



INTERIOR BOARD OF INDIAN APPEALS

Pueblo of Laguna v. Assistant Secretary - Indian Affairs

12 IBIA 80 (12/07/1983)

Also published at 90 Interior Decisions 521



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

PUEBLO OF LAGUNA

v.

ASSISTANT SECRETARY FOR INDIAN AFFAIRS

IBIA 83-23-A

Decided December 7, 1983

Appeal from a determination of the Assistant Secretary for Indian Affairs, contained in a December 2, 1982, letter to the Chairman of the House and Senate Subcommittees on Interior Appropriations, that a proposed school on the Laguna Indian Reservation was not needed and that construction should not proceed.

Vacated and referred for evidentiary hearing and recommended decision.

1. Board of Indian Appeals: Jurisdiction--Secretary of the Interior

In reviewing a decision of the Assistant Secretary for Indian Affairs referred to the Board of Indian Appeals by the Secretary of the Interior under 43 CFR 4.220(a)(2), the Board has the full authority of the Secretary to review questions both of law and of discretion.

2. Administrative Procedure: Administrative Review--Administrative Procedure: Substantial Evidence--Rules of Practice: Supervisory Authority of the Secretary

In exercising the full review authority of the Secretary of the Interior, the Board of Indian Appeals is not required to uphold a decision of the Bureau of Indian Affairs merely because it is reasonable and based upon substantial evidence in the record, but has the authority to review the decision de novo.

3. Regulations: Binding on the Secretary--Regulations: Publication

Procedures promulgated by the Department of the Interior specifically to provide uniformity in decisionmaking are "rules" within the meaning of 5 U.S.C. § 551(4) (1976) and are binding upon the Department, whether or not they are codified in the Code of Federal Regulations.

4. Regulations: Publication

When an appellant personally received documents supplementing and amending a document previously published in the Federal Register, acknowledges that it knew the later documents would be used in deciding its case, and does not allege failure of publication, the Board of Indian Appeals will apply the procedures established in the later documents in deciding the appeal.

5. Administrative Practice--Regulations: Applicability

In the absence of specific rules governing reevaluation of an Indian school construction funding application, the Bureau of Indian Affairs will be held to the rules governing the initial evaluation of such an application, in order to avoid the appearance and reality of arbitrary, ad hoc decisionmaking.

6. Administrative Practice--Administrative Procedure: Adjudication

Although true ex parte communications are the antithesis of reasoned, informed, and objective decisionmaking, the circumstances of this case do not permit a finding that the proceeding before the Bureau of Indian Affairs was impermissibly tainted by ex parte communications.

7. Administrative Procedure: Administrative Review

Administrative review is intended to provide the reality as well as the appearance of an objective and impartial reexamination of the law and discretion applied initially by a subordinate agency official.

8. Administrative Procedure: Administrative Review

Without definite proof to the contrary, the Board of Indian Appeals must assume that, in affirming a decision of a Bureau of Indian Affairs field official, the Assistant Secretary for Indian Affairs made an objective and impartial review of the decision and was convinced of the correctness of that position.

9. Administrative Procedure: Administrative Review

A decision by the Bureau of Indian Affairs that is not supported by the record will not be upheld. In appropriate circumstances, the matter will be referred for an evidentiary hearing and recommended decision.

APPEARANCES: Richard Schifter, Esq., Washington, D.C., for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

Appellant Pueblo of Laguna (the Pueblo) seeks review of a determination of the Assistant Secretary for Indian Affairs (appellee) that construction of a new school on the Laguna Indian Reservation should not proceed because the school was not needed. The Bureau of Indian Affairs (BIA) had previously ranked this school as its number one priority school construction project for fiscal year 1982, and funds for its construction had been appropriated by

Congress. At the direction of the Senate Subcommittee on Interior, of the Senate Committee on Appropriations (Senate Committee), the need for the school was reevaluated. On December 2, 1982, appellee notified both the Senate and House Subcommittees on Interior (Senate Subcommittee; House Subcommittee) that the school was not needed and should not be constructed. Appellant seeks review of this decision and the process through which it was reached.

### Background

The essential background facts of this case are not in dispute. The Laguna Indian Reservation and adjacent Indian and non-Indian communities are presently served by two schools: the Laguna Elementary School (Laguna Elementary), operated by BIA for grades K-6, and the Laguna-Acoma Junior/Senior High School (L-A School), operated by the Grants, New Mexico, school district (district) for grades 7-12.

The L-A School, which was built with Federal funds appropriated under P.L. 81-815, <sup>1/</sup> was designed as a junior high school. It has, however, always been operated as a junior/senior high school. On April 5, 1972, the Pueblo of Laguna Council (council) passed Resolution No. 25-72 in which it noted that the L-A School was badly overcrowded, and that requests for funding to construct additional classroom space had not achieved results. The council asked BIA to construct a new school to serve grades 7 through 9.

---

<sup>1/</sup> Act of Sept. 23, 1950, as amended, 64 Stat. 967, 20 U.S.C. §§ 631-647 (1976).

All further citations to the United States Code are to the 1976 edition, unless indicated otherwise.

Congress appropriated funds in 1973 and 1974 for planning and designing a new school. Because of disagreements among BIA, the Pueblo, and the Grants school district, a definite plan for the new school was not developed until 1976. At that time, the plan was to retain grades K-5 at Laguna Elementary and grades 9-12 at the L-A School and to construct a new middle school for grades 6-8. The district was to seek funding for the necessary alterations to the L-A School from the Office of Education under P.L. 81-815 and the Pueblo would seek funding for the construction of the middle school from BIA.

Requests for P.L. 81-815 funding for the L-A School alterations were denied by the Office of Education in 1976 and again in 1978. Funding from BIA was held up because of Congressional concern over BIA's failure to develop a standard system for analyzing and ranking school construction requests. <sup>2/</sup> This concern resulted in Congress' decision not to fund any BIA school construction projects in fiscal year 1978, and the requirement that BIA establish and publish in the Federal Register a system for analyzing project requests. See Education Amendments of 1978, P.L. 95-561, 92 Stat. 2319, 25 U.S.C. § 2005(c) (Supp. II 1978).

Standard procedures for analyzing and ranking school construction requests were published in the Federal Register on May 22, 1979. See 44 FR 29864. When the Laguna project was analyzed under this new system, it was

---

<sup>2/</sup> Apparently Indian school construction projects were previously funded largely on political grounds, rather than on the merits of a particular project.

determined that although there was overcrowding, the problem was not severe enough to justify funding that year.

Because of the results of this analysis, the Pueblo requested that the project be reevaluated as a junior high school project to serve grades 7 through 9. An evaluation team visited the site on August 2, 1979. Because the team believed that more information was needed, the project was not ranked that year. A second onsite evaluation was conducted on August 14, 1980. As a result of this evaluation, the Laguna project was ranked number one priority for fiscal year 1982. See 45 FR 74997 (Nov. 13, 1980). The project was subsequently funded, see F.Y. 1982 Interior Appropriations Act of December 23, 1981, 95 Stat. 1391, P.L. 97-100; construction bids were requested and opened; and a low bid of \$3,230,000 was selected. 3/

The Grants school district had not sought further Federal funds for alterations and additions to the L-A School after the failure to obtain P.L. 81-815 funds. In 1980, however, the district floated a bond issue for school construction. Although initial plans for these funds had not included any expenditure for the district's Indian students, the Laguna and Acoma Pueblos filed suit seeking to force some of the funds to be used at the L-A School. Under a settlement agreement reached in the suit, 42 percent of the funds, or about \$750,000, would be spent in the part of the district in which the Indian population resided.

---

3/ The ranking of school construction priorities for fiscal year 1983 was published on Dec. 24, 1981, the day after the Laguna project was funded by Congress. In this listing, Laguna was ranked number 2. See 46 FR 62549.

Apparently at this time, resentment against the new Laguna school surfaced in the Grants school district, which withdrew its previous support for the new construction, claiming that the new school would be duplicative. School district officials met with BIA personnel and apparently with the New Mexico Congressional delegation. BIA was thereafter requested by the Chairman of the Senate Subcommittee, a Senator from New Mexico who had previously supported the new school, to respond to certain questions concerning the proposed project. The following text was inserted into the Senate report on Interior's 1982 supplemental appropriations bill:

The Committee directs that no funds be spent for further planning, design or construction of the proposed Laguna Junior High School until the application has been reviewed. Such review shall take into account the declining enrollment and the renovations which are being made to the Laguna-Acoma Junior-Senior High School which is located on the reservation. If the review shows that Laguna was assigned the proper position on the priority list the construction may proceed upon notification of such finding to the House and Senate Committees on Appropriations.

S. Rep. No. 516, 97th Cong., 2d Sess. 111 (1982).

In response to this Congressional directive, BIA reviewed the Laguna project. The new report, completed on or about September 15, 1982, reversed the previous findings and concluded that enrollment at the L-A School was actually less than capacity.

Appellant sought and was granted an opportunity to respond to the new factual findings. However, appellant was informed that because of pressure from Congress, BIA intended to submit the report before the date set for

appellant's presentation. Appellant filed suit in Federal District Court seeking a temporary restraining order (TRO) against BIA's submission of the report to Congress. The TRO was denied when BIA agreed to give appellant an opportunity to present its position to the Deputy Assistant Secretary--Indian Affairs (Operations) on September 29, 1982.

Appellant states that its counsel was informed on November 23, 1982, that no decision had yet been reached. The final decision was communicated orally to counsel on December 1, 1982, and the written decision was signed by the Assistant Secretary for Indian Affairs and submitted to the Senate and House Subcommittees on December 2, 1982. Also on December 2, the full House Appropriations Committee acted to reprogram the funds which had been appropriated for Laguna. See H. Rep. No. 942, 97th Cong., 2nd Sess. (1982).

In an affidavit submitted with appellant's opening brief, it is stated that appellant learned from a House Committee staff person that the full Committee had acted upon a November 18, 1982, House Subcommittee recommendation. Furthermore, appellant was informed that the House Subcommittee acted after receiving material from the Albuquerque, New Mexico, office of BIA. The Committee staff person said it would be too much trouble to find the document in the Committee background materials and referred appellant to a specific individual in the Albuquerque Area Office.

Following these actions, appellant sought to file an appeal from the Assistant Secretary's action with the Office of Hearings and Appeals (OHA) of the Department of the Interior (Department). The notice of appeal was

docketed and dismissed on January 17, 1983, on the grounds that OHA did not have general review authority over decisions of the Assistant Secretary and could review such decisions only as they might be specially referred to it by regulation or on a case-by-case basis. See In the Matter of Pueblo of Laguna (Laguna Middle School), 5 OHA 77 (1983).

Appellant subsequently sought and obtained a special referral from the Secretary of the Interior (Secretary), who directed consideration of the case by the Board of Indian Appeals (Board) on March 23, 1983. After receiving the administrative record from BIA's Albuquerque Area Office, the Board docketed the case and established a briefing schedule. The case was fully briefed and oral argument was heard on October 20, 1983.

#### Jurisdiction and Scope of Review

[1] As noted in the January 17, 1983, decision of the Director of OHA docketing and dismissing appellant's original notice of appeal, neither OHA nor the Board has general review authority over decisions of the Assistant Secretary for Indian Affairs. See also Willie v. Commissioner, 10 IBIA 135, 138-39 (1982). Here, however, the matter was specifically referred to the Board by the Secretary. Such referral, which is provided for in 43 CFR 4.330(a)(2), gives the Board jurisdiction to review a matter that would otherwise be final for the Department as the decision of a Secretarial-level official. The Board interprets this referral as granting it authority to review questions both of law and of discretion as fully as could the

Secretary. This interpretation was explicitly endorsed by counsel for appellee at oral argument (Tr. 49). <sup>4/</sup>

### Issues on Appeal

Appellant's arguments can be generally broken down into three major areas of concern: (1) The governing law in this case; (2) procedural violations and irregularities; and (3) substantive violations. Subsidiary issues are raised in each of these general areas. Appellant argues both that the decision violates substantive law and is arbitrary, capricious, and an abuse of discretion.

### Standard of Review

Appellee cites appellant's assertion that the decision is arbitrary, capricious, and an abuse of discretion as an admission that the decision was discretionary. Consequently, appellee argues that the decision should be upheld because substantial evidence in the record demonstrates that it is reasonable, even though someone else might have reached a different conclusion. See Appellee's Answer Brief at 17; Tr. 40, 50-51. <sup>5/</sup>

---

<sup>4/</sup> The Board does not have general review authority over decisions committed to the discretion of the Secretary. See 43 CFR 4.330(b)(2) and 4.337(b); Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142, 144 (1983).

<sup>5/</sup> It is clear from the oral argument that appellant believes the decision to be based upon an interpretation of law, not upon an exercise of discretion (Tr. 3).

Counsel for appellee incorrectly stated at oral argument that appellant's initial notice of appeal to OHA had been denied because the decision involved was discretionary (Tr. 49). As previously mentioned, the appeal was denied on the sole ground that the decision was rendered by the Assistant Secretary for Indian Affairs, a Secretarial-level official over whose decisions neither OHA nor the Board has general review authority.

This argument seeks to impose upon the Board's review of this matter the statutory standard for judicial review of administrative decisions. Under this standard, a court reviewing a final agency decision would normally be bound to uphold the decision if it were based upon substantial evidence in the record. See 5 U.S.C. § 706(1)(E).

[2] The Board is not a reviewing court. It is part of the administrative body making the determination and is acting by specific delegation from the head of that administrative body. It, therefore, is not limited by statutes restricting judicial review of administrative decisionmaking. See Walch Logging Co. v. Portland Assistant Area Director (Economic Development), 11 IBIA 85, 101, 90 I.D. 88, 96 (1983). The scope of review of administrative decisions by the Secretary has recently been discussed by the Interior Board of Land Appeals:

The Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of appellate review and decisionmaking as to be required to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion. Act of March 3, 1849; 9 Stat. 395. [See also 5 U.S.C. § 557(b).] The Secretary's inherent authority in this regard may not be diminished or constrained by those whose only authority derives from the delegated powers of the Secretary. Therefore, the scope of appellate review by or on behalf of the Secretary can be so limited only by the Secretary himself in a duly promulgated regulation, or by the Congress through enacted law. No such restraint

on the scope of agency review has been imposed in cases such as this one. Therefore, the Board has a duty to consider and decide them "as fully \* \* \* as might the Secretary." 43 CFR 4.1. [Italics in original. Footnotes omitted.]

United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

The Board of Land Appeals has jurisdiction to review discretionary decisions of the Bureau of Land Management (BLM). The jurisdiction of the Board of Indian Appeals has been limited by regulation found in 43 CFR 4.330(b)(2), which states that it may not review decisions of BIA made through the exercise of discretion. Thus, in order to avoid impinging upon the exercise of discretion, the Board customarily accords greater deference to decisions of BIA which involve the application of special expertise when those decisions are supported by substantial evidence than does the Board of Land Appeals to similar decisions of BLM officials. See, e.g., Walch Logging Co., supra; Wooding v. Portland Area Director, 9 IBIA 158 (1982); Fort Berthold Land & Livestock Association v. Aberdeen Area Director, 8 IBIA 230, 88 I.D. 315 (1981); Combs v. Commissioner, 4 IBIA 27, 82 I.D. 184 (1975).

The Board has held that the referral of this matter by the Secretary grants it the full authority of the Secretary to review questions both of law and discretion. Because the Board is not required to give deference to the discretionary decisions of BIA in this matter, it has the duty to review the matter de novo.

### Discussion and Conclusions

The Board begins consideration of this case with the assumption that all parties have a common goal: A proper determination of the educational needs of the Laguna children. In this regard, the Board further assumes that appellee, as trustee for those children, has no vested interest in the determination made in December 1982, except as he believes it to be correct. Both of these assumptions were implicitly recognized in the Secretary's referral of this decision, which was otherwise final for the Department, for additional administrative consideration.

#### A. Governing Law.

The first general area of contention between the parties concerns the governing law in this case. Appellant argues that, in reevaluating its application, BIA was required to follow the procedures for evaluating Indian school construction requests established pursuant to the Congressional mandate contained in the Education Amendments of 1978. As previously mentioned, under this mandate, BIA developed and published in the Federal Register uniform rules for the determination of need for the construction of Indian schools and for the ranking of requests for such construction (published procedures). See 44 FR 29864 (May 22, 1979).

The record reveals that subsequent to the Federal Register publication, BIA issued three other documents relating to school construction applications: Guidelines for Determining Educational Spaces for Bureau of Indian Affairs Schools, which appears to be dated March 13, 1980 (Guidelines; BIA Exh. 76,

Attachment 4); School Construction Application Procedure; undated (Procedure, Pueblo Exh. 4); 6/ and a memorandum from the Deputy Assistant Secretary--Indian Affairs (Operations) to all BIA area directors and tribal governments, entitled "Procedures for Advising Applicants for School Construction on the Status of their Applications and Ranking," dated May 5, 1980 (Memorandum, BIA Exh. 76, Attachment 3). None of these documents was published in the Federal Register.

Appellee contends that none of the above procedures are "regulations" and are, therefore, not binding upon the Department. Furthermore, appellee argues that all of the procedures were developed for the initial determination of need for school construction and of priority rankings, and that they are not required to be applied in a reevaluation. See Appellee's Answer Brief at 11-12. Apparently, appellee contends that no standard procedures exist for the reevaluation of need and priority determinations. 7/

The Board will first address appellee's contention that the published procedures are not regulations and are not binding upon the Secretary. It is clear that these procedures were developed and initially published in the Federal Register at the express direction of Congress because of concern over the lack of a standard system for evaluating school construction requests. The preamble appearing in the Federal Register candidly recites the general

---

6/ In order to distinguish between exhibits, those documents forwarded to the Board by BIA as the administrative record in this case will be designated "BIA Exh.," and those supplied by appellant in supplementation of the administrative record will be designated "Pueblo Exh."

7/ Counsel for appellee stated at oral argument that she knew of no instances in which a tribe had appealed a school construction priority determination or ranking (Tr. 49). Appellee's contention that no standard procedures for reevaluation exist may be related to this apparent paucity of appeals.

lack of credibility in the method previously employed to determine which projects would be funded. See 44 FR 29864 (May 22, 1979).

It is difficult to conceive of a more explicit requirement for the development and utilization of standard procedures for a program administered by an executive agency. Here, Congress singled out a particular program of a particular agency and mandated specific improvements in the way the program was managed. The method chosen by Congress to deal with the problems it perceived in the administration of the Indian school construction program fully comports with the general provisions relating to publication of agency rules <sup>8/</sup> or procedures affecting members of the public set forth in 5 U.S.C. § 552, which applies to all Federal agencies and programs.

[3] It is true that the published procedures were not incorporated into the Code of Federal Regulations, the Government-wide compilation of general rules affecting the public. It is perhaps this fact which led to appellee's argument that the procedures are not "regulations." Whether or not the procedures should be termed "regulations," they are clearly "rules" within the meaning of 5 U.S.C. § 551(4), and the Department is bound by the public pronouncement of its own rules. See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959). See also Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982); Shoshone and Arapahoe Tribes v. Commissioner, 9 IBIA 263, 89 I.D. 200 (1982) (in both cases, Departmental procedures were found to be rules as defined in section 551(4) although not so characterized by BIA).

---

<sup>8/</sup> In 5 U.S.C. § 551(4), a rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

However, it appears in this case that appellee did not follow the procedures published in the Federal Register in the initial determination of appellant's application, and that appellant did not expect those procedures to be employed. Instead, the later Guidelines, Procedure, and Memorandum were applied.

[4] Appellant acknowledges personal receipt of the Guidelines, Procedure, and Memorandum, and knowledge that these documents would be used in evaluating its initial application. Under 5 U.S.C. § 552(a)(1) and (2)(ii), agency decisions and rules may be applied against a person who had actual and timely notice of those decisions and rules, even without publication in the Federal Register. Under the circumstances of this case, the Board will apply the later documents rather than the procedures published in the Federal Register in reviewing the case. The Department will be required to follow the above-named documents as if they had been published in the Federal Register. <sup>9/</sup>

[5] Appellee next contends that none of the procedures developed to evaluate initial school construction applications applies to a reevaluation. First, to the extent that appellee seeks a Board determination that a reevaluation, as distinct from an initial determination, is totally discretionary, the Board declines to accept the argument. Alteration of the basic procedures

---

<sup>9/</sup> The Board expresses no opinion as to whether the failure to publish the later documents in the Federal Register is a violation of either or both 5 U.S.C. § 552(a)(1)(D) or 25 U.S.C. § 2005(c) (Supp. II 1978). Neither does the Board consider the question whether these documents could be used to deny the construction application of a tribe which did not have actual knowledge of their existence and applicability and which alleged that they were not properly published. See 5 U.S.C. § 552(a)(1); Morton v. Ruiz, 415 U.S. 199 (1974); Allen, *supra*; Shoshone and Arapahoe Tribes, *supra*.

used to determine need and ranking depending upon whether the investigation is an initial evaluation or a reevaluation invites both the appearance and reality of arbitrary, ad hoc decisionmaking. See Morton v. Ruiz, *supra*. This was precisely the situation Congress sought to remedy in requiring the adoption of standard procedures.

A second aspect of appellee's argument is that its reevaluation of appellant's application was circumscribed by the specific instructions of the Senate Subcommittee to consider declining enrollment and the renovations being made to the L-A School, factors not normally considered under the standard procedures. The record reveals, however, that BIA did not confine its reevaluation to the two factors raised in S. Rep. No. 97-516, but rather conducted a full redetermination of the application. Once BIA undertook a full reevaluation of the Laguna project because of the statement in the Senate report, it was required to conduct that study under its established procedures except as specific alterations were required to conform to the instructions in that report.

In summary, the Board finds that appellee's reevaluation of appellant's application for school construction funds should have been conducted in accordance with the procedures set forth in the Guidelines, Procedure, and Memorandum, except as specific changes were required to conform with the instructions set forth in S. Rep. No. 97-516. However, despite appellee's legal arguments on these points, it appears from the record that the reevaluation was conducted within the framework of the established procedures. The real issue is whether the procedures were properly interpreted and applied.

## B. Alleged Procedural Errors.

Appellant next raises several procedural arguments. First, appellant alleges that BIA's reevaluation decision was based on ex parte communications with the Grants school district. "Ex parte communication" is defined in 5 U.S.C. § 551(14) as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." This definition applies to all rulemaking and adjudicatory functions of an administrative agency that are required to be conducted under the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559. Ex parte communication is further defined in the Board's regulations as a "communication between any party and a member of the Board concerning the merits of an appeal" without knowledge of such communication and its contents by opposing parties. See 43 CFR 4.317(b). There is no comparable regulation governing appeals within BIA. See 25 CFR Part 2.

[6] True ex parte communications are the antithesis of reasoned, informed, and objective decisionmaking, and so should be eschewed whether or not they are prohibited by statute or regulation. In this case, appellee's consideration of appellant's application was not subject to the APA or to a regulation prohibiting ex parte communications. Furthermore, the record does not permit a clear determination of whether ex parte communications actually occurred, or whether appellant merely did not have what it considered an adequate opportunity to rebut the district's position. Under these circumstances, the Board will not find that the proceeding was impermissibly tainted by ex parte communications.

Appellant's second allegation of procedural error involves BIA's failure to consult with it before making a final determination. Appellant finds a consultation requirement in the May 5, 1980, Memorandum.

The Board disagrees with appellant's reading of the Memorandum. In distinction to some other BIA documents, such as the "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs" considered by the court in Oglala Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979), and raised in appellant's opening brief, the memorandum does not specifically require prior consultation with the tribe. It merely requires that the tribe be kept informed of the status of its application and ranking, and of its right to appeal a tentative ranking with which it disagrees. The record discloses that appellant was kept advised of the matters addressed in the Memorandum and was given some opportunity to present its views to the Department. 10/

Appellant's consultation argument appears to be a corollary argument to the major contention of procedural error found in the allegation that the reevaluation decision was made at the area office level without any meaningful opportunity for input by the Pueblo and that the "final decision" issued by the Washington office was another rubber stamping of the area office's decision. This allegation is based upon appellant's discovery that the House

---

10/ This finding does not constitute a Board determination that the Department need not consider the position of an Indian tribe in matters concerning the tribe. As trustee for Indian tribes and the agent carrying out legislative mandates and Federal policy concerning tribal self-determination, the Department has a responsibility to act in the best interest of those tribes. The determination of a tribe's best interests should not be reached in a vacuum.

Appropriations Committee had received and acted upon material submitted to it by the BIA area office weeks before the issuance of the Assistant Secretary's decision on December 2, 1982.

The indication in the record that an individual in the BIA area office provided Congress with what in essence was a proposed Departmental decision during the period in which the person affected by that proposed decision still had a right of appeal to a higher Departmental official and consequently during a period in which that decision was not final or effective is disturbing. See 25 CFR 2.3(b). Although the Board has no specific knowledge of the procedures within BIA for communicating with Congress, it is doubtful that under even normal circumstances communications from the area office at this point in a proceeding would be appropriate.

[7] Washington officials are entitled to rely upon their subordinates in the field for recommended decisions. Field officials are frequently in a much better position to collect and analyze data and to bring their awareness of local conditions and relations to a problem. However, administrative review is intended to provide the reality as well as the appearance of an objective and impartial reexamination of the law and discretion applied initially by the field official.

[8] The Board is not privy to the deliberations of the Assistant Secretary. Although several circumstances are revealed in the record which tend to support appellant's argument, without definite proof to the contrary, the Board must assume that the Assistant Secretary made an objective and

impartial review of the area office's initial decision and was convinced of the correctness of that position.

Therefore, although the Board is concerned about the procedures followed in this case, it finds that the procedural matters raised by appellant are not sufficient in themselves to invalidate the decision.

### C. Alleged Substantive Errors.

[9] Finally, appellant raises arguments based on four alleged substantive violations of the Procedure. In each case, the Board finds that the administrative record furnished to it by BIA and supplemented by appellant is insufficient to support the Assistant Secretary's factual determinations. <sup>11/</sup> Therefore, the Board finds that it is appropriate to refer this case to the

---

<sup>11/</sup> Appellant has furnished the Board with several documents which were not included in the record furnished by the BIA area office, including Pueblo exhibit 15, "Study of Space Utilization and Need: Laguna Elementary, Laguna-Acoma Jr./Sr. High School," September 1982, by Mauck, Stasty & Rassam, P.A., appellant's primary exhibit in opposition to BIA's study.

The Board's regulations in 43 CFR 4.335(a) provide that "[t]he record on appeal shall include, without limitation, copies of transcripts of testimony taken, all original documents, petitions, or applications by which the proceeding was initiated and all supplemental documents which set forth claims of interested parties, as well as documents upon which all previous decisions are based." Paragraph (b) of section 4.335 further states that the record shall include "certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed."

These regulations are intended to ensure that the Board has before it all documents relating to the matter that were within the Department when the decision under review was rendered. Because 5 U.S.C. § 706 provides that judicial review of administrative decisions must be supported by the record, the agency can only harm its position by failing to ensure that all documents within its possession when it was considering a particular decision are provided to the Board. Regardless of the particular standard of review that is applied in a specific case, the Board cannot uphold a decision that is not supported by the record. To do so would be a dereliction of its duties and responsibilities as a delegate of the Secretary.

Hearings Division of OHA for an evidentiary hearing and recommended decision on the issues discussed below.

Appellant first asserts that during the reevaluation, relocatable classrooms (mobile units) were improperly counted in determining the capacity of the L-A School for the purpose of ascertaining the number of "unhoused students." "Unhoused students" is the basic unit used to determine the need for additional school facilities:

A student is considered unhoused when the condition of the school facility is such that it can no longer be used without major repair, renovation or complete replacement; when the space is no longer adequate for the educational program; when the enrollment exceeds the design enrollment of the facility.

Procedure at 4, Policy 4. The Procedure further provides at page 6 that:

Students are unhoused if they must attend school in temporary structures. Temporary structures are mobile units or facilities brought in for short term or emergency use with a limited life span of not more than 10 years. Buildings placed on concrete slabs with a life expectancy of more than ten years are permanent structures.

In 1978, 1979, and 1980, evaluation teams visiting the L-A School found that mobile units on the site should not be counted in determining the capacity of the school. In an August 1982 letter to the Chairman of the Senate Subcommittee, appellee remarked that the mobile units were one of the problems at the L-A School. In the September 1982 reevaluation study, however, the capacity of 7 of the 13 mobile units was included in determining the school's design capacity. This change was explained on the grounds that these

particular mobile units were affixed to the ground in such a way as to become permanent fixtures and had an anticipated lifespan of more than 10 years.

Appellant raises both legal and factual arguments against BIA's classification of any of the mobile units at the L-A School as permanent structures. These arguments are based on the alleged plain meaning of the section defining unhoused students, the meaning of the provision relating to concrete slabs, and the fact that some of the mobile units counted by BIA are only leased to the school. Appellant also cites Congressional concern over health and safety conditions in BIA schools as evidence that mobile units should not be included because of their inherent fire hazard problems.

The Board recognizes that it has no special architectural or safety engineering expertise. Furthermore, it has been able to observe the mobile units at issue only through several pictures supplied by appellant at oral argument. The Board takes official notice of the general use of mobile units as interim measures intended to provide sufficient classroom space to alleviate a temporary situation.

The Procedure clearly does not contemplate the permanent housing of Indian students in mobile classrooms. The parties here apparently do not disagree that the units included in determining the design capacity of the L-A School in the 1982 reevaluation were brought to the school as mobile units. They do, however, disagree on whether the units are now permanent, although physically separate, additions to the school, or whether they remain

temporary structures. The determination of the nature of these structures is a question of fact.

Appellant's second substantive argument against the reevaluation decision is that BIA erred in determining capacity of the school on the basis of square footage alone, without relation to the school program. According to appellant, the Procedure and Guidelines require that capacity be measured in terms of the educational program provided. Based upon its interpretation of BIA's procedures, appellant argues that the capacity of the school is at most 360.

Appellee argues that in its prior evaluations it erred by relying upon the representation of school officials as to design capacity rather than making an independent determination of the capacity, and in failing to take several additions into consideration. Appellee alleges that the design capacity of the main school building is 535.

The Board agrees with appellant that the Procedure and Guidelines contemplate a determination of capacity in relation to the educational program. See Pueblo Exh. 4 at 2, 4; BIA Exh. 76, Attachment 4 at 1, 3. It does not appear that in its reevaluation BIA considered the use of space in relation to the educational programs in determining the school's design capacity. Instead, BIA appears to have determined capacity merely by dividing the square footage by the number of students. See BIA Exh. 67 at 2.

Because the determination of the capacity of the L-A School is a question of fact, and because of the extreme disagreement between the parties regarding design capacity, an evidentiary hearing is again required.

Appellant next argues that, in determining enrollment, BIA should have taken into consideration Laguna students who were attending off-reservation boarding schools because of overcrowded conditions at the L-A School and who would return to that school if conditions improved. In support of this argument, appellant submitted affidavits from the parents of 50 such students. Appellee counters that the Procedure provides for an enrollment count based on the number of students actually enrolled, and that students who are not enrolled simply cannot be counted.

The Procedure does provide for a decision based on current enrollment data. The wisdom of such an approach is not at issue in this case. If BIA were making this reevaluation merely under the Procedure, the Board would have to accept appellee's argument. However, the reevaluation in this case also based on the Senate Committee report, which specifically required BIA to consider "declining enrollment." In considering factors indicating a decline in enrollment, BIA should also have considered factors indicating potential increases in enrollment.

The affidavits submitted by appellant are dated April and May of 1983. Some of the students at that time were juniors and seniors, and may have graduated or may desire to graduate from the school they have been attending. Furthermore, none of the parents of the children were available for cross-examination as to other possible factors influencing their choice of a school for their children. The Board is not in a position to determine how many students might return to the L-A School and so should, therefore, be included in determining enrollment for the purposes of the reevaluation mandated by

the Senate Committee. Again, an evidentiary hearing is required to resolve this question.

Finally, appellant objects both to BIA's consideration of projected enrollment and to the figures used. The argument that the Procedure does not contemplate projected enrollment has already been addressed. Appellant objects that the record does not disclose either the factual basis for BIA's projected enrollment figures or the process used to determine projected enrollment from the raw data. Appellee generally attacks appellant's conclusions that current enrollment in the elementary grades indicates a future increase in junior and senior high school enrollment. The parties disagree over the net impact of the discontinuation of certain mining activities in the area.

The Board agrees with appellant that the record does not provide sufficient information to support appellee's conclusion that enrollment in the L-A School will decline. An evidentiary hearing is necessary to consider this issue.

Therefore, pursuant to the special delegation of authority from the Secretary, the Board finds that the administrative record in this case does not support the Assistant Secretary's December 2, 1982, decision. Accordingly, that decision is vacated and the case is referred to the Hearings Division of OHA for a hearing and recommended decision by an Administrative Law Judge to resolve the questions of fact and law involved. This hearing shall be conducted in full compliance with administrative due process standards applicable generally to other hearings proceedings conducted by

Administrative Law Judges of the Hearings Division. The present administrative record may be considered as part of the evidentiary record in the hearing.

The administrative record and recommended decision in this case shall be returned to the Assistant Secretary for Indian Affairs who shall then make a new determination, based upon the information presented at the hearing and the findings of the Administrative Law Judge, as to whether the application of the Pueblo of Laguna for school construction funds meets the standards established in the Procedure and, if so, what its ranking should be compared with other current Indian school construction applications. 12/

\_\_\_\_\_  
//original signed  
Jerry Muskrat  
Administrative Judge

We concur:

\_\_\_\_\_  
//original signed  
Wm. Philip Horton  
Administrative Judge  
Alternate Member 13/

\_\_\_\_\_  
//original signed  
Franklin D. Arness  
Administrative Judge

12/ Appellant seeks a Board order that, if its application is found to have been improperly reevaluated, it be again placed in the number one priority position. Although the Board sympathizes with appellant's request, it cannot, in clear conscience, grant it. The Board is cognizant of the fact that a finding that the Laguna project meets the requirements established under the Procedure would impact upon other, equally or more deserving, Indian school construction applications. The Board sees no value in punishing the children affected by those projects because of a possible violation of BIA's duty to appellant.

13/ Wm. Philip Horton, formerly Chief Administrative Judge, Board of Indian Appeals, was transferred to the position Chief Administrative Judge, Board of Land Appeals, effective Oct. 30, 1983. He remains a signator on this opinion as an Alternate Member of the Board of Indian Appeals by special assignment of the Director, OHA. See Memorandum dated Nov. 15, 1983.