INTERIOR BOARD OF INDIAN APPEALS

Miami-Dade County, Florida v. Acting Eastern Regional Director, Bureau of Indian Affairs

57 IBIA 192 (07/10/2013)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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MIAMI-DADE COUNTY, FLORIDA, Appellant,	)	Order Vacating Decision and Remanding
v.	)	
	)	Docket No. IBIA 12-152
ACTING EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	July 10, 2013

Miami-Dade County, Florida (County), appealed to the Board of Indian Appeals (Board) from a July 27, 2012, decision (Decision) by the Acting Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the acceptance into trust of 229.3 acres of land, more or less, located in Miami-Dade County, Florida, by the United States for the Miccosukee Indian Tribe of Florida (Tribe). After the County filed its opening brief, the Regional Director requested a "limited remand of two sections of the Decision on appeal, without vacating the [D]ecision." Request for Remand at 1. The Regional Director seeks the remand in order to allow him to address compliance with the National Environmental Policy Act (NEPA) by "conduct[ing] additional detailed NEPA review" and to address BIA's statutory authority to accept the land in trust within the framework set forth in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Request for Remand at 2.

Both the County and the Tribe object to the Regional Director's request for a remand. The County argues that the Board can and should simply reverse the Decision (with no remand) for lack of BIA statutory authority to accept land in trust for the Tribe, or alternatively, that the Board should vacate the Decision if the remand is granted, in accordance with the Board's practice in other cases involving voluntary remands. The Tribe argues that a remand is unnecessary because the *Carcieri* issue can be addressed on appeal and because the Decision already complies with NEPA. If a remand is granted, however, the Tribe agrees with the Regional Director that the Decision should not be vacated. The Regional Director did not file a reply to the objections lodged by the County and the Tribe.

We grant the Regional Director's request for a remand, but we vacate the Decision in its entirety because complying with NEPA involves an exercise of discretionary authority, and thus a remand necessarily requires the Regional Director to reconsider the Decision in

the context of, and pursuant to, the "additional detailed NEPA review," Request for Remand at 2.

When a BIA regional director concludes, for whatever reason, that further consideration is warranted for a decision that has been appealed to the Board, it is entirely appropriate—and the correct course—for the regional director to seek a remand. Vacating the decision as part of a remand order is consistent with the Board's practice in other cases. *See, e.g., Village of Hobart v. Acting Midwest Regional Director*, 53 IBIA 269 (2011). It serves the purpose of allowing BIA to give further consideration to the issue or issues that may have prompted the remand request, while also providing BIA with full authority to address other matters, as appropriate. If, on remand, the regional director concludes that portions of the original decision remain sound, nothing prevents him from reincorporating them in the new decision, addressing as required any arguments raised during the appeal or on remand. And on the other hand, nothing constrains the regional director from changing any and all portions of the decision, including the final conclusion.[1]

In the present case, in addition to the *Carcieri* issue, the County raised in its opening brief several arguments concerning BIA's exercise of discretion in deciding to accept the land in trust, only one of which was directed to BIA's NEPA compliance.[2] Without expressing any views on the merits of the County's arguments, and because the Regional Director has concluded that certain portions of the Decision should be reconsidered, we agree with the County that it is appropriate to vacate the Decision in full. On remand, the Regional Director should address the arguments raised by the County on appeal.[3]

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[1] As we noted in *Hobart*, 53 IBIA at 271 n.1, if the Regional Director supplements the record on remand, he must give interested parties an opportunity to comment on the supplemental materials.

[2] For example, the County argues that the Decision does not give any indication that the Regional Director gave "greater weight" to the County's concerns, based on the off-reservation character of the proposed trust acquisition. *See* 25 C.F.R. § 151.11(b).

[3] As the Regional Director notes, in one trust acquisition case the Board did grant a remand to a regional director that was limited to the issue of BIA's statutory authority to take land in trust for the tribe in that case. *See* Order Vacating Decision in Part and Remanding in Part, May 17, 2010, *Preservation of Los Olivos v. Pacific Regional Director*, Docket No. IBIA 05-050-1. But we still vacated the portion of the decision implicated by the remand. The procedural posture of *Los Olivos* was unusual, *e.g.*, *Carcieri* was issued after the regional director's original decision, and the case was on judicial remand to the Board. As a general rule, we think that attempting to bifurcate a trust acquisition decision should be disfavored. The arguments in favor of bifurcating a BIA decision by granting a limited remand, without

(continued…)

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 Decision and remands the matter to the Regional Director for further consideration and issuance of a new decision.

I concur:

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

(…continued)
vacating the decision, generally rest (at least implicitly) on the assumption that the Board is likely to affirm the non-remanded portions of the decision. That assumption may or may not prove to be correct.