



INTERIOR BOARD OF INDIAN APPEALS

Wichita and Affiliated Tribes v. Acting Southern Plains Regional Director,
Bureau of Indian Affairs

62 IBIA 301 (03/22/2016)



United States Department of the Interior

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

WICHITA AND AFFILIATED TRIBES,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	Docket No. IBIA 14-121
)	
ACTING SOUTHERN PLAINS)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	March 22, 2016

The Wichita and Affiliated Tribes (Appellant) seeks review of a June 26, 2014, decision (Decision) of the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to withhold further action in deciding an appeal by Appellant from a June 7, 2013, decision of BIA’s Anadarko Agency Superintendent (Superintendent) concerning the partition of lands jointly held by Appellant, the Caddo Nation, and the Delaware Nation (collectively, the WCD Tribes), until an internal governance dispute within the Caddo Nation has been resolved and the Caddo Nation has had a reasonable opportunity to provide its views on the matter.

The Regional Director failed to articulate his reasoning for denying Appellant’s request that BIA refuse the Caddo Nation any further extensions of time and proceed with the partition. Thus, we conclude that the Decision must be vacated and the matter remanded for further consideration. We decline to address the merits of the Superintendent’s decision, or order the Regional Director to immediately execute the conveyances requested by the WCD Tribes, as Appellant urges. Several of Appellant’s arguments underlying this request have yet to be presented to BIA, and we deem it prudent for BIA to consider the entire matter in the first instance.

Background

In 1963, the United States restored 2,306.08 acres to Appellant, the Caddo Nation, and the Delaware Nation, which had previously been ceded in the Jerome Agreement of June 4, 1891. 28 Fed. Reg. 10157 (Sept. 17, 1963) (Administrative Record (AR) 6). Subsequently, an additional 124.06 acres were restored to the WCD Tribes. 38 Fed. Reg. 16065 (June 13, 1973) (AR 9); 47 Fed. Reg. 11282 (Mar. 16, 1982) (AR 14);

48 Fed. Reg. 15908 (Apr. 13, 1983) (AR 36). The lands are held in trust jointly for the benefit of the tribes. Superintendent’s Decision, June 7, 2013, at 1 (AR 75).

On February 8, 2007, the WCD Tribes provided BIA with tribal resolutions representing a “historic agreement to partition and set aside 600 acres of the lands restored to the joint ownership of the three tribal nations.” Letter from the WCD Tribes to Superintendent, Feb. 8, 2007 (AR 36). After the consolidation and exchange of the trust lands, the Caddo Nation would receive 312 acres, Appellant would receive 180 acres, and the Delaware Nation would receive 108 acres.¹ Superintendent’s Decision at 1.

At BIA’s suggestion, the tribes pursued legislation from Congress that would explicitly authorize BIA to act on the consolidation and exchange of trust lands. Opening Brief (Br.), Dec. 12, 2014, at 9; Letter from Delaware Nation to Superintendent, July 27, 2010 (AR 66) (noting that the tribe was working with Congress to get legislation passed). On February 15, 2013, however, Appellant provided BIA with its views on the Department’s authority to administratively consolidate and exchange the lands. Letter from William R. Norman, Jr. to Assistant Secretary - Indian Affairs, Feb. 15, 2013 (AR 69); Facts of Findings [*sic*]—Proposed Partition, August 2010 (AR 68).

On June 7, 2013, the Superintendent responded to Appellant’s February 15, 2013, letter. The Superintendent rejected Appellant’s suggestion that the Indian Land Consolidation Act (ILCA), specifically 25 U.S.C. § 2203, provides authority for the conveyance. Superintendent’s Decision at 2. The Superintendent noted, however, that 25 C.F.R. § 152.22 states that lands held in trust for a tribe may be conveyed, when statutory authority exists and Secretarial approval is given. *Id.* He further held that “25 U.S.C. § 464 appears to provide specific statutory authority for the voluntary exchange of interests and partition of the subject 600 acres.”² *Id.* Accordingly, the Superintendent stated that BIA was prepared to proceed under that statutory authority and the regulations found at 25 C.F.R. Part 152. *Id.* Citing 25 C.F.R. § 152.24, the Superintendent stated

¹ The distribution of land is based on each individual tribe’s “mutually accepted membership enrollment numbers” when the 2007 agreement was negotiated. Superintendent’s Decision at 1. This membership-based system of distributing benefits from jointly held trust land has been in place since the first of the three restoration orders was enacted. *See Delaware Tribe of Western Oklahoma v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)*, 10 IBIA 40, 51-52 (1982).

² Section 4 of the Indian Reorganization Act, 48 Stat. 985, codified at 25 U.S.C. § 464, provides, *inter alia*, that “the Secretary of the Interior (Secretary) may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value” for the purpose of consolidating Indian lands. 25 U.S.C. § 464.

that an appraisal of fair market value was required prior to approval of the exchange, and requested that the WCD Tribes submit independent appraisals to the Office of Appraisal Services for review and approval. *Id.* Once the appraisal process was complete, the Superintendent explained, BIA would work with the tribes to analyze the appraised values, the land at issue, tribal membership levels, and other historical evidence, to ensure that the statutory and regulatory requirements were met to the satisfaction of the Secretary and the tribes. *Id.*

Appellant appealed the Superintendent's decision to the Regional Director. Notice of Appeal to Regional Director, July 15, 2013 (AR 88). Appellant first argued that the decision to require appraisals was not mandated by Part 152, was contrary to Federal policies promoting each tribe's right of self-determination, self-government, and opportunities for economic development, and was in conflict with previous BIA representations regarding the jointly-held lands. *Id.* at 2. Appellant also stated that the Secretary should exclude the partition agreement from the appraisal requirement. *Id.* (citing 25 C.F.R. § 152.24). Next, Appellant argued that BIA's and the WCD Tribes' treatment of these jointly-held lands constitute special circumstances and the tribes have a special relationship; thus, the consolidation and exchange of the property warrants approval without regard to the consideration exchanged. *Id.* (citing 25 C.F.R. § 152.25(c) & (d)). Appellant then contended that the Superintendent failed to address its request that the agreement be approved pursuant to 25 C.F.R. § 151.7 (acquisition of fractional interests). *Id.* Appellant also argued that the Superintendent's decision to reject the exchange and consolidation of the property under ILCA, because the WCD Tribes do not have Land Consolidation Plans, was contrary to their request. *Id.* at 3. Appellant contends that the tribes requested that BIA approve their tribal resolutions as a Land Consolidation Plan. *Id.* Finally, Appellant argued that the Caddo Nation's recent request for appraisals was not an appropriate basis for upholding the Superintendent's decision or rejecting the 2007 request from the WCD Tribes. Statement of Reasons, Sept. 11, 2013, at 5 (AR 101).

After Appellant filed its appeal to the Regional Director, the Regional Director granted the Caddo Nation multiple extensions of time to file an answer brief, to which Appellant objected.³ *See, e.g.*, Letter from Eugene Bertman to Regional Director, Oct. 11,

³ Appellant also requested, pursuant to 25 C.F.R. § 2.8, that the Regional Director issue a decision or establish a date by which the decision would be made. Request for Official Action Pursuant to 25 C.F.R. § 2.8, Jan. 14, 2014 (AR 110). After the Regional Director found that § 2.8 was inapplicable because he considered the administrative record incomplete without the Caddo Nation's response, and had granted the Caddo Nation an extension to respond, Appellant appealed to the Board of Indian Appeals (Board). Letter from Regional Director to William R. Norman, Jr., Apr. 9, 2014 (AR 122); *Wichita and* (continued...)

2013 (AR 105) (describing an intra-tribal leadership dispute that hampered the Caddo Nation's ability to respond); Letter from William R. Norman, Jr. to Regional Director, Nov. 15, 2013 (AR 107). On June 2, 2014, Appellant requested that BIA deny the Caddo Nation any further extensions of time and proceed with the partition. Letter from William R. Norman, Jr. to Regional Director, June 2, 2014 (AR 128).

On June 26, 2014, the Regional Director responded to Appellant's request. Decision at 1 (unnumbered). After acknowledging the Caddo Nation's intra-tribal leadership dispute, the Regional Director concluded that "limiting the ability of the Caddo Nation to fully advise [BIA] of the Caddo Nation's views regarding the proposed tribe to tribe partition of trust property . . . is completely inappropriate." *Id.* Accordingly, the Regional Director stated that BIA has "decided to withhold further action on this matter until such time as the Caddo Nation advises this office that its internal tribal dispute has been finally resolved, and has had a reasonable opportunity to advise the Regional Office of the Caddo Nation's views on this subject." *Id.* at 2.

Appellant appealed to the Board. Appellant included arguments in its statement of reasons and opening brief. No other briefs were filed.⁴

Discussion

The Regional Director's decision to withhold action and delay deciding the merits of Appellant's appeal is not well-founded. Accordingly, we vacate the Decision, and we remand this matter to the Regional Director for further consideration and a new decision regarding the merits of Appellant's appeal from the Superintendent's June 7, 2013, decision.

(...continued)

Affiliated Tribes v. Acting Southern Plains Regional Director, 58 IBIA 263, 264 (2014). On May 23, 2014, the Board dismissed the appeal because it lacked jurisdiction to review an interlocutory appeal of a procedural decision by the Regional Director. *Wichita and Affiliated Tribes*, 58 IBIA at 264.

⁴ On January 12, 2016, without explanation, the Regional Director filed a copy of an April 22, 2015, tribal resolution enacted by the Caddo Nation. Submission to the Board and Interested Parties, Jan. 12, 2016. Subsequently, Appellant moved to strike the submission. Motion to Strike, Feb. 2, 2016. We need not reach the merits of Appellant's motion because we do not find it necessary to rely on the Regional Director's submission for any portion of our decision.

BIA's authority to approve conveyances of trust land is discretionary. *Van Mechelen v. Northwest Regional Director*, 61 IBIA 125, 128 (2015); *Aitson v. Southern Plains Regional Director*, 59 IBIA 240, 246 (2014). We review a regional director's discretionary decision to determine whether it is supported by the administrative record, comports with applicable law, and provides a reasonable explanation for the decision. *Van Mechelen*, 61 IBIA at 128. In reviewing a BIA discretionary decision, we do not substitute our judgment for that of BIA. *Id.*; *Aitson*, 59 IBIA at 246. Our responsibility is to ensure that BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, and has explained the rationale and factual basis for its decision. *Aitson*, 59 IBIA at 246. An appellant bears the burden of proving that BIA's decision was in error. *Van Mechelen*, 61 IBIA at 128; *Aitson*, 59 IBIA at 246.

In the Decision, the Regional Director acknowledges Appellant's challenge to the Superintendent's conclusions regarding the statutory and regulatory authority permitting BIA to act on the consolidation and transfer of the property, along with the decision to require appraisals. Decision at 1 (unnumbered). Without addressing the merits of Appellant's challenge, the Regional Director states that it would be "completely inappropriate" to proceed without the Caddo Nation's views, *id.*, but provides no explanation as to why such views are necessary to the resolution of Appellant's statutory and regulatory arguments. Similarly, the Regional Director has not attempted to explain his reasoning or respond to Appellant's contentions during the course of this appeal.

We agree with Appellant that the Decision represents an indefinite suspension of its appeal, *see* Opening Br. at 12, and we are not aware of, nor has BIA provided, any authority permitting BIA to withhold or forbear from considering an appeal in this manner. The Regional Director's responsibility to consider the merits of an appeal cannot hinge on an interested party's incentive (or lack thereof) to respond to an appeal. To the extent that a lack of information from the Caddo Nation is germane, BIA can factor this into its analysis in deciding the appeal.⁵ BIA has not provided a reasoned explanation for the Decision; thus, we must vacate and remand to BIA for further consideration. *Aitson*, 59 IBIA at 249

⁵ We note that some evidence of the Caddo Nation's views does appear in the administrative record. *See, e.g.*, Letter from Caddo Nation to Superintendent, Sep. 26, 2007 (AR 56) ("It is our wish to proceed with the Cadastral Survey to transfer title of the properties from WCD ownership to ownership of each individual nation."); Resolution No. 07-2013-02 (AR 77) (not waiving right to an appraisal). If an issue has arisen regarding whether the Caddo Nation still consents to the WCD Tribes' agreement, the Regional Director may consider whether the Caddo Nation's consent has any substantive impact on Appellant's appeal or the underlying question of whether BIA has authority to approve the consolidation and exchange of the trust lands.

(“It is not for the Board . . . to supply reasoning that is absent from a discretionary decision of BIA”); *Bighorse v. Southern Plains Regional Director*, 59 IBIA 1, 14 (2014) (vacating regional director’s decision because it was devoid of reasoning); *see also Cantrell v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 70, 86 (2015) (remanding because BIA failed to address the merits of appellants’ allegations).

Appellant requests that the Board take further action, and either order the Regional Director to immediately execute the conveyances requested by the WCD Tribes in 2007, or reverse the Superintendent’s decision to require appraisals. Opening Br. at 15, 18. We decline to do so. Appellant’s request is based, in part, on arguments that have not previously been presented to BIA. *See id.* at 16-18 (arguing that the partition agreement binds the Caddo Nation). The Board does not ordinarily consider arguments raised for the first time on appeal, which could have been presented in the proceedings below. 43 C.F.R. § 4.318 (scope of review); *Birdbear v. Acting Great Plains Regional Director*, 62 IBIA 56, 60 n.5 (2015). Further, even if a portion of Appellant’s appeal from the Superintendent’s decision rests on a question of law, the Board finds that it would be prudent to allow the Regional Director to address the entire matter in the first instance. *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 28 (2013) (the Board may decline to decide an issue *de novo* as a matter of law).

Conclusion

For all of the foregoing reasons, we conclude that it was arbitrary and capricious for the Regional Director to withhold action, and decline to consider the merits of Appellant’s appeal.

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 June 26, 2014, decision and remands the matter to the Regional Director for further consideration and issuance of a new decision.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge