INTERIOR BOARD OF INDIAN APPEALS

Protect the Peninsula's Future v. Northwest Regional Director, Bureau of Indian Affairs

57 IBIA 225 (07/22/2013)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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PROTECT THE PENINSULA'S FUTURE,	)	Order Vacating Decision and Remanding
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 13-099
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	July 22, 2013

Protect the Peninsula's Future (Appellant) appealed to the Board of Indian Appeals (Board) from an April 11, 2013, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept, in trust for the Jamestown S'Klallam Tribe (Tribe), 15.787 acres of land referred to as the "Blyn Basin I Properties" (Properties). In their appeal, Appellants asked that the Decision "be withdrawn or reversed," and requested a "hearing . . . to resolve major issues of fact as to whether the Trust conversion is sufficiently related to" a "proposed" Large On-Site Sewage System (LOSS) to be located on the Properties to require further environmental and cultural reviews by BIA.

Shortly after the appeal was filed, the Regional Director requested that the Board vacate the Decision and remand the matter to him for further action. Appellant now opposes having the Decision vacated and remanded without further proceedings before the Board, arguing that any further delay caused by a remand without resolving the environmental compliance issues will endanger the public health and safety because the Tribe will continue to rely on its failing, existing LOSS. Appellant has not satisfied its burden to show why the Regional Director's motion for a remand should not be granted. "Resolving" BIA environmental compliance issues presumes BIA action to take the Properties in trust. The Board has no grounds to resolve an issue that is rendered moot by the act of setting aside the BIA action that gave rise to the issue. Whether or not some or all of the same issues may arise in a future appeal is speculative, and in any event not a sufficient reason to deny the Regional Director's remand request.

Discussion

A party opposing a regional director's motion to vacate a decision that has been appealed to the Board has the burden to provide compelling reasons why the Board should not grant the motion. *Hamaatsa, Inc. v. Southwest Regional Director*, 55 IBIA 132, 134 (2012) (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 v. Great Plains Regional Director*, 54 IBIA 34, 34 (2011) (standard for opposing a motion for a voluntary remand). "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.*, 55 IBIA at 133; *Village of Hobart v. Acting Midwest Regional Director*, 53 IBIA 269, 270 (2011) ("a hallmark of administrative law [is] that, in the course of governmental decision making, agencies and officials should be able, without penalty, to revisit their decisions"). The Board has rejected the argument that judicial economy and efficiency serve as grounds for denying a motion by BIA to vacate a decision and remand for further proceedings. *Hamaatsa, Inc.*, 55 IBIA at 134.

Although the burden to provide compelling reasons not to grant a remand applies to any party opposing a voluntary remand, including a party who has intervened in support of a BIA decision, *see United Keetoowah Band of Cherokee Indians v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 89 (2008), an appellant faces a unique challenge: having filed an appeal to set aside a BIA decision, the appellant must explain why that relief is no longer acceptable. *Cf.* Notice of Appeal, May 11, 2013, at 5 (asking that the Decision be "withdrawn or reversed"). Often times, an appellant who opposes a voluntary remand wants to have a BIA decision set aside in a particular way, with the Board ruling on particular issues. But as the Board noted in *United Keetoowah*, 47 IBIA at 89, BIA's new decision on remand may obviate any need for the Board to decide some or all of the issues that were raised in a prior appeal.

In the present case, the Decision relied upon a Tribal resolution in which the Tribe states that it no longer intends to build a previously-proposed new LOSS on the Properties, and instead intends to continue the current use of the Properties. Decision at 1-2. Appellant contends that a new LOSS will, and perhaps even should, be built on the Properties to address problems with the Tribe's existing LOSS. Appellant's contention apparently is that building a new LOSS on the Properties is inevitable, and thus reasonably foreseeable, notwithstanding the Tribe's no-change-in-use Resolution, and thus BIA's environmental compliance associated with taking the land in trust must take that into

consideration.[1] As noted, Appellant argues that a remand will only serve to delay the inevitable construction of the sewage system, and that the Board should permit its appeal to continue in order to settle the legal issues related to the sewage system.

But the BIA action at issue in this appeal is the Decision to accept title to the land. The Regional Director decided to accept the land in trust, Appellant asked that the Decision be withdrawn or reversed (thus leaving the Properties owned in fee by the Tribe), and the Regional Director moved to have the Decision vacated (thus leaving the Properties owned in fee by the Tribe, until and unless BIA makes a new decision to accept title to the land in trust). The purported "inevitability" of the construction of a new LOSS on the land is separate and distinct from whether BIA, exercising its discretion, will again decide to accept the land in trust. If BIA, on remand, decides not to accept the land in trust, fee title remains in the Tribe and any BIA environmental compliance obligations that would attach if a contrary decision had been issued never arise. On the other hand, if on remand BIA again decides to accept the land in trust, it should consider and address the arguments raised in Appellant's notice of appeal, to the extent appropriate and relevant to the new decision. *Roberts County v. Acting Great Plains Regional Director*, 48 IBIA 304, 307 (2009).[2]

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 Regional Director's April 11, 2013, decision

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[1] Appellant is concerned that if the Properties are taken into trust based on the no-change-in-use Resolution, the Tribe will then proceed with construction of the new LOSS without having to comply with state environmental laws and regulations and without the need for any new BIA action that would trigger the National Environmental Policy Act.

[2] It is somewhat difficult to discern, from Appellant's pleadings, whether Appellant actually opposes the action requested of BIA by the Tribe, i.e., to accept title to the Properties. In a letter to the Board, Appellant suggests that if the "[Regional] Director can negotiate with the Tribe to establish" a certain condition for a new LOSS, Appellant would not oppose the trust acquisition. *See* Letter from Gerald Steel, Esq. to Board, May 28, 2013, at 2. That suggestion, of course, is only relevant if BIA remains inclined to accept the Properties in trust, and if, as Appellant contends, the Tribe will construct a new LOSS on the Properties. Even if this appeal had proceeded, the Board could not, as suggested by Appellant, have "condition[ed a] remand to require any replacement LOSS on the [parcel] to achieve Class A reclaimed water," nor could we have ordered the Regional Director to do so. *Id*. at 1. Thus, to the extent Appellant may believe that it was entitled to greater relief than having the Decision set aside and the matter remanded, Appellant is mistaken.

is vacated and the case is remanded to him for further consideration and issuance of a new decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Debora G. Luther
Administrative Judge