INTERIOR BOARD OF INDIAN APPEALS

Cayuga Indian Nation of New York, Clint Halftown, Tim Twoguns, and Gary Wheeler v. Eastern Regional Director, Bureau of Indian Affairs

58 IBIA 171 (01/16/2014)

Related Board cases:
49 IBIA 164

United States Department of the Interior

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CAYUGA INDIAN NATION OF NEW YORK, CLINT HALFTOWN, TIM TWOGUNS, AND GARY WHEELER, Appellants,	)	Order Vacating Decision
v.	)	Docket No. IBIA 12-005
EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	January 16, 2014

The Cayuga Indian Nation of New York (Nation), Clint Halftown, Tim Twoguns, and Gary Wheeler (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from an August 19, 2011, decision (Decision) of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), concerning the composition of the Nation's Council of chiefs and seatwarmers and the identity of the Nation's representatives for government-to-government relations.[1] The Regional Director decided that the Nation, through its clan mothers, had removed and replaced Halftown, Twoguns, and Wheeler from the Nation's Council, and that the newly constituted Council had appointed new representatives of the Nation for government-to-government purposes.

[1] This appeal involves a dispute concerning the leadership of the Nation. The Board's reference to the Nation and the Nation's Council, in whose name certain pleadings have been filed, shall not be construed as expressing any view on the merits of the dispute or on the authority of any attorney to file pleadings on behalf of either the Nation or the Nation's Council. For purposes of this decision, the Board uses the terms "Council" or "Nation's Council" to refer to the council consisting of chiefs and/or seatwarmers, who are also sometimes characterized as the "representatives" of their respective clans to the Council.

The parties also use the term "representatives" to refer to the two individuals designated by the Council as the Nation's representatives to BIA for government-to-government purposes. It is undisputed in this appeal that the Council currently consists of a total of six individuals—two each from three clans—but three members of the Council are disputed, as are the identities of the Nation's two representatives for government-to-government purposes.

After briefing on the merits of the appeal was completed, the Board denied a motion by the Regional Director and Interested Parties to place the Decision into immediate effect and ordered supplemental briefing by the parties on a threshold issue not previously addressed in the appeal: Was it even appropriate, at the time the Decision was issued, for BIA to issue a decision on the composition of the Council or the identity of the Nation's representatives? *See* Order Denying Motion to Place Decision into Effect, Aug. 28, 2012 (Order Denying Motion).[2]

After considering the supplemental briefs and the record, we conclude that the Regional Director impermissibly intruded into tribal affairs by issuing the Decision. At the time he did so, there was no separate matter pending before BIA that independently required or warranted BIA action which, in turn, made it necessary for BIA to address the internal dispute. We therefore vacate the Decision without expressing any view on the merits of the underlying dispute, the current leadership of the Nation, or the identity or scope of authority of any individual to represent or take action on behalf of the Nation.

Background

I. History of the Tribal Dispute Preceding the Decision

The Nation is governed by oral law and traditions. *See George v. Eastern Regional Director*, 49 IBIA 164, 167 (2009). Cayuga law and traditions "mirror" the law and traditions of the Haudenosaunee (Iroquois) Confederation, of which the Nation is a member. Letter from Keith M. Harper and Daniel J. French to Patrice Kunesh, Oct. 17, 2011 (Administrative Record (AR) Tab 25); *see George*, 49 IBIA at 167.

The Nation has been involved in a governance dispute since 2004, when the Council split into factions. The dispute, as it stood in 2006, was the subject of an earlier appeal in which the Board affirmed a decision by the Regional Director declining a request from one faction to "withdraw" BIA's recognition of Appellant Halftown as the Nation's designated representative for government-to-government purposes as relevant to an Indian Self-Determination and Education Assistance Act (ISDA) contract between the Nation and BIA. *George*, 49 IBIA at 180. BIA's previous identification of Halftown as the Nation's

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[2] The Interested Parties who collectively intervened in this appeal identify themselves as the Cayuga Nation Council and Chiefs William Jacobs and Samuel George; Clan Mothers Bernadette Hill, Inez Jimerson, and Brenda Bennett; Faithkeepers Karl Hill, Alan George, Tammy VanAernam, and Pamela Isaac; and Clan Representatives Chester Isaac, Daniel C. Hill, Justin Bennett, and Samuel Campbell. *See* Motion of Cayuga Council to Have Decision Made Effective Immediately, Sept. 29, 2011, at 1.

representative was based on action by the Council in 2003.[3] In the *George* appeal to the Board, no party challenged the composition of the Council as it stood in 2005, or at least as it was identified by the Regional Director at that time: Appellants Halftown, Twoguns, and Wheeler ("Halftown faction"); and Interested Parties William Jacobs, Samuel George, and Chester Isaac ("Jacobs faction"). *Id*. at 175. In *George*, the Jacobs faction contended that a 5-member "consensus" of the Council (all except Halftown) had acted to remove Halftown as the Nation's representative.[4] Twoguns and Wheeler, who subsequently realigned with Halftown, purported to revoke their consent to remove Halftown. The Regional Director concluded that there was insufficient evidence for him to "withdraw" BIA's recognition of Halftown, whom BIA had previously recognized as the Nation's representative for government-to-government purposes. *Id*. at 180. The Board affirmed that decision.

Even while the *George* appeal was pending, and separate from the issue of whether Halftown was still designated as the Nation's representative, the factions continued to disagree on whether or to what extent actions that had been taken by Halftown had been authorized by a consensus of the Council. Thus, they continued to disagree about whether Halftown, even in the role of representative, was exceeding his authority. Neither the Regional Director nor the Board addressed the scope of authority vested in Halftown as the Nation's representative, with respect to ISDA contracts or any other matters. *Id*. at 165, 187.

In 2008, the Jacobs faction wrote to the Regional Director and asked that a moratorium be placed on fee-to-trust applications that it contended had been submitted by Halftown without having been approved by a consensus of the Council. Letter from Jacobs, George, and Isaac to Regional Director, Jan. 9, 2008 (AR Tab 14F). After *George* was decided, the Jacobs faction continued to take the position that Halftown had not been authorized to submit land-into-trust applications on behalf of the Nation, although in correspondence to the Regional Director and the Assistant Secretary – Indian Affairs (Assistant Secretary) in 2010, the Jacobs faction stopped short of repeating its request for a

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[3] In 2003, following Chief Vernon Isaac's death, the Council consisted of Halftown, Jacobs, Twoguns, and Wheeler. That 4-member Council recognized Halftown as the Nation's representative and Twoguns as an alternate representative. *George*, 49 IBIA at 169. The scope of the representatives' authority is defined by the Council.

[4] The parties agreed in *George* that the Council must act by consensus. In *George*, the Halftown faction argued that consensus "is achieved only when *all* of the members of the Nation's Council are 'of one mind.'" *George*, 49 IBIA at 165; *see also id*. at 188 (Halftown testified that consensus meant unanimity and that disputes were tabled until agreement occurs).

moratorium, but insisted that any lands restored to the Nation must be held by the Nation in the same manner as they had been before they were illegally taken. *See* Letter from Jacobs, George, and Isaac to Assistant Secretary, Nov. 19, 2010 (AR Tab 14G); Letter from Jacobs, George, and Isaac to Regional Director, Nov. 19, 2010 (AR Tab 14G). In May 2011, without addressing the tribal dispute, the Regional Director transmitted the Nation's fee-to-trust application to the Assistant Secretary, recommending approval of a 129.14-acre transaction. *See* Appellants' Consolidated Response, June 6, 2012, Ex. A (Declaration of Halftown) & Ex. [A]12 (Memorandum from Regional Director to Assistant Secretary, May 4, 2011).

In another matter, in 2009, after the Board decided *George*, BIA apparently accepted a proposal submitted by Sharon LeRoy, as the Executive Administrator of the Nation, for a Community Services Program ISDA contract for the years 2009-2012. *See* Appellee's Supplemental Brief, Sept. 24, 2012, at 12 & Ex. B. The Regional Director submitted to the Board a partial copy of the proposal for the contract, but no documentation associated with the Regional Director's consideration and approval of the proposal. No party has disputed the existence of the 2009-2012 contract, but the contract itself is not part of the Regional Director's administrative record for the Decision, nor has any party provided the Board with a copy. Thus, we cannot determine who the actual signatories are to the contract, who is authorized to request drawdowns, and the schedule for drawdowns to fund the contract.

Between 2009, when the Board decided *George*, and 2011, when the most recent developments within the Nation occurred, the dispute between the Halftown faction and the Jacobs faction continued to fester, focusing on what, if any, present-day continuing substantive authority had been vested in Halftown by the Council, and whether the Halftown faction could operate as the Council—i.e., with less than a full 6-member consensus.[5]

[5] Notwithstanding its prior representations, *see supra* note 4, the Halftown faction apparently sometimes takes the position that the Council can take affirmative action (and not simply table a matter) based on the unanimity of only three members of the Council—or at least the three-member Halftown faction if the Jacobs faction is not present. The Jacobs faction accuses the Halftown faction of excluding them from Council meetings, which the Halftown faction denies, and the Halftown faction in turn accuses the Jacobs faction of refusing to participate in Council meetings. Each faction accuses the other of imposing unreasonable pre-conditions for a meeting of the full Council.

II. The Request for BIA to Recognize New Representatives and the Regional Director's Decision

On June 1, 2011, the Nation's Turtle Clan Mother, Brenda Bennett (Bennett), wrote to the Regional Director "in reference to the serious and critical issues facing the Cayuga Nation community," complaining about the Halftown administration's allegedly hostile treatment of Nation citizens who expressed disagreement with the Halftown faction, and advising the Regional Director that Twoguns and Wheeler had been "released" as the Turtle Clan representatives (to the Council), and had been replaced with Justin Bennett and Samuel Campbell. Letter from Brenda Bennett to Regional Director, June 1, 2011 (AR Tab 5). Bennett asked that the two newly-selected individuals "be officially recognized by [BIA]." *Id*. at 2 (unnumbered). She enclosed a summary of "Concerns/Issues" regarding the Halftown-controlled government, and also enclosed "Cayuga Nation Resolution 11-001," titled "Cayuga Nation Composition of Federal Recognition." AR Tab 5.

Resolution 11-001 recites that the Council, in addition to Jacobs, George, and Isaac (whose positions on the Council are undisputed), now includes representatives Justin Bennett and Samuel Campbell (for the Turtle Clan) and seatwarmer Dan Hill (for the Heron Clan), replacing Twoguns and Wheeler (Turtle Clan), and Halftown (Heron Clan), who are no longer recognized by their clan mothers as representatives to the Council.[6] The Resolution also states that Halftown and Twoguns are no longer recognized as the Nation's representatives to BIA, and have been replaced by Jacobs and George. *Id*.

Bennett's letter was followed by another letter from an attorney for Interested Parties, referring to the "newly unified" Council and the "historic unity" among the Council, "the three Cayuga Clan Mothers and the Nation's Faithkeepers." Letter from Joseph J. Heath to Regional Director, June 9, 2011 (AR Tab 8). Heath urged the Regional Director "to promptly recognize the newly constituted Cayuga Nation government and representatives, as affirmed in Resolution # 11-001." *Id*. at 1. Heath outlined the events leading up to the changes, including a litany of complaints against the Halftown faction. The letter explained how Twoguns and Wheeler had been removed by Clan Mother Bennett. It did not articulate the circumstances of Halftown's removal from the Council, but asserted that even if Halftown argued that he had not properly been

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[6] Although Resolution 11-001 identifies Dan Hill as a seatwarmer for the Heron Clan, it also recites that Clan Mother Bernadette Hill appointed "Karl Hill, currently serving as a Faithkeeper, as the duly recognized Heron Clan Representative," and the Resolution itself is signed by "Karl Hill – Faithkeeper, Heron Clan Representative," but not by Dan Hill. As noted earlier, *supra* note 2, Interested Parties identify Dan Hill as a clan representative and Karl Hill as a faithkeeper.

removed, his refusal to attend or participate by telephone in the Council meeting allowed the five Council participants to act by consensus to remove him as the Nation's representative to BIA. *Id*. at 6-7.

The Halftown faction responded and asked the Regional Director to reject, on the merits, or as in part barred by the preclusive effect of the *George* decision, the Jacobs faction's request that he find that Halftown and Twoguns are no longer the Nation's designated representatives for government-to-government purposes. *See* Letter from Daniel J. French to Regional Director, June 24, 2011 (AR Tab 13). Additional correspondence from attorneys for both factions followed, with each side arguing the merits of the tribal issues and urging for or against BIA recognition of a new composition of the Council and newly designated representatives. *See* AR Tabs 15, 16, 18.

On August 19, 2011, the Regional Director issued the Decision. The Decision begins by stating that BIA had been informed in early June by members of the Nation that some clan representatives had been removed and new representatives appointed. Although no faction had suggested that the purported developments within the Nation would affect the administration of the Nation's Community Services ISDA contract (and if so, how), nor did Resolution 11-001 refer to any changes in the administration of the Nation's existing ISDA contract, the Regional Director stated that "[f]or the limited purpose of determining to whom BIA funds are appropriately directed in carrying out the government-to-government relationship, the BIA, in its capacity as a steward of federal funds and programs . . . can only recognize or not recognize the actions of a nation in choosing its leaders. That is the limited scope of this determination." Decision at 2. The remainder of the Decision addressed the merits of the tribal dispute, concluding that "for purposes of the government-to-government relationship between the United States and the Cayuga Nation, I recognize the Nation Council as set out in Cayuga Nation Resolution 11-001," and "recognize . . . Jacobs and . . . George as the federal representatives designated by the new Nation Council." *Id*. at 4.

III. Appeal Proceedings and Briefing on Whether the Regional Director Was Justified in Addressing the Tribal Dispute

The Halftown faction appealed to the Board. Interested Parties quickly responded by filing a motion to have the Decision placed into immediate effect, pursuant to 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314(a), or in the alternative, for expedited consideration of the appeal. Subsequently, the Regional Director also filed a motion to make the Decision effective immediately. The Board allowed briefing on the motions to place the Decision into effect, and subsequently took the motions under advisement and ordered briefing on the merits.

On August 28, 2012, the Board denied the motions to place the Decision into effect, finding that the Regional Director and Interested Parties had not demonstrated that compelling circumstances existed that warranted such action by the Board. Critically, in denying the motion, we found that we were "unable to determine, as a threshold matter, what specific request for action or decision was pending before the Regional Director at the time of the Decision that required BIA to address the tribal dispute and to make any determination on the composition of the Nation's Council or its representative(s)." Order Denying Motion at 2.

The Board ordered supplemental briefing from the parties to address several Board decisions issued since *George*—none of which had been mentioned by the parties—that reemphasized, reiterated, and applied, as relevant to tribal disputes, the principles of tribal self-determination and sovereignty, and the corresponding principle of BIA noninterference in those disputes unless required. *See, e.g., Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220 (2012) (affirming BIA decision not to address a tribal dispute on the ground that there was no Federal action required, but vacating—on that same ground—the portion of the decision that purported to "continue" to recognize the council with which BIA had a past relationship). The Board ordered the parties to identify what separate request or matter was pending at the time the Decision was issued (1) that required BIA action; and (2) which, in order to take that action, required BIA to decide the composition of the Nation's Council or the identity of the Nation's representative(s) for the matter at issue. Order Denying Motion at 3-4.

In response, Interested Parties and the Regional Director argue, first, that BIA has an independent, stand-alone obligation to intervene and decide a tribal government dispute when BIA's failure to do so would leave the tribe without an operative government. Second, they argue that even if no such stand-alone obligation exists, there were three separate matters that required BIA action at the time the Decision was issued, which in turn required the Regional Director to address the tribal dispute on the merits: (1) a pending agreement between the U.S. Department of Homeland Security (DHS) and the Nation; (2) a request by Interested Parties that the Department of the Interior (Department) stay further consideration of the fee-to-trust application submitted by Halftown; and (3) BIA's need to know to whom to direct funding for an existing ISDA contract with the Nation.

Appellants argue that the Decision should be vacated because BIA does not have authority to intervene in a tribal dispute unless a separate matter requires BIA action and, in turn, implicates the government-to-government relationship and necessitates a BIA decision addressing the merits of a tribal dispute. Appellants contend that none of the three matters posited by Interested Parties and the Regional Director triggered a need for BIA action which, in turn, required the Regional Director's issuance of a decision addressing the tribal dispute.

Discussion

We agree with Appellants that the Regional Director committed procedural error in issuing the Decision, and therefore we vacate the Decision. We address in turn each of the arguments raised by Interested Parties and the Regional Director.

I. Does BIA have an Independent Obligation to Intervene and Decide a Tribal Government Dispute Whenever a Tribe Appears Incapable of Resolving the Dispute by Itself?

Interested Parties and the Regional Director argue that when there is a dispute within a tribe over the leadership of the tribe, BIA has an independent obligation to decide whom to recognize when internal tribal processes for resolving the dispute have been exhausted and there is a danger that the tribe may be incapable of sorting out the dispute by itself, thus leading to tribal governmental paralysis. Interested Parties' Supplemental Brief, Sept. 24, 2012, at 1, 4. The Regional Director contends that issuance of the Decision was necessary and justified because BIA has an obligation to ensure "that the Nation is not left with an inoperative government." Appellee's Supplemental Brief, Sept. 24, 2012, at 2; *see id*. at 3 ("BIA cannot refrain from recognizing a tribal leader when the effect is to leave a tribe without a functional government."). The Regional Director contends that the Decision was predicated on his understanding that the Nation was "at an impasse, with no ability to achieve effective government." *Id*. at 17.

The Regional Director cites our decision in *George*, involving an earlier iteration of the same tribal dispute, as establishing "an important exception" to the general rule that BIA may not render a tribal leadership recognition decision in a vacuum, because in *George* the parties did not dispute the need for a BIA recognition decision, yet no discrete and separate matter requiring BIA action was identified. Appellee's Supplemental Brief, Sept. 24, 2012, at 3. The Regional Director suggests that it would be a change in Board precedent if the Board were to hold that BIA was not permitted to intervene in the dispute in order to ensure that the Nation has a functional government. *Id*.

In our view, the Regional Director and Interested Parties read judicial and Board precedent too broadly, but to the extent Board precedent may be unclear or even arguably inconsistent, we clarify and confirm our conviction that more recent Board precedent more accurately and correctly reflects the principles of tribal sovereignty and self-determination that serve to constrain BIA's intrusion into internal tribal disputes, unless it is truly necessary as an incident to satisfying some separate Federal obligation.

At least since 1996, the Board has recognized that BIA has the authority to make a determination on tribal leadership "when the situation [has] deteriorated to the point that recognition of some government was *essential for Federal purposes*." *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130, 145 (1996) (emphasis added). A corollary is that BIA has "both the authority and responsibility to interpret tribal law *when necessary to carry out the government-to-government relationship* with the tribe." *United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75, 80 (1992) (emphasis added); *see also Ransom v. Babbitt*, 69 F. Supp. 2d 141, 151-52 (D.D.C. 1999) (Department has authority to review tribal procedures "when it is forced to recognize" tribal leadership). And it is well-established that in executing responsibilities for carrying on government relations with a tribe and providing necessary day-to-day services, *BIA* may not effectively *create* a hiatus in tribal government by simultaneously recognizing two tribal governments or declining to recognize any tribal government. *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983).

But disfunctionality or even paralysis within a tribal government, standing alone, does not necessarily, or even ordinarily, mean that *BIA* has created a hiatus in the tribal government, nor does it trigger some free-standing obligation for BIA to end the stalemate to ensure that the tribal government remains functional, even when the government-to-government relationship is not, at the time, implicated in any concrete way. As Appellants argue, and as the Board has held, no statute or regulation imposes on BIA a free-standing obligation to intervene in a tribal dispute solely for the *tribe's* sake—i.e., to save a tribe from its own disfunctionality, even when the tribal dispute has not yet in fact affected BIA's ability to carry out its responsibilities. *See* Appellants' Supplemental Brief Reply Brief, Oct. 15, 2012, at 7 (citing *Alturas Indian Rancheria v. Pacific Regional Director,* 54 IBIA 138, 143 (2011)); *see also Wasson v. Western Regional Director*, 42 IBIA 141, 153 (2006) (the appellants' request for recognition was "fatally flawed because it does not seek recognition for the purpose of the conduct of any specified BIA function or program").

The Regional Director relies in part on our decision in *LaRocque v. Aberdeen Area Director*, 29 IBIA 201 (1996), arguing that in *LaRocque* we affirmed a BIA area director's recognition decision when his interpretation of tribal law was not only reasonable "but also avoid[ed] the absurd result of rendering the tribal government totally inoperative." Appellee's Supplemental Brief, Sept. 24, 2012, at 15 (quoting *LaRocque*, 29 IBIA at 204). But that case does not stand for the proposition that BIA may intervene in tribal affairs whenever necessary to prevent a tribal dispute from rendering a tribal government totally inoperative. The Board's language must be read in context: The Board was justifying the reasonableness of BIA's interpretation of tribal law, not addressing whether BIA's intervention itself was justified. That issue—whether there was a matter pending that permitted BIA to issue a decision that interpreted tribal law—had been addressed earlier in the decision. *See LaRocque*, 29 IBIA at 202 ("the Area Director notified the Tribe that

matters were pending which required the recognition of a tribal government for the purposes of carrying out the Federal government-to-government relationship").

Nor does the Federal court decision in *Winnemucca Indian Colony v. United States*, 837 F. Supp. 2d 1184 (D. Nev. 2011), which is also relied on by both the Regional Director and Interested Parties, support their position. In *Winnemucca*, the Colony sued the United States for interfering with its own activities on tribal trust lands. *See id*. at 1187-88. The suit was prompted when BIA law enforcement officers threatened to arrest individuals for trespass on tribal trust land. The individuals had been authorized to be there by Thomas Wasson, as Chairman of the Winnemucca Indian Colony. BIA's actions regarding possible trespass on lands owned by the United States in trust for the tribe—whether or not otherwise misguided in that case—implicated Wasson's authority and status. *See also Wasson v. Western Regional Director*, 52 IBIA 353, 358-60 (2010) (ordering BIA to address an earlier trespass allegation by the Wasson faction, and recognizing that BIA's decision may need to address the tribal government dispute).

We recognize that while the principle that BIA has the authority to intervene in tribal disputes "when necessary to carry out the government-to-government relationship with [a] tribe," *United Keetoowah*, 22 IBIA at 80, has been often stated, the predicate—that such intervention be based, in fact, on necessity—has not always been raised by parties to appeals, nor has it necessarily been raised or expressly addressed *sua sponte* by the Board. For example, in *George*, the parties did not dispute the premise that BIA recognition of a tribal representative was necessary for conducting government-to-government business, as relevant to an ISDA contract. *See George*, 49 IBIA at 164, 187. It may well be that the premise should have been questioned or more closely examined. What is more important, in our view, is that in *George*, the Board plainly reaffirmed the principle that "[r]ecognition is not required in the abstract," and that BIA is not required to make *any* recognition decision if it is not needed for government-to-government purposes. *Id*. at 186. Thus, we reject the Regional Director's argument that *George* should be read as creating an exception to the rule that BIA is precluded from intervening in tribal disputes unless essential for Federal purposes.

Instead, we reaffirm the Board's case law that principles of tribal sovereignty and self-determination must prevail, and must act as constraints on BIA intervention, when there is no separate matter that requires or separately triggers a need for BIA action that implicates the government-to-government relationship, and which in turn necessitates a BIA decision on the tribal dispute. *See Cloverdale*, 55 IBIA 220 (BIA may not address a tribal dispute when there is no separate Federal action required); *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320 (2012) (vacating BIA decisions addressing a tribal dispute when BIA had not identified any required BIA action that prompted BIA's intervention); *Pueblo de San Ildefonso v. Acting Southwest Regional Director*,

54 IBIA 253 (2012) (vacating BIA recognition decision because there was no evident need for Federal action); *Phillip Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317 (2010) (same).[7]

II. Were There Separate Pending Matters That Required or Warranted BIA Action Which, in Turn, Required a Determination on the Tribal Dispute?

A. Pending Memorandum of Understanding with DHS

The Regional Director and Interested Parties contend that even if BIA has no stand-alone obligation to ensure that the tribal dispute does not render the Nation unable to function, there were three separate matters that required BIA action at the time the Decision was issued, which in turn required the Regional Director to address the tribal dispute on the merits. The first such matter relied upon is a pending Memorandum of Understanding (MOU) that apparently had been negotiated by Halftown, purportedly on behalf of and as authorized by the Nation, and DHS, relating to the Western Hemisphere Travel Initiative concerning entry into and departure from the United States. In a letter to the Jacobs faction in 2008, DHS indicated that it would rely on BIA to determine points of contact for Federally recognized tribes, and that DHS follows guidelines set by BIA when addressing Federally recognized tribal entities. *See* Interested Parties Supplemental Brief, Sept. 24, 2012, Ex. F. According to Interested Parties and the Regional Director, because DHS was relying on BIA to determine whether Halftown was authorized to represent the Nation, the Regional Director was justified in issuing the Decision.

We initially note that the DHS correspondence was not addressed to the Regional Director, nor was it in the form of a request to BIA. It is not part of the Regional Director's administrative record for the Decision, meaning that it was not utilized by the

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[7] The Regional Director suggests that as long as the Decision is stayed by this appeal, "BIA is required to continue to recognize a Cayuga council composed of [the Halftown faction and Jacobs faction]." Appellee's Supplemental Brief, Sept. 24, 2012, at 16. That is not the case. If there is no separate need for Federal action during the Nation's tribal government dispute, BIA is not required to recognize anyone as the Nation's representative or any composition of the Council, nor would it be appropriate for BIA to do so. *See Cloverdale*, 55 IBIA at 225-26 (vacating the portion of a BIA decision that otherwise (correctly) declined to intervene in a tribal dispute but then stated that BIA "continues" to recognize the council it had previously recognized). And if there *is* a separate need for Federal action, which in turn requires a recognition decision, it would be BIA's responsibility to make a decision about whom to recognize, setting forth its reasoning and justification, and providing appeal rights to interested parties.

Regional Director in issuing the Decision. *See* 43 C.F.R. § 4.335 (BIA's record certification).[8] But even if DHS's correspondence to the Jacobs faction had been considered by the Regional Director, it could not have served as the necessary justification for issuing the Decision.

In the correspondence to the Regional Director leading up to the Decision, the Halftown faction expressly informed the Regional Director that due to the tribal governance dispute, the Nation—i.e., Halftown, with whom DHS apparently had been negotiating—had decided to *postpone* signing an MOU. The Regional Director relies on this "indefinite[] postpone[ment]" of the MOU signing as "signaling that the Appellants viewed [BIA's] decision as bearing upon" which party to this appeal DHS would work with. Appellee's Supplemental Brief, Sept. 24, 2012, at 13. That may well be the case. But whether intended or not by Appellants, their willingness to effectively table further proceedings with DHS while the dispute remained unresolved served, if anything, to *remove* this as a possible justification for BIA intervention and issuance of a decision.[9]

Moreover, as we held in *Alturas*, BIA does not have some independent duty to serve as the arbiter for tribal disputes for the convenience of other agencies or third parties. 54 IBIA at 143-44. Thus, while the emergence of the present dispute possibly could have served as a reason for the Regional Director to advise DHS of the existence of the dispute, the pendency of a proposed MOU—by then tabled by Halftown—could hardly serve as a separate matter requiring BIA action and necessitating BIA's intervention in the dispute.

B. Land-Into-Trust Application and Interested Parties' Stay Request

The Regional Director and Interested Parties also contend that the Regional Director and the Assistant Secretary had pending before them, at the time the Decision issued, a request from Interested Parties to stay consideration of the land-into-trust application submitted by Halftown. They argue that resolution of the stay request—an

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[8] Nor did the Regional Director refer to the pending MOU with DHS in his affidavit to support making the Decision effective immediately. *See* Motion of Appellee to Make Decision Effective Immediately, Oct. 26, 2011, Ex. A (Affidavit of Franklin Keel).

[9] To the extent Interested Parties and the Regional Director contend that a requirement for BIA action was triggered by DHS's need to determine whether Halftown was authorized to speak for the Cayuga Nation, it is unclear why the Regional Director would have waited until 2011 to act, when the Jacobs faction had been contending for some time that under the Council as recognized for purposes of the Regional Director's 2006 decision, Halftown lacked such authority in the absence of a consensus decision by the entire 6-member Council.

apparent reference to the correspondence in 2008 and 2010 from the Jacobs faction to the Regional Director, *see supra* at 173-74—required the Regional Director to determine if the trust application had been submitted by the legitimate representatives of the Nation.[10]

But the land-into-trust application was not pending before the Regional Director when he issued the Decision. *See supra* at 174 (Regional Director transmitted the land-into-trust application to the Assistant Secretary on May 4, 2011). Thus a request for the Department to stay consideration of the application could not serve as the separate matter that required action *by the Regional Director*. The Regional Director argues that because the matter was briefed to him, and has now been briefed to the Board, administrative efficiency would be well served by a decision on the merits. That misses the point. Neither the Regional Director nor the Board serve as general arbiters of disputes that may be implicated in matters that are pending before other Departmental officials. When the Regional Director transmitted the land-into-trust application to the Assistant Secretary for consideration, any request to stay consideration was for the Assistant Secretary, not the Regional Director, to decide.

C. ISDA Contract Administration and Funding

The final argument made by the Regional Director and Interested Parties is that the administration and funding of an existing ISDA contract between BIA and the Nation required BIA to issue a decision on the composition of the Council and the designation of the Nation's representatives. In some cases, an ISDA contract may have action-triggering events that do indeed require BIA to address an internal tribal dispute and to make a tribal leadership determination in order to take some ISDA action. But in other cases, even a tribal governance dispute involving a purported change in tribal leadership does not necessarily directly and immediately affect the administration of an ISDA contract, nor require BIA to address the dispute. As the Board recognized in *Coyote Valley*, not all interaction between BIA and a tribe regarding the administration of an ISDA contract requires a determination of the tribe's political leadership. 54 IBIA at 326 n.12. In that case, we recognized that "ISDA may require BIA to act on a request for approval of an ISDA document from a tribe," but we found that the regional director in that case "did not produce or identify any such request as the foundation to justify issuance of the decisions." *Id*. at 327.

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[10] Interested Parties suggest that they reiterated the stay request in a June 16, 2011, meeting, but it appears that their request at that time was directed to the Halftown faction in the context of exploring mediation. No reiteration of the request appears to have been directed to the Regional Director.

Similarly, in the present case, the Regional Director has not produced or identified any ISDA document that had been presented to him, either by Halftown or LeRoy, or by Jacobs or George as the newly-designated representatives, that required BIA action. Instead, Interested Parties (and the Regional Director) would have us simply assume that the administration and funding of the Nation's contract required a Federal recognition decision because in the absence of a decision, Federal funds would improperly be "disbursed to an individual who is no longer the Nation['s] representative," and contract money would continue to be used to pay the salary of LeRoy, who is "nominally employed" by the Nation but who allegedly has refused to follow direction from the Interested Parties and the newly constituted Council. Interested Parties' Response to Appellants' Supplemental Brief, Oct. 15, 2012, at 6; Interested Parties' Supplemental Brief, Sept. 24, 2012, at 12-13. But as Appellants point out, Interested Parties concede that LeRoy remains employed by the Tribe. Resolution 11-001 does not purport to relieve LeRoy of her position, or instruct BIA to no longer accept her as having any authority or role in relation to obtaining the Nation's funding under the contract. Nor is there any documentation in the record to show what Halftown's role is in the ongoing administration of the contract, or that a request was submitted to BIA to amend the contract in a way that would change any role he may have.

ISDA contracts are predicated on a government-to-government relationship, and on BIA's statutory obligation to contract certain programs and functions to tribes, if requested to do so. But once an ISDA contract is executed, the rights and obligations of the parties are governed by the contract, and changes to the contractual relationship are not to be taken lightly or informally. Funds are directed according to the terms of the contract. If a change in the designated tribal representative on an existing contract is to be made, it is for the tribe, not BIA to initiate the request for change. No such request is incorporated in Resolution 11-001. And unless the change in the designated tribal representative has some actual practical effect on administration of the contract, e.g., to change the authority for requesting drawdowns or to change where such drawdowns are to be directed, it still may not require BIA to intrude in the internal affairs of the tribe by addressing a tribal dispute.

Of course, a tribal request to renew a contract requires tribal authorization, which in turn may require BIA to determine the composition of the Council and whether the individual submitting the proposal was authorized to do so by the Council. But no such proposed contract request was pending when the Regional Director issued the Decision.

Instead of waiting for an ISDA matter to arise that required BIA action, and which may (or may not) have required a determination on the tribal governance dispute, the Regional Director acted in anticipation that ISDA funding might *become* an issue. But in so doing, the Regional Director intruded into the tribal dispute and undermined the right and

responsibility of the tribe to have the maximum opportunity to resolve the dispute by itself. *See Cloverdale*, 55 IBIA at 225.[11]

We note that over a year after the Decision was issued, and while this appeal was pending, LeRoy apparently submitted a new proposal to BIA for a 3-year Community Services Program ISDA contract, which purportedly was authorized by a duly enacted resolution of the Council. *See* Interested Parties' Supplemental Brief, Sept. 24, 2012, Ex A. As Appellants correctly argue, that post-decisional submission could not serve as the justification for the Regional Director to have issued the Decision. *See Cloverdale*, 55 IBIA at 224 ("Appellants' *post-decisional* request cannot serve as the predicate to either require or justify an *earlier* decision by BIA on the internal tribal dispute."); *San Ildefonso*, 54 IBIA at 259 ("The cornerstone of any decision by BIA to recognize a tribal government should be a present Federal need to do so, not an anticipated need at a future date."). Instead, it could at best serve as justification for a future decision.[12]

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[11] In reaching this conclusion, we are only recognizing that when the Decision was issued, there was a continuing dispute between the factions. We express no opinion, of course, on Interested Parties' argument that as a matter of Cayuga law and tradition, the clan mothers' action to remove a seatwarmer from the Council is final and thus the dispute has been resolved as a matter of tribal law. That argument, of course, goes to the underlying merits of the dispute as presented to BIA for a decision.

[12] No party has informed the Board what happened to LeRoy's submission. Appellants assert that a decision by BIA to approve or deny the application submitted by LeRoy would not necessitate a decision regarding the Nation's leadership, but it is not at all clear why that would be the case for an ISDA proposal based on purported authorization and action by the Council. At a minimum, in light of the tribal dispute, action on the proposal presumably would require a decision that included appeal rights, with proper notice to all interested parties.

And even if, as the Halftown faction contends, the Council composition did not change in 2011, it would not follow that the Regional Director could accept the submission without possibly needing to address the tribal dispute, in light of the governance structure of the Nation. *See George*, 49 IBIA at 187 (Regional Director has discretion to decide whether and what form of verification may be appropriate to show Council approval of Halftown's action); *see also Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144, 151 (1996) ("BIA has the right to require proof of the validity of Council enactments relevant to the government-to-government relationship whenever there is a question as to the validity of those enactments."). Absent proper grounds for declination, Indian tribes have a statutory right to enter into ISDA contracts, but they are not required to choose to do so. Nothing in *Goodface* prohibits a tribe from letting its own authorization for a contract lapse, even if

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Conclusion

We conclude that by issuing the Decision when there was no separate matter that was pending that required or warranted BIA action, and which in turn would have necessitated a determination on the tribal dispute, the Regional Director impermissibly infringed on the sovereign rights of the Nation by intruding into tribal affairs. In vacating the Decision, we make no assumptions about the willingness or the ability of the tribal parties to resolve the dispute among themselves, although the pendency and disposition of this appeal has provided and will provide them additional time to do so without Federal interference. And if it becomes necessary for the Regional Director to issue a new decision, when a separate matter presents itself for BIA action that would implicate the tribal dispute, the Regional Director will have the benefit of, and may respond as necessary to, the parties' arguments on the merits as set forth in briefs in this appeal and in any supplemental submissions to the Regional Director.

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.

I concur:

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Steven K. Linscheid	Thomas A. Blaser
Chief Administrative Judge	Administrative Judge

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to do so results in a contractual hiatus. BIA cannot supply the necessary authorization from a tribe if such authorization does not exist as a matter of tribal law.