



## INTERIOR BOARD OF INDIAN APPEALS

Native One Deposit & Trust v. Deputy Director, Office of Tribal Services, Bureau of Indian  
Affairs

42 IBIA 42 (11/18/2005)



# United States Department of the Interior

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

NATIVE ONE DEPOSIT & TRUST : Order Affirming Decision  
Appellant, :  
 :  
v. :  
 :  
 : Docket No. IBIA 04-70-A  
DEPUTY DIRECTOR, OFFICE OF :  
TRIBAL SERVICES, BUREAU OF :  
INDIAN AFFAIRS, :  
Appellee. : November 18, 2005

Native One Deposit & Trust of Mission, South Dakota (Appellant), appeals a December 24, 2003 decision of the Deputy Director, Office of Tribal Services, Bureau of Indian Affairs (Deputy Director; BIA) denying its application to be a BIA guaranteed lender. For the reasons discussed below, the Board affirms the Deputy Director's decision.

## Background

BIA's Loan Guaranty, Insurance, and Interest Subsidy Program (Program) encourages eligible borrowers to develop viable Indian businesses through conventional lender financing. The Program helps lenders reduce excessive risks on loans they make which, in turn, helps borrowers secure conventional financing that might otherwise be unavailable. See 25 C.F.R. § 103.2.

A lender may be considered for BIA approval under the Program, if the lender is:

- (1) Regularly engaged in the business of making loans;
- (2) Capable of evaluating and servicing loans in accordance with reasonable and prudent industry standards; and
- (3) Otherwise reasonably acceptable to BIA.

25 C.F.R. § 103.10(a).

Appellant is a chartered company of the Modoc Tribe of Oklahoma with its corporate office located in Miami, Oklahoma. At the time of its application, it was a new

company in the process of establishing a branch office on the Rosebud Sioux Reservation in South Dakota. Appellant is a non-traditional lending institution that would contract out and/or out-source most of the technical aspects of its operations. The application noted that Appellant “is a new company with no track record,” but explained that the individuals on its Board of Directors had many years experience in Indian Country and were familiar with the unique characteristics of lending in that market.

On September 8, 2003, Appellant submitted an application for BIA guaranteed lender approval. Appellant stated that it intended to focus on loans for Native American economic development projects that would raise the standard of living and create jobs for Indians. The application was forwarded to BIA’s Office of Economic Development by the Acting Regional Director of the Great Plains Region (Regional Director) with a recommendation for approval. The Regional Director noted that review of the Office of Economic Development was required because the application involved a non-traditional certified lender request.

The Deputy Director concluded that Appellant was not eligible to be a BIA Guaranteed Lender, and provided the following explanation for that decision:

1. NODT is not regularly engaged in the business of making loans. The BIA Loan Guaranty Program is not an appropriate place to enable start-up of new banks with no experience and no loan portfolio. We do not want the program to become an incubator for new banks.
2. NODT does not have capability to evaluate and service loans in accordance with reasonable and prudent industry standards. Your September 8 letter to Stacey Johnston acknowledges that NODT will continue to contract/out-source most of the technical aspects of its operation. We select banks which have excellent capability for evaluating loan applications and servicing loans they make to enter into Loan Guaranty Agreements.
3. NODT is not otherwise reasonably acceptable to BIA. The fact that NODT has no paid-in capital and or surplus is a source of concern. If NODT gains experience and meets our other requirements, we will ask for the opinion of *independent counsel* that the lender complies with applicable banking laws. (“Independent Counsel” is counsel that is not an “associate” of the lender.)

Decision at 1 (emphasis in original).

On February 5, 2004, Appellant filed a timely appeal of the Deputy Director's decision with the Board. The Notice of Appeal stated that grounds for the appeal would follow. On March 4, 2004, prior to the notice of docketing of the appeal, Appellant filed a Statement of Reasons. Appellant did not file an opening brief but instead relied on "the materials in the record and the Notice of Appeal." June 4, 2004 Letter from Appellant to Board. The Deputy Director filed an answer brief.

### Discussion

The Deputy Director argues as a threshold matter that the appeal should be dismissed because Appellant did not file a Statement of Reasons with its Notice of Appeal. The Deputy Director relies on 43 C.F.R. § 4.332(a), which provides that "[a] notice of appeal shall include \* \* \* [a] statement of the reasons for the appeal and of the relief sought."

While the Board considers the requirement to timely file a notice of appeal to be jurisdictional, and will thus dismiss an appeal that is not filed within the required time, the Deputy Director points to no decision of the Board that has treated the *contents* of the notice of appeal as jurisdictional, and we are unaware of any such decision. The Board will dismiss an appeal if the appellant fails to set forth specific grounds for the appeal and thus fails to meet its burden of proof against the decision being appealed. See Archer v. Eastern Regional Director, 38 IBIA 111, 112-13 (2002); Denny v. Northwest Regional Director, 36 IBIA 220, 224-25 (2001). Here, however, Appellant stated in its Notice of Appeal that it would subsequently supply the grounds for reversal and then filed a Statement of Reasons setting forth such grounds. The Board thus declines to dismiss the appeal. 1/

The determination whether or not to permit a lender to participate in the loan guaranty program is matter within the discretion of BIA. See CAL-NOR v. Assistant Secretary - Indian Affairs, 36 IBIA 41, 44 (2001). In reviewing a discretionary decision, the Board will not substitute its judgment for that of BIA but may review whether BIA provided an adequate explanation for its decision and gave proper consideration to all legal requisites in the exercise of discretion. See Aloha Lumber Corp. v. Alaska Area Director, 41 IBIA 147, 157 (2005).

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1/ The Deputy Director, in his answer brief, appears to be unaware that Appellant filed a Statement of Reasons. The service certificate accompanying the Statement of Reasons indicates that it was served on the Deputy Director, Regional Director, Associate Solicitor, and Field Solicitor. In any event, because the Board affirms the Deputy Director's decision, he suffers no prejudice from any failure to receive the Statement of Reasons.

Here, the Deputy Director provided a reasoned explanation for the decision, which properly considered whether the lender's application established that it met the regulatory criteria. Appellant fails to show that this decision was inadequate in any respect.

Appellant argues that it is actively engaged in negotiating a management agreement with a duly licensed federal banking institution that is actively engaged in the business of making and servicing loans, which Appellant says will give it the capability to evaluate and service loans in accordance with reasonable and prudent industry standards. Appellant argues that it has paid-in capital available to create a surplus, and has available the opinion of an independent counsel stating that Appellant complies with applicable banking laws.

These arguments — at least if the anticipated objectives are completed — might present a new basis for BIA to consider approving Appellant as a BIA guaranteed lender. <sup>2/</sup> But they were not in the application submitted to the Deputy Director and were not available to him at the time of his decision. The Board's review is limited to those issues which were before the BIA official on review. See 43 C.F.R. § 4.318. Thus, we do not address those arguments here.

Appellant additionally argues that it seeks BIA guaranteed lender status in order to accelerate technology development for the benefit of Native American's employment and to contribute to the nation's war effort through the manufacture of Department of Defense and Homeland Security technologies. It also argues that its unique capitalization from overseas sources creates a net import of capital for funding such technologies.

The purpose of a lender's loans is not part of the specified regulatory criteria in 25 C.F.R. § 103.10 regarding eligibility for guaranteed lender status and did not form any part of the basis of the Deputy Director's denial of Appellant's application. The Deputy

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<sup>2/</sup> The record shows that, before appealing to the Board, Appellant sought "clarification" from the Deputy Director of the reasons specified in his decision, and asked whether a demonstration of Appellant's source of capital, a management contract between the Lender and a major U.S. banking institution, and an opinion of independent counsel that the Lender complied with applicable banking laws would address and overcome all of the Deputy Director's reasons for denying the Lender's application. The Deputy Director, in a letter dated February 26, 2004, stated that these steps would not overcome BIA's concerns with Appellant's application. By that time, Appellant had filed its appeal with the Board and the Deputy Director no longer had jurisdiction over the matter, see e.g., Bullcreek v. Western Regional Director, 39 IBIA 100, 101-02 (2003), although he was not precluded from considering possible settlement or requesting a remand to allow for reconsideration.

Director's decision cites a variety of concerns about Appellant's financial and technical capacity. The fact that Appellant may have a worthy purpose or the potential to import capital does not establish that the Deputy Director's concerns about its capacity were unreasonable.

Finally, Appellant argues that BIA has granted guaranteed lender status to other financial institutions similar to Appellant in the past and alleges that BIA has an unwritten policy of granting guaranteed status to banks only. Appellant does not identify any specific financial institutions similar to it that were granted guaranteed lender status and provides no basis for concluding that BIA will grant such status to banks only. Accordingly, the Board rejects these arguments.

### Conclusion

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 affirms the Deputy Director's December 24, 2003 decision.

I concur:

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// original signed  
Katherine J. Barton  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge