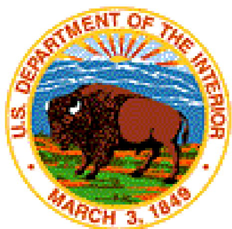
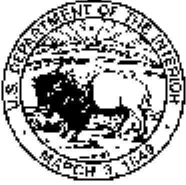


INTERIOR BOARD OF INDIAN APPEALS

Sycuan Band of Mission Indians v. Acting Sacramento Area Director,
Bureau of Indian Affairs

31 IBIA 238 (11/05/1997)



United States Department of the Interior

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

SYCUAN BAND OF MISSION INDIANS
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-1-A Decided November 5, 1997

Appeal from a decision vacating a decision to take land into trust.

Affirmed.

1. Administrative Procedure: Administrative Review--Indians: Generally--Secretary of the Interior

Under 43 C.F.R. § 4.5(a)(2), the Secretary of the Interior has the authority, except with respect to certain decisions of the Interior Board of Contract Appeals, "to review any decision of any employee or employees of the Department * * * or to direct any such employee or employees to reconsider a decision."

APPEARANCES: Paul Alexander, Esq., Washington, D. C., for Appellant; John H. Sansone, Esq., Diane Bardsley, Esq., and Ian Fan, Esq., for the County of San Diego, California.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Sycuan Band of Mission Indians (Band) appeals from a July 26, 1996, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), which vacated an August 30, 1995, decision concerning the acquisition of land in trust for the Band. For the reasons discussed below, the Board affirms the Area Director's July 26, 1996, decision.

Background

On August 30, 1995, the Area Director issued a notice of intent to take two tracts of land into trust for the Band. One tract, known as the "Bradley property," contains approximately 57 acres and is contiguous to the Sycuan Reservation. The other, known as the "Big Oak property," contains approximately 20 acres and is located about one mile from the reservation.

The San Diego County Board of Supervisors (County) appealed the Area Director's August 30, 1995, decision to this Board. On October 18, 1995, the Board dismissed the County's appeal as untimely. San Diego County Board of Supervisors v. Sacramento Area Director, 28 IBIA 224, recon. denied, 28 IBIA 278 (1995).

Apparently because of objections to the trust acquisitions from the County and others, the Secretary of the Interior instructed BIA not to finalize them immediately. 1/ He appointed a Departmental representative to meet with the Band and the County to attempt to resolve issues concerning the acquisitions. It appears that, by early December 1995, the Interior representative had begun communications with both. The record shows that various Departmental personnel continued efforts to promote a working relationship between the County and the Band well into the following year.

On December 11, 1995, the County, through the Chairwoman of its Board of Supervisors, Dianne Jacob, filed suit in Federal district court, challenging the Board's dismissal of its appeal and seeking certain documents under the Freedom of Information Act, 5 U.S.C. § 552 (1994). 2/ Jacob v. Babbitt, No. 95-3911J(CM) (S.D. Cal.).

Sometime during December 1995, the Band paved about 7.5 acres of the Bradley property for use as a parking lot for the gaming operation it conducted on its reservation. The BIA expressed concern about the Band's action, stating that the use was not one described in the Band's trust acquisition application. Despite this, however, the Department continued its efforts to bring the County and the Band together. The Band enacted a resolution on January 18, 1996, committing itself "to work cooperatively on a Government-to-Government basis with the County of San Diego and the Bureau of Indian Affairs to identify and solve local planning and land use management issues." Jan. 18, 1996, Resolution at 1. At the end of January 1996, the Department believed that "[i]n spite of [the] Band's parking lot construction, the Co. (Dianne Jacob) is still willing to sit down w/ tribe as two govts to work toward resolution of issues." Jan. 25, 1996, BIA Note to File. On February 7, 1996, the Counselor to the Secretary wrote to the Band and the County, proposing discussions between the two, to be arranged by a BIA official. It appears that one or more meetings between the Band and the County took place.

On March 28, 1996, the Area Director wrote to an Assistant United States Attorney (AUSA), presumably in connection with the County's lawsuit, stating:

> The August 30, 1995, decision by the BIA Area Director to accept the "Bradley" and "Big Oak" real properties into trust for the Sycuan Band was based on representations made in the Tribe's application that there was no contemplated change in land use, or that any change would be for agricultural purposes subsequent to further environmental review. Based on the fact that the existing and proposed use for the "Bradley" property is now somewhat

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1/ No Secretarial document containing these instructions is included in the record. From other materials in the record, it appears that the Secretary's involvement in this matter began during November 1995.

2/ All further references to the United States Code are to the 1994 edition.

> different than that described in the Sycuan Band's land acquisition application, staff of the Bureau of Indian Affairs have agreed that a re-evaluation of the proposal is in order.
>
> Upon completion of such re-evaluation, all appropriate parties, including the County of San Diego, Board of Supervisors, and the Tribe will receive notice of the results of that re-evaluation. Any parties who feel they may be adversely affected by the result will be given an opportunity to file an administrative appeal pursuant to the Code of Federal Regulations, Title 43, Part 4.310.

Counsel for the County expressed concern that BIA's re-evaluation would be a limited one. The Area Director then clarified his original statement in an April 26, 1996, letter to the AUSA, stating that BIA would reconsider the August 30, 1995, decision "in its entirety." Copies of both the March 28 and April 26, 1996, letters were sent to the Band and the County. 3/

On March 28, 1996, the Band submitted an environmental assessment (EA) for the "Bradley Property Parking Lot Project." On June 18, 1996, the Area Director wrote to the Band, stating:

> We see no role for the BIA in the approval of the paving project since Federal monies were not used and the land at this time is not in trust status. Therefore, there is no "Federal action" requiring National Environmental Policy Act (NEPA) compliance for the BIA for the parking lot paving.
>
> * * * * * *
>
> The Federal action needing NEPA compliance appears to be the approval by the BIA of an off-reservation land acquisition by the United States in trust status for the Sycuan Band of Mission Indians for the enhancement of the present gaming facility. The potential environmental effects of the trust acquisition and the proposed uses of the entire parcel need to be addressed in the EA. A portion of the parcel is now being used for a parking lot to enhance the Tribe's gaming enterprise. Other uses may include classrooms for DQ University which may require lease approval by the BIA, road construction, easements, and the uses of the other structures on the parcel.

Area Director's June 18, 1996, Letter at 1.

3/ It appears likely that this correspondence concerned the terms under which the County's Federal court action would be dismissed. Although no information about such a dismissal appears in the record for this appeal, the Band states that the case has been dismissed.

On July 26, 1996, the Area Director issued the decision on appeal here. He stated:

> As you know, final federal action with regard to the Band's "trust" land acquisition applications for the "Big Oak" and "Bradley" properties has been suspended since issuance of our notice of decision on August 30, 1995. Since issuance of our August 30, 1995 decision, the following events have occurred:
>
> (1) on October 26, 1996, Congressman Duncan Hunter provided this office with correspondence relative to local opposition and concerns about the potential impact resulting from approval of the applications which had not been previously part of the record and/or considered;
>
> (2) on December 11, 1995, an action against the Secretary of the Interior was filed before the U. S. District Court, Southern District of California, Civil No. 95-3911J(CM), on behalf of the San Diego County Board of Supervisors seeking reconsideration of our August 30, 1995 decision;
>
> (3) on or about December 12, 1995, approximately 7.5 acres of the "Bradley" property was paved for parking lot purposes in support of the Band's gaming facilities, a use not contemplated by the Band's application or in an environmental assessment;
>
> (4) in response to a court decision, State of South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1995), the Interior Department established a new procedure to ensure the opportunity for judicial review of administrative decisions to acquire title in trust for Indian tribes or individuals; the New Rule amending the BIA's land acquisition regulations at 25 C.F.R. 151 was published on April 24, 1996 and is applicable to all future and currently pending land acquisition proposals; and
>
> (5) there has been a commitment on behalf of the Sycuan Band, as evidenced by tribal resolution dated January 18, 1996, and the County of San Diego to establish a government-to-government dialogue to address land use issues of mutual concern.
>
> Due to the time that has elapsed since completion of our previous review, the need to revise and/or update the present applications, and the above-stated reasons, our August 30, 1995 decision is hereby vacated. We offer our assistance to the Band in establishing its dialogue with the County, and sincerely hope that the parties can successfully achieve resolution of issues.

Area Director's July 26, 1996, Decision at 1.

The Band appealed this decision to the Board. Briefs were filed by the Band and the County. 4/

Discussion and Conclusions

On appeal to the Board, the Band contends that the Area Director's August 30, 1995, decision is final for the Department of the Interior and that the Department had no jurisdiction to reconsider that decision one year later. Further, the Band contends:

> The Secretary of the Interior had no authority to issue a stay of BIA action or otherwise interfere with the decisionmaking process in this case. Although the DOI [Department of the Interior] regulations provide that the Secretary has reserved powers to assume jurisdiction over cases before the DOI's Office of Hearing[s and] Appeals, this authority exists only as to cases before the Office of Hearing[s and] Appeals. See Department of the Interior, Office of the Secretary, Department Hearings and Appeals Procedures, 50 Fed. Reg. 43703 (Oct. 29, 1985). This authority is exercised only in exceptional cases and, if exercised, the Secretary must comply with various procedural requirements, and the regulations emphasize that ex parte communications concerning the merits of a proceeding are strictly prohibited. Id at 43704-05.
>
> The regulations do not permit the Secretary to assume any control or influence over the course of proceedings at the Bureau level.

Band's Opening Brief at 19.

[1] The regulation concerning exercise of the Secretary's reserved powers is found at 43 C.F.R. § 4.5, which provides:

4/ After briefing was completed, the Board received a motion to intervene from Leo A. Carlin and the Dehesa Valley Community Council, Inc. They stated that their interests would be adversely affected if these trust acquisitions are approved. They further stated that they had participated in earlier proceedings in this matter but had not been informed when this appeal was taken.

The Board gave the parties an opportunity to respond to the motion. The Band opposed intervention, contending, inter alia, that would-be intervenors had never filed anything with BIA during the earlier proceedings and were therefore not entitled to receive personal notice of the Band's appeal. The County notified the Board that it did not oppose intervention. The Board postponed ruling on the motion until now.

In light of the conclusion it reaches below, the Board finds that the participation of would-be intervenors in this appellate proceeding is not necessary. Therefore, it denies their motion to intervene.

(a) Secretary. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office [of Hearings and Appeals], except a case before the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978, and render the final decision in the matter after holding such hearing as may be required by law; and

(2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision, except a decision by the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978.

* * * * * *

(c) Exercise of Reserved Power. If the Secretary * * * assumes jurisdiction of a case, or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued.

The Band cites a 1985 final rulemaking document which adopted amendments to 43 C.F.R. Part 4. That document amended section 4.5 to add provisions concerning the Board of Contract Appeals and to add subsection 4.5(c). It also amended section 4.27(b), concerning prohibited ex parte communications with personnel of the Office of Hearings and Appeals. Nothing in the 1985 rulemaking document suggests that the Secretary's reserved powers were to be exercised only with respect to cases pending before the Office of Hearings and Appeals.

The language of 43 C.F.R. § 4.5 is clear. Under that section, the Secretary reserved to himself, inter alia, "authority to review any decision of any employee or employees of the Department * * * or to direct any such employee or employees to reconsider a decision." It is plain that, under section 4.5, the Secretary has the authority to review a decision made by a BIA Area Director and/or to direct an Area Director to reconsider a decision. It is equally plain that section 4.5 is applicable to the Area Director's August 30, 1995, decision at issue here. 5/

5/ It is not absolutely clear from the record in this appeal that the Secretary personally directed the Area Director to reconsider his Aug. 30, 1995, decision. Nevertheless, there is ample evidence that directions

Although the Band does not contend that there was a violation of 43 C.F.R. § 4.5(c) in this case, the Board observes that the procedure set out in that subsection was apparently not followed. However, the subsection does not specifically apply to cases in which the Secretary directs an employee to reconsider a decision, as he apparently did in this case. Therefore, there does not appear to have been a violation of subsection 4.5(c).

The Band cites a number of cases for the proposition that an agency's reconsideration of a decision, if allowed at all, must be undertaken in a timely manner. E.g., Prieto v. United States, 655 F. Supp. 1187, 1191-92 (D.D.C. 1987). There are no time limits specified in 43 C.F.R. § 4.5 for the Secretary's exercise of his review authority. Even so, in view of the cases cited by the Band, it seems unlikely that the Federal courts would construe the provision as reserving to the Secretary the authority to review decisions for an unlimited period of time. 6/

In this case, the Secretary reopened the matter in November 1995, shortly after the Board issued its decision dismissing the County's appeal. It cannot be said, therefore, that there was an unreasonable delay in reopening the case. It is true that the Area Director's decision to vacate his earlier decision was not issued until July 26, 1996. However, during the period between the Secretary's reopening of the case and the Area Director's decision, active efforts to settle the dispute between the Band and the County were being pursued by Departmental officials, with the apparent cooperation of both parties. The record shows that these endeavors continued for some time and that they included an effort, made with the Band's knowledge, to dispose of the suit filed by the County.

Further, although the Band now contends that the Secretary's actions in this case were invalid, it participated actively in the discussions sponsored by the Secretary. See, e.g., Band's Jan. 18, 1996, Resolution; Mar. 28, 1996, Letter from the Band's Director of Special Projects to the

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fn. 5 (continued)
concerning the proceedings were coming from the Secretary's office. Further, the Band's arguments here indicate that it believed the Secretary himself had directed the Area Director to reconsider. For purposes of this decision, therefore, the Board assumes that it was the Secretary who did so.

The Board discusses the Secretary's actions in this case subject to the following caveat: The Board has no authority to review the Secretary's actions per se. 43 C.F.R. § 4.1(b)(1); Murdock v. Acting Phoenix Area Director, 22 IBIA 130 (1992). The Board's discussion of the Secretary's actions is undertaken only so far as necessary to address the Band's challenges to the Area Director's July 26, 1996, decision.

6/ The Board is unaware of any Federal court decision addressing time limitations on the Secretary's review authority under 43 C.F.R. § 4.5.

Deputy Area Director. 7/ Moreover, the Band itself bore some responsibility for the Secretary's involvement because it undertook to pave a part of the Bradley property for a parking lot in December 1995. The Band clearly seems to have understood that its action in this regard would necessitate some further analysis on the part of BIA before the Bradley property could be taken into trust. This understanding is evidenced by the Band's March 1996 submission of an EA concerning the parking lot.

Under the circumstances here, where proceedings were reopened shortly after the Board's decision; where efforts to resolve the matter amicably were undertaken by the Secretary; where the Band actively participated in the proceedings it now challenges; and where the Band's own actions contributed to the decision to reconsider, the Board finds no reason to believe that the Secretary's actions were untimely or otherwise beyond the authority reserved to him under 43 C.F.R. § 4.5. It therefore finds that the Area Director's July 26, 1996, decision was timely.

The Band also contends that it "has vested property rights that arose well over one year ago when a final decision was made to accept the Bradley and Big Oak properties in trust." Band's Opening Brief at 18. The Band cites Prieto and County of Thurston v. Andrus, 586 F.2d 1212 (8th Cir. 1978), for this contention. Prieto, however, concerned a tract which had already been taken into trust, and County of Thurston concerned allotments which were held in trust. The Area Director's August 30, 1995, decision announced an intent to take the Band's two properties into trust but did not constitute an acceptance of the properties into trust. Indeed, as the regulations in 25 C.F.R. Part 151 make clear, further steps must be taken before a tract approved for trust acquisition can be formally accepted in trust status. See 25 C.F.R. §§ 151.13, 151.14.

In response to an argument made by the County concerning the factual distinction between Prieto and this case, the Band contends:

> The [County] attempts to distinguish Prieto on the grounds that the deeds to the property in Prieto had already been issued in trust. Prieto, however, was decided in 1987, prior to the time the Secretary of the Interior delegated decision-making authority to the BIA Area Directors and prior to the time the DOI promulgated 25 C.F.R. § 2.6 which expressly makes decisions rendered by BIA officials "final" upon the expiration of the appeal period. 50 Fed. Reg. 6478 (1988) [sic] should be 54 Fed. Reg. 6478 (Feb. 10, 1989)]. There is no valid ground for distinguishing Prieto.

Band's Reply Brief at 6 n.5.

The Band's assertions concerning BIA's pre-1989 appeal regulations are factually incorrect. The appeal regulations in effect in 1987, which date

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7/ This letter transmitted the EA discussed above. In its concluding sentence, the letter stated: "I look forward to seeing you at our next meeting with San Diego County Supervisor Dianne Jacob."

from 1960, made it clear that the Area Directors exercised decision-making authority. 8/ Those regulations also included a provision concerning the finality of BIA decisions which is virtually identical to the provision in the present regulations. 9/

Even if its contentions concerning changes in the appeal regulations were accurate, the Band fails to explain how such changes would render this case indistinguishable from Prieto. It offers no other argument in support of its contention that Prieto controls here on the question of vested rights. Nor does it cite any authority other than Prieto and County of Thurston for the proposition that it acquired vested property rights as a result of the Area Director's August 30, 1995, decision. As noted above, those cases involved land already in trust status and are thus easily distinguishable from the present case. The Board therefore rejects as unsupported the Band's contention that it acquired vested property rights on August 30, 1995.

One other argument made by the Band must be mentioned. In its Opening Brief, the Band contends:

> [T]here was no change in the use of [the Band's] property, as * * * the * * * Area Director claims. The property referred to in that decision is 7.67 acres of the total 57 acre Bradley property. This area was previously graded by the prior owner, and was used for overflow casino parking before [the Band] filed its "fee-to-trust" applications with the BIA. (Administrative Record at 2). The Area Director was specifically aware of this prior use of this land as a parking area. (Memorandum dated June 6, 1995 from the Area Director to the Deputy Regional Solicitor of the BIA's Pacific Southwest Region, Administrative Record at 20). The previously graded area was paved to prevent erosion, and the paving does not affect the zoning designation for the remaining 50 acres of the Bradley property.

Band's Opening Brief at 12.

The Area Director's June 6, 1995, memorandum cited by the Band (Document 20 in the Administrative Record) concerns the Big Oak property, rather than the Bradley property. The memorandum states that the Band's plot map showed one use of the Big Oak property to be "open parking." However, the memorandum says nothing about the use of any part of the Bradley property for parking.

8/ See, e.g., 25 C.F.R. § 2.18 (1987), "Action by Area Director on appeal. The Area Director shall render a written decision in each case appealed to him * * *."

9/ See 25 C.F.R. § 2.3(b) (1987): "If no appeal is timely filed, the decision shall be final for the Department."

The Band also cites Document 2 in the Administrative Record, which is the Band's Interim Development Plan for the Bradley property. The Band points to nothing in that plan or in anything else it filed with BIA which indicated that any part of the property was being used for overflow casino parking.

Not cited by the Band is a May 16, 1995, memorandum from the Area Director to the Deputy Regional Solicitor (Document 18 in the Administrative Record) concerning the Bradley property. (This memorandum is analogous to the June 6, 1995, memorandum concerning the Big Oak property. Both memoranda sought preliminary title opinions.) The May 16, 1995, memorandum states, with respect to uses of the Bradley property:

> The property now proposed for trust acquisition is zoned for rural agriculture, and the Band has submitted an Interim Land Use Plan which indicates the intent to convert certain portions to vineyards (from 3.50 to 7.00 acres). It is indicated that the remaining property will remain under its present use. The attached documentation reflects the presence of the following improvements: water wells and perimeter wire fencing, 3-bedroom residence, office and six apartments, various storage sheds, 3-bedroom modular home, water storage tanks, horse stable and riding/show ring, various livestock corrals, etc. Two underground fuel tanks (one gasoline and one diesel) were removed from the property.

Area Director's May 16, 1995, Memorandum at 1.

The Area Director's August 30, 1995, decision reflects a similar understanding of the existing and planned uses of the Bradley property:

> The acquisition of the Bradley property, containing approximately 57 acres and bordering the present reservation boundary on the north, will enable commercial agricultural development and recreational use, thus enabling further tribal self-sufficiency and self-determination. With the existing housing facilities, the site is available for limited tribal housing purposes. * * *
>
> *   *   *   *   *   *
>
> The land data provided for the Bradley property indicates that considerable grading was accomplished by a prior owner with five terraces of approximately 3.5 acres each. The [Band] submitted an Interim Land Use Plan for the Bradley property which anticipates no immediate or substantial change in land use with the exception of possible utilization of the terraced areas for vineyards with the remaining property to remain under its present use * * *. The Band's application indicates the presence of the following improvements: water wells and storage tanks, numerous dirt access roads, perimeter wire fencing, 3-bedroom residence,

> office and residential units, various storage sheds, 3-bedroom modular home, horse stable and riding arena, various livestock corrals and associated equestrian structures, and various overhead utility lines.
>
> *   *   *   *   *   *
>
> The Bradley property is reported to be zoned for rural agriculture with past use being for rural residential and a horse ranch. The Band's application indicates its intended use will not be substantially different.

Area Director's Aug. 30, 1995, Decision at 2-3.

The same decision states at pages 4-5:

> When the [Band] first acquired the Bradley and Big Oak properties in 1993, community concerns were primarily focused on anticipated increases in traffic based on assumptions that they would be utilized for expansion of the tribal gaming operations and construction of a hotel. While the Band is not prepared to rule out this possibility, or any other possibility, this agency is certainly <u>not</u> in a position to "guarantee" that alternative uses will not occur in the future. We feel that conversion to gaming or other use in the immediate future is not likely, and this agency has not been provided with any evidence which demonstrates that the Band intends to use the subject properties other than as stated in its applications.

The Board finds that the Band has failed to show (1) that it informed BIA prior to August 30, 1995, that it was using a portion of the Bradley property for overflow casino parking or (2) that the Area Director was aware of such a use. <u>10</u>/

Although not discussed by the Area Director in his July 26, 1996, decision, or addressed by the parties to this appeal, there appears to be a question as to whether, in light of the actual or potential use of a portion of the Bradley property for a parking lot, the trust acquisition of that tract now requires analysis under section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, and/or approval by BIA's Central

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<u>10</u>/ In its Opposition to the Motion to Intervene discussed in footnote 4, the Band states: "[I]n response to continued concerns raised by the County, the paved portion of the Bradley lot is no longer used for parking purposes. <u>See County of San Diego Notice of Violation (attached as Exhibit 'A').</u>" Opposition at 3.

Exhibit A is a Feb. 7, 1997, Notice of Violation requiring that the Band "[c]ease the use of this parcel as commercial parking lot by compliance date of 3-7-97."

Office. 11/ The Board reaches no conclusion on this point. It notes, however, that the possibility that such further analysis may be needed seems to lend additional support to the Area Director's decision to vacate his August 30, 1995, decision.

The Board makes one final observation. Many of the Band's arguments assume that the Area Director's July 26, 1996, decision constituted a decision to deny the Band's request for trust acquisition of the Bradley and Big Oak properties. It did not. The Area Director's decision vacated his August 30, 1995, decision but left open the possibility of trust acquisition in the future. Thus, the Band will have another opportunity to present its arguments in favor of such acquisition.

The Board finds that the Band has failed to show error in the Area Director's July 26, 1996, decision.

11/ A July 19, 1990, memorandum issued by the Secretary required, at page 2, that all requests for trust acquisitions for gaming purposes be submitted for "[a]pproval/disapproval by BIA's Central Office after discussion with the Secretary of the Interior." A Sept. 28, 1994, memorandum from the Acting Deputy Commissioner of Indian Affairs to "All Area Directors" stated that the Secretary's July 19, 1990, directive was still in effect and attached a "Checklist for Acquisitions for Gaming Purposes." The checklist states at page 8:

"All requests for the trust acquisition of land intended for gaming purposes must be processed with [IGRA] Section 20 considerations in mind. Typically, the intended gaming purpose will be for the construction and operation of a new gaming facility. There will be projects, however, which on first impression will not readily appear to be for 'gaming purposes.' In these cases, if the proposed acquisition is for a project which proposes to enhance or expand an existing gaming facility, then the acquisition is for gaming purposes. For example, the tribe intends to enlarge the parking area, or expand the gaming facility through the addition of a hotel with additional gaming space." (Emphasis added.)

In this case, it appears that the Area Director intended at one point to submit the Band's applications to the Assistant Secretary - Indian Affairs for review. The Area Director's May 16, 1995, memorandum concerning the Bradley property and his June 6, 1995, memorandum concerning the Big Oak property each state at page 1:

"The Assistant Secretary delegated the authority to approve off-reservation nongaming land acquisitions to the Area Directors by memorandum dated May 26, 1994. In this particular instance, it was agreed in December 1994 that this application would be forwarded to the Assistant Secretary for additional review."

There is no evidence in the record, however, that either application was sent to the Assistant Secretary for review.

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 Area Director's July 26, 1996, decision is affirmed. 12/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

12/ Arguments made by the Band but not discussed in this decision have been considered and rejected.