



INTERIOR BOARD OF INDIAN APPEALS

Rio Arriba, New Mexico, Board of County Commissioners
v. Acting Southwest Regional Director, Bureau of Indian Affairs

38 IBIA 18 (07/24/2002)

Related Board cases:

36 IBIA 14, reconsideration denied, 36 IBIA 102

38 IBIA 108



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RIO ARRIBA, NEW MEXICO, BOARD OF COUNTY COMMISSIONERS
v.
ACTING SOUTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 02-25-A

Decided July 24, 2002

Appeal from a decision to take a tract of land into trust for the Jicarilla Apache Nation.

Vacated. Matter referred to the Assistant Secretary - Indian Affairs.

1. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions-Indians: Lands: Trust Acquisitions

Where remarks made by a Bureau of Indian Affairs deciding official suggest a possible lack of objectivity concerning a matter pending before him, and the extent of that official's participation in the Bureau's decision in the matter cannot be determined, the Board of Indian Appeals must consider the possibility that the Bureau's decision was tainted by bias. Where the possibly tainted decision was issued under the Bureau's discretionary authority, the Board will refer the matter to the Assistant Secretary - Indian Affairs under 43 C.F.R. § 4.337(b) for issuance of a new discretionary decision.

APPEARANCES: Dennis Luchetti, Esq., and Ted J. Trujillo, Esq., Española, New Mexico, for Appellant; John L. Gaudio, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Acting Regional Director; Daniel I.S.J. Rey-Bear, Esq., Albuquerque, New Mexico, for the Jicarilla Apache Nation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from an October 23, 2001, decision of the Acting Southwest Regional Director, Bureau of Indian Affairs (Acting Regional Director; BIA), to take approximately 32,000 acres in Rio Arriba County (Lodge at Chama property or the property) into trust for the Jicarilla Apache Nation (Nation). The Acting Regional Director's decision was issued following the Board's remand in Rio Arriba, New Mexico, Board of County Comm'rs v.

Acting Southwest Regional Director (Rio Arriba I), 36 IBIA 14, recon. denied, 36 IBIA 102 (2001). 1/ For the reasons discussed below, the Board vacates the Acting Regional Director's decision and refers this matter to the Assistant Secretary - Indian Affairs.

Background

Under the remand in Rio Arriba I, the Southwest Regional Director (Regional Director) 2/ was required to re-analyze the Nation's trust acquisition request under 25 C.F.R. § 151.10(e) ("[T]he impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"). As directed by the Board, the Regional Director sought the advice of the Solicitor's Office as to whether the law concerning the New Mexico gross receipts tax was sufficiently clear to allow an analysis of the loss of revenue which would result from the trust acquisition at issue here. By memorandum of March 15, 2001, the Acting Regional Solicitor, Southwest Region, advised the Regional Director that the law was clear and that, under that law, "sales by and sales to the Nation * * * transacted on the Lodge at Chama [property] will not be subject to the New Mexico gross receipts tax if the Lodge at Chama [property] is taken into trust." Acting Regional Solicitor's Memorandum at 3. He therefore advised that, under Rio Arriba I, BIA must consider loss of revenue from gross receipts taxes.

After Appellant and the Nation submitted additional information, the Acting Regional Director issued a decision on October 23, 2001, in which he considered the tax impacts of the requested trust acquisition resulting from loss of property taxes, gross receipts taxes, and a new lodgers tax first assessed in 2000. The Acting Regional Director again decided to take the property into trust, and Appellant filed a new appeal with the Board.

Briefs were filed by Appellant, the Nation, and the Acting Regional Director. The Board's initial review of the briefs and the administrative record convinced it that Appellant and the Nation were becoming increasingly polarized. In the belief that these two parties should be

1/ As was noted in Rio Arriba I, the Nation, through its Running Elk Corporation, operates a working ranch and a hunting, fishing and outdoor sports resort on the property. For further background of this matter, see the Board's earlier decision.

2/ As discussed further below, it is not clear whether, or to what extent, the Regional Director himself participated in the consideration of this matter. However, upon remand by the Board, the matter was officially pending before him. In this decision, the Board uses the term "Regional Director" in reference to the Regional Director himself and when discussing events occurring during the pendency of this matter in the Southwest Regional Office. It uses the term "Acting Regional Director" when discussing the Oct. 23, 2001, decision.

allowed to explore the possibility of resolving at least part of their dispute in a non-adversarial setting, the Board stayed proceedings and referred this matter to the Department's newly established Office of Collaborative Action and Dispute Resolution for an assessment conference on the use of alternative dispute resolution. Although the assessment process was initiated, the matter did not proceed to alternative dispute resolution. The Board therefore lifted the stay and began consideration of this appeal.

Discussion and Conclusions

Appellant attached to its notice of appeal a November 20, 2001, memorandum from its Chief Appraiser addressing the tax impact issue. In its opening brief, Appellant addressed the tax impact issue, as well as a number of other issues. The Nation moved to strike the Chief Appraiser's memorandum and Appellant's non-tax impact arguments. The Regional Director filed a motion in support of the Nation's motion and Appellant filed a response.

The Chief Appraiser's memorandum post-dates the Acting Regional Director's decision and clearly could not have been considered by him. The Board has a well-established practice of declining to consider arguments or evidence presented for the first time on appeal. E.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 114-15 (2000); Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996), and cases cited therein. This matter was pending on remand long enough for Appellant to have prepared and submitted this information to the Regional Director. It is now too late. The Board will not consider the Chief Appraiser's memorandum.

Appellant contends that it is entitled to make non-tax impact arguments in this appeal because the Board expanded the scope of its remand when it stated, in denying Appellant's petition for rehearing, that Appellant could make its arguments to the Regional Director. The scope of the remand in this case was clearly set out in the Board's original decision. Even assuming the statement in the Board's order denying rehearing could reasonably be read as broadly as Appellant reads it, Appellant failed to raise non-tax impact issues before the Regional Director and thus waived any opportunity it may have had to raise them. ^{3/}

^{3/} Appellant suggests that, because a copy of the petition for reconsideration it filed with the Board was included in the administrative record for this appeal, Appellant must be deemed to have asked the Regional Director to consider the arguments contained in the petition. However, the copy of the petition included in the record was attached to a letter Appellant wrote to the Secretary of the Interior, requesting that she disqualify the Regional Director from the matter. Nothing in the record can reasonably be construed as a request to the Regional Director that he consider the arguments in the petition.

One of Appellant's non-tax impact arguments concerns a matter which arose following the Board's remand. In that argument, Appellant alleges that the Regional Director showed bias against Appellant in remarks reported in two articles published in the Rio Grande Sun on February 15, 2001, and that the Regional Director's bias was reflected in the Acting Regional Director's October 23, 2001, decision. The Board defers its consideration of this issue until it completes its review of the tax impact issue.

As noted above, the Acting Regional Director analyzed tax impact with respect to property taxes, gross receipts taxes, and lodgers taxes. With respect to property taxes, Appellant contends that the Acting Regional Director erred in considering only taxes actually paid by the Nation. Although acknowledging that the Nation has a still-pending appeal from an increase in valuation made in 2000, Appellant argues that the Acting Regional Director should either have considered property taxes in the disputed amount assessed by Appellant or awaited a final decision in the Nation's tax appeal.

In remanding this matter, the Board stated that BIA was to take updated tax information into account but that "any such updated information should be based upon taxes actually assessed and paid." 36 IBIA at 24. The Board further stated that "the Regional Director should take into account any appeals the Nation may have filed concerning the new valuation or property taxes based upon that valuation." Id.

The Board intended in the just-quoted language to make it clear that the Regional Director was not required to speculate as to the Nation's chances of success in its tax appeal. The Acting Regional Director properly followed the Board's instructions in considering only the taxes actually paid by the Nation. 4/

4/ Appellant contends that the Nation did not protest its 2001 property taxes and has paid the first half of the 2001 taxes, which were based on the disputed 2000 valuation. Appellant's Opening Brief at 8-9. Appellant appears to be arguing that these taxes were "assessed and paid" within the meaning of the Board's remand.

The Nation's answer brief attaches exhibits showing that its first-half payment for 2001 was made on Dec. 6, 2001, and that it has filed a protest and claim for refund concerning its 2001 taxes. Nation's Answer Brief, Exhibits 4-7.

Clearly, the Nation had not paid any 2001 taxes on Oct. 23, 2001, the date of the Acting Regional Director's decision. Even if payment had been made prior to the Acting Regional Director's decision, the Nation's protest and claim for refund would have made it clear that the 2001 taxes were disputed and thus not "assessed and paid" within the meaning of the Board's remand.

Contending that a decision in the Nation's tax appeal is imminent, Appellant faults the Acting Regional Director for not awaiting a decision in that appeal. In October 2001, the Acting Regional Director believed that the Nation's tax appeal was "not anticipated to be decided for some time." Acting Regional Director's Decision at 4. On June 20, 2002, the date of Appellant's most recent filing in this appeal, the Nation's tax appeal had not yet been decided.

As nine months have passed since the Acting Regional Director issued his decision, and no decision in the Nation's tax appeal has been issued, it clearly appears that a decision in the tax appeal was not actually imminent when the Acting Regional Director issued his decision. Appellant offers no reason to believe that, in October 2001, the Acting Regional Director should have expected an imminent decision. Thus, it has not shown that the Acting Regional Director acted unreasonably in issuing his decision without awaiting a decision in the Nation's tax appeal.

Next, Appellant contends that the Acting Regional Director erred in not considering the gross receipts taxes paid on construction of additional lodging facilities on the Lodge at Chama property.

After a visit to the property and a meeting with the manager of the Lodge facility, BIA staff concluded that the construction would be completed before the property was taken into trust. Therefore, the Acting Regional Director omitted the taxes on this construction from his analysis, in accordance with footnote 8 in Rio Arriba I. 5/

Appellant contends that some construction, and/or repairs will undoubtedly take place in the future and that the Acting Regional Director should have attempted to quantify them. However, as the Acting Regional Director argues in his answer brief, any attempt on his part to quantify such activities would have been entirely speculative. The Acting Regional Director was not required to engage in speculation on this point.

Appellant next contends that the Acting Regional Director erred in failing to discuss specifically the loss of gross receipts taxes from sales of hunting licenses on the property. The Nation responds that it included gross receipts taxes on the sale of hunting licenses in the information it provided to BIA, which included gross receipts taxes paid on all receipts generated on the property, except for timber licenses and grazing leases. The Acting Regional Director argues that BIA had no reason to doubt the Nation's information.

5/ See 36 IBIA at 26 n.8: "Of the amount [the Nation] estimated it would pay in gross receipts taxes in 2000, the greatest amount by far was attributed to construction. Presumably, construction will be a finite activity. If so, it would be reasonable and appropriate for BIA to take that fact into consideration."

Appellant does not contend that the Nation submitted incorrect information as to the amount of gross receipts taxes it paid. Nor did it so contend before the Regional Director. In the absence of some reason to doubt the Nation's information, BIA was not required to request a more detailed breakdown of the Nation's gross receipts tax information.

Next, Appellant contends that the Acting Regional Director underestimated the amount of lost revenue from the lodgers tax by using figures for 2000 when the construction discussed above will result in more rooms, thus more guests and a greater loss of revenue from the lodgers tax. The Acting Regional Director responds that he did not consider the potential lodgers tax loss from the new rooms "partly because of the offsetting benefits that will accompany the expansion and partly because the lodger's tax may remain applicable after the Property is taken into trust." Acting Regional Director's Answer Brief at 6. In his October 23, 2001, decision, the Acting Regional Director stated that he considered losses from the lodgers tax (in the amount paid in 2000) out of an abundance of caution. He also stated:

The * * * lodgers tax is a new tax that the County only started assessing in January 2000. Unlike the gross receipts tax, it is not clear where the legal incidence of the lodgers tax falls. Pursuant to the [Board's] direction, I will not engage in a complex legal analysis to determine whether the County would lose its lodgers tax from the Property after it is taken into trust.

Acting Regional Director's Decision at 5-6.

Appellant does not contend, let alone show, that the law concerning the new lodgers tax is clear enough to enable the Acting Regional Director to determine with certainty that the tax would not apply on the property if it were taken in trust. Under these circumstances, Appellant has not shown that the Acting Regional Director was required under Rio Arriba I to consider the lodgers tax at all, either by reference to taxes actually paid in 2000 or by estimation of taxes to be paid in the future.

Next, Appellant contends that the information provided by the Nation concerning its purchases from local vendors is not independently verifiable.

The Nation furnished information on purchases it made for the property during 2000 and the amount of gross receipts taxes that were paid on those purchases. It also furnished information concerning which of the purchases were made on the property and which were made off the property. The distinction was relevant because gross receipts taxes for on-property purchases could no longer be collected if the property were taken into trust, but taxes on off-property purchases would continue to be collected regardless of trust acquisition of the

property. BIA compared the on-property/off-property breakdown for the 2000 purchases to the breakdown for the previous four years and found the pattern to be consistent.

Appellant does not contend that the Nation furnished incorrect information. It apparently believes, however, that the Acting Regional Director should have required the Nation to produce records of its purchases. If that is Appellant's contention, the Board rejects it. Absent some reason to believe that the Nation was furnishing incorrect information concerning its vendor purchases, the Acting Regional Director had no responsibility to require the Nation to furnish records of those purchases.

Appellant also faults the Acting Regional Director for projecting a pattern of future vendor purchases based upon the past pattern. Although its argument on this point is difficult to understand, Appellant seems to be arguing that the Acting Regional Director should not have projected tax losses from vendor purchases unless he was also willing to project losses in the amounts Appellant contends will occur with respect to property taxes, gross receipts taxes on future construction, and increased lodgers taxes.

The Acting Regional Director based his vendor purchase projection on actual purchases made and actual taxes paid. The tax losses Appellant hypothesizes are speculative. As discussed above, the Acting Regional Director properly based his analysis on taxes actually assessed and paid and was not required to consider speculative tax losses.

Next, Appellant contends that the Acting Regional Director erred in his analysis of the loss of bonding capacity claimed by Appellant and the Chama Valley School District. The Acting Regional Director considered bonding capacity to be a tax-impact issue because of arguments that a reduction in total property valuation for the County and the School District would result in a decrease in bonding capacity for both entities.

Appellant concedes that it bases its argument on the still-disputed 2000 valuation of the Lodge at Chama property, rather than on the undisputed valuation relied upon by the Acting Regional Director. For the reasons discussed above, in connection with property taxes *per se*, the Board finds that the Acting Regional Director properly relied upon the undisputed valuation in his analysis of bonding capacity.

Appellant also contends that the Acting Regional Director employed an incorrect formula for determining the bonding capacities of Appellant and the School District. The Acting Regional Director analyzed bonding capacity as a percentage of taxable value, which is 1/3 of full value. Appellant contends that the bonding capacities must be determined by reference to full value.

Appellant cites two provisions of the New Mexico Constitution and two New Mexico statutory provisions concerning issuance of bonds by counties and school districts. ^{6/} None of the cited provisions answers the question of whether bonding capacity is determined by reference to taxable value or full value.

When this matter was pending before the Regional Director, the Nation submitted excerpts from a document titled “Financial and Property Tax Data by County and Municipality, Fiscal Year 2000,” published by the New Mexico Department of Finance and Revenue. Page 206 of that document is titled “County General Obligation Bond Report.” It shows bonding capacity for each county as a percentage of net taxable value. A footnote states: “Per state law maximum bonding capacity for general purpose obligation bonds is limited to 4% of the net taxable value.” The Nation also informed the Regional Director that it had confirmed, through the New Mexico Department of Education’s School Budget and Financial Analysis Division, that a Department of Education publication showing total valuation by school district used the taxable values and not the full values. See Nation’s Supplemental Information for Lodge at Chama Trust Acquisition at 19 and accompanying Exhibits 5 and 7.

In its answer brief in this appeal, the Nation noted that the constitutional and statutory provisions cited by Appellant did not specify that bonding capacities were to be based on full value, rather than taxable value. The Nation also referred to the materials just discussed. Despite the Nation’s arguments, however, Appellant failed in its reply brief to cite any additional support for its position or to explain why its position appears to be at odds with the position of two agencies of the New Mexico State government. The Board finds that Appellant has failed to show that the bonding capacity of counties and school districts in New Mexico is based upon a percentage of full value, rather than taxable value, of property within the county or school district. Accordingly, the Board also finds that Appellant has failed to show that the Acting Regional Director employed an incorrect formula in his analysis of bonding capacity.

Next, Appellant contends that the Acting Regional Director improperly considered other revenue received by Appellant from Indian and Federal lands in Rio Arriba County (taxes on oil and gas production on the Jicarilla Reservation and payments in lieu of taxes on Federal lands). Appellant contends that these revenues cannot be considered because Appellant will continue to receive them regardless of whether the property is taken into trust.

In a similar argument, Appellant contends that the Acting Regional Director improperly considered economic and tax benefits to Appellant from ongoing business activity on the property. Among other things, the Acting Regional Director noted contributions to the local

^{6/} These are N.M. Const. art. IX, §§ 10 and 11, and N.M. Stat. Ann. §§ 4-49-7 and 22-18-1.

tax base from tourists visiting the Lodge and from Lodge employees, the majority of whom are non-Indian. Again, Appellant contends that these benefits cannot be considered because Appellant will continue to receive them regardless of whether the property is taken into trust.

In both cases, the Acting Regional Director considered the revenues as a part of Appellant's total revenues, which he examined in relation to the tax losses resulting from the trust acquisition, in order to assess the overall tax impact of the acquisition. The Board finds nothing unreasonable in this approach.

Appellant has not shown that the Acting Regional Director erred in his analysis of the tax impact issue.

The Board now returns to Appellant's argument that the Regional Director showed bias in remarks reported in two articles published in the Rio Grande Sun on February 15, 2001, and that the Regional Director's bias was reflected in the Acting Regional Director's October 23, 2001, decision.

One of the articles is titled "Tax Re-Evaluation of Running Elk Ranch Stands" and concerns the Nation's initial protest of the 2000 tax valuation. ^{7/} The other is titled "Trust Status for Jicarilla Ranch Denied" and concerns the Board's decision in Rio Arriba I. The first article includes two direct quotes from the Regional Director. In one, he is quoted as saying, "They [*i.e.*, the County] want to increase their (the Jicarilla Nation's) taxes by 10 times just because the tribe sells hunting permits." Quoting him again, the article states: "I question the timing of this on the part of the county,' [the Regional Director] said. 'This trust status decision has been pending for a couple of years now, and they just decide to do this in the last few weeks before it's decided.'" In addition to these direct quotes, each article contains characterizations of statements made by the Regional Director. The first article states that the Regional Director "said the increase was a tactic by Rio Arriba County in its fight to prevent the tribe from placing the Running Elk Ranch in federal trust." The second article states that the Regional Director "questioned the legitimacy of the property tax assessment."

By letter of March 5, 2001, Appellant asked the Secretary of the Interior to disqualify the Regional Director from this matter on grounds of improper conduct. Appellant contended that the Regional Director's remarks, as reported in the Rio Grande Sun, showed "hostility, bias, partiality and a fundamental lack of objectivity." Appellant's Mar. 5, 2001, Letter at 3. In the same letter, Appellant asked the Secretary to assume jurisdiction over the matter under 43 C.F.R. § 4.5.

^{7/} As discussed above, the Nation has continued to pursue this matter and has a still-pending appeal concerning it.

Appellant's March 5, 2001, letter was referred to the Deputy Commissioner of Indian Affairs, who wrote to Appellant on August 17, 2001, stating that "[t]he Regional Director will continue to exercise the authority to render a decision in this matter," and noting that the Regional Director's decision could be appealed to the Board. The Deputy Commissioner did not specifically address Appellant's allegation of improper conduct by the Regional Director.

Appellant did not raise the improper conduct issue before the Regional Director and did not ask the Regional Director to recuse himself from the matter. Arguably, Appellant should have made such a request to the Regional Director as soon as the articles appeared or at the same time Appellant wrote to the Secretary. Appellant might have thought, however, that its request to the Secretary served this purpose. Given the seriousness of the issue, the Board concludes that it should exercise its authority under 43 C.F.R. § 4.318 to consider Appellant's bias argument despite Appellant's failure to make the argument before the Regional Director.

Appellant contends that the Regional Director's bias is reflected in the October 23, 2001, decision signed by the Acting Regional Director. Appellant makes only two arguments in support of this contention. It first argues that the Acting Regional Director deliberately failed to address the bias argument in his decision. Given Appellant's failure to make that argument to the Regional Director, Appellant cannot complain that the argument was not addressed. Under the circumstances, the fact that the Acting Regional Director did not address the issue in his decision does not show that he was biased against Appellant.

Appellant also argues that the Acting Regional Director's decision showed bias by stating that the 2000 valuation of the Lodge of Chama property represented a ten fold increase over the 1999 valuation. Appellant contends: "This attitude parrots the Regional Director[']s statements to the Rio Grande Sun. By choosing to focus on the size of the increase, an improper motive is attributed to Appellant for the assessor's change in classification of the property." Appellant's Opening Brief at 5.

Appellant does not contend that the Acting Regional Director's statement was inaccurate. In fact, the Acting Regional Director exaggerated slightly. ^{8/} Even so, he did not attribute any improper motive to Appellant but simply made a statement of (slightly exaggerated) fact. The minimal inaccuracy had no direct bearing on the Acting Regional Director's decision

^{8/} The Acting Regional Director stated:

"The Nation's 1999 property tax valuation showed a full value of \$2,199,378 and a taxable value of \$733,126. This resulted in property taxes of \$15,100.61. The Nation submitted the notice of valuation it received in June 2000, for the 2000 tax year. The notice shows a full value of \$21,301,191 and a taxable value of \$7,100,397. This is a ten fold increase."

Acting Regional Director's Decision at 4.

because, as discussed above, he based his decision on taxes actually assessed and paid, not on the taxes that would result from the disputed 2000 valuation. The Acting Regional Director's statement concerning increase in valuation does not show that he was biased against Appellant.

Appellant has not shown that bias is evident on the face of the Acting Regional Director's decision.

The Regional Director's remarks, as reported in the Rio Grande Sun, are more susceptible to a charge of bias. Whether or not they establish actual bias, they present the appearance of a lack of objectivity on the Regional Director's part. Without doubt, it is inappropriate for a BIA deciding official to make public comments of this nature on a matter that is pending before him.

The Regional Director did not sign the October 23, 2001, decision. However, the individual who signed as Acting Regional Director was evidently a Regional Office employee and thus under the supervision of the Regional Director. Although it is possible that the Regional Director did not participate in the decision-making process, there is no recusal memorandum in the record, and the Board must therefore consider the possibility that the Regional Director participated in the process, even though he did not sign the decision.

The Board must also consider the fact that, in this appeal, BIA has not offered any response to Appellant's bias argument, although it had the opportunity to do so in its answer brief.

The Nation argues that no bias was shown in the October 23, 2001, decision and that "the Board's review is restricted to the final decision issued by BIA in this matter." Nation's Motion to Strike at 6.

The Nation appears to be contending that the Board cannot consider the two Rio Grande Sun articles, even though they are included in the administrative record. The Board rejects such a contention. The Board has authority to consider all documents included in the administrative record. It also has authority to consider the absence of documents (e.g. a recusal memorandum) from the administrative record.

[1] In the absence of any evidence that the Regional Director removed himself entirely from the decision-making process, the Board is compelled to conclude that the Regional Director's reported remarks constitute a taint on the Acting Regional Director's decision. That taint cannot be cured in this proceeding because of the Board's limited review authority over trust acquisition decisions. While the Board could remand this case to the Regional Director with a direction that he fully recuse himself from the matter, it appears likely that, at this point, the taint could not be fully erased as long as the matter remains within the Southwest Regional

Office. Therefore, in order to remove any question as to whether BIA's final decision in this matter has been influenced by bias, the Board concludes that it should refer this matter to the Assistant Secretary - Indian Affairs under 43 C.F.R. § 4.337(b) for exercise of his discretionary authority and issuance of a new decision.

The Board contemplates that the Assistant Secretary will either issue a new decision himself or assign the matter to a BIA official outside the Southwest Region. ^{9/} It is within the Assistant Secretary's discretion to determine whether a de novo review of the Nation's trust acquisition request should be conducted or whether the new review should be restricted to the tax impact issue that was before the Regional Director when he made his questionable remarks. In either case, the Board believes that the Assistant Secretary or his designee could reasonably take the background work done by Regional Office staff, as well as the Board's two decisions in this matter, into consideration when issuing the new decision.

Finally, despite the failure of the earlier attempt at alternative dispute resolution, the Board continues to believe that Appellant and the Nation would benefit by talking to each other concerning this dispute, with the assistance of an experienced neutral party. Therefore, the Board recommends that the Assistant Secretary consider making another attempt to persuade Appellant and the Nation to engage in alternative dispute resolution.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Regional Director's October 23, 2001, decision is vacated, and this matter is referred to the Assistant Secretary - Indian Affairs for issuance of a new decision.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

^{9/} If the Assistant Secretary issues the decision himself, his decision will be final for the Department unless he states otherwise in the decision. 25 C.F.R. § 2.6(c).