INTERIOR BOARD OF INDIAN APPEALS

Alturas Indian Rancheria, Phillip Del Rosa, Wendy Del Rosa, Calvin Phelps, and Donald Packingham v. Acting Pacific Regional Director, Bureau of Indian Affairs

54 IBIA 1 (08/05/2011)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ALTURAS INDIAN RANCHERIA, PHILLIP DEL ROSA, WENDY DEL ROSA, CALVIN PHELPS, AND DONALD PACKINGHAM, Appellants,	)	Order Dismissing Appeal in Part, Vacating Decision, and Remanding
v.	)	Docket No. IBIA 11-033
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	August 5, 2011

The Alturas Indian Rancheria (Tribe) is embroiled in a dispute that has split the Tribe's tiny membership into two factions. Appellants[1] Phillip Del Rosa and Wendy Del Rosa control the Tribe's last undisputed Business Committee, which consists of the Tribe's elected leadership.[2] The opposing "Rose Faction" controls the Tribe's last undisputed General Council, which is the Tribe's governing body and which consists of the Tribe's voting members, but which has no leadership positions other than the elected officials who

[1] The appeal was filed in the name of the Tribe and four individuals. The Board's inclusion of the Tribe as an appellant shall not be construed as expressing any view on the merits of the tribal dispute or on the authority of counsel to file the appeal on behalf of the Tribe.

The Board refrained from finalizing a decision in this appeal pending the outcome of settlement efforts directed by the U.S. District Court in *Alturas Indian Rancheria v. Salazar*, No. 2:10-cv-01997-LKK-EFB. Based on the most recent status reports to the Court, it appears that the tribal factions are at an impasse in their efforts to voluntarily resolve the dispute in a mutually acceptable manner.

[2] In an undisputed election held in 2008, Phillip Del Rosa was elected Chairman, Darren Rose was elected Vice-Chairman, and Wendy Del Rosa was elected Secretary/Treasurer.

constitute the Business Committee.[3] The Business Committee and General Council share concurrent authority under the Tribe's Constitution.

The relevance of the tribal dispute to the Bureau of Indian Affairs (BIA), and to this appeal, is that the Tribe's Indian Self-Determination and Education Assistance Act (ISDA) contract to fund its government operations is up for renewal.[4] Both factions submitted proposals to renew the Tribe's contract.[5] At issue in this appeal is the Decision[6] of the BIA Acting Pacific Regional Director (Regional Director) to "accept," on an interim basis, the contract renewal proposal from the Rose Faction, which was supported by a tribal resolution from the last undisputed General Council, which, as noted, is controlled by the Rose Faction. In accepting the Rose Faction's proposal, the Regional Director stated that BIA recognized the last undisputed General Council on an interim basis. The supporting tribal resolution for that proposal grants to the General Council, as a body, the authority to execute, and apparently to administer, the contract. In his decision, however, the Regional Director also stated that BIA will recognize, also on an interim basis, the last undisputed elected leadership of the Tribe (i.e., the 2008 Business Committee controlled by Appellants Del Rosa) for government-to-government purposes. Appellants challenge the Regional Director's decision to accept and award the ISDA contract proposal submitted by the last undisputed General Council controlled by the Rose Faction.

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[3] The Rose Faction consists of Darren Rose, Jennifer Chrisman, and Joseph Burrell. Chrisman and Burrell are brother and sister, as are Phillip and Wendy Del Rosa, and the pairs of siblings are first cousins to each other.

[4] *See* 25 U.S.C. § 450f.

[5] The contract to be renewed appears to be limited to providing funds for staff, office equipment, utilities, and related expenses for the Tribe's government. Neither faction has identified any services to be provided by the tribal government to tribal members, directly or indirectly, through the contract, and the record does not otherwise indicate that tribal government services have been delayed or placed at risk in the absence of the contract renewal. A separate ISDA contract for roads improvement apparently was awarded to the Tribe in 2010. A Notice to Proceed for that contract was addressed to Rose by the BIA awarding official and was signed as acknowledged by Rose. *See* Administrative Record (AR) Tab 6.H. That contract is not within the scope of this appeal, nor does the record provide any information to indicate on what basis BIA accepted the acknowledgment signed by Rose.

[6] *See* Letter from Regional Director to Steven J. Bloxham, Esq. (for Rose Faction), Oct. 22, 2010 (Decision).

Appellants also contend that the Regional Director, in accepting the Rose Faction's ISDA proposal, erroneously recognized the General Council as consisting of five members (the Rose Faction's position), instead of seven members (Appellants' position). The dispute over the size of the General Council arose following a 2009 General Council meeting at which the General Council voted to "adopt" into the Tribe Appellants Phelps and Packingham. Whether Phelps and Packingham were adopted as voting members or only "honorary" members, and whether they are even constitutionally qualified to be adopted as voting members of the Tribe, is a source of dispute between the factions.[7]

We dismiss for lack of jurisdiction those claims raised in this appeal in which Appellants ask us to adjudicate whether Phelps and Packingham are enrolled voting members of the Tribe. The Department's regulations withhold jurisdiction from the Board to adjudicate tribal enrollment disputes. BIA and the Assistant Secretary - Indian Affairs may resolve tribal enrollment disputes to the extent it is otherwise within the Department's authority to do so, but the Board does not have that authority. On the narrower question concerning the portion of the Decision concerning the ISDA contract renewal, we conclude that while it may have been reasonable in theory for the Regional Director to accept, as authorized by the Tribe, the ISDA proposal supported by a tribal resolution enacted by a majority of the last undisputed General Council, the Decision must be vacated for two reasons.

First, the Regional Director failed to address the fact that the Rose Faction's ISDA proposal did not identify the name, title, and signature of the authorized representative of the Tribe for purposes of executing the contract renewal, as required by the ISDA regulations. Instead, the Rose Faction's authorizing resolution purported to "grant" to the collective General Council the authority to "execute" the contract, without designating the name and title of an authorized representative.

Second, even if this defect may be easily be cured, we would still be required to vacate the Decision because it fails to reconcile what appears to be a critical internal inconsistency and fails to clarify precisely who BIA intends to deal with as the Tribe's representative(s) and for what purposes. In order to determine, on an interim basis, "who

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[7] Appellants contend that Phelps and Packingham were adopted as full voting members of the Tribe in 2009. The Rose Faction contends that the two are not qualified under the Tribe's Constitution to be adopted as voting members, that in any event proper procedures were not followed for the two to be adopted as voting members, and that the Tribe only intended to bestow honorary membership on the two.

can act on behalf of the [Tribe] in its government to government relationship with the United States," Decision at (unnumbered) 4, the Regional Director decided that BIA "will recognize" the last uncontested Business Committee, i.e., the 2008 Business Committee controlled by Appellants Del Rosa. The Regional Director also decided that the five-member General Council, controlled by the Rose Faction, is the last undisputed General Council, and declared it to be the General Council "currently recognized" by BIA. *Id*. The Regional Director then decided that BIA should accept and award the ISDA contract proposal that was submitted by that General Council.

But the General Council resolution supporting the Rose Faction's ISDA proposal appears to reserve to the General Council the authority to act in a government-to-government capacity with BIA, and to preclude a role for the Business Committee. Both the Business Committee and General Council share concurrent authority under the Tribe's constitution but are led by opposing factions, and it appears wholly inconsistent and impractical under the circumstances for BIA to recognize both bodies — at least not for the same government-to-government purposes. Particularly when the very purpose of the contract is to fund *tribal government operations*, it is not apparent how the Regional Director could simultaneously accept the Rose General Council's ISDA contract proposal and also recognize the Del Rosa Business Committee. The Regional Director's Decision fails to clarify which officials or representatives of the Tribe BIA will recognize for purposes of the ISDA contract, and why, and therefore we vacate the Decision and remand the matter to BIA.

Background

The Tribe has both a General Council, which effectively consists of all voting members of the Tribe, and a Business Committee, which consists of the Tribe's three elected officials (a Chairman, Vice-Chairman, and Secretary-Treasurer). The Tribe's Constitution declares the General Council to be the "governing body" of the Tribe. *See* AR Tab 7, Ex. K, Constitution of Alturas Indian Rancheria, Modoc County, California (Constitution), art. IV, § 1. The Tribe's Constitution delegates to the Business Committee the authority to promulgate "all ordinances, resolutions, or other enactments of the [Tribe]", and to represent the Tribe "in all negotiations between the [T]ribe and local, state, and federal governments, and other tribes." *Id.* art. VII, §§ 2(a) & (b). The Constitution also delegated to the Business Committee the authority "[t]o administer all lands and assets and manage all economic affairs and enterprises of the [Tribe]." *Id*. § 2(e). Thus, the Business Committee, through authority granted by the Tribe's Constitution, has legislative authority and also executive authority to represent the Tribe in relations with the Federal government and administer the affairs of the Tribe. But then, to round things out, the Constitution provides that the General Council "shall concurrently exercise all powers

delegated to the [B]usiness [C]ommittee." *Id*. art. VII, § 1. The Constitution does not create any separate leadership positions within the General Council, i.e., apart from the elected officials on the Business Committee.

The General Council meeting in which Phelps and Packingham were adopted, or purportedly adopted, into the Tribe occurred in February 2009. It appears that there was already conflict within the Tribe, but the adoptions and disputed membership status of the two exacerbated the conflict when the two aligned themselves with the Del Rosas. In April 2010, each faction held a competing election for the Business Committee. The election sponsored by Appellants included ballots cast by Phelps and Packingham and, not surprisingly, only individuals from Appellants' faction were elected to office. The election sponsored by the Rose Faction excluded Phelps and Packingham, and equally not surprising, resulted in the Rose Faction electing itself to the Business Committee.[8]

As noted earlier, both factions submitted proposals to BIA to renew the Tribe's ISDA contract to fund its government. The Rose Faction submitted a contract renewal request dated February 18, 2010, supported by a General Council resolution passed on February 3, 2010, by a majority of a five-member General Council. *See* AR Addendum I, Tab 13.B. The resolution states that the "General Council grants to its self the authority to execute contract, amend[], and submit for payment requests to the General Council by way of majority vote." *Id*. Phillip Del Rosa submitted a contract renewal request dated April 23, 2010, supported by a resolution passed on the same day by a majority of the 2008 Business Committee. *Id*. Tabs 12 & 12.A.

Initially, in May 2010, the BIA Northern California Agency Superintendent (Superintendent) returned both factions' ISDA proposals on the ground that he lacked jurisdiction to decide which proposal might be authorized by the Tribe because the tribal government dispute was the subject of a then-pending appeal to the Board in *Del Rosa v. Pacific Regional Director*, Docket No. IBIA 10-064. The Rose Faction appealed the Superintendent's May 2010 decision, and a short time later the Board decided *Del Rosa*. *See* 51 IBIA 317 (2010). Thereafter, in the Rose Faction's appeal, the Board affirmed the Superintendent's May 2010 decision, and because *Del Rosa* had been decided, the Board returned the matter, and jurisdiction, to BIA to consider the factions' ISDA proposals on the merits. *See Alturas Indian Rancheria v. Northern California Agency Superintendent*, 52 IBIA 7 (2010). Phillip Del Rosa subsequently submitted another contract renewal

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[8] In the Rose Faction's 2010 election, Chrisman was elected Chairman, Rose was elected Vice-Chairman, and Burrell was elected Secretary/Treasurer.

request to BIA dated July 12, 2010, which was supported by a resolution passed on July 1, 2010, also by a majority of the 2008 Business Committee. *See* AR Tab 7.C.

In an August 18, 2010, decision, the Superintendent again returned the ISDA proposals from both factions, but this time on the ground that he could not determine which of the competing 2010 elections was valid and who were the Tribe's elected officials on the Business Committee. But in the same decision, the Superintendent addressed the tribal membership dispute and concluded that Phelps and Packingham had been adopted as voting members of the Tribe, announcing that future tribal action must reflect involvement of a seven-member General Council.

The individuals comprising the Rose Faction, in their "official capacities" as the Business Committee elected in 2010, and as members of the General Council, appealed to the Regional Director from the Superintendent's refusal to recognize their election and his membership determination. *See* AR Tab 6.3. But neither the Rose Faction nor Appellants appealed from the Superintendent's decision to return the ISDA proposals. Thus, while the tribal leadership and membership disputes were elevated to the next level within BIA, both factions left behind in the administrative proceedings the only reason that had been identified as justifying and requiring BIA's involvement — the competing ISDA contract proposals.

Separately, however, the Rose Faction filed litigation in Federal court seeking to have its contract proposal declared approved by operation of law, *see* 25 U.S.C. 450f(a)(2), on the ground that BIA had not rejected the proposal on the merits within 90 days after it was submitted. *See Alturas Indian Rancheria*, No. 2:10-cv-01997-LKK-EFB (E.D. Cal.). And the Rose Faction, in its "official capacity" as the "governing majority" of the (five-member) General Council and as "the *current officers of the Tribe's Business Committee*," asked the Regional Director to fund its ISDA contract immediately. *See* AR Addendum I, Tab 10, Letter from Steven J. Bloxham, Esq., to Regional Director, July 28, 2010, at 1 (emphasis added). The Rose Faction's request to the Regional Director was not served on Appellants, and because the Rose Faction did not administratively appeal from the Superintendent's action to return its contract proposal, it is unclear what, if any, notice Appellants had that the Regional Director might nevertheless be considering action on the Rose Faction's proposal. *See id*.[9]

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[9] The Rose Faction now asserts that its appeal to the Regional Director included "the return of the Rose Administration's ISDA contract." Rose Faction's Memorandum in Opposition at 16. That assertion contradicts the Rose Faction's earlier representation to the (continued...)

In his Decision, the Regional Director rejected the Rose Faction's arguments that the Tribe had resolved the tribal leadership dispute and that Chrisman, Rose, and Burrell should be recognized as the Tribe's Business Committee as a result of the Rose Faction's 2010 election. Thus, the Regional Director upheld the Superintendent on those issues. In the absence of BIA recognition of either factions' 2010 election, the Regional Director invoked the general rule that, for purposes of the government-to-government relationship, and pending a tribe's own resolution of a governance dispute, BIA may continue the status quo ante by recognizing, on an interim basis, the last undisputed tribal officials. Applying that status quo ante to this case, the Regional Director concluded that BIA would continue to recognize, on an interim basis, the 2008 Business Committee (in which Appellants Del Rosa hold a 2-1 majority) as the Tribe's officials for government-to-government purposes. Despite these unfavorable rulings, the Rose Faction did not appeal the Decision, apparently because two additional determinations by the Regional Director were, or appeared to be, favorable to the Rose Faction.

In favor of the Rose Faction, the Regional Director set aside the Superintendent's determination that the General Council consisted of seven members, finding that the evidence to support the validity of the purported adoptions was inconclusive. In the absence of an affirmative decision on the actual present composition of the General Council, the Regional Director acknowledged that the last undisputed General Council recognized by BIA was the five-member Council, in which the Rose Faction holds a majority, and the Regional Director asserted that the five-member Council was "currently recognized" by BIA. And then, although neither faction had administratively appealed the Superintendent's decision to return the ISDA proposals, the Regional Director decided that BIA should "accept and award" the ISDA contract proposal that the Rose Faction had submitted, because it was supported by a resolution enacted by a majority of the General Council "currently recognized" by BIA. In deciding to accept the Rose Faction's ISDA proposal, the Regional Director appears to have applied and extended the last-undisputed-*officials* rule to the General Council as a *body*, and impliedly to have found that it would be more appropriate to accept an action by the last undisputed General Council than an action by the smaller, last-undisputed Business Committee. The Regional Director did not explain, however, the relationship between his continued recognition of the 2008 Business Committee for government-to-government purposes and his decision to accept and award

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[9](...continued)
Regional Director. *See* AR Tab 6.2, Rose Faction's Statement of Reasons in Appeal to Regional Director, Sept. 20, 2010, at 7 n.1 ("This appeal does not relate to the contract renewal request submitted by the Alturas General Council, through the Rose Administration, on February 18, 2010.").

the ISDA proposal submitted by the Rose Faction, also for government-to-government purposes.

On appeal from the Regional Director's Decision to the Board, Appellants contend that the Board must (1) decide the composition of the General Council as consisting of seven members or reverse what they characterize as the Regional Director's determination that the General Council consists of only five members, and reinstate the Superintendent's seven-member-Council determination, and (2) set aside the Regional Director's decision to accept the Rose Faction's ISDA proposal.

In response, the Rose Faction contends that Appellants lack standing to bring the appeal and also argue, on the merits, that Appellants have failed to demonstrate error in the Regional Director's decision. The Rose Faction also filed a motion for the Board to place the Decision into immediate effect, based on the apparent assumption that placing the Decision into immediate effect would mean that the Rose Faction would gain control of administering the tribal government operations to be funded through the ISDA contract.[10]

The Regional Director filed a motion for expedited consideration of the appeal, which the Board denied without prejudice. The Regional Director did not file a brief on the merits defending the Decision. In a separate letter to Phillip Del Rosa, however, the Regional Director purported to "clarify" the Decision, stating that "the [2008] Business Committee . . . will be recognized to represent the Tribe for purposes of carrying out the federal relationship with the Alturas Rancheria." Letter from Regional Director to Phillip Del Rosa, Mar. 4, 2011. The Regional Director's letter prompted renewed controversy over the Decision, with Appellants suddenly focusing on the portion of the Decision that was favorable to them and arguing that it should be deemed "final" because the Rose Faction did not appeal, and the Rose Faction responding that this portion of the Decision was unnecessary dicta.[11]

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[10] Our disposition of this appeal renders moot the Rose Faction's motion to place the Regional Director's Decision into immediate effect.

[11] The Rose Faction appealed from the Regional Director's March 4 "clarification" letter and the Board summarily vacated it on the grounds that the Regional Director lacked jurisdiction over the subject matter while this appeal was pending. *See Alturas Indian Rancheria v. Pacific Regional Director*, 53 IBIA 100 (2011). Although the letter has no independent effect as a decision, the Board nevertheless finds it appropriate to consider it as a statement of the Regional Director's position as a party to this appeal.

Discussion

I. Standard of Review

The Board reviews questions of law and the sufficiency of evidence de novo. When a BIA decision involves an exercise of discretion, we determine whether BIA considered all legal prerequisites and whether the decision is adequately explained and supported by the record, but we do not substitute our judgment for that of BIA. *See George v. Eastern Regional Director*, 49 IBIA 164, 185-86 (2009), and cases cited therein; *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 318 (2007).

II. Standing

The Rose Faction argues that Appellants lack standing to bring this appeal because Appellants did not appeal from the Superintendent's decision to return their ISDA contract proposal, individual tribal members lack standing to assert tribal interests, and the decision to award the Rose Faction's ISDA contract proposal did not adversely affect any personal interest held by Appellants. According to the Rose Faction, Appellants will not be harmed if the Rose Faction's ISDA contract is awarded to the Tribe.

In order to have standing to appeal to the Board, an appellant must have a legally-protected interest that has been adversely affected by the decision being appealed. *See* 43 C.F.R. § 4.331 (Who may appeal); 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested party"); *see also Parker*, 45 IBIA at 317.

We express no opinion on whether Phelps and Packingham have standing, but we conclude that the Del Rosas have made a sufficient showing to demonstrate their standing to challenge the Decision with respect to the ISDA proposal. First, the fact that the Del Rosas did not appeal from the Superintendent's decision to return their ISDA proposal does not mean that they — as a majority of the 2008 Business Committee — were not injured by the decision to accept the Rose Faction's proposal. Moreover, as noted earlier, *neither faction* appealed from the August 18, 2010, decision by the Superintendent returning the ISDA proposals. In deciding to address the renewal of the competing ISDA contract proposals in the Decision, the Regional Director reopened an issue that had not been within the scope of an appeal, but which the Regional Director had authority to address. Second, the Del Rosas constitute a majority of the 2008 Business Committee, which the Regional Director decided he would continue to recognize — a determination that the Rose Faction did not appeal. The Decision to accept the Rose Faction's ISDA proposal — at least to the extent it might be implemented by allowing individuals other than the Tribe's elected

officials to execute or administer the contract — did, or could, harm the Business Committee's delegated constitutional authority (albeit concurrent with the General Council) "to administer all lands and assets and manage all economic affairs and enterprises" of the Tribe. Constitution, art. VII, § 2(e). The 2008 Business Committee's interest, as represented by a majority on that body — the Del Rosas — and the asserted injury to that interest, are sufficient to give Appellants Del Rosas standing in their official capacities, whether or not they would, as individual tribal members, have standing.

III. Membership Dispute

Appellants contend that by not recognizing Phelps and Packingham as voting members, and thus declining to accept Appellants' 2010 election results, the Regional Director effectively "disenfranchised" Phelps and Packingham. Appellants contend that the General Council intended, and had authority, to adopt the two as full voting members of the Tribe. As relief, Appellants ask the Board to "find and order" that "[t]he Tribe's General Council is comprised of seven (7) members that includes Donald Packingham and Calvin Phelps." Appellants' Statement of Reasons in Support of Appeal at 16. In the alternative, Appellants ask the Board to "reverse" the Regional Director's Decision to the extent it makes a determination regarding the General Council's composition. *Id*.[12]

We dismiss these claims because they ask the Board to determine that Phelps and Packingham are voting members of the Tribe, or to reverse a "determination" that the Regional Director did not make. The Board lacks authority to adjudicate tribal enrollment disputes. *See* 43 C.F.R. § 4.330(b); *Edwards v. Pacific Regional Director*, 45 IBIA 121, 125 (2007); *Vedolla v. Acting Pacific Regional Director*, 43 IBIA 151, 154-55 (2006). Fairly characterized, that is what Appellants ask us to do by requesting an order determining the composition of the General Council and the membership of Phelps and Packingham. The fact that the membership dispute in this case may carry broader implications relating to the Tribe's governance does not change the fact that we lack jurisdiction to grant the relief requested by Appellants. And independent of any jurisdictional issues, we have no basis to "reverse" a "determination" by the Regional Director of the composition of the General Council because the Regional Director made no such determination. Instead, he concluded that the evidence was inconclusive, that he was unable to make such a determination, and

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[12] Appellants also ask that the Board order the General Council to provide notice in accordance with the Tribal Constitution to all members prior to holding meetings and conducting Tribal business. The Board lacks jurisdiction over action or inaction by tribal officials. *See Wasson v. Pyramid Lake Tribal Council*, 51 IBIA 169 (2010); *Pacheco v. Governor, Santo Domingo Pueblo*, 51 IBIA 34 (2009); *see also* 43 C.F.R. § 4.330.

therefore he was resorting to "interim" decisions, based on the last undisputed composition of the General Council (and of the Business Committee), for purposes of dealing with the Tribe.

IV. ISDA Contract Proposal

An ISDA contract proposal must be authorized by an Indian tribe. Subsection (a)(1) of § 450f requires BIA, with exceptions not relevant here, to accept an ISDA contract proposal "upon the request of any Indian tribe by tribal resolution." Subsection (a)(2) authorizes a tribal organization to submit an ISDA proposal to BIA "[i]f so authorized by an Indian tribe" under subsection (a)(1). In addition, in entering into an ISDA contract with an Indian tribe, BIA necessarily must determine which individual(s) is(are) authorized to execute the contract as the official(s) representing the Tribe. To that end, the regulations require that an ISDA contract proposal from a tribe must include "[t]he name, title, and signature of the authorized representative of the Indian tribe . . . submitting the contract proposal." 25 C.F.R. § 900.8(e); *see id*. § 900.12 (contract renewal proposals). The Decision to accept the Rose Faction's ISDA proposal, while simultaneously recognizing the 2008 Business Committee, implicates both the issue of tribal authorization and the issue of which individual(s) may act as the authorized tribal official(s) to execute the contract.

It is well-established that "the ultimate determination of tribal governance must be left to tribal procedures." *Wasson v. Western Regional Director*, 42 IBIA 141, 158 (2006). It is for a tribe, and not BIA, to elect or otherwise designate the tribe's representative(s). *See George*, 49 IBIA at 190. It is equally well-established, however, that "when an intra-tribal dispute has not been resolved and the Department [of the Interior] must deal with the tribe for government-to-government purposes, the Department may need to recognize certain individuals as tribal officials on an interim basis, pending final resolution by the tribe." *Id.* at 186, quoting *LaRocque v. Aberdeen Area Director*, 29 IBIA 201, 203 (1996). The practice of recognizing certain individuals as tribal officials when necessary for government-to-government purposes is normally applied by continuing to recognize the last undisputed officials. *George*, 49 IBIA at 186, citing *Poe v. Pacific Regional Director*, 43 IBIA 105, 112 (2006), and *Rosales v. Sacramento Area Director*, 32 IBIA 158, 167 (1998). That practice, however, is not invariably required, *see Poe*, 43 IBIA at 112 n.10, and thus the decision concerning with whom BIA will deal as a tribe's representative(s) on an interim basis involves an exercise of discretion by BIA.

In the present case, the Regional Director upheld the Superintendent's determination that BIA could not recognize either of the two competing 2010 elections. In

the interim, however, the Regional Director concluded that BIA must "determine who can act on behalf of the [Tribe] in its government to government relationship with the United States." Decision at (unnumbered) 4. Applying the practice of recognizing the last undisputed officials, the Regional Director decided that "until [BIA] is able to recognize the results of a more recent Tribal election, [BIA] will recognize the Business Committee elected in 2008 in the interim." *Id*.

Turning to the ISDA "requests to contract," the Regional Director concluded that although BIA would continue to recognize the individuals elected in 2008 as the Tribe's Business Committee, he would also require that requests to contract be supported by a majority of the last undisputed General Council, which consists of five members. *Id.* The Regional Director recognized that there was an ongoing dispute within the Tribe over its membership and decided, on an interim basis, to rely on the last undisputed composition of the General Council, at least for purposes of deciding to accept an ISDA contract proposal as supported by a valid tribal resolution. *See* 25 U.S.C. § 450f(a)(1) & (2).[13] Because the Rose Faction's ISDA proposal was supported by a majority of the last undisputed General Council, the Regional Director directed the Superintendent to accept and award that contract proposal. Both the Business Committee and the General Council have constitutional authority to enact tribal resolutions, and both have concurrent constitutional authority. In light of these concurrent authorities, and given the fact that the General Council is, institutionally, a more inclusive body, it may well have been reasonable for the Regional Director to accept a resolution by the last undisputed General Council as more acceptable than a Business Committee resolution, for purposes of determining that the ISDA proposal was authorized by the Tribe as required by ISDA.

But the Decision is flawed in two respects. First, it fails to address the fact that the authorizing resolution for the Rose Faction's ISDA proposal purports to reserve to the

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[13] Appellants interpret the Regional Director's acceptance of a resolution passed by the last undisputed General Council as itself a "membership" determination, but we do not construe it as such. In accepting the Rose Faction's ISDA proposal, the Regional Director did not purport to be determining the *present* membership of the Tribe; he only sought to reach back to the recent General Council composition that had been undisputed by either faction.

In recent pleadings to the Board, Appellants now contend that the last undisputed General Council actually consists of four, not five, members, because Appellants suggest that Rose's membership has never been undisputed, and they now purport to dispute it. Appellants did not make that argument to the Regional Director, nor did they raise it in their initial pleadings to the Board, and we decline to consider this new argument at this late stage in the proceedings.

collective General Council the authority to "execute" the contract, and does not identify the name and title of a tribal representative who is, in fact, authorized to execute the contract. An ISDA contract proposal must include such information. This defect might be easily cured on remand, but a more significant flaw in the Decision requires us to vacate it.

The Decision fails to address the apparent conflict between "dueling recognitions" contained in two parts of the same decision that appear to be at odds with the ISDA contract proposal that was accepted by the Regional Director. The tribal resolution supporting the Rose Faction's ISDA proposal grants to the General Council the authority to execute, and apparently to administer the ISDA contract, and seemingly excludes a role for the Tribe's own elected officials. Yet the Regional Director, while recognizing the Rose General Council and accepting its ISDA proposal, also announced that BIA would recognize the 2008 Business Committee, because BIA must determine "who can act on behalf of the [Tribe] in its government to government relationship with the United States." Decision at (unnumbered) 4.[14] If the Regional Director intended to "accept and award" the Rose Faction's ISDA proposal, but to allow the Del Rosa Business Committee to administer it, he failed to address the fact that the authorizing resolution does not appear to contemplate that. On the other hand, if the Regional Director intended to accept and award the Rose Faction's ISDA proposal, and to allow the Rose Faction to execute and administer it, he failed to explain what he intended when he determined that BIA would recognize the 2008 Business Committee for government-to-government purposes, especially when the purpose of the contract is to fund tribal government operations.

Thus, we are left with a Decision that appears to recognize both the last undisputed Business Committee and the last undisputed General Council, both for government-to-government purposes, without reconciling that dual recognition in the context of deciding to accept and award the Rose Faction's ISDA proposal. The Regional Director's Decision involves an exercise of discretion, and when the exercise of discretion is not adequately explained, we must vacate and remand. Because we cannot determine from the Regional

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[14] We note that the Rose Faction describes itself as the "Rose Administration," and in demanding that its ISDA contract be funded purported to be acting *in the capacity of the Tribe's Business Committee elected in 2010*. But the Regional Director's Decision expressly declined to recognize the Rose Faction in that capacity and the Rose Faction declined to appeal that determination.

Director's decision which faction or tribal representative(s) BIA recognizes *for purposes of executing and administering* the ISDA contract, we vacate the Decision and remand.[15]

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 dismisses the appeal in part, vacates the Decision, and remands the case to the Regional Director for further proceedings.

I concur:

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

[15] Upon issuance of a decision by the Regional Director on remand, the Regional Director and interested parties may of course petition the Board to place the new decision into immediate effect. We caution, however, that any such request must provide a clear and convincing reason for such extraordinary relief, and must be supported with a proper evidentiary foundation, and not simply allegations. In this respect, we note that in contrast to other cases in which the Board has placed a tribal recognition decision into immediate effect to ensure that governmental services to tribal members are not interrupted, neither faction in the present case has, to date, identified any actual services to tribal members that hinge on implementation of ISDA contract renewal. *See supra* note 5. The general rule that BIA is required to recognize tribal officials on an interim basis, pending a tribe's resolution of an internal leadership dispute, is largely premised on the principle that BIA may not be responsible for creating a hiatus in the delivery of tribal governmental services to tribal members. Here, it is not apparent what governmental functions or services either faction plans to provide that create exigent circumstances, and thus any motion to place a BIA recognition decision into immediate effect must identify the harm that would be caused if the motion is not granted.