



INTERIOR BOARD OF INDIAN APPEALS

Village of Ruidoso, New Mexico v. Albuquerque Area Director,
Bureau of Indian Affairs

31 IBIA 143 (09/12/1997)

Related Board cases:

32 IBIA 130

34 IBIA 242



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

VILLAGE OF RUIDOSO, NEW MEXICO

v.

ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-103-A

Decided September 12, 1997

Appeal from a decision to take a tract of land into trust for the Mescalero Apache Tribe.

Referred to the Assistant Secretary - Indian Affairs.

1. Administrative Procedure: Administrative Procedure Act--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

Under 43 C.F.R. § 4.330(b)(2), the Assistant Secretary -Indian Affairs may, by special delegation or request, enlarge the normally limited jurisdiction of the Board of Indian Appeals over discretionary Bureau of Indian Affairs decisions. Nothing in subsection 4.330(b)(2), however, authorizes the Board to apply a new substantive standard which has not been enacted as statutory law or issued in accordance with the Administrative Procedure Act, 5 U.S.C. § 553 (1994).

2. Administrative Procedure: Administrative Procedure Act--Indians: Lands: Trust Acquisitions

The rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), are not satisfied when a new standard for the review of trust acquisition requests is announced by the Assistant Secretary - Indian Affairs only in a brief before the Board of Indian Appeals.

APPEARANCES: John Underwood, Esq., and Charles Rennick, Esq, Ruidoso, New Mexico, for Appellant; Mary Jane Sheppard, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., and Ethel Abeita, Esq., Office of the Regional Solicitor, Albuquerque, New Mexico, for the Assistant Secretary - Indian Affairs and the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Village of Ruidoso, New Mexico, seeks review of a June 18, 1996, decision of the Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), to take a 7.436-acre tract into trust for the Mescalero Apache Tribe (Tribe), subject to receipt of a satisfactory title examination. For the reasons discussed below, the Board refers this appeal to the Assistant Secretary - Indian Affairs for further action.

Background

The tract at issue is located within the boundaries of the Village of Ruidoso and contains a lodge, formerly known as the Carrizo Lodge and now known as the Mescalero Inn. It is contiguous to the Mescalero Apache Reservation. In 1995, the tract was given to the Tribe by Gaim Ko, Inc., a New Mexico corporation. By Tribal Resolution No. 95-61, dated August 15, 1995, the Tribe accepted the gift and requested the Area Director to take the property into trust. ^{1/} The deed from Gaim Ko, Inc., to the Tribe was executed on November 21, 1995. By Tribal Resolution No. 96-03, dated January 5, 1996, the Tribe authorized its President to proceed with the trust acquisition request.

On March 22, 1996, the Acting Superintendent, Mescalero Agency, wrote to Appellant, as well as the Governor of New Mexico and the Assessor of Lincoln County, New Mexico, informing them that the Tribe's trust acquisition request was being considered and inviting their comments. Appellant submitted extensive comments and requested that the Tribe's request be denied. Lincoln County also opposed trust acquisition. The Governor stated that the State opposed trust acquisition if the property was to be used for gaming purposes and asked that the Tribe's request be denied until appropriate information was provided.

On May 21, 1996, the Acting Superintendent submitted the Tribe's acquisition request to the Area Director, analyzing it under the criteria in 25 C.F.R. § 151.10 and recommending approval. On June 18, 1996, the Area Director issued the decision on appeal here. In a memorandum of that date addressed to the Superintendent, he included his analysis of the factors in section 151.10 and a discussion of the concerns expressed by the commenters. By letters of the same date, he notified Appellant and others of his decision.

Appellant appealed the Area Director's decision to the Board. In the notice of docketing for this appeal, issued on August 16, 1996, the Board stated:

The Board has some concern about its review role in this matter. Prior Board decisions have made it clear that the Board considers BIA's decisions to grant or deny trust acquisition requests to be discretionary decisions and therefore, in light of 43 CFR 4.330(b)(2), subject to limited review by the Board. See, e.g., Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992); Baker v. Muskogee Area Director, 19 IBIA 164, 98 I.D. 5 (1991), and cases cited therein. Following the decision of the United States Court of Appeals for the Eighth Circuit in South Dakota v.

^{1/} This resolution was deemed by BIA to satisfy the requirement of 25 C.F.R. § 151.9 for a "written request for approval" of a trust acquisition. See Area Director's Sept. 26, 1995, memorandum to Superintendent, Mescalero Agency.

U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1996), petition for cert. filed 64 U.S.L.W. 3823 (U.S. June 3, 1996) (No. 95-1956), [2/] the Assistant Secretary - Indian Affairs published an amendment to 25 CFR 151.12, designed to allow for judicial review of decisions to acquire land in trust. The preamble to the revised rule states: "Judicial review is available under the [Administrative Procedure Act (APA)] because the [Indian Reorganization Act (IRA)] does not preclude judicial review and the agency action is not committed to agency discretion by law within the meaning of the APA." 61 FR 18082-83 (Apr. 24, 1996). While the discussion in the preamble is clearly concerned with judicial review, the Board is uncertain of the impact of the Assistant Secretary's statement concerning discretion on the Board's review role in this kind of appeal. The Board has considered the possibility that the Assistant Secretary intended by this statement, or otherwise intends, to confer additional authority on the Board under her authority in 43 CFR 4.330. However, this intent is far from clear.

The parties are therefore requested to address in their briefs the question of the scope of the Board's review authority in this matter.

Notice of Docketing at 1-2.

In response to the Board's request for briefing on this point, Appellant argues that the April 24, 1996, amendment to 25 C.F.R. § 151.12 did not alter the Board's authority, which therefore remains as previously described by the Board.

The Assistant Secretary - Indian Affairs and the Area Director filed a joint brief,^{3/} in which they respond thus to the Board's request:

The Assistant Secretary does intend to confer additional authority on the Board. The Board correctly concluded that in providing a procedure for judicial review * * * the Assistant Secretary intended review to encompass not only procedural matters but, in addition, the substance of the decision. This is so because judicial review requires there to be law to apply so that a court may

^{2/} On Oct. 15, 1996, the Supreme Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case to that court for eventual remand to the Secretary of the Interior for reconsideration of his administrative decision. Department of the Interior v. South Dakota, 117 S. Ct. 286 (1996).

See also 106 F.3d 247 (8th Cir. 1996) (recalling mandate and vacating judgment); 62 Fed. Reg. 26,551 (May 14, 1997) (Assistant Secretary's notice that, as of Dec. 24, 1996, when jurisdiction returned to the Department of the Interior, the land at issue in South Dakota was no longer held in trust).

^{3/} This brief is hereafter referred to as the Assistant Secretary's brief.

have a standard against which to measure actions of an agency. Similarly, in extending the review authority of the Board, the Assistant Secretary must set out a standard for that review. In other words, the Assistant Secretary intends the review to include the legal conclusion underlying a decision to acquire land in trust (or not).

Now the Assistant Secretary sets out the extent of review by the Board. As stated in Jack and Shirley Baker v. Muskogee Area Director, [supra], the Board has authority to review legal conclusions. * * * [T]he Board stated that because the Area Director had denied the request on the basis of a legal conclusion * * * the decision was subject to Board review. (19 IBIA at 169) [4/]

Similarly, having concluded that decisions of the Secretary to take lands into trust fall within the scope of the judicial review under the APA, there must be Board review of the application of the factors as well as procedural and other legal prerequisites of the Area Director's decision to take this land into trust.

* * * Having provided the opportunity for judicial review, the Assistant Secretary asks that the Board review the substance of a decision to take land into trust (or not), as explained below.

In the petition for certiorari [in South Dakota], the United States said with respect to authority delegated under the IRA:

The Secretary of the Interior has recognized that Section 5 [of the IRA, 25 U.S.C. § 465 (1994),] does not confer boundless discretion. He has promulgated implementing regulations that articulate specific factors governing the exercise of his authority. See 25 C.F.R. Pt. 151 (citation omitted). By setting out ascertainable standards that govern his trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the IRA's limiting principles. (emphasis added [by the Assistant Secretary.])

Petition for Cert. at 23. In characterizing the factors as "ascertainable standards," the United States provides that the Secretary must not only consider the factors as had been done previously, but, in addition, weigh any negative impacts against positive impacts and the extent of the contribution to the purposes behind the IRA. Those purposes were identified in the

4/ The legal conclusion at issue in Baker, which the Board found it had full authority to review, was the Area Director's conclusion that there was no statutory authority for the trust acquisition of land for certain members of the Five Civilized Tribes.

preamble to the rule making. In that preamble, the Assistant Secretary stated that the legislative history of the IRA demonstrates intent to limit the authority so delegated to acquiring lands either:

(1) "within or adjacent to an Indian reservation," or (2) "for purposes of facilitating tribal self-determination, economic development or Indian housing."

61 FR 18082. * * *

* * * * *

* * * [I]n providing an opportunity for judicial review (pursuant to 25 C.F.R. 151.12(b)), the Assistant Secretary was reversing her previous opinion that acquisitions under the IRA were completely within her discretion and therefore lacked law to apply. Having reconsidered the matter, the Assistant Secretary is now of the opinion that there is law to apply as was stated by the Government in its [petition for certiorari in South Dakota]. * * * Therefore, as in the Baker case, supra, where the Board remanded because the Area Director's legal conclusion was in error, the Board may remand decisions under the IRA.

Thus, in reviewing Bureau decisions, it is the intent of the Assistant Secretary that the Board review not only adherence to the procedures set out in the regulations. In addition, the Assistant Secretary intends that each decision, whether to accept or deny an application to take land into trust, be the result of the weighing of the contribution to the purposes of the IRA against the detriment to local jurisdictions.

In a case where an acquisition would impose severe economic distress on a local jurisdiction, the Area Director's decision based on the record must justify imposing such distress. Where the record does not support the Area Director's conclusion that visiting severe economic distress on a local jurisdiction is outweighed by the contribution taking the land in trust would make to the purposes of the IRA, the Assistant Secretary requests [that] the Board remand the case for further deliberations.

In a future rulemaking to amend 25 C.F.R. Part 151, the BIA may choose to address further the extent of the Board's jurisdiction to review land acquisition decisions. Having considered the matter in light of the recent litigation but without the benefit of the notice and comment of [the] rulemaking process, the Assistant Secretary anticipates that her views may change as a result of such rulemaking. For now, however, the Assistant Secretary wishes the Board to apply the economic standard that

arises out of application of the factors listed in Part 151 and remand to the BIA any decisions that fail to meet that standard.

Assistant Secretary's Brief at 2-6.

Discussion and Conclusions

The Board exercises review authority delegated to it by the Secretary of the Interior. The scope of that authority is set out in 43 C.F.R. § 4.1(b)(2), which provides: "Board of Indian Appeals. The Board decides finally for the Department appeals to the head of the Department pertaining to: (i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I, except as limited in 25 CFR chapter I or § 4.330 of this part." The limitations stated in 43 C.F.R. § 4.330 include the following: "(b) Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

It is this limitation in the Board's review authority which, as discussed further below, has been the basis for the Board's narrow scrutiny of BIA trust acquisition decisions. As indicated in 43 C.F.R. § 4.330(b), however, the Assistant Secretary may, by special delegation or request, remove the limitation on the Board's review authority. This has been done on occasion by former Assistant Secretaries. E.g., Robinson v. Acting Billings Area Director, 20 IBIA 168, 170-71 (1991). When the limitation is removed, the Board may fully review a BIA discretionary decision, even to the extent of substituting its judgment for BIA's. It may, therefore, as it did in Robinson, reverse a discretionary BIA decision and issue a final Departmental decision on the merits. By contrast, under its normal limited review authority over discretionary decisions, the Board, upon concluding that BIA has exercised its discretion improperly, can do no more than remand the case to BIA for another decision. See, e.g., Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126 (1997).

In this case, although initially suggesting an intent to grant the Board full review authority over the Area Director's decision, the Assistant Secretary ultimately stops short of such a grant, stating instead that the Board, if it finds problems with the Area Director's decision, is to remand the matter for further deliberations. In other respects as well, the Assistant Secretary's statement makes it clear that she expects the Board's review to continue to be a legal review, rather than a full review of the exercise of discretion. What the Assistant Secretary actually does here, rather than grant the Board additional review authority, is to articulate a new standard for trust acquisitions, which she asks the Board to apply in this case. In other words, the Assistant Secretary is requesting the Board to continue to review BIA trust acquisition decisions "on the law" but is seeking to add some new law for the Board to apply.

At the same time, the Assistant Secretary appears to be asking the Board to conduct the initial evaluation of the Tribe's trust acquisition request under the new balancing standard she articulates in her brief.

That is, even though the Area Director has had no opportunity to evaluate the Tribe's request under the new standard, the Assistant Secretary does not seek remand of this case to him but, rather, urges the Board to affirm the Area Director's decision.

Were the Board to find the new standard applicable to this case, it would not undertake to conduct the initial evaluation under the standard. Instead, in accord with prior practice, it would vacate the Area Director's decision and remand the matter to him in order to give him the initial opportunity to render a decision on the issue. See, e.g., *Walter Torske & Sons v. Acting Billings Area Director*, 30 IBIA 157, 161 (1997).

However, even if, as the Board assumes for the moment, the new standard can be applied to this case, a remand to the Area Director with directions to follow that standard would cause more problems than it would solve. The Assistant Secretary's brief offers little guidance to the Area Director as to how the new standard is to be interpreted. The Board has a number of questions about its meaning and would expect that a BIA Area Director attempting to apply it might also have questions.

How, for instance, does the new standard relate to the existing criteria in 25 C.F.R. § 151.10? If the standard is an economic one, as some of the Assistant Secretary's statements indicate, 5/ what weight is to be given to the criteria in section 151.10 which are not economic, or not primarily economic, in nature? 6/

What are the "purposes of the IRA," contributions to which are to be weighed under the new standard? It appears likely that the purposes the Assistant Secretary has in mind are related to what she describes in her brief as limitations on trust acquisition authority. 7/ However, this is not entirely clear.

5/ See, e.g., Assistant Secretary's Brief at 6: "[T]he Assistant Secretary wishes the Board to apply the economic standard that arises out of application of the factors listed in Part 151 and remand to the BIA any decisions that fail to meet that standard."

6/ One example of such a criterion is 25 C.F.R. § 151.10(f), which concerns "[j]urisdictional problems and potential conflicts of land use which may arise."

7/ At page 4 of her brief, the Assistant Secretary states:

"[T]he Secretary must not only consider the factors as had been done previously, but, in addition, weigh any negative impacts against positive impacts and the extent of the contribution to the purposes behind the IRA. Those purposes were identified in the preamble to the rule making. In that preamble, the Assistant Secretary stated that the legislative history of the IRA demonstrates intent to limit the authority so delegated to acquiring lands either:

How does the term "local jurisdiction," as used in the new standard, relate to the term "State and its political subdivisions" in 25 C.F.R. § 151.10(e) and the term "state and local governments" in section 151.10 and subsection 151.11(d)? Specifically, does the term "jurisdiction" mean a governmental entity? Or, by using a term different than those used for governmental entities in the regulations, does the Assistant Secretary intend something different? Does she, for instance, intend the term "jurisdiction" to be understood in a territorial sense? If so, are the economic interests of individuals or businesses located within the local jurisdiction to be taken into consideration in the equation? §/

Further, Appellant argues, and the Board tends to agree, that there are arguable inconsistencies in the Assistant Secretary's various phrasings of the standard. See Appellant's Amended Reply Brief at 3-4.

These questions of interpretation, however, need not be addressed at this point. The Board must first deal with a threshold question)) What is the source of the Board's authority to apply the new standard or to ask the Area Director to apply it?

[1] The Assistant Secretary does not cite 43 C.F.R. § 4.330(b) as authority for her request. Accordingly, it is not clear that she intended to rely on that provision. In any event, the provision does not authorize the Board to apply a new substantive standard in a pending appeal. Rather, it simply authorizes the Board to exercise an expanded scope of review in cases, or classes of cases, in which its review authority would otherwise

fn. 7 (continued)

"(1) 'within or adjacent to an Indian reservation,' or (2) 'for purposes of facilitating tribal self-determination, economic development or Indian housing.'"

The Board finds no explicit discussion of the purposes of the IRA in the cited preamble, which does, however, state:

"Section 5 of the IRA authorizes the Secretary to acquire land in trust for Indians and Indian tribes: (1) Within or adjacent to an Indian reservation; or (2) for purposes of facilitating tribal self-determination, economic development or Indian housing."

61 Fed. Reg. 18,082.

§/ This is not an academic question. There are several appeals presently pending before the Board in which individuals and businesses contend that their economic interests will be affected by certain trust acquisitions. E.g., Chapman v. Muskogee Area Director, Docket No. IBIA 96-115-A; Dudley v. Muskogee Area Director, Docket No. IBIA 96-119-A; Quik Trip v. Muskogee Area Director, Docket No. IBIA 97-12-A. The standing of these individuals and businesses to challenge trust acquisition decisions before the Board has not yet been determined.

be limited. ^{9/} The Board's authority to apply a new substantive standard must come from another source.

The Assistant Secretary clearly has authority to develop and announce new standards for trust acquisitions. In this case, however, she has not amended the regulations in 25 C.F.R. Part 151 to incorporate the new standard. Nor, as far as the Board is aware, has she made a general dissemination of the standard in any format. ^{10/} Indeed, as far as the Board is aware, she has announced the new standard only in her brief in this appeal.

Under the APA, rulemaking and adjudication are entirely different processes. See 5 U.S.C. §§ 551(4), (5), (7); 553; 554 (1994). See also, e.g., American Express Co. v. United States, 472 F.2d 1050, 1055 (C.C.P.A. 1973). The Board recognizes that, in South Dakota, rulemaking and adjudication tended to coalesce. ^{11/} The new rule involved in South Dakota, however, was published in the Federal Register. Here, the Assistant Secretary seeks to implement an as-yet unpublished standard through this appeal.

[2] The Board reaches no conclusion as to whether the Assistant Secretary must follow formal notice and comment procedures to promulgate her new standard or whether another method of dissemination would satisfy the requirements of the APA. The Board finds, however, that announcement of

^{9/} Under a related provision, the Board may review "other matters pertaining to Indians," *i.e.*, matters not normally within the Board's jurisdiction, which are referred to the Board by the Assistant Secretary for exercise of her review authority. 43 C.F.R. § 4.330(a).

^{10/} From the record in this appeal, it appears that the Assistant Secretary has, on at least one occasion in the past, issued trust acquisition guidelines in memorandum form, pending promulgation of regulations. See Assistant Secretary's May 20, 1994, Memorandum to "All Area Directors."

^{11/} As indicated above, following the Eighth Circuit decision in South Dakota (in which that court held that the trust acquisition authority in the IRA, 25 U.S.C. § 465, was an unconstitutional delegation of legislative power), the Assistant Secretary published an amendment to 25 C.F.R. § 151.12, designed to allow for judicial review of trust acquisition decisions. In its petition for certiorari in South Dakota, the Department argued, *inter alia*:

"The court of appeals premised its decision on the assumption that the Secretary's decision to acquire land in trust is not subject to judicial review. Since the court rendered its decision, however, the Secretary has issued a regulation that acknowledges the availability of judicial review of such decisions and affords an opportunity for judicial review to be instituted before the land is actually taken in trust."

Petition for Cert. at 15.

the new standard in a brief before the Board does not satisfy the requirements of the APA. Accordingly, the Board concludes that it lacks authority to apply the new standard in this appeal.

What standards, then, should the Board apply in deciding this appeal? Despite the Assistant Secretary's belief that there is now more "law to apply" than there was in the past, in fact the "law to apply" is virtually identical to the law in existence in 1989 when the Board first enunciated its standard of review in trust acquisition appeals. That law, as the Board described it in City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 Interior Dec. 328 (1989), was, for the most part, derived from 25 C.F.R. § 151.10 (1989), which provided: "In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors: [list of factors omitted]." Thus the Board held that the administrative record in a trust acquisition appeal must show that the factors listed in 25 C.F.R. § 151.10 have been considered. Further, the Board stated:

Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. See also [Florida Dep't of Business Regulation v. United States Dep't of the Interior, 768 F.2d 1248, 1256 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)]: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion, however, BIA's final decision should be reasonable in view of its overall analysis of the factors listed in section 151.10. [Footnote omitted.]

17 IBIA at 196-97, 96 Interior Dec. at 331.

Although some changes to 25 C.F.R. § 151.10 were made in 1995, that section still does not require that BIA give any particular weight to any of the criteria listed.^{12/} Nor does it require any particular balancing of interests.

In a decision issued on May 7, 1997, in McAlpine v. United States, 112 F.3d 1429, 1434 (10th Cir. 1997), the United States Court of Appeals

^{12/} Among the 1995 changes was a revision of the above-quoted sentence from the 1989 version of section 151.10. That sentence now reads: "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated: [list of criteria omitted]."

for the Tenth Circuit held that trust acquisition decisions are reviewable by the Federal courts because there is "law to apply." ^{13/} The court stated:

Even assuming that the statutory language contained in § 5 of the IRA does not provide "law to apply" in this case, we hold that the regulatory factors for evaluating trust land acquisition requests at 25 C.F.R. § 151.10 do provide "law to apply" in evaluating the Secretary's exercise of his discretion. Section 151.10 provides seven factors which the Secretary "shall" consider "[i]n evaluating requests for the acquisition of land in trust status." 25 C.F.R. § 151.10. The factors include the need of the individual Indian or tribe for additional land, the purposes for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls, and the potential for jurisdictional problems and conflicts of land use which may arise from the acquisition. *See id.* While the regulation does not provide guidance on how the Secretary is to "weigh" or "balance" the factors, it does provide a list of objective criteria that the decisionmaker is required to consider in evaluating trust land acquisition requests. *See Turri v. I.N.S.*, 997 F.2d 1306, 1308-09 (10th Cir. 1993) (holding that as long as the administrative agency "considers all the relevant factors, this court cannot second-guess the weight, if any, to be given any factor" where no weight prescribed in the law). Because an agency's failure to follow its own regulations is challengeable under the APA, *see Thomas Brooks Chartered [v. Burnett]*, 920 F.2d [634,] 642 [10th Cir. 1990], and because the touchstone of our eventual review of the administrative action is to determine only "whether the decision was based on a consideration of the relevant factors," [*Citizens to Preserve Overton Park [v. Volpe]*, 401 U.S. [402,] 416 [1971]], we conclude the regulatory factors contained in § 151.10 do provide a meaningful and objective standard by which the court can judge the Secretary's exercise of discretion in this case. [Footnote omitted.]

112 F.3d at 1434. The court then concluded that its task was "to assess whether the agency considered all of the relevant factors contained at 25 C.F.R. § 151.10 in evaluating Mr. McAlpine's 1990 request to extend trust status to his property." *Id.* at 1436.

McAlpine involved a challenge to BIA's denial of a trust acquisition request and the Board's affirmance of the denial. *See McAlpine v. Muskogee Area Director*, 19 IBIA 2 (1990). Upon reviewing these Departmental decisions, the Tenth Circuit concluded:

^{13/} In Florida Dep't of Business Regulation, the Eleventh Circuit held that trust acquisition decisions are "unreviewable as within [the Secretary's] discretion." 768 F.2d at 1257. In McAlpine, the Tenth Circuit explicitly disagreed with the Eleventh Circuit on this point. 112 F.3d at 1433-35.

The administrative record in this case demonstrates that the agency properly considered the relevant regulatory factors then in effect in denying Mr. McAlpine's request. * * * On the basis of [certain BIA findings concerning the factors in section 151.10], which are well documented in the administrative record, we hold that the Secretary's denial of Mr. McAlpine's decision [sic] was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

112 F.3d at 1436-37.

As the Board reads McAlpine, the Tenth Circuit has taken an approach similar to that taken by the Board since 1989. More importantly, with respect to the concerns expressed by the Assistant Secretary in this appeal, the court has found that there is, in the present regulations, law which may be applied by a reviewing court.

The Board finds itself in somewhat of a quandary. Especially in view of the decision in McAlpine, the Board might undertake at this point to review this trust acquisition decision under its previously articulated standard of review. The Assistant Secretary, however, has made it plain that she believes this trust acquisition request, and presumably all others to follow, should be evaluated under a new standard. Although, for the reasons discussed above, the Board has found that it cannot apply the Assistant Secretary's new standard to this appeal at this time, it also respects the Assistant Secretary's authority to set policy for trust acquisitions. Therefore, the Board concludes that it should not follow its past practice because to do so would be to ignore the Assistant Secretary's authority, as well as her intent, in this regard.

Under the unusual circumstances here, the Board concludes that the only reasonable disposition of this appeal is to refer it to the Assistant Secretary. If the Assistant Secretary continues to believe that her new standard should be applied to this trust acquisition request, she will have the opportunity to promulgate the standard through formal rulemaking, or other method permitted under the APA, and then to return the trust acquisition request to the Area Director for evaluation under the new standard. If, however, she now believes, in light of the discussion above, that the Area Director's decision should be reviewed under the Board's present standard of review, she may return the case to the Board for such review.

The Assistant Secretary also has two other options. One of these is to grant the Board full authority to review the Area Director's exercise of discretion under 43 C.F.R. § 4.330(b). As discussed above, if she were to do this, the Board would have authority to second-guess the judgment calls made by the Area Director. Acting under such a grant of authority, the Board, if it were to disagree with the Area Director's judgment, would not remand the case to him for further work but would simply reverse his decision.

The Assistant Secretary's fourth option is to review the Area Director's decision herself under 25 C.F.R. § 2.20(f), in which case she may, of course, exercise her full authority to review the Area Director's exercise of discretion. For purposes of this option, the Board construes this referral as a referral under 43 C.F.R. § 4.337(b).

The Board currently has several pending appeals which challenge trust acquisition decisions. It therefore requests that the Assistant Secretary decide upon a course of action in this case in such a way as to provide guidance for these other appeals. The Board further requests that she notify it of her decision as to a course of action as soon as possible. The Board will issue stays in its current trust acquisition appeals pending such notice from the Assistant Secretary.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this matter is referred to the Assistant Secretary - Indian Affairs.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge