no sense" to insist that BIA stay out of internal tribal affairs unless and until some separate Federal action is required, and we affirm the Regional Director's conclusion that the Superintendent correctly declined Appellants' request to issue a decision on whether to recognize their constitution as the Tribe's constitution.

II. BIA's Decisions Must be Vacated in Remaining Part.

Although the Superintendent and the Regional Director reached the correct conclusion—to stay out of the tribal dispute because no Federal action was required at the time—both of them nevertheless strayed outside the confines of that decision, and in some cases offered advice that was both misleading and incorrect as a matter of law. For example, the Superintendent appeared to suggest that a tribe to which the IRA applies may only adopt or amend a constitution pursuant to 25 C.F.R. Part 81 and a Secretarial election. Superintendent's Decision at 1.[10] The Regional Director attempted to correct the Superintendent, citing 25 U.S.C. § 476(h), but then suggested, without explanation, that the Tribe is not "organized" and that "only those of the *Hardwick* Class are eligible to participate in the organization of the Tribe's government, including the adoption of governing documents and actions that affect Tribal elections and leadership." Decision at 5. The Decision fails to address the Council's contention that the Tribe is and has been organized since 1996, that its membership expanded in 2003, and that it adopted a written constitution in 2007. And the Decision also fails to acknowledge and address the fact that BIA has conducted government-to-government relations with the Tribe, including entering into ISDA contracts, in the intervening years since the 1996 election. The dicta in the BIA decisions was unnecessary to reach the correct conclusion—declining Appellant's request that BIA recognize their 2008 and 2009 elections.

And finally, notwithstanding his correct conclusion that BIA should avoid deciding matters that are the subject of a tribal dispute when Federal action is not required to carry

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[10] Section 478 of 25 U.S.C. provides that the IRA "shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application." The Tribe voted not to reject the IRA, and thus the IRA applies to the Tribe.

out the government-to-government relationship, the Regional Director concluded by stating that BIA "since 1998 *continues*" to recognize the government-to-government relationship with the Council. Decision at 6 (emphasis added). Whatever the past relationship between BIA and the Council, the fact that there was no pending Federal action that required BIA to issue a decision on the validity of the Committee-sponsored 2008 and 2009 elections, made it equally unnecessary to make a current determination regarding the Council.

Conclusion

Except for the correct conclusion reached by BIA in declining to decide the validity of the 2008 or 2009 elections, and the supporting rationale of noninterference in tribal affairs, we vacate the decisions. We take no position on the issue of the Tribe's leadership, form of organization, or tribal constitution, nor, of course, on its membership.[11]

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 affirms the Regional Director's June 3, 2010, decision in part, and vacates it in remaining part.[12]

I concur:

// original signed	//original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge

[11] The Board lacks jurisdiction to adjudicate tribal enrollment disputes. 43 C.F.R. § 4.330(b)(1).

[12] On November 10, 2011, after briefing was concluded, the Board received, *ex parte*, from Appellant Goodwin, apparently on behalf of the Committee, a letter requesting that the Board "consider a Secretarial election as the resolution to the present problem." Letter from Goodwin to Board, Nov. 4, 2011. *Ex parte* communications with the Board are prohibited, *see* 43 C.F.R. § 4.27(b), but in any event, the Board has no authority, under any circumstances, to call a Secretarial election. We note that BIA previously approved a request from the Committee for a Secretarial election, but when the Board raised questions about whether BIA's decision was properly supported, the *Committee* voluntarily withdrew its request for a Secretarial election and mooted an appeal to the Board by the Council. *See Cloverdale Rancheria v. Pacific Regional Director*, 48 IBIA 308 (2009).