INTERIOR BOARD OF INDIAN APPEALS

Carolyn Lubenau, Bill Sweet, Jolene Williams, Nicholas Burley, Sharon Frelinger, Marilee Mai, Kanium Ventura, Dan Willoughby, Richard Zambrano, and Michelle Wood v. Acting Northwest Regional Director and Puget Sound Agency Superintendent, Bureau of Indian Affairs

56 IBIA 45 (12/11/2012)

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

CAROLYN LUBENAU, BILL SWEET, JOLENE WILLIAMS, NICHOLAS BURLEY, SHARON FRELINGER, MARILEE MAI, KANIUM VENTURA, DAN WILLOUGHBY, RICHARD ZAMBRANO, AND MICHELE WOOD,	)	Order Vacating Decision in Docket No. 12-125 and Dismissing Appeals
Appellants,	)	
	)	Docket Nos. IBIA 12-125
v.	)	13-023
	)	
ACTING NORTHWEST REGIONAL DIRECTOR AND PUGET SOUND AGENCY SUPERINTENDENT, BUREAU OF INDIAN AFFAIRS,	)	
Appellees.	)	December 11, 2012

These two appeals, which we consolidate for purposes of this decision, involve a tribal government dispute within the Snoqualmie Tribe (Tribe). Both appeals to the Board of Indian Appeals (Board) are brought by the same Appellants, who identify themselves, collectively, as the Snoqualmie Tribal Council. Appellants contend that they were elected to the Tribal Council in an election held on June 2, 2012, and should be recognized by the Bureau of Indian Affairs (BIA). We do not reach that issue because we grant a motion from the BIA Northwest Regional Director (Regional Director) to vacate his June 1, 2012, decision (Decision), which is the subject of Appellants' appeal to the Board in Docket No. IBIA 12-125, thereby rendering that appeal moot. And we also dismiss as moot Appellants' second appeal, in Docket No. IBIA 13-023, which sought to compel action by the Regional Director or BIA's Puget Sound Agency Superintendent (Superintendent), because the Superintendent has issued a decision in response to Appellants' demand for action.

Appeal from Decision (Docket No. IBIA 12-125)

In the first appeal, Appellants challenge the Decision, which the Regional Director issued in response to a May 29, 2012, request from Appellants, who at the time identified themselves as the Snoqualmie Emergency Interim Tribal Council (SEITC), to recognize

SEITC; to recognize as valid certain membership meetings held or to be held by SEITC; to recognize the results of a yet-to-be-held June 2 election to be conducted by SEITC; and to fund, assist, and provide support for the June 2 election. Notice of Appeal at 2 & n.2. In the Decision, the Regional Director responded first by stating that he believed the matter involved an internal tribal issue, and by emphasizing that BIA should not involve itself in an internal tribal dispute, unless and until recognition of a tribal government is essential for Federal purposes. In direct response to Appellants' requests, the Regional Director stated that he "will not" recognize the tribal meetings or the results of the election, or provide the assistance requested. Decision at 1.

Appellants appealed the Decision to the Board in their capacity as members of what they contend is the Tribal Council elected on June 2. The Regional Director has moved to vacate the Decision, clarifying that he intended the Decision to avoid any interference with internal tribal matters and that no decision had been made to recognize a tribal government. Thus, to the extent that the Decision's refusal to grant recognition to Appellants might be construed as expressing a view on the underlying merits of their claim, which is not what was intended, the Regional Director asked to have the Decision vacated to make clear that he was not taking sides in the tribal dispute. Appellants oppose the Regional Director's motion, and contend that the Board should reserve ruling on the motion to vacate until after the parties have completed briefing the merits of the appeal.

Appellants argue that the Regional Director should not be permitted to have the Decision vacated unless BIA is prepared to provide Appellants with the affirmative relief that they requested. Appellants' Response to BIA Motion to Vacate, Sept. 20, 2012, (Response) at 4. Contrary to Appellants' suggestion, however, "[a] BIA official has a broad right to seek vacatur of his or her discretionary decision while an appeal is pending before the Board." *Hamaatsa, Inc. v. Southwest Regional Director*, 55 IBIA 132, 133 (2012); *see also Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317, 319 (2010). A party that opposes a BIA motion to vacate a BIA decision that has been appealed has the burden to provide compelling reasons why the Board should not grant the motion. *Hamaatsa*, 55 IBIA at 134 (a party opposing a request from BIA to vacate BIA's decision bears the same burden as one opposing a request from BIA for a voluntary remand); *see also City of Minnewaukan, North Dakota v. Great Plains Regional Director*, 54 IBIA 34, 34 (2011) (setting forth the standard for opposing a motion for a voluntary remand). The fact that Appellants apparently contend that they are entitled to recognition as a matter of law does not relieve them of their burden. Even where a party argues that resolution of a dispute rests on a question of law, the Board has recognized a presumptive right by BIA to address the matter in the first instance. *See United Keetoowah Band of Cherokee Indians v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 89 (2008).

Appellants argue that the Decision "has already had significant ramifications—social and political ramifications that cannot be erased or rewound by merely vacating the [Decision]." Response at 4. But the Decision never became effective because it was appealed. *See* 25 C.F.R. § 2.6; 43 C.F.R. § 4.314(a). Whatever ramifications the Decision had among third parties cannot be attributed to it becoming effective, nor would such ramifications entitle Appellants to some greater relief than removal—by vacatur—of the very source of alleged injury upon which their appeal and their standing are premised. *Cf. Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 332 (2009).[1]

Appellants' real objection to vacatur is not based on what the Decision did, but apparently on what it did not do: they object to the motion to vacate because vacating the Decision would leave unaddressed what Appellants contend is BIA's obligation to recognize them as the Tribal Council, or at least the interim leadership of the Tribe, as a result of the June 2 election. Response at 5.[2] Appellants suggest that the Board at least postpone ruling on the Regional Director's motion, so that if the Board decides to vacate the Decision after briefing on the merits of the appeal, the Board can direct the Regional Director to "recognize[e] the legitimacy of the Snoqualmie Tribal Council." Response at 2. But the Board has no authority in the context of this appeal to grant that relief. Notably, Appellants' request for relief relies on evidence not in the record that post-dates the Decision—the June 2 election. At most, if the appeal had proceeded and the Board had found error in the Decision, we would have vacated it—the very action now requested by the Regional Director.[3]

---

[1] In opposing the Regional Director's motion, Appellants read far more into the Decision than is either evident or—as now clarified by the Regional Director—was intended. The Decision does not address tribal funding or the Tribe's contracts under the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, nor does it recognize any composition of the tribal government.

[2] In their notice of appeal, Appellants identify themselves as the Tribal Council, without qualification. In the Response, Appellants suggest that BIA must at least recognize them as the leadership of the Tribe on an interim basis, for the purpose of maintaining government-to-government relations. Response at 5; *see infra* note 5. The distinction is not material for purposes of our resolution of these appeals.

[3] Moreover, when a BIA decision involves an exercise of discretion, the Board does not substitute its judgment for that of BIA. *See Alturas Indian Rancheria v. Acting Pacific Regional Director*, 54 IBIA 1, 13 (2011).

In summary, Appellants have provided no compelling reasons why the Regional Director's motion to vacate the Decision should not be granted. By vacating the Decision, we nullify the action from which Appellants appealed, thereby rendering this appeal moot.

Appeal from BIA Inaction (Docket No. IBIA 13-023)

In Docket No. IBIA 13-023, Appellants appealed from BIA's failure to issue a decision in response to Appellants' demand, under 25 C.F.R. § 2.8 (appeal from inaction of official),[4] for action on a petition from Appellants to BIA. *See* Letter from Appellants to Regional Director and Superintendent, Sept. 20, 2012; *see also* Letter from Appellants to Regional Director and Superintendent, Sept. 6, 2012 (Petition).[5] Appellants simultaneously directed their demand for action to the Regional Director and to the Superintendent. The Superintendent responded by first setting a timetable for issuing a decision, and then issuing a decision within that timetable, on November 15, 2012. The Superintendent's issuance of a decision renders this appeal from BIA's inaction moot.[6] As we have made clear in previous decisions, an appeal to the Board from alleged BIA inaction

---

[4] Section 2.8 is a mechanism to prompt action by a BIA official. Under § 2.8, a party may demand that a BIA official "either take[] action on the merits of [a] written request within 10 days of receipt of such request . . . or establish[] a date by which action will be taken." 25 C.F.R. § 2.8(a)(3). The official receiving the request must make a decision within 10 days "or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request." *Id*. § 2.8(b). "If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable." *Id*.

[5] Appellants' Petition asked BIA to take several specific actions: (1) deposit all funds provided pursuant to the Tribe's ISDA contracts in an account designated by Appellants, recognize Lubenau as the Tribe's Chairwoman, and provide Appellants at least 60 days to cure the breaches of contract; (2) refuse to recognize the "Expired" Tribal Council, which Appellants contend has served past the expiration of its term; (3) refuse to recognize the results of an August 25, 2012, election and the "8/25" Tribal Council elected on that date; and (4) recognize the election results of the June 2, 2012, General Council meeting, at which Appellants contend they were elected as the interim leadership for the Tribe. Petition at 1-2 (unnumbered).

[6] The Board, of course, lacks jurisdiction to review either action or inaction by the Superintendent. *See* 25 C.F.R. § 2.4; 43 C.F.R. § 4.331(a); *Marruffo v. Southern California Agency Superintendent*, 53 IBIA 276, 277 (2011) ("Appeals from action or alleged inaction by an agency superintendent must first be brought to a BIA regional director."); *Gardner v. Uintah and Ouray Agency Superintendent*, 51 IBIA 166, 167 (2010).

is limited to a review of whether BIA must take action on a request, and does not extend to directing BIA how to act on a request. *See Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 265-66 (2009). Nor would the Board have authority to dictate to BIA at what level a decision on Appellant's Petition must be issued in the first instance. Appellants, having submitted their Petition and their § 2.8 demand to the Regional Director and the Superintendent, and having received a decision from the Superintendent, must first exhaust their administrative remedies within BIA (i.e., by appealing to the Regional Director).

Conclusion

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 grants the Regional Director's motion in Docket No. IBIA 12-125 and vacates the Decision, and dismisses both appeals.

I concur:

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