



INTERIOR BOARD OF INDIAN APPEALS

Roberts County, South Dakota; and State of South Dakota and
Sisseton School District No. 54-2 v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

48 IBIA 304 (02/27/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROBERTS COUNTY, SOUTH)	Order Vacating Decision
DAKOTA; AND STATE OF)	and Remanding
SOUTH DAKOTA AND SISSETON)	
SCHOOL DISTRICT NO. 54-2,)	
)	
Appellants,)	
)	Docket Nos. IBIA 08-68-A
v.)	08-85-A
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	February 27, 2009

Roberts County, South Dakota (County), and the State of South Dakota, on behalf of itself and the Sisseton School District No. 54-2 (collectively Appellants), appealed to the Board of Indian Appeals (Board) from a March 25, 2008, discretionary decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to accept a parcel identified as the Brooks property¹ in trust for the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (Tribe). The appeals were consolidated with appeals filed by these and other appellants from four other decisions made by the Regional Director in March of 2008 to accept four other parcels in trust for the Tribe.² The

¹ The Brooks property is described as the South Half of the Southwest Quarter (S½SW¼) of Section 28, Township 125 North, Range 51 West of the Fifth Principal Meridian, Roberts County, South Dakota.

² The Brooks property appeals were assigned Docket Nos. IBIA 08-68-A (County) and 08-85-A (State and School District No. 54-2). The four remaining appeals are from trust acquisition decisions to accept parcels identified as Smith Subdivision, Gardner parcel, German parcel, and Marlo Peters land. See Notice of Docketing and Order Setting Briefing Schedule, May 15, 2008, *Roberts County, South Dakota; State of South Dakota and Sisseton School District No. 54-2; City of Sisseton, South Dakota; and Wilmot School District No. 54-7*, Docket Nos. IBIA 08-68-A through 08-72-A, 08-75-A through 08-80-A, 08-85-A, and 08-86-A.

Regional Director has requested that the Brooks property decision be remanded for additional consideration. Appellants oppose the request. We conclude that Appellants have not met their heavy burden to justify denying the Regional Director's request to have BIA's discretionary decision remanded for additional consideration. Therefore, we vacate the Regional Director's Brooks property decision and remand the matter for further consideration.

In opposing the Regional Director's request for a remand, Appellants argue that BIA has proffered no justification for a remand and, thus, there is no basis upon which the Board may grant BIA's request. They also argue that they have expended a substantial amount of time and effort in briefing their appeal from the Brooks decision, and if BIA is allowed to withdraw the decision and substitute another, Appellants will lose that investment of time and effort. The County also contends that if the Brooks property decision is vacated and remanded, all of the appellants' briefing in the remaining four consolidated cases will be "undermined" because the briefs used the Brooks decision to illustrate problems that the appellants contend are common to all five of the trust acquisition decisions. County's Opposition at 1. The County argues that BIA "has failed to make any showing why this one parcel should be separated from the others for reconsideration," *id.*, and that the remand allowed BIA to "turn a blind eye to the cumulative effect[s]" of the Brooks acquisition, *id.* at 2. Finally, the County suggests that a remand "may result in inconsistencies in the decisions of the applications in this fee-to-trust process" and that a remand does not ensure that the Regional Director will address "the inherent structural flaws in the process that denied Appellants their right to a fair and impartial decision maker." *Id.*

We are unpersuaded by Appellants' arguments.

In the present case, the Board has not yet begun consideration of the merits of this appeal. Additionally, the Regional Director's decision in this case was based largely, if not entirely, on the exercise of discretion. *See* 25 C.F.R. § 151.10. In matters involving BIA's discretionary authority, the Board lacks authority to dictate what decision BIA should reach. *See Kent v. Northwest Regional Director*, 45 IBIA 168 (2007). Thus, we have held that if BIA requests a remand in order to further consider a decision that was issued based on its discretionary authority, a refusal by the Board to remand arguably interferes with authority reserved to BIA. *United Keetoowah Band of Cherokee Indians v. Eastern Oklahoma Regional*

Director, 47 IBIA 87, 89 (2008).³ We therefore disagree with Appellants' argument that BIA bears the burden of justifying a remand request. On the contrary, if BIA wishes to give additional consideration to a decision, we think that the burden is on a party opposing a remand to demonstrate why a remand should *not* be granted by the Board. *Id.*

Appellants next contend that their investment of time and effort in preparing briefing on appeal will be wasted if BIA is allowed to issue another decision in the Brooks property case. We disagree. To the contrary, a remand will allow the Regional Director to consider and fully address, as appropriate, both discretionary and legal issues raised in Appellants' briefs on appeal that may not have been clearly or fully discussed in the March 25, 2008, decision. And if a new decision is adverse to Appellants, they may reassert, in a new appeal, their arguments with respect to unresolved issues.

The County argues that if BIA withdraws its decision in the Brooks case, their briefing on the remaining consolidated cases will be undermined. This argument is conclusory and unpersuasive. We recognize that Appellants' briefs used the Brooks property case to illustrate what they contend are problems common to all five of the Regional Director's trust acquisition decisions, but the fact that the Brooks property decision has been vacated and remanded, at the request of the Regional Director, does not lessen or undermine the weight and consideration that the Board will give to Appellants' arguments as they apply to the remaining four properties.

Of course, if the Regional Director issues a new decision regarding the Brooks property while the appeals from the remaining four decisions are still pending, if that new decision is to accept the property into trust, and if Appellants appeal that decision and contend that the alleged defects in the present Brooks property decision were not cured on

³ The County seeks to distinguish *United Keetoowah* by arguing that the appellants in the present consolidated cases all have standing to contest the decisions, unlike the Cherokee Nation in *United Keetoowah*. In *United Keetoowah*, the Board questioned — but did not decide — whether the Cherokee Nation as an intervenor had standing to oppose a BIA request for a remand, and we distinguished between a party's status as an interested party with respect to the merits, and that same party's status with respect to a BIA request for a remand. We recognize that in this case, the County argues that BIA is inherently incapable of serving as a proper decision maker with respect to trust acquisition requests, but that issue is preserved in the appeals from the four remaining decisions, and we are not convinced that the assertion of that allegation is sufficient to provide grounds to deny BIA an opportunity to further consider its decision, which must also include consideration of Appellants' arguments before the Board.

remand, it may well be appropriate to consolidate any new appeals with the pending appeals for the other four properties, which will likely promote efficiency. On the other hand, if the Regional Director decides not to accept the Brooks property in trust, then Appellants will have obtained their ultimate objective. And if the Board issues a decision in the remaining appeals before a new decision is issued for the Brooks property, the Regional Director will have the benefit of the Board's decision when giving additional consideration to the proposed Brooks property trust acquisition.

Having fully considered Appellants' arguments, we conclude that they have failed to satisfy their burden of showing that a remand request should be denied. On remand, the Regional Director shall address, as necessary and appropriate to support a new decision, the arguments that were raised by the parties in their briefs on appeal to the Board.

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 Regional Director's March 25, 2008, decision and remands the matter for further consideration.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge