

2016 Survey of Administrative Decisions on Fee-to-Trust Acquisitions

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Note

- ▶ My presentation is intended as a summary of recent land acquisition administrative appeals.
- ▶ Any errors or omissions are my own.
- ▶ Administrative appeals should be read completely and carefully because they are all very fact specific.
- ▶ So, when referencing administrative appeals in written materials, I recommend you consult with your legal counsel to assure the reference is apt.

Administrative Appeals

- ▶ BIA Regulations at 25 CFR Part 2 define the administrative process for appeals from decisions made by BIA officials.
- ▶ Officials who may decide appeals include:
 - Regional Directors (RDs),
 - The Interior Board of Indian Appeals (IBIA), and
 - The Assistant Secretary of Indian Affairs (ASIA) or the Deputy ASIA.
 - *See* 25 CFR 2.4

Administrative Appeals

- ▶ RDs may decide appeals when the subject of the appeal is a decision by a person under the authority of the RD.
 - 25 CFR 2.4(a).
- ▶ The IBIA may decide appeals when the subject of the appeal is a decision by an RD or the Deputy ASIA
 - 25 CFR 2.4(e).
 - *See also* 43 CFR part 4, subpart D (Rules Applicable in IBIA Appeals).
- ▶ The ASIA may assume jurisdiction over an IBIA appeal.
 - 25 CFR 2.20.

Administrative Appeals

- ▶ The Department recognizes that restoring tribal homelands is critical to promoting tribal self-determination, self-governance, and remedying negative effects of allotment and assimilation.

Administrative Appeals

- ▶ On November 12, 2013, the ASIA issued a memorandum entitled “Assumption of Jurisdiction over certain appeals of fee-to-trust decisions to the Interior Board of Indian Appeals pursuant to 25 CFR 2.4(c).”
- ▶ Under this new policy, the ASIA assumes jurisdiction over fee-to-trust (FTT) appeals to IBIA on acquisitions of at least 200 acres.
- ▶ BIA’s Midwest Region has approximately 4 of these appeals pending before the ASIA.

Administrative Decisions – ASIA

- ▶ In 2015, the ASIA issued his decision in an appeal styled:

Capay Valley Coalition v. Pacific Regional Director, BIA (Aug. 14, 2015).

- ▶ We've provided a copies of this administrative appeal for your reference.
- ▶ Capay Valley Coalition (CVC) appealed the RD's decision to take 853 acres of land in Yolo County, California in trust for the Yocha Dehe Wintun Nation (Nation).

Administrative Decisions – ASIA

- ▶ *Capay Valley* is significant because it serves as an example of an ASIA decision issued since the 2013 policy.
- ▶ The opinion is 15 pages long, with over 100 footnotes, and cites liberally from IBIA precedent.

Administrative Decisions – ASIA

▶ CVC argued:

1. The RD failed to adequately consider the Tribe's need for land.
2. The RD failed to adequately consider potential jurisdictional and land use conflicts.
3. BIA failed to comply with the National Environmental Policy Act (NEPA).
4. The administrative record did not support the RD's decision.

Overall, CVC argued the size of the acquisition was larger than needed and BIA did not consider potential future uses like gaming.

Administrative Decisions – ASIA

- ▶ Structurally, the ASIA’s Decision outlined:
 - The statutory and regulatory background.
 - The factual and procedural background.
 - Analysis
 - *In the instant case:*
 - *The Standard of Review*
 - *The RD’s Analysis Under 151.10*
 - *NEPA Compliance*
 - Conclusion

- ▶ Thus, the structure is similar to that of other administrative decisions whether by IBIA, an RD, or a Superintendent.

Administrative Decisions – ASIA

In his Analysis as to Standard of Review:

- The ASIA adopted the IBIA's standard of review.
- As a reviewing official he did not substitute his judgment for BIA's rather he considered whether BIA gave proper consideration to all legal prerequisites to exercise the discretionary authority to take land into trust.
- Acknowledged that he had full authority to review legal issues other than challenges to the constitutionality of laws or regulations.
- Noted that he was adopting IBIA's scope of review, *i.e.* scope would be limited to those issues that were before the BIA official on review.

Administrative Decisions – ASIA

- ▶ The RD’s Analysis Under 25 CFR 151.10(b)
 - The “Nation’s Need for Additional Land”
 - ~ noted appellant had conflated criteria in 25 CFR 151.3(a) (Land Acquisition Policy) with 151.10(b) (need of Individual Indian or the tribe for land).
 - 151.3(a) Outlines circumstances in which a tribe may acquire trust land:
 1. When property is located within the exterior boundaries of the tribe’s reservation or is adjacent thereto.
 2. When the tribe already owns an interest in the land.
 3. When the Secretary determines acquisition is necessary to facilitate self-determination, economic development or Indian housing.

Administrative Decisions – ASIA

- ▶ ASIA Looked to RD's Analysis Under 25 CFR 151.10(b)
 - The “Nation’s Need for Additional Land”
 - 151.10(b) – “Courts ...have uniformly rejected the need for some kind of particularized, acre-by-acre justification for the trust acquisition. ‘It was sufficient for the Department’s analysis [of § 151.10(b)] to express the Tribe’s needs and conclude generally that IRA purposes were served.’” *Capay Valley* at 8.

Affirmed RD's decision that Tribe needed the additional trust land to protect the environment and preserve the Nation and its lands.

RD was not required to consider whether this could be achieved on less acreage or that the acquisition was obviated by Nation's purported healthy financial status.

Acknowledged RD's decision referenced existing trust acreage and found it to be insufficient to meet the Nation's need.

Administrative Decisions – ASIA

- ▶ The RD's Analysis Under 25 CFR 151.10
- ▶ Jurisdictional Impacts Under 151.10(f).
 - ▶ Appellant focused on speculative uses such as gaming that were not considered by RD.
 - ▶ ASIA found that nothing in the record supported appellant's theories about future uses. Instead RD gleaned from the record the proposed land uses which were in congruence with the county's general land use plan.
 - ▶ RD was not foreclosed from using in her decision the language found in a tribe's application or any other administrative record information.
 - ▶ "The record must merely demonstrate that due consideration was given to comments submitted in a timely way by interested parties." *Capay Valley* at 12.

Administrative Decisions – ASIA

▶ Compliance with NEPA

- If you are looking for an administrative appeal with an analysis of NEPA issues, consider reviewing *Capay Valley* at 12–15.

To comply with NEPA, BIA must conduct as appropriate:

- A categorical exclusion determination (CE);
- An environmental assessment (EA) and a finding of no significant impact (FONSI); or
- An environmental impact statement (EIS), as applicable to the proposed action.

Administrative Decisions – ASIA

▶ Compliance with NEPA

◦ Standard of review

- NEPA does not prescribe results – rather prescribes the necessary process.
- “[P]rocess assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that the selection of a particular course represents a fully informed decision.” *Capay Valley* at 12-13.
- NEPA obligates agencies to consider the significant environmental impacts of a proposed action and it ensures that the agency informs the public that it considered environmental concerns during its decision-making process.

Administrative Decisions – ASIA

- ▶ Compliance with NEPA
 - Standard of review

“As long as the EA contains ‘a reasonably thorough discussion of the significant aspects of the probable environmental consequences, I will uphold the BIA’s decision.’”

Capay Valley at 13 (citing *Neighbors for Rational Development, Inc. v. Albuquerque Area Director*, 33 IBIA 36, 48 (1998)).

Administrative Decisions – ASIA

- ▶ Compliance with NEPA
 - Consideration of Reasonably Foreseeable Impacts
 - In *Capay Valley* – the FONSI at issue expressly noted the reasonably foreseeable consequence of the trust acquisition.
 - Appellant failed to cite any evidence in support of a speculative conversion from agricultural use.
 - RULE – RD need only consider “reasonably foreseeable future actions.”

Administrative Decisions – ASIA

- ▶ Capay Valley Coalition has since filed judicial litigation challenging the trust acquisition:
- ▶ Capay Valley Coalition v. Jewell, Case 2:15-cv-02574-MCE-KJN (E.D. Ca. filed 12/11/2015).
- ▶ In its complaint, CVC seeks a declaratory judgment that defendant DOI failed to adhere to the Administrative Procedures Act. Hence, CVC requests the Notice of Decision for taking the property in trust be set aside and DOI be permanently enjoined from taking the property into trust.
- ▶ Plaintiff's allegations – denied by the United States in its answer – highlight the importance of properly processing trust land applications.

Administrative Decisions – IBIA

▶ Introduction to IBIA

- The IBIA exercises its delegated authority from the Secretary of the Interior and is separate and independent from the BIA and the ASIA. The Board's authority is found at 43 CFR 4.1.
- The purpose of the Board is to provide independent, objective administrative review of decisions of BIA officials and to prevent the politicization of those decisions. Griffith v. Acting Portland Area Director, 19 IBIA 14 (1990).
- Its decisions are final for the Department and may be appealed to the United States district courts.

Introduction to the IBIA (cont.)

- ▶ The IBIA is composed of three administrative law judges:
 - Steven K. Linscheid, Chief Administrative Judge
 - Thomas A. Blaser, Administrative Law Judge
 - Robert E. Hall, Administrative Law Judge.
- ▶ IBIA has the authority to consider a variety of appeals.

Introduction to IBIA (cont.)

- ▶ For example, appeals arising from BIA decisions may concern:
 - Fee-to-trust land acquisitions;
 - The use of Indian trust lands (e.g., lease approval, enforcement, cancellation, and rental rate adjustment);
 - The use of mineral resources;
 - Conveyances of rights-of-way on Indian lands;
 - Land sales, exchanges, or other encumbrances;
 - Trespass; and
 - Disputes over the recognition of tribal officials for government-to-government relations between the Department and a tribe.
- ▶ IBIA also considers appeals from decisions issued by administrative law judges and Indian probate judges in OHA's Hearings Division.

Introduction to IBIA (cont.)

- ▶ The Board is located in Arlington, Virginia.
- ▶ IBIA began issuing decisions in 1970.
- ▶ The decisions can be found at the Board's website at www.oha.doi.gov.
- ▶ Based on the following cases, it appears that the time from filing of a notice of appeal to the issuance of an IBIA decision is roughly a year and half.

Introduction to IBIA (cont.)

- ▶ The Board's website contains a 2004 treatise on Indian land acquisition prepared by former Field Solicitor Priscilla Wilfahrt.
 - <https://www.doi.gov/oha/ibia/Survey-of-Interior-Board-of-Indian-Appeals-Case-Law-on-Land-Acquisition>
- ▶ This treatise provides valuable legal analysis on:
 - Authorities for Indian land acquisition;
 - Trust responsibility in land transactions;
 - Process for trust land acquisition including issues of notice, the content of decisions, policy considerations and a discussion of specific regulatory factors; and
 - Appeals including timing, burden of proof, IBIA standard of review, and standing to appeal.
 - RULES – concludes with a two-page summary of the general rules of practice for land acquisition.

Recent IBIA Decisions

- ▶ In the past year the Board has issued approximately 11 fee-to-trust decisions.
- ▶ My presentation is intended to highlight key issues from FTT decisions issued between June 2015 and June 2016 in reverse chronological order.

Recent IBIA Decisions

State of South Dakota and City of Wagner v. Acting Great Plains Regional Director, BIA, 63 IBIA 179 (June 29, 2016)

- Yankton Sioux Tribe (Tribe)
- On-Reservation – IRA Authority
- Remand to RD

- Tribe proposed acquisition in City of Wagner for housing purposes.

- Appellants succeeded, in part, on challenge to:
 - RD’s consideration of impact on the State and political subdivisions resulting from removing the land from the tax rolls.
 - RD’s consideration of jurisdictional and land use issues because it was unclear that city had dealt with such issues before.
 - RD required to address appellants’ comment that there was no way to enforce tribal compliance with a restrictive covenant regarding zoning.
 - RD’s failure to address comments regarding BIA budget limitations which, purportedly, could prevent the discharge of additional BIA duties related to the acquisition.

Recent IBIA Decisions

Desert Water Agency v. Pacific Regional Director, BIA, 63 IBIA 127 (May 27, 2016)

- Agua Caliente Band of Cahuila Indians (Tribe)
 - Question as to whether parcel proposed for acquisition could be processed as “on reservation”
 - Remand, in part, to RD
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- ▶ Good recitation of IBIA’s established standard of review for land acquisition cases.
 - ▶ “Contiguity” discussed in detail for it is relevant as to whether acquisition may be processed as “on-reservation.”
 - To be contiguous under Part 151, at a minimum, the lands must touch.
 - When a highway easement separates the actual surfaces of two parcels, contiguity could still be found.
 - Question existed as to whether strip of land separating the parcel at issue was an easement. Therefore, IBIA found remand necessary.
 - ▶ RD declined to make payment of water assessments, charges, or fees a condition of accepting property into trust.
 - RD: “[T]here is no basis for the Secretary, even if such authority existed, to condition the proposed trust taking on the payment of the two taxes.”

Recent IBIA Decisions

County of San Diego, California; Viejas Band of Kumeyaay Indians; and State of California v. Pacific Regional Director, BIA, 63 IBIA 75 (May 24, 2016)

- Ewiiapaayp Band of Kumeyaay Indians (Band)
 - Off-Reservation (ILCA; then IRA authority)
 - Affirmed in part, vacated in remaining part, remanded.
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- ▶ Ode to agency mistakes
 - ▶ “Decision fails as an exercise of discretion”
 - ▶ Application was inconsistent on proposed land use and this created many problems for RD
 - ▶ RD failed to address a variety of comments:
 - Error for RD not to respond to State’s contention that acquisition was not justified by § 465.
 - RD must not merely describe comments – RD must address them.
 - RD failed to address Viejas Band’s comments that acquisition would negatively impact the Viejas Band’s territorial jurisdiction.
 - RD failed to address how she viewed distance of parcel from reservation land given inconsistent mileages submitted.
 - ▶ Erroneous application of NEPA categorical exclusion (b/c land use unclear).
 - ▶ Secretary’s § 465 authority (regulatory definition of reservation for land acquisition) not constrained by § 467 (reservation proclamations).

Recent IBIA Decisions

David V. Dillenburg and Thomas G. Sladek v. Midwest Regional Director, BIA, 63 IBIA 56 (May 11, 2016)

- Oneida Nation (Nation)
 - On-reservation – IRA Authority
 - Order dismissed appeals for lack of standing.
-
- ▶ Burden of proof on appellants to establish standing.
 - ▶ IBIA applies judicial elements of standing as articulated in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Generally, appellants must establish:
 1. Actual or imminent injury to legally protected interest.
 2. Traceable to BIA decision before IBIA.
 3. Capable of redress by a favorable IBIA decision.
 - ▶ Change in tax base is not a particularized injury-in-fact.
 - ▶ Jurisdictional “Uniformity” is not a cognizable interest of appellants.
 - ▶ Economic injury to competitive ability requires competition in same market (Tribe was using residential housing for enrolled members and was not proposing to compete with public rental market).

 - ▶ IBIA had previously addressed Oneida’s *Carciari* analysis in Village of Hobart, 57 IBIA 4 (2013)

Recent IBIA Decisions

State of Kansas v. Acting Eastern Oklahoma Regional Director, BIA, 62 IBIA 225 (Feb. 23, 2016)

- Wyandotte Nation (Nation)
 - On-Reservation/Off-Reservation? – IRA Authority
 - Affirmed RD’s Decision
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- ▶ “RD had full authority to consider and change the analysis of the proposed trust acquisition from off-reservation to on-reservation.”
 - ▶ “A tribe may exercise jurisdiction over trust property, including trust property that is not itself contiguous to a tribe’s treaty reservation.”
 - ▶ On-Reservation process was appropriate notwithstanding State’s argument that the use of the contiguous trust property in Kansas was limited to cemetery purposes and the Nation’s treaty reservation was in Oklahoma.
 - ▶ RD’s resolution to *Carciere* challenge upheld as it was supported by the record.

Recent IBIA Decisions

Mille Lacs County, Minnesota v. Acting Midwest Regional Director, BIA, 62 IBIA 130 (Jan. 29, 2016)

- Mille Lacs Band of Ojibwe Indians (Band) of the Minnesota Chippewa Tribe.
 - Challenge to on-reservation process and IRA authority to acquire.
 - Affirmed RD's decision.
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- ▶ Extensive *Carciere* Analysis based on historical record.
 - ▶ On-Reservation Process was appropriate under regulatory definition notwithstanding county's assertion of disestablishment.
 - An M-Opinion addressed the Band's reservation status shortly before IBIA issued its order. In November 2015, the Solicitor concluded that the reservation as established by an 1855 Treaty remained intact. See M-Op. No. 37032 (Nov. 20, 2015).

Recent IBIA Decisions

Big Sandy Rancheria Band of Western Mono Indians v. Pacific Regional Director, BIA, 61 IBIA 311 (Sept. 30, 2015)

- Table Mountain Rancheria (Tribe)
 - Off-reservation – IRA Authority
 - Affirmed RD’s decision
- ▶ **National Historic Preservation Act / Agency Consulting Obligations**
- The acceptance of land into trust for an Indian tribe under Part 151 qualifies as a Federal “undertaking” for NHPA purposes where there exists an object on site that qualifies for inclusion in the National Register of Historic Places.
 - No change in land use (rural residential with neighboring habitat for grazing).
 - State Historic Preservation Officer (SHPO) concurred in BIA’s finding of “no adverse effect” under NHPA.
 - RD invited Big Sandy Rancheria to participate as a consulting party under NHPA and comment on finding.
 - After initially denying Big Sandy access to cultural resources reports, BIA released those reports to Big Sandy as a consulting party.
 - No indication in the administrative record that Big Sandy subsequently provided BIA with information on additional cultural, religious, or historic sites, or properties in the area proposed by the Tribe to be taken in trust.

Recent IBIA Decisions

City of Bloomfield, Nebraska; and Knox County v. Acting Great Plains Regional Director, BIA, 61 IBIA 296 (Sept. 29, 2015)

- Ponca Tribe of Nebraska (Tribe)
 - Mandatory acquisition under the Ponca Restoration Act, 25 U.S.C. §§ 983–983h
 - Affirmed RD’s decision.
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- ▶ The notice and comment procedures of BIA’s *Trust Acquisition* regulations, and associated requirements for discretionary acquisitions, do not apply to this mandatory acquisition.
 - ▶ NEPA does not apply to this mandatory acquisition.
 - ▶ IBIA lacks jurisdiction to review appellants’ claims against the Tribe for the Tribe’s refusal to provide the appellants with documents including the Economic Development Plan prepared pursuant to the Restoration Act.

Recent IBIA Decisions

Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director, BIA, 61 IBIA 273 (Sept. 25, 2015)

- Grand Traverse Band of Ottawa and Chippewa Indians (Tribe)
- Off-reservation – IRA Authority
- Affirmed RD’s decision

- ▶ *Carcieri* Analysis– Extensive Discussion
 - RD cited treaties, correspondence, and Department’s formal acknowledgement decision in 1980 which confirmed continuous tribal existence.
 - RD noted historical recognition of treaty hunting and fishing rights.
 - RD acknowledged DOI correspondence from the 1930s reflected “confusion and conflicting views on the Tribe’s status in relation to the IRA” but argued Tribe’s relationship with the Federal Government as a jurisdictional matter, remained intact.
 - IBIA examined the absence of a reserved land base for the Tribe and the Secretary’s erroneous interpretation of the 1855 treaty in light of the confusion evident in the 1930s correspondence.
 - IBIA concluded that such confusing historical documents held little probative value based on the erroneous interpretation of the 1855 treaty and which ignored continuing reserved Federal treaty rights.
- ▶ RD considered appellant’s comment that no agreement existed for a payment-in-lieu-of-taxes in context of off-reservation criteria.
- ▶ IBIA noted that tribes are not obligated to offset State and local governments’ tax losses.

Recent IBIA Decisions

Crest-Dehesa-Granite Hillsharbison Canyon Subregional Planning Group; Dehesa Valley Community Council, Inc.; Waldon G. Riggs AndCarolynn P. Riggs; David O'Connor and Delia O'Connor; Geraldeane Fox; and, Irene M. Harper v. Acting Pacific Regional Director, BIA, 61 IBIA 208 (Aug. 21, 2015)

- Sycuan Band of the Kumeyaay Nation (Nation)
 - IRA authority
 - RD's decision vacated in part, affirmed in remaining part, and dismissing appellant individuals' appeal in remaining part, and the appeals of other appellants for lack of standing.
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- ▶ Land to be acquired is used for tribal housing.

 - ▶ RD did not address adjacent landowners' comments that trust acquisition of unrecorded easements would interfere with their property interests. On this basis, the case was remanded.

Recent IBIA Decisions

State of Kansas v. Acting Southern Plains Regional Director, BIA, 61 IBIA 18 (June 16, 2015)

- Prairie Band Potawatomi Nation (Nation)
 - On-reservation – IRA Authority.
 - RD’s decision affirmed.
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- ▶ State disputed that on-reservation process was appropriate if lands were merely contiguous to trust lands.
 - ▶ RD confirmed that the on-reservation process was appropriate for parcels contiguous to trust land citing Part 151.
 - ▶ RD addressed the Tribe’s need for land which would continue to be used for agricultural and housing purposes.
 - ▶ RD determined that the proposed use consistent with county zoning.
 - ▶ IBIA found that RD appropriately processed the acquisition as on-reservation and that she appropriately exercised her discretion in accordance with the Part 151.0 criteria.
 - ▶ Appellant failed to show error in RD’s analysis.

Questions?

- ▶ Thank you for participating in today's Realty sessions.
- ▶ We look forward to working with you on land acquisition!

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