INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota, County of Charles Mix, and City of Wagner
v. Acting Great Plains Regional Director, Bureau of Indian Affairs

53 IBIA 138 (04/20/2011)

Related Board case:
49 IBIA 84

United States Department of the Interior

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STATE OF SOUTH DAKOTA, COUNTY OF CHARLES MIX, and CITY OF WAGNER, Appellants,	)	Order Remanding Case to Regional Director
v.	)	Docket No. IBIA 07-80-1
ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	April 20, 2011

This appeal was decided by the Board of Indian Appeals (Board) on April 16, 2009. 49 IBIA 84. In that decision, the Board upheld a January 9, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the acceptance into trust of approximately 39.90 acres of land,[1] located in the city of Wagner, Charles Mix County, South Dakota, by the United States for the Yankton Sioux Tribe (Tribe). Appellants sought judicial review and the U.S. District Court for the District of South Dakota vacated the Board's decision and ordered that the case be remanded to BIA. *See State of South Dakota, County of Charles Mix, and City of Wagner v. U.S. Department of the Interior*, No. CIV 10-3006-RAL, 2011 WL 1303022 (D.S.D. Mar. 31, 2011).

The Court held that the Regional Director's failure to provide Appellants with access to 23 documents in the record, at the time the matter was pending before BIA, violated 25 C.F.R. § 2.21(b)[2] and Appellant's due process rights because it precluded Appellants from addressing or rebutting a significant portion of factual material on which the Regional

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[1] The property is commonly referred to as the "Wagner Heights Addition."

[2] Section 2.21(b) provides in relevant part:

> When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.

Director relied in making the decision. The Board found the error harmless, but the Court disagreed because the Regional Director's decision is discretionary and the Board does not review BIA's exercise of discretion de novo. *See id.*, 2011 WL 1303022, at *11-14. The Court vacated the Board's decision and ordered that the case be remanded to the Regional Director to provide the required notice and opportunity to comment under § 2.21(b), and to conduct a de novo review and consider argument on the 23 documents and any other documents before making a decision on the Tribe's trust acquisition request. *See id.*, 2011 WL 1303022, at *17.[3]

By letter dated April 8, 2011, the Department of the Interior's Office of the Solicitor formally transmitted the Court's decision to the Board, advised the Board that the United States will not appeal, and requested that the Board remand the case to BIA for further consideration in accordance with the Court's decision.

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 remands this case to the Regional Director, for proceedings consistent with the Court's order.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

[3] In the litigation, Appellants raised several additional challenges, which the Court rejected.