



INTERIOR BOARD OF INDIAN APPEALS

Brian Chuchua, Laverta W. Page, Victor W. Page, Charline E. Chrispens, Gabino Carvajal,
Jesus Garcia and Gilberto Arias v. Pacific Regional Director, Bureau of Indian Affairs

42 IBIA 1 (11/01/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

BRIAN CHUCHUA, LAVERTA W. PAGE,	:	Order Vacating and Remanding
VICTOR W. PAGE, CHARLINE E.	:	Decision
CHRISPENS, GABINO CARVAJAL,	:	
JESUS GARCIA and GILBERTO ARIAS,	:	
Appellants,	:	
	:	Docket No. IBIA 00-47-A
v.	:	
	:	
PACIFIC REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	November 1, 2005

This is an appeal from a January 28, 2000 decision of the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), approving a request by the Rincon San Luiseño Band of Mission Indians (Tribe) to remove a portion of Road 340 from the BIA Indian Reservation Road System. For the reasons discussed below, the Board vacates the Regional Director’s decision and remands the matter for reconsideration.

Background

Appellants in this case are Brian Chuchua, LaVerta W. Page, Victor W. Page, Charline E. Chrispens, Gabino Carvajal, Jesus Garcia, and Gilberto Arias. 1/ They own or

1/ The original appeal in this case was filed by Brian Chuchua. By Order Allowing Joinder of Additional Appellants, dated July 13, 2000, the Board joined LaVerta W. Page, Victor W. Page, Charline E. Chrispens, Gabino Carvajal, Jesus Garcia and Gilberto Arias as Appellants. All of the Appellants are represented by the same attorney, who filed a single Opening Brief.

On Feb. 20, 2001, after briefing for this appeal was completed, the Board received a further Request to Join Appeal by Natalie Mowry, also represented by Appellants’ attorney. Appellant Chuchua apparently purchased his property from Ms. Mowry and her husband

(continued...)

have interests in various parcels of land located immediately adjacent to the Tribe's reservation. A set of roads collectively designated as BIA Road 340, located entirely on the reservation, connects the property owned by Appellants with State Route 6 (S-6), a State highway passing through the reservation. 2/ Because of geography and adjacent land use, Appellants apparently have no other means of access to their property. 3/

Since 1928, or shortly thereafter, Road 340 has been included in the system of Indian reservation roads maintained by BIA, although it is unclear just when some portions of the road affected by this dispute were constructed, or by whom. 4/ Under applicable regulations, BIA's maintenance of Road 340 has meant that the roadway must remain available for free public use, including use by Appellants.

1/(...continued)

(now deceased), and she now claims an interest in this appeal as a consequence of a non-judicial foreclosure on the property. Chuchua apparently still retains "limited possessory rights" in the property. Request to Join Appeal by Natalie Mowry at 1. There is no indication that Ms. Mowry has any arguments or information to present to the Board that differ from what her attorney has already presented on behalf of the other Appellants.

In light of the Board's decision in this case, we need not add Ms. Mowry as an appellant in order to protect any interest she may have in this matter.

2/ BIA Road 340, also called Route 340, is actually a series of roads which, when mapped out, might be mistaken for some sort of skeleton. In any event, it is not a single route with clearly defined endpoints. Portions of significance to this dispute are variously called Omish Road, East Omish Road, East Omish Lane, North Calac Lane, North Calac Road, and Main Line Road. Together, the affected roadway is said to consist of approximately 1.55 miles.

For simplicity, we will describe the portion of roadway in dispute in this case as Road 340, the name used by the Regional Director in his Jan. 28, 2000 decision, recognizing however that BIA Road 340 is actually more extensive than the portion under review.

3/ Appellant Carvajal claims to have an unrecorded easement that differs somewhat from the access route generally discussed in this case. According to Appellants, the Tribe has told Mr. Carvajal that his easement is invalid. The Board will assume, for purposes of this appeal, that Mr. Carvajal does not have a separate means of access to his property.

4/ Road 340 has not always been so designated; it has in the past gone by other road numbers within the BIA road system. Portions of Road 340 may even predate the establishment of the Tribe's reservation.

Since at least 1973, there have been questions about access rights through the reservation to one or more of the properties now owned by Appellants. In that year the Tribe allegedly advised one or more prospective purchasers of off-reservation property that they would have no right-of-way through the reservation and that the access road could be closed by the Tribe. See Aug. 30, 1973 Letter from Ethel L. McClish to U.S. Senator John Tunney. At the time, BIA took the position that it had never obtained a formal right-of-way for the road, and that the Tribe could elect to have the road removed from BIA's road system and closed to the public. As long as the road was within BIA's system, however, it was open to the public. See Oct. 29, 1973 Letter from Acting Sacramento Area Director to Senator John Tunney. ^{5/} Similar questions about access rights were raised in 1981 by Chuchua's predecessors-in-interest, the Mowrys. See Feb. 19, 1981 Letter from Terry Singleton (counsel for the Mowrys) to William Gianelli (BIA). The record in this case indicates that BIA has consistently taken the position that it has never acquired a formal right-of-way or easement for the road. It has repeated that position in correspondence with Appellant Chuchua. See Dec. 7, 1994 Letter from Acting Sacramento Area Director to Brian Chuchua.

Over the years, there have been occasional conflicts between the Tribe and the Appellants or their predecessors. The Tribe has made periodic efforts to have the road removed from BIA's road system and designated as private, under the exclusive jurisdiction of the Tribe. Since at least 1994, there also have been efforts by the Tribe to block Appellant Chuchua's access to his property over Road 340. Until the Regional Director's January 28, 2000 decision, however, BIA had never agreed to remove the road from BIA's road system.

On October 11, 1999, the Tribe passed Resolution 99-42, entitled "A Resolution of the Rincon Business Committee of the Rincon San Luiseño Band of Mission Indians Approving the Removal of a Portion of the BIA Route 340 From the BIA Roads System." In pertinent part, the resolution says:

WHEREAS, the Rincon Band and Tribal Council deem it in the best interest of the Rincon Band to remove a portion of the Bureau of Indian Affairs, Route 340 from the Bureau of Indian Affairs Reservation Roads System immediately, and;
WHEREAS, the Rincon Band immediately requests the Superintendent, Southern California Agency to remove this portion of the BIA

^{5/} The Pacific Regional Office of BIA was formerly called the Sacramento Area Office.

Route 340, commencing from Route 340 connection onto County Highway S-6, South and East of the Rincon San Luis Rey River Bridge, to the Rincon Reservation East Boundary, North to the road known as E. Calac Lane.

NOW THEREFORE BE IT RESOLVED THAT the Superintendent of the Southern California Agency, Bureau of Indian Affairs is directed to take the necessary action to immediately remove the above described portion of the BIA Route 340 from the BIA Indian Reservation Roads System.

The Regional Director acted on the Tribe's request, rather than the Superintendent. His January 28, 2000 decision stated in its entirety:

Rincon Tribal Resolution No. 99-42, adopted on October 11, 1999, requests the removal of a portion of Road 340 from the Bureau of Indian Affairs Indian Reservation Road System (BIA/IRR). [6/] For the following reasons, this office intends to comply with the Tribe's request:

Road 340 has been used by a private landowner, Brian Chuchua, to access his ranch. The Tribe has expressed its concern that the mining operation conducted on his ranch and the daily transportation of sand and gravel by trucks over Road 340 have created health and safety concerns on the Reservation. Both the EPA and the County of San Diego have issued administrative directives ordering Mr. Chuchua [to] cease and desist his mining operations. This has resulted in the cessation of transportation of sand and gravel over Road 340. Even so, the Tribe has not rescinded its request to remove a portion of Road 340 from the BIA/IRR Road System.

We have no information to conclude that Mr. Chuchua holds a valid license, easement or patent to use Road 340 to access his property. Additionally, even though the Bureau has maintained the road in the past, it is now clear that no right-of-way has been granted by the Tribe to the BIA. Since there exists no right-of-way, and no valid legal rights outstanding in Mr. Chuchua and since the Tribe is requesting removal from the Bureau's

6/ The Tribe's request and the Regional Director's decision refer to the "[BIA] Indian Reservation Road System." They appear to mean by this a BIA-maintained subset of "Indian Reservation Roads and Bridges," defined in 25 C.F.R. § 170.2(d) (1999) to include virtually any road located within, or providing access to, an Indian reservation. The Board construes the Regional Director's decision as intending to remove the affected portions of Road 340 from those roads that BIA would be required to maintain, or even consider maintaining, under 25 C.F.R. § 170.6 (1999).

Road System, that portion of Road 340 identified by the Tribe will be removed from the System. Once this is accomplished, no Federal funds may be expended to maintain that portion of the road.

Please note that Mr. Chuchua may be considered an interested party to this decision. If so, he may have the right to appeal this decision pursuant to the regulations in 43 CFR Part 4.

If a Notice of Appeal is not filed in a timely manner, this decision will become final for the Department of the Interior at the expiration of the appeal period.

Jan. 28, 2000 Decision.

Both the Regional Director and Appellants assume that the practical effect of the Regional Director's decision will be to allow the Tribe to assert jurisdiction over Road 340, and close it to Appellants' use. If Road 340 were closed, Appellants would have no access to their property.

Mr. Chuchua was provided a copy of the Regional Director's decision, but the other Appellants were not. Appellants appealed the Regional Director's decision, ^{7/} and have since filed briefs with the Board. The Regional Director has also filed a brief, but the Tribe has not. After briefing was completed in this case, the Board suggested that the parties engage in mediation. The parties have tried that course for the past several years, without success.

Discussion and Conclusions

Appellants have the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. See, e.g., Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 198 (2005); Aloha Lumber Corp. v. Alaska Area Director, 41 IBIA 147, 156 (2005). The Board reviews questions of law and the sufficiency of evidence de novo. See, e.g., Aloha, 41 IBIA at 157; Navajo Nation v. Navajo Regional Director, 40 IBIA 108, 115 (2004). When BIA makes a decision based on the exercise of its discretion, the Board will not substitute its judgment for that of BIA, but may

^{7/} Mr. Chuchua filed a timely appeal with the Board. The other Appellants subsequently joined the appeal when they learned of the Regional Director's decision through their neighbor, Mr. Chuchua. The Regional Director's decision did not comply with the requirements of 25 C.F.R. § 2.7(c), concerning notification of appeal rights, so all of the Appellants' appeals were accepted as timely, see id. § 2.7(b).

review whether BIA provided an adequate explanation for its decision and gave proper consideration to all legal prerequisites in the exercise of its discretion, including any regulatory standards. Id.

In an effort to show error in the Regional Director's decision, Appellants first argue that there should have been "open and public hearings on the proposed road deletion," see Appellants' Opening Brief at 6, and that the absence of such hearings violated Appellants' procedural due process rights under the Fifth Amendment to the United States Constitution. 8/ More specifically, Appellants claim such hearings were required by 25 C.F.R. §§ 170.10 and 170.11 (1999); 9/ 57 BIA Manual §§ 7.3 and 7.6; and case law construing the Fifth Amendment.

The provisions of 25 C.F.R. §§ 170.10 and 170.11 (1999) do not apply to this case. They apply only to "road projects scheduled to begin construction in Fiscal Year 1975 and thereafter." 25 C.F.R. § 170.10 (1999). Neither the Tribe's request nor the Regional Director's decision anticipates any "project" or "construction," as those terms are defined in 23 U.S.C. § 101(a)(3) and (21) and 25 C.F.R. § 170.2(g) (1999).

Provisions from 57 BIAM do not govern this case either. 10/ Both parties note in their briefs that at the time of the Regional Director's decision, 57 BIAM was merely a draft

8/ "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

9/ Since the Regional Director issued his Jan. 28, 2000 decision, 25 C.F.R. Pt. 170 has been substantially revised. See Indian Reservation Roads Program, 69 Fed. Reg. 43,090 (July 19, 2004) (codified at 25 C.F.R. Pt. 170 (2005)). To the extent necessary to be clear, we will indicate the date of any regulations cited throughout this order.

10/ Draft 57 BIAM § 7.3 indicates that the Superintendent is responsible for convening a meeting with appropriate tribal officials to determine, among other things, the number of open hearings required with respect to a given road project. Draft 57 BIAM § 7.6 describes BIA's objectives for conducting public hearings on proposed road projects, including the desire to inform interested persons of road proposals while there is still flexibility to respond to their views. Even if these provisions were in effect, it is doubtful they would apply to a proposal to remove a road from BIA's road system. Again, such an action does not anticipate any "project" or "construction," as those terms are defined in 23 U.S.C. § 101(a)(3) and (21) and 25 C.F.R. § 170.2(g) (1999).

document. Draft BIA manual provisions, like draft regulations, are not binding. See Kaw Nation v. Anadarko Area Director, 24 IBIA 21, 29 n.12 (1993).

As for case authority, we have held in prior Board decisions that an appellant's due process rights are protected by the right to appeal a BIA decision to this Board. See, e.g., Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126, 132 (1997) (and cases cited therein). We see no reason to deviate from this precedent. Appellants argue that they have a lawful right-of-way over Road 340, and that they are entitled to a hearing before that property interest is terminated. But even assuming the Regional Director's decision would have the effect of terminating a property interest belonging to Appellants, that decision has been appealed. Except in unusual circumstances not relevant here, a decision on appeal before the Board is not final for the Department until the Board affirms it. See 25 C.F.R. § 2.6(a). The Regional Director's decision therefore has not operated to terminate any interest of Appellants.

In any event, it is far from certain that Appellants' premise is correct, *i.e.*, that the Regional Director's decision would terminate a property interest belonging to Appellants. The only clear effect of the decision is to remove a road from BIA's road system. At least, by its terms, it does not purport to terminate Appellants' use of Road 340, or to close the road, or to strip it of any other status it may have as a public or private right-of-way. The only element of the Regional Director's decision that even arguably purports to determine Appellants' rights is the apparent finding by the Regional Director that "there exists no right-of-way, and no valid legal rights outstanding in Mr. Chuchua [with respect to Road 340]." The Regional Director's intention in making this statement is unclear at best. If he actually intends to terminate some property interest of Appellants — a conclusion the Board will not infer at this time — the Regional Director will have an opportunity on remand to make that clear. We also will leave it to the Regional Director to determine, in the first instance, whether the nature of any further decision he may make in this matter will indicate the need for extra procedures (such as open public hearings) in order to adequately document the basis of his decision.

The Board correspondingly rejects Appellants' due process arguments in this case.

We turn next to Appellants argument that Road 340 follows, at least in part, the route of the former Rincon Road and Bear Valley Road. 11/ Appellants maintain that

11/ Evidence in the record suggests that at most a relatively short portion of the former Rincon Road follows a similar section of current Road 340, where North Calac Road is

(continued...)

these prior roads existed before the Tribe's reservation was formed, and that they constitute a public highway still in use today under the Highway Act of 1866, often referred to as R.S. 2477. 12/ Appellants assert that BIA has no authority to "convert this public highway into a private tribal road which can then be deleted from the system of BIA maintained roads and closed to public use." Appellants' Opening Brief at 15.

Assuming for a moment that Appellants could establish that Road 340 is a public highway under R.S. 2477, we come back to the fact that the Regional Director's January 28, 2000 decision did not purport to remove Road 340 from any status it might have under R.S. 2477. Perhaps if BIA deletes Road 340 from its road system, the Tribe will assert jurisdiction and close (or attempt to close) Road 340 to Appellants' use. But neither the lawfulness of such an action by the Tribe nor the implications of an R.S. 2477 claim are issues decided by the Regional Director, and neither is properly before the Board.

Should Appellants establish in an appropriate forum that all or part of Road 340 is a public highway under R.S. 2477, 13/ that determination would not necessarily be at odds with a decision by BIA to delete Road 340 from BIA's road system. Another party (typically, a state or county government in the context of an R.S. 2477 highway)

11/(...continued)

today, in the northeast quadrant of Section 35. Rincon Road used to continue in a southeasterly direction, looping into Section 36 through what is now the property of Appellants Arias, Page, Chrispens, Chuchua, and possibly Garcia, before linking with Bear Valley Road. There is no indication in this case that any of the Section 36 portion of the former roadway still exists today. No other portions of Road 340 affected by this dispute follow the path of the former Rincon and Bear Valley Roads.

In fact, record documents suggest that Road 340, as it is configured today, may not even touch any of Appellants' properties. Thus, even if the current course of Road 340 is established as some sort of public right-of-way, such as a Federal highway, it still may leave Appellants with no direct access to their properties.

12/ The Highway Act was formerly codified at 43 U.S.C. § 932. It was repealed in 1976 by the Federal Land Policy Management Act (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793. Highways that had already come into existence under R.S. 2477 retained their status as public highways, however, even after FLPMA was passed. 43 U.S.C. § 1769(a).

13/ Of course, Appellants' standing to pursue a claim that Road 340 is a public highway under R.S. 2477 is a separate issue — also not within the scope of this appeal.

presumably could assert jurisdiction, take on the maintenance duties associated with operating Road 340 as a highway, and use its resources and authority to keep the roadway open for use by the public in general, and Appellants in particular.

And suppose that the Tribe seeks to close the road, after it is clearly established to be an R.S. 2477 highway. That would be the action of the Tribe, not BIA. Appellants have cited no authority that requires BIA to prevent arguably unlawful road closures by keeping within its road system highways established under R.S. 2477. 14/

We therefore find no merit in Appellants' arguments that the Regional Director's January 28, 2000, decision was in error based upon R.S. 2477. 15/

14/ The same logic would apply equally to Appellants' private right-of-way claims. Appellants allege that before establishment of the reservation, a private right-of-way serving Appellants' property was already in place, according to one or more legal theories. They submit that creation of the reservation did not and could not extinguish such rights.

If Appellants have a private right-of-way, dating from before the Tribe's reservation was formed, that right-of-way also predates any role of the Secretary in creating rights-of-way there. BIA's road system clearly was not a factor in creating or securing Appellants' right-of-way. It is therefore difficult to see how the process of adding Road 340 to BIA's road system, and subsequently removing it, has changed the nature of any rights Appellants may claim. Moreover, neither the Tribe's resolution nor the Regional Director's decision purported to extinguish any such right, only to delete Road 340 from BIA's road system. The fact that the Tribe has threatened to close the road to Appellants' use is a threat Appellants could easily have faced if BIA had never included Road 340 in BIA's road system in the first place.

Since the Regional Director did not purport to terminate any private right-of-way Appellants claim, and since there is no obvious harm to Appellants from BIA's decision (as opposed to speculative actions the Tribe may take), Appellants' claim of a private right-of-way pre-dating the formation of the reservation is not properly before us. See 43 C.F.R. § 4.318.

15/ Our conclusion concerning Appellants' R.S. 2477 argument is not intended to ignore the Regional Director's statement that once BIA deletes the relevant portion of Road 340 from BIA's road system, "no Federal funds may be expended to maintain that portion of the road." This language appears intended merely to note that, by taking these sections of Road 340 out of BIA's road system, BIA would no longer seek or spend Federal funding to maintain them. We do not read the quoted language as intended to address funding eligibility from other Federal sources.

Appellants next argue that the Regional Director's decision was in error because he wrongly concluded that it was necessary for the Tribe to grant a right-of-way to BIA to maintain Road 340. ^{16/} Possibly, because the Tribe never consented to such a right-of-way, the Regional Director felt he could not refuse the Tribe's request to remove Road 340 from BIA's road system. Appellants argue that, to the contrary, Road 340 is a Federal highway and BIA does not need the Tribe's consent to maintain it.

BIA's concern over the Tribe's role in authorizing a right-of-way is presumably based upon 25 U.S.C. §§ 323–328 and 25 C.F.R. Part 169. Starting in 1948, these statutes (followed later by the cited regulations) allowed the Secretary to grant rights-of-way over Indian lands, subject in most cases to the consent of the Tribe or individual Indian owner of the beneficial interest in the land. See generally, 25 U.S.C. §§ 323–324; 25 C.F.R. § 169.3.

Based upon this law, it seems clear that after 1948, non-tribal entities were prohibited from building any road crossing the Tribe's land without first obtaining a right-of-way from the Secretary, and the consent of the Tribe. The problem is, it appears from the record that at least some relevant portions of Road 340 existed on the Tribe's reservation before 1948. As already indicated, the record does not make clear when some of these roadways were built, or by whom. We are unclear, for instance, when Omish Road was built, whether BIA built it or merely maintained it, and who it was intended to serve. If it were built after the formation of the Tribe's reservation but before 1948, as seems reasonably likely, we see nothing in the Regional Director's decision or in the administrative record that makes clear what importance, if any, the Regional Director ascribed to that fact.

Appellants argue that 25 U.S.C. §§ 323–324 empowered the Secretary “to grant rights of way for all purposes over and across ‘Indian Lands,’ subject, for the first time, to consent of ‘proper tribal officials.’” Appellants' Opening Brief at 19. Appellants believe that before the existence of 25 U.S.C. §§ 323–324, i.e., before 1948, any road created or maintained by BIA on a reservation could become a Federal Lands Highway without the need for a formal grant of right-of-way, and certainly without the consent of the Tribe. In the case of Road 340, Appellants argue that it is “by definition and in fact a public road, an Indian Reservation Road and a Federal Lands Highway.” See Appellants' Opening Brief at

^{16/} Appellants note, correctly, that the Tribe's authorization for a right of way is not actually a “grant” of the right-of-way itself, but a consent to the Secretary's grant of a right-of-way. See Appellants' Opening Brief at 19. The fundamental issue, however, seems only to be that the Tribe never consented to a public right-of-way for Road 340.

22. As an alleged Federal Lands Highway, Appellants argue that the Tribe “may not request” its deletion from the BIA road system. 17/

On the other hand, the Regional Director does not say why his decision seems to suppose that a right-of-way cannot exist with respect to Road 340 unless the Tribe has consented to it, even though some or all of Road 340 might predate 1948. Perhaps he simply did not consider when Road 340 was built, and believed the matter to be clearly governed by 25 U.S.C. § 324. Perhaps he believed that 25 U.S.C. §§ 323–324 somehow applies retroactively to roads existing on the reservation before 1948. Perhaps he believed that before passage of 25 U.S.C. §§ 323–328, the Secretary had only limited authority to grant rights-of-way across Indian lands, 18/ and that none of those authorities applied to Road 340. 19/ If so, maybe he determined that, whatever the status of Road 340 was before 1948, it could no longer be maintained as a right-of-way against the wishes of the

17/ Appellants’ argument would seem to lead to the conclusion that the creation by BIA of *any* road on Indian lands before 1948 constitutes a Federal highway “by definition,” thereby giving non-Indians vested access rights across reservation lands. Unlike the possible existence of rights-of-way that predate the formation of the Tribe’s reservation (a theory we need not consider for reasons already stated), the Board finds no basis for this sweeping argument.

The fact that BIA may have created and maintained a road on tribal lands without tribal consent prior to 1948 does not mean that by doing so BIA either had the authority or the intent to establish a public right-of-way — whether categorized as a Federal highway or otherwise — for the benefit of non-tribal members. It seems equally if not more likely that roads of this sort were intended solely for the benefit of Indians residing on the reservation, and that rights-of-way for the use of those not living on the reservation was never even contemplated. Yet by labeling Road 340 a Federal highway, Appellants mean to establish for their use a right-of-way formed without regard to any of the very specific laws that identify how a right-of-way can be established across Indian lands. We are not prepared to adopt the view that BIA could accidentally or unwittingly create a vested right-of-way benefitting off-reservation parties, which consequently burdens Indian lands held in trust.

18/ *See, e.g.*, 25 U.S.C. §§ 311 (rights-of-way for public highways for state and local authorities), 312 (rights-of-way for railways, telegraph, telephone lines, and roads), and 319 (rights-of-way for telephone and telegraph lines).

19/ Appellants themselves indicate that Road 340 is not a state or county highway. *See* Appellants’ Opening Brief at 21 (“we are dealing with a Federal highway”; “[t]his road is a federal road.”) *See also id.* at 22 (“Road 340 is a Federal Lands Highway and a public road. It is not a state or county highway.”)

Tribe, which is essentially what keeping the road in BIA's road system has the effect of doing.

These issues (among others) and the facts needed to address them are not fully developed in the administrative record or in the parties' filings with the Board. The Regional Director's January 28, 2000 decision relies upon just three conclusory statements: the Tribe never "granted" a right-of-way to BIA; Appellant Chuchua has "no valid legal rights outstanding" in Road 340; 20/ and simply, the Tribe asked BIA to remove Road 340 from BIA's road system. 21/ These bare explanations do not reveal what standards the Regional Director used to make his decision. We cannot even tell, for instance, whether the Regional Director viewed his decision as mandatory or discretionary. The record before us does not suggest a clear answer on this particular issue, either. Under the circumstances of this case, we are reluctant to reach conclusions on such possibly far-reaching topics without first giving BIA officials an opportunity to carefully develop and articulate their position.

Did the Regional Director think that the Tribe's request, coupled with a lack of tribal consent, made removing Road 340 from BIA's road system compulsory under law? If so, the decision should reference the legal framework dictating that result. In particular, something in the record should explain why tribal consent was critical when all or at least part of the relevant portion of Road 340 predated 25 U.S.C. § 324, the statute that made tribal consent to rights-of-way a requirement. Also, and perhaps most troubling to understand, the wording of the decision suggests that the result might have been different if there were some "valid legal right" in Appellant Chuchua to use Road 340. If the Regional Director believed his decision was somehow compulsory under law, what law made a "valid legal right" in Appellant Chuchua relevant to a decision that does nothing more than remove a road from BIA's road system? If for instance Mr. Chuchua could establish a

20/ This statement does not logically follow from the only related statement in the Regional Director's decision, "We have no information to conclude that Mr. Chuchua holds a valid license, easement or patent to use Road 340 to access his property." Just because the Regional Director does not have such information does not mean Mr. Chuchua's rights do not exist.

21/ A fourth element to the Regional Director's decision discussed past "health and safety concerns," specifically involving Appellant Chuchua's mining of sand and gravel and the transportation of that product over Road 340. As the decision itself notes, however, the offensive activity had ceased, and was no longer a consideration. The Board does not consider that portion of the Regional Director's decision relevant to this appeal.

private right-of-way that predated, and was not extinguished by, the formation of the Tribe's reservation, why would that matter?

If on the other hand the Regional Director viewed his decision as discretionary under the circumstances, we are left to wonder what exactly the Regional Director thought to be important in his determination. Was the Regional Director's focus solely on the needs and desires of the Tribe and its members, as expressed by tribal Resolution No. 99-42? 22/ Or would it have mattered if Appellants had established to the Regional Director's satisfaction that they had some sort of valid right-of-way existing independent of the consent of the Tribe? The wording of the Regional Director's decision implies that proof of some such right-of-way might have changed the result, yet clearly the Regional Director did not consider all potential "valid legal rights outstanding in Mr. Chuchua," let alone the other Appellants. 23/

The Board has the authority to review whether BIA has provided an adequate explanation for its decision. See Aloha, 41 IBIA at 157; Navajo Nation, 40 IBIA at 115. In this case, BIA has been aware of the Tribe's desire to close part of Road 340 to off-reservation use since at least the 1970s. In the ensuing years, several different analyses generated by the Department's Office of the Solicitor and others have attempted to provide a legal framework for the issues presented. Yet in reviewing the Regional Director's January 28, 2000 decision, we see no cited legal authority and no cohesive explanation for why the decision is what it is. As indicated, we cannot even be certain of whether the Regional Director believed his decision to be mandatory or discretionary.

Under the circumstances presented here, we conclude that the Regional Director has failed to adequately describe the intended scope of his action and the basis upon which it rests. In the absence of a clear decision and explanation, the Board will not issue what could only be an advisory opinion on the several legal issues we have identified, since they might not be implicated at all by the Regional Director's intended reasoning. We must instead vacate and remand the Regional Director's January 28, 2000 decision for reconsideration.

22/ The Regional Director's Answer Brief cites draft 57 BIAM §§ 1.1, 1.2, and 11.2 in a manner that suggests, but does not expressly argue, that Appellants might not even have standing to complain of the Regional Director's Jan. 28, 2000 decision.

23/ The Regional Director concedes in his Answer brief that Appellants' theory that Road 340 is a highway by virtue of R.S. 2477 has not even been analyzed.

Upon remand, the Regional Director should determine the extent, if any, to which his decision is dictated by law, and the extent, if any, to which it is discretionary. ^{24/} Citing applicable law or precedent, and not draft documents or other non-binding sources, would give the Board a proper basis upon which to review this matter, should the Regional Director's decision on remand result in further appeals. If tribal consent is crucial to the decision, the Regional Director should develop a factual record that clarifies, to the extent possible, when the relevant portions of Road 340 were built, by whom, for what purpose, and when they were first included in BIA's road system. Using those facts, the Regional Director should then explain whether and how tribal consent figures into the decision to remove any portions of the road that predate 1948. If on the other hand the Regional Director intends that his decision is completely or predominantly an exercise of discretion, he should explain the legal and factual basis for concluding that the decision is discretionary, and should specify what factors he has considered in his determination. The Regional Director may also wish to examine other issues discussed in this order.

Given this result, we will not address other arguments that Appellants present for why the Regional Director's decision ought to be reversed. Most, if not all, of these arguments are based upon circumstances that may not re-emerge when the Regional Director reconsiders this case.

One argument could easily re-appear in the future, however, so we will address it now. Appellants argue that the Regional Director's decision was based upon a request by the tribal council that was, itself, ultra vires. Appellants submit that the Tribal Chairman has been removed from tribal enrollment, and that Resolution No. 99-42 is therefore invalid.

Whether or not Appellants' accusations have any merit is of no significance. Appellants, as non-members of the Tribe, have no standing to seek the invalidation of a tribal resolution. See White v. Acting Muskogee Area Director, 29 IBIA 39, 41 (1996).

In closing, we must mention another factor for the Regional Director to consider upon remand, a separate procedural matter that raises an issue regarding his authority to

^{24/} The Board expresses no opinion on whether BIA's decision concerning tribal Resolution No. 99-42 might be discretionary today, or bounded by legal constraints. We note, however, that the standards under which the Regional Director will have to make his decision may well have changed. The most comprehensive treatment of the Indian Reservation Roads Program, found at 25 C.F.R. Pt. 170, has been completely re-written since the Regional Director issued his Jan. 28, 2000 decision.

issue the January 28, 2000 decision. A May 6, 1993 memorandum from the Acting Area Director, Sacramento Area Office to the Central, Northern and Southern Agency Superintendents established a process (as opposed to standards) for considering the removal of a road from BIA's road system. It says, in pertinent part:

The following is the procedure and information that will be needed for removal of a road from the BIA Road System:

* * * * *

3. Upon receipt of the request from the agency, [the] Area Office will send the request and information received from the agency and the completed inventory form which reflects the deletion of the road, to Central Office for final action. A copy of our request to Central Office will be sent to the Agency for information.

May 6, 1993 Memorandum at 2 (emphasis added). The Regional Director, in his answer brief, specifically relies on this memorandum as authority for BIA to delete a road, but ignores the language emphasized above. There is no indication from the record that this memorandum was ever superseded or withdrawn. Yet the decision before us was decided by the Regional Director, and not Central Office.

The Board cannot conclude from the record why the May 6, 1993 memorandum was issued — i.e., whether it was a self-imposed restriction, or the result of a separate Central Office directive. Upon remand, if a new decision is issued by the Regional Director, he must explain the basis of his authority to issue such a decision.

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 vacates the Regional Director's January 28, 2000 decision and remands the matter for further consideration.

I concur:

// original signed
David B. Johnson
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge