United States Department of the Interior

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

QUINAULT INDIAN NATION and ANDERSON & MIDDLETON COMPANY, Appellants,	)	Order Affirming Decisions
v.	)	Docket Nos. IBIA 07-133-A IBIA 08-11-A IBIA 08-17-A
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	December 30, 2008

These three consolidated appeals -- two from the Quinault Nation (the Nation) and one from Anderson & Middleton Company (A&M) — seek review of three related decisions by the Northwest Regional Director,[1] Bureau of Indian Affairs (Regional Director; BIA), concerning the sale of 26 allotments on the Quinault Reservation, totaling 1,706 acres. As explained in greater detail below, the Board of Indian Appeals (Board) rejects Appellants' arguments and affirms the decisions of the Regional Director to award the sale of the 26 allotments to the Nation for the aggregate sum of $5,476,415 based on the Nation's commitment to match the highest bid from A&M for 20 of the allotments, pursuant to 25 U.S.C. § 2216(f), and the Nation's own highest bid for the remaining 6 allotments.

Docket Nos. IBIA 07-133-A and IBIA 08-17-A

The Nation first appealed from a July 23, 2007, decision by the Regional Director in which he informed the Nation that it was the unsuccessful bidder for 20 of 26 allotments offered for sale on the Quinault Reservation. Docket No. IBIA 07-133-A. Subsequently, the Nation appealed from the Regional Director's September 14, 2007, decision to accept

[1] A&M appeals from a decision of the *Acting* Northwest Regional Director. However, for purposes of our decision, we will refer to all of the decisions as issued by the "Regional Director."

the Nation's bid as the high bid for the purchase of the remaining 6 allotments. Docket No. IBIA 08-17-A.[3] The Nation contends that BIA provided erroneous information concerning the sale and, when the errors were brought to BIA's attention, BIA refused to issue corrected notices concerning the advertised sale. Next, the Nation argues that its bid for all 26 allotments exceeded, by $408,974, the bid submitted by A&M for 20 of the 26 allotments, and therefore the Nation submitted the highest bid. The Nation claims that BIA had informed it that its bid was the highest and argues that BIA is estopped from determining otherwise. Finally, the Nation argues that it should have been provided a right to purchase the allotments at fair market value without an advertised sale to the public.

The Board rejects the Nation's arguments. First, we reject the Nation's arguments that the sale advertisement contained misinformation and omissions that require us to set aside and readvertise the sale. There is no evidence in the record to show that the Nation was affected by the alleged misinformation or omissions in the sale advertisement or that the sale itself was tainted. Next, we find no support in the record for the Nation's contention that BIA informed the Nation that it had the highest bid. BIA's advertisement for bids for the sale of the 26 allotments expressly invited bids for individual allotments and did not require bidders to bid on all 26 allotments. The Nation accepted these terms in submitting its bids. Even if estoppel could lie, the Nation has failed to establish that BIA did anything more than say it would "consider" package bids as the high bid. Finally, with respect to the Nation's contention that it had a right to purchase the allotments for fair market value prior to any advertised sale, we find nothing in the regulations or statutes provides the Nation with such a right.

Therefore, we affirm the Regional Director's decisions of July 23 and September 14, 2007.

Docket No. IBIA 08-11-A

A&M appeals from an August 31, 2007, decision by the Regional Director in which he approved the sale to the Nation of 20 allotments for which A&M submitted the highest bids. The Regional Director approved the sale to the Nation after the Nation agreed to match A&M's high bids. A&M contends, as did the Nation, that BIA's sales materials failed to comply with the regulations governing the sale of trust interests and omitted

[3] As we understand the appeal by the Nation from the Regional Director's September 14 decision, the Nation does not object to being found to be the high bidder for these 6 allotments, but instead is protecting its appeal of the total sales price for all 26 allotments, and also is contesting the manner in which the sale was conducted.

certain information. We reject A&M's argument for the same reason we reject the Nation's argument: There is no showing that A&M was prejudiced or that the sale was tainted by any misstatements or omissions in the sales materials.

A&M further contends that BIA erred in offering the Nation an opportunity to match A&M's bids and is estopped from awarding the sale of the 20 allotments to any entity other than A&M. We disagree and conclude that the Nation's right to match A&M's bid arises under 25 U.S.C. § 2216(f) and not under separate regulatory provisions that contain a right to match a high bid. And, contrary to the arguments made by A&M, the plain language of section 2216 does not render its provisions inapplicable to this case. Even if the language of section 2216 were ambiguous and arguably could be read to preclude the Nation's right to match A&M's bid, we question whether such a result was intended by Congress, given Congress's statement of policy in subsection 2216(a) and the overall intent expressed in section 2216 to extend a right to match to tribes to maintain the trust status of lands over which the tribes exercise jurisdiction.

Background

In June 2006, the Indian owners of 26 allotments, totaling 1,706 acres, on the Quinault Reservation,[3] wrote to BIA requesting an advertised sale of the allotments pursuant to 25 C.F.R. § 152.26.[4] The Indian owners asked that the allotments be sold as a "single lot" and sought to reserve the right to refuse any bids. In particular, the owners emphasized that they did not consent to BIA offering the Nation an opportunity to match the high bid(s).[5]

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[3] The allotments are identified as Allotment No. 30G, consisting of 10 acres; Allotment Nos. 987, 1195B, 1196A, 1352A, 1352B, 2087, and 2119, each consisting of 40 acres; Allotment Nos. 448 and 2200, each consisting of 67 acres; Allotment No. 450, consisting of 79 acres; Allotment Nos. 404, 411, 461, 463, 465, 1350, 1353, 1355, 1356, 1435, 1464, 1591, 1940, and 3026, each consisting of 80 acres; and Allotment No. 452, consisting of 83 acres. In three of the allotments, undivided fractional interests were offered for sale: a 40% interest in Allotment No. 452; a 16.66% interest in Allotment No. 30G; and a 50% interest in Allotment No. 1591.

[4] Sections 152.26 and 152.27 of Title 25 of the Code of Federal Regulations provide procedures for conducting sales of Indian trust or restricted land by advertisement.

[5] Section 152.27(b)(1) of Title 25 of the Code of Federal Regulations provides that "[w]ith the consent of the [Indian] owner and when the notice of the sale so states, the tribe or member of such tribe shall have the right to meet the high bid."

BIA informed the owners' designated spokesperson, Helen Sanders, that BIA was required by the terms of the American Indian Probate Reform Act (AIPRA), 25 U.S.C. § 2216(f),[6] to offer the Nation the opportunity to match the high bid, if the high bid came from an individual or entity to whom the property would necessarily pass out of trust status to fee status, i.e., from a non Indian individual or entity.[7] Appraisals were then prepared for each of the 26 allotments, copies of which were provided to Sanders in April 2007.[8]

In May 2007, the Regional Director and members of his staff met with Sanders to review the terms of the advertised sale. According to BIA's notes from the meeting, Sanders specifically requested that the advertisement not disclose that the Nation had a right to match the high bid. She expressed concern that any such notice would discourage competitive bidding. Sanders clarified that she was not opposed to a sale to the Nation if the Nation either submitted or matched the high bid.

In June 2007, BIA advertised the sale in six local newspapers. In pertinent part, the advertisement bore the caption of "ADVERTISEMENT FOR SALE OF INDIAN LANDS – INVITATION TO BID." Public Notice, Montesano Vidette, June 7, 2007, attached as an Exhibit to Statement of John Beck, Sept. 28, 2007.[9] The advertisement stated, "SALE OF LANDS ON QUINAULT INDIAN RESERVATION. . .with current land use for recreation, homesites and timber," invited bidders to submit sealed bids "on

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[6] Subsection 2216(f) provides in relevant part,

> (f) Purchase of land by Indian tribe
>
> (1) In general
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> . . . . [B]efore the Secretary approves an application to terminate the trust status or remove the restrictions on alienation from a parcel of, or interest in, trust or restricted land, the Indian tribe with jurisdiction over the parcel shall have the opportunity —
>
> (A) to match any offer contained in the application; or
>
> (B) in a case in which there is no purchase price offered, to acquire the interest in the parcel by paying the fair market value of the interest.

[7] The record does not reflect any response from Sanders concerning BIA's assertion of the Nation's right to match the high bid.

[8] BIA has not included a complete copy of the appraisals in the record, presumably to protect the confidentiality of the appraised values.

[9] Beck's statement was included with the Nation's Statement of Reasons.

separate parcels or the entire listing [of 26 parcels]" by July 9, 2007, and advised that a "[f]ull information packet concerning the lands, conditions of the sale and submission of bids can be obtained from [BIA]." *Id.*

A bid package or prospectus was prepared by BIA for each of the 26 allotments. The package included information concerning the bidding process; a map of each allotment along with the legal description; photographs of each allotment; and a description for each allotment of the tree stand(s), previous timber harvests, topography, soils, streams, and access to the property. Each allotment description began by identifying the parcel as a "trust allotment," or "trust interest." *See, e.g.*, descriptions for Allotment No. 2087 ("trust allotment") and Allotment No. 1355 ("trust interest"). The cover form for the prospectus advertised the "Invitation, Bid and Award (Sale of Indian Lands)" by BIA and advised that "all bids [would be] subject to acceptance by the respective Indian owners and final approval by the Regional Director [and] [t]he right is reserved to reject any and all bids." Again, bidders were invited to "bid on individual tracts or the entire listing totaling 1,706 acres." *Id.*

None of the information provided by BIA in the prospectus, cover form, or newspaper advertisements advised potential bidders that the Nation had a right to match the highest bid, in the event that the high bid were made by a non-Indian individual or entity. According to Sanders, "the policy had once been to write into the sale documents that any sales were subject to a right to match the high bid by the Quinault [T]ribe." Declaration of Helen Sanders, Aug. 6, 2007, at ¶ 3 (attached to the Nation's Statement of Reasons); *see also* 25 C.F.R. § 152.27(b)(1) ("With the consent of the owner and when the notice of sale so states, the tribe or members of such tribe shall have the right to meet the high bid."). In addition, none of the sales information contained a proscription against intimidating bidders or potential bidders.

On June 29, 2007, the President of the Nation, Fawn Sharp, and other tribal employees met with the Regional Director and members of his staff to review details of the sale. President Sharp, expressed concern about the advertisement and requested that it be reissued. In particular, "[s]he requested that the references to [the allotments' availability for] home sites and recreational use be removed from the notice" as these references could harm the Nation by causing it to compete against inflated bids and, according to the Nation, none of the allotments were zoned by the Nation for such use. Statement of Fact by Mike Stamon, Sept. 28, 2007, at ¶ 7. President Sharp also stated that the Regional Director advised that "bids for the whole package of [26] parcels would be considered for high bids over individual parcel bids." Statement of Fact by President Sharp, Sept. 28, 2007, at ¶ 10; *see also* Stamon Statement at ¶ 8 (same). The Regional Director confirms that a meeting was held between BIA and the Nation on June 29, but denies "indicat[ing]

that a bid covering all the parcels would receive any preferential treatment." Declaration of Stanley Speaks, Jan. 8, 2008, at ¶ 6 (attached to the Regional Director's answer brief). The Regional Director avers that "[i]t was clear during my discussion with the Nation's representatives that the successful bid would be the highest bid." *Id.*

BIA received bids from a total of three bidders, one of which was A&M. A&M describes itself as "a longstanding forest products company in Washington [with] experience in purchasing Indian lands and timber." Declaration of James C. Middleton, Aug. 10, 2007, at ¶ 2 (attached to the Nation's Statement of Reasons). A&M owns fee land within the Quinault Indian Reservation. *Id.* It is undisputed that A&M is a non-Indian business entity. A&M explained that, "[b]ecause of the unique location of several of the advertised parcels next to [A&M]-owned land, and because of the terrain and topography of [A&M's] land, [A&M] has a strategic business interest in purchasing several of the advertised parcels." *Id.* at ¶ 5. A&M also explained that the loss of the opportunity to purchase these parcels would "put [A&M's] strategic business interests at risk." Declaration of Douglas J. Hockett, Aug. 10, 2007, at ¶ 10 (attached to the Nation's Statement of Reasons). Further, A&M avers it would

> have to seek permission from the [Nation] in order to use this land to access some of the property already in [A&M's] holdings while at the same time paying solely for capital improvements such as roads, which the [Nation] will have sole control over in the long term. Loss of these parcels may also result in substantial costs to establish property lines between the sale parcels and current [A&M] land holdings. Collectively, this will be detrimental to [A&M's] logging business.

Id.

The Nation submitted individual bids for all 26 allotments, the aggregate of which totaled $4,800,000. A&M submitted individual bids for 4 allotments, totaling $1,317,383, and a single, non-itemized package bid of $3,073,643 for 16 allotments. The aggregate of A&M's bids totaled $4,391,026 for the 20 allotments on which it bid. A&M did not submit a bid for 6 of the allotments.[10] Because A&M submitted only a single package bid for 16 of the allotments, BIA requested A&M to break down its bid by individual allotment and specified that the total could be no more than the aggregate bid made by A&M. A&M

[10] BIA received bids from one other bidder, who submitted individual bids on four allotments. None of these four bids was the high bid.

promptly provided the requested individual bids, which totaled the original amount of A&M's collective bid for the 16 allotments.

It is undisputed that, when considered individually, A&M submitted the highest bid on each individual allotment on which it bid; the Nation had the highest bid on the 6 allotments that A&M did not bid on. In addition, it is undisputed that A&M's aggregate bid for the 16 allotments was higher than the Nation's aggregate bid for the same 16 allotments. Finally, it is undisputed that the Nation's total bid for all 26 allotments exceeded A&M's total bid for 20 allotments.

On July 23, 2007, the Regional Director wrote to President Sharp and informed the Nation that it was not the highest bidder for 20 of the allotments.[11] The Regional Director explained that A&M had submitted the highest bid for the 20 allotments with its offer of $4,391,026, and provided the Nation "an opportunity to match the purchase price that has been offered for these allotments." Letter from Regional Director to Nation, July 23, 2007. On August 7, 2007, the Nation responded to the July 23 letter by demanding to be recognized as the high bidder with its $4,800,000 bid for all 26 allotments. The Nation also argued that it should have been able to purchase the allotments for fair market value, without having to bid, because BIA "is obligated to protect the Indian character of the [Quinault] Reservation." Letter from Nation to Regional Director, Aug. 7, 2007, at 4. In addition, the Nation claimed that the advertisement for the sale contained significant errors that led to inflated bids. Finally, the Nation claimed that the Regional Director had informed the Nation that bids for the entire package of 26 allotments would be favored over bids for individual allotments that did not exceed, as a package price, a bid received for all 26 allotments. The Nation maintained that BIA should therefore be estopped from seeking payment greater than the Nation's bid and estopped from awarding the allotments to A&M.

Notwithstanding the position of the Nation in its August 7 letter to BIA, the Nation agreed under protest, through Tribal Resolution No. 07-118-86, to "match the $4,391,026 bid to obtain [the 20] allotments" identified in the Regional Director's July 23 letter. By letter dated August 28, 2007, President Sharp provided the Regional Director with a copy of Resolution No. 07-118-86 and, in a cover letter, reiterated that the Nation "under protest, will match the [A&M] bid of $4,391,026, as described in your July 23, 2007 letter to President Sharp."

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[11] The July 23 letter identified the Nation's unsuccessful bids as the ones submitted for Allotment Nos. 404, 461, 463, 465, 987, 1195-B, 1196-A, 1350, 1352-A, 1352-B, 1353, 1355, 1356, 1435, 1464, 1940, 2087, 2119, 2200, and 3026. These were the 20 allotments for which A&M had submitted the highest bids.

On August 31, 2007, the Regional Director notified A&M that he had received confirmation from the Nation that it was exercising its right to match A&M's bid for 20 of the allotments and, therefore, A&M would not be awarded the sale. On September 14, 2007, the Regional Director wrote to the Nation to confirm that the Nation was the high bidder for the remaining six allotments included in the sale and advised the Nation to remit full payment for these allotments.

The Nation timely appealed the Regional Director's July 23 decision, which extended the Nation the opportunity to match A&M's high bids for 20 allotments, and the September 14 decision, which notified the Nation that it was the high bidder for the remaining 6 allotments in the sale. A&M timely appealed the Regional Director's August 31 decision, which notified A&M that the Nation had confirmed its intention to match A&M's bid for the 20 allotments and, therefore, the sale would not be made to A&M. The Board consolidated the three appeals and granted expedited review. Briefs were submitted to the Board by all of the parties.

Discussion

I. Introduction

We affirm each of the three decisions challenged by Appellants. The Regional Director correctly determined in his decision of July 23, 2007, that the Nation did not submit the highest bid for 20 of the 26 allotments and correctly determined, in his decision of September 14, 2007, that the Nation did submit the highest bid for the remaining 6 allotments. We reject the arguments proffered by the Nation, in which the Nation challenges the advertising of the sale and argues that it had a right to purchase the parcels for fair market value prior to the advertised sale.

We also conclude that the Regional Director properly determined that A&M was the high bidder for each of the 20 parcels on which it bid and also that the Regional Director was required by 25 U.S.C. § 2216(f) to offer the Nation the opportunity to match A&M's bids for the parcels. When the Nation agreed to match A&M's bid, the Regional Director properly notified A&M, in his letter of August 31, 2007, that he had approved the sale of the allotments to the Nation instead of to A&M.

II. Standard of Review

Appellants bear the burden of showing error in the Regional Director's decisions. *LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 142 (2007). We review the Regional Director's decisions to determine whether they are arbitrary or capricious, in

accordance with the law, and supported by substantial evidence. *Id.* We review de novo any legal determinations made by the Regional Director. *Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 29, 33 (2007).

III. Adequacy of the Administrative Record

A&M argues that the administrative record provided to the Board by BIA is incomplete, and has attached records to its briefs that it contends BIA should have included in its administrative record. The Regional Director has not objected to A&M's supplementation of the record, although the Regional Director notes that many, if not most, of the additional documents proffered by A&M post-date the challenged decision or were not considered by him, and therefore cannot properly be considered to be part of the Regional Director's administrative record.

The additional material provided by A&M consists primarily, though not exclusively, of filings made in *Anderson & Middleton Company v. Kempthorne*, No. C07-5419 RBL (W.D.Wash. *dism'd* Sept. 7, 2007), in which A&M sought to enjoin BIA from recognizing any party other than A&M as the high bidder for those parcels on which it bid.[12] We agree with the Regional Director that documents that post-date any of the three challenged decisions are not part of BIA's record.[13] Notwithstanding, all parties have had an opportunity to respond to A&M's documents and, therefore, they may be considered as part of the supplemental record in this appeal. *See Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 227-28 n.15 (2008).[14]

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[12] The district court dismissed A&M's action on the grounds that the agency has not yet issued a final agency decision following an exhaustion of administrative remedies.

[13] To the extent that the Regional Director's argument suggests that the record is limited to those documents actually considered by him, we disagree. In addition to containing the documents relied on by the deciding BIA official, *see* 43 C.F.R. § 4.335(b)(3), "the record shall include, *without limitation*, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based," *id.* § 4.335(a) (emphasis added).

[14] The Nation also submitted additional documents in support of its contentions. Neither the Regional Director or A&M objected to the Nation's supplementation, and these documents, too, are now part of the record.

IV. Alleged Deficiencies in the Public Notice and the Prospectus

Both Appellants contend that the sale should be voided and readvertised based on alleged errors and omissions in the public notice and prospectus for the sale. The Nation argues that the notice erroneously advised that the "current land use" for the allotments permitted homesites and recreation. According to the Nation, its zoning laws prohibit use of these lands for such purposes, and by identifying homesites and recreation as permissible uses of the allotments, BIA's notice of sale invited inflated bids. The Nation also argues that BIA failed to comply with 25 C.F.R. § 152.26(b)(3) when it did not include language in the public notice to warn bidders against the use of intimidation against other bidders or potential bidders.[15] Finally, the Nation claims that the public notice or prospectus should have given clear notice concerning the means of determining the high bid for the properties.

A&M argues that if BIA intended to give the Nation a right to match high bids, then 25 C.F.R. § 152.27(b)(1) required the public notice to inform potential bidders of that right. According to A&M, BIA's failure to do so precludes BIA from affording the Nation a right to match A&M's bid.

As we explain below, we conclude that although BIA omitted certain information from the public notice and prospectus concerning this particular sale that should have been included, neither the Nation nor A&M has shown that the omissions caused or resulted in misinformed bids or that the sale was somehow tainted by the omissions. Therefore, we reject Appellants' challenges to the public notice and prospectus.

Although the public notice failed to advise potential bidders against intimidation, the Nation has not shown that it was prejudiced or harmed by the omissions or that these omissions somehow tainted the sale. None of the parties claims to have been intimidated in the course of this land sale, nor does any party aver that it is aware of intimidation perpetrated against another bidder or would-be bidder. Therefore, we are not persuaded by this argument.

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[15] Subsection 152.26(b) of 25 C.F.R. governs the content of notices of sales of trust allotments by BIA. That subsection requires the notice to provide relevant information concerning the sale itself, i.e., time, place, terms, and means of conducting the sale; information concerning the bidding process; "[a] statement warning all bidders against violation of 18 U.S.C. 1860 prohibiting unlawful combination or intimidation of bidders or potential bidders;" and a description of the lands offered for sale, known restrictions and encumbrances affecting the lands, and information that might enhance or encourage bidding for the lands. 25 C.F.R. § 152.26(b).

To the extent that the Nation claims that the advertisement induced inflated bids by misleading bidders into believing the lands were zoned for homesite and recreational use, contrary to the Nation's zoning laws, the Nation fails to show that its zoning laws would apply to non Indian bidders for the parcels, such as A&M. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 498 (1989) (Yakima Nation's zoning laws do not apply to fee lands within the reservation boundaries owned by non-Indians). Thus, the Nation has failed to demonstrate that the advertisement was misleading on this basis. Nor does the Nation show that A&M — the only bidder whose bids exceeded the Nation's bids — was induced to bid on the allotments for any reason other than their value for timber. Therefore, we are not persuaded by this argument.

The Nation also argues that the notice or prospectus should have stated clearly how the high bids would be determined, i.e., on a "parcel-by-parcel" basis or by total package bids. Nothing in the regulations requires BIA to provide this information. Notwithstanding, by expressly inviting separate bids on individual parcels as well as on the entire listing, the only inference to be drawn is that BIA reserved full authority to consider bids on either basis. To do so is, of course, consistent with BIA's trust responsibility to the owners of the land to obtain the highest and best value for the lands.

A&M claims it would not have bid on the properties had it known that its bids could be matched by the Nation. Two of A&M's officers aver that A&M committed time and resources to submit its bids for the properties and that A&M has lost the use of its deposit of $400,000, which it contends has not been deposited into an interest-bearing account. We do not find these contentions compelling for several reasons. First, the public notice stated that the sale would be subject to the terms and conditions set forth in the invitation to bid. The one-page invitation to bid, as well as the two-page instruction sheet in the accompanying prospectus, advised potential bidders that BIA reserved the right to reject any and all bids. *See also* 25 C.F.R. § 152.29 (same). Further, the Nation's right to match is publically available in the form of a published statute, 25 U.S.C. § 2216(f). Subsection 2216(f) does not require that notice of the right to match be included in the public notice or invitation to bid. Thus, as long as A&M had notice that its bid might not be accepted, it is irrelevant whether the bid was rejected due to a challenge to the advertised sale itself or, as here, to the Nation's statutory right to match. BIA's retention of A&M's deposit is, of course, due solely to A&M's pursuit of this appeal.[16]

[16] BIA is not required to retain deposits in interest-bearing accounts or otherwise pay interest on deposits under the circumstances presented here.

Moreover, A&M's experience together with its representation by counsel in this bidding process leads us to conclude that, independent of the notice that was provided to it that its bid might be rejected by BIA, A&M had the means available to it to know or to learn that the Nation potentially had a right to match the high bid for these parcels.[17] Specifically, A&M represents that it is experienced in the purchase of Indian lands and, at the time of its bids for the parcels at issue, already owned several parcels on the Quinault Reservation. Additionally, A&M has been represented throughout this sale by counsel, who contacted BIA prior to A&M's bid to inquire about the sale.

Finally, and to the extent that 25 C.F.R. § 152.27(b)(1) requires the advertisement to provide notice of a tribe's right to match, such notice is required where the *seller* elects, pursuant to the regulation, to provide the tribe and its members the right to match the high bid. The Nation's right to match A&M's bids did not derive from the sellers' election but was a statutory right to match created by Congress in 25 U.S.C. § 2216(f). Prior to the enactment of subsection 2216(f), BIA's policy of affording tribes and their members a right to match was embodied in the regulations, but made expressly conditional on the prerogative of the Indian owner and notice to the public. Thus, bidders could not know, unless the sale advertisement so stated, that the tribe was to have a right to match the high bid because doing so was the prerogative of the Indian seller on a case specific basis.

With the enactment of present subsection 2216(f), all non-Indian bidders were put on notice that their bids, at least arguably, could be matched by the tribe exercising jurisdiction over the lands on which their bids were submitted. Therefore, with the publication of section 2216, A&M had constructive notice of the Nation's potential right to match its high bids.

Therefore, for the foregoing reasons, we reject Appellants' contentions with respect to the content of the public notice and the prospectus.

V. Estoppel

The Nation contends that BIA stated that bids for all 26 parcels would take precedence over bids for individual parcels and, since the Nation was the only bidder to bid on all 26 parcels, its bid is the highest bid and BIA should be estopped from demanding any price above and beyond the Nation's total bid of $4,800,000. We disagree.

[17] Whether or not A&M agreed that subsection 2216(f) afforded the Nation the right to match a high bid from a non-Indian bidder, that subsection at least put A&M on notice that such a right might exist.

It is well-established that estoppel typically does not lie against the United States. *See Yakima Ridgerunners, Inc. v. Acting Northwest Regional Director*, 44 IBIA 72, 78 (2007), and cases cited therein. The law particularly counsels against the application of estoppel where the United States is acting as trustee for Indians. *Id.*[18] Even if estoppel were to apply, the traditional elements of estoppel, set forth below, are not met here:

> Whether (1) BIA knew the true facts; (2) BIA intended that its conduct would be acted on or BIA acted in such a way that Appellant had a right to believe it was so intended; (3) Appellant was ignorant of the true facts; and (4) Appellant reasonably relied on BIA's conduct to its injury.

Id. at 78-79. With respect to these elements, we conclude that BIA knew the true facts concerning how it would determine the high bid and we accept, for purposes of this appeal, that the Nation was unaware of the true facts.[19] However, the Nation offers no evidence that establishes the remaining two elements of estoppel. We have carefully reviewed the declarations submitted by the Nation and nowhere do the affiants testify that the Regional Director informed the Nation that bids for all 26 parcels would take precedence over bids for less than all of the allotments (or where a single package bid for all parcels exceeded the aggregate bid for a subset of the parcels). At best, President Sharp states that the Regional Director advised that bids for all 26 parcels would be *considered* for high bid. Nothing in the statements attributed to the Regional Director suggests that a single bid for the entire

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[18] Under the facts of the instant appeal, the United States is trustee for the individual Indian owners of the 26 parcels who uniformly expressed their desire to sell their trust interests. Therefore, BIA's fiduciary duty as trustee is to seek the highest price for the sale of these lands from a qualified buyer without regard — at the outset — to whether the lands will remain in trust status. Although there may be a *statutory* duty owed to the Nation under the facts of this appeal, e.g., to advise the Nation, pursuant to 25 U.S.C. § 2216(f), of its right to match A&M's high bid, the United States is not acting in any *fiduciary* capacity on behalf of the Nation in advertising and selling the 26 parcels at issue here, only on behalf of the owners of record of the parcels.

[19] The Nation certainly suggests, though it does not state, that it was ignorant of the true facts, i.e., that the Regional Director would consider the high bid on a parcel-by-parcel basis. The parties do not inform the Board whether this is the first advertised sale of multiple parcels on which the Nation has bid. If the Nation has previously bid on such sales in the past, presumably the Nation would be well aware that the United States has a duty to obtain the best price for the Indian landowner, which would necessarily dictate considering bids on a parcel-by-parcel basis in the absence of a compelling reason to do otherwise. In the absence of such evidence in the record, we accept that the Nation was unaware of how BIA would determine the high bidder(s).

listing *would* be accepted as the "highest" bid or that he intended his statements to be so construed.

Even if the Regional Director's statement could be construed as confirming that he necessarily would give precedence to bids for the entire lot of 26 parcels, it would be unreasonable for the Nation to rely on such a statement for several reasons. First, such a statement by BIA would not be in the best interests of the Indian landowner. For example, if BIA advertised 26 parcels for sale, and the Nation bid $1,500,000 for 6 parcels, and $3,000,000 for the remaining 20 parcels, according to the Nation's argument, BIA would be required to accept its total bid of $4,500,000 for all 26 parcels even if another party bid $4,500,000 on just 6 parcels and a third party bid $6,000,000 on the remaining 20 parcels. If the Regional Director were to accept the Nation's argument, he would be denying the landowners an additional $6,000,000 income from the sale of the 26 parcels. Put another way, he would be selling the 26 parcels for far less than their bid value based solely on how the bids were packaged. To tie the hands of the the Regional Director in this way would not be in the best interests of the landowners.[20] Second, nothing in the public notice or the prospectus for the sale in any way suggested that bids for the entire package of 26 parcels would be given precedence over partial package bids. The invitation for bids itself advises that "[b]idders may bid on individual tracts *or* the entire listing totaling 1,706 acres." Emphasis added. The public notice also advised that "[i]nterested parties are welcome to bid on separate parcels or the entire listing." Consequently, the public notice and the invitation both intimate that the parcels could be sold separately. For these reasons, it would be unreasonable of the Nation to rely on any suggestion, perceived or actual, by BIA that suggests that a bid for the entire listing would automatically trump bids for a partial package of allotments or for individual parcel bids.

VI. Nation's Right to Purchase at Fair Market Value

The Nation contends that, pursuant to 25 C.F.R. § 152.2, it has the right to purchase trust lands on its reservation at fair market value prior to advertising the sale on the open market. We reject the Nation's argument.

In its entirety, 25 C.F.R. § 152.2 provides:

> Action on any application, which if approved, would remove Indian land from restricted or trust status, may be withheld, if the Secretary

[20] We use this hypothetical to highlight the improbability of the Nation's position. In actuality, the Nation offered $408,979 less than A&M for the 20 parcels that made up A&M's package bid.

> determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant. If action on the application is to be withheld, the applicant shall be advised that he has the right to appeal the withholding action pursuant to the provisions of part 2 of this chapter.

Nothing in section 152.2 requires BIA to notify the Nation of a *potential* transfer of title from restricted or trust status to fee status, i.e., prior to advertising a sale of trust lands, and nothing in 152.2 affords the Nation a right to obtain a parcel of trust property at fair market value prior to advertising the property for sale. What section 152.2 does is to allow BIA to provide the Nation with "a reasonable opportunity to acquire the land from the applicant" before BIA approves an application that would effect the transfer of land from trust or restricted status to fee status. BIA has provided the Nation with the opportunity required by section 152.2 and consistent with 25 U.S.C. § 2216(f).[21]

To the extent that the Nation also argues that subsection 2216(f)(1)(B) requires that it be given the opportunity to purchase the parcels prior to advertising the parcels for sale on the open market, we disagree. Subsection 2216(f)(1) sets forth in clear language that the operative time for the Nation to be given notice of an intended transfer of land from restricted or trust status to fee status is "before the Secretary approves an application to terminate the trust status or remove the restrictions on alienation." Nothing in section 2216 requires notice and an opportunity to purchase prior to the Secretary's approval to advertise the sale of trust lands. Indeed, subsection 2216(f)(1) specifically contemplates that an offer to purchase exists, which could be the product of advertisement. Moreover, an advertised sale of Indian trust lands may well result in high bids by individual Indians or by tribes, in which event the notice provisions of subsection 2216(f) would not apply inasmuch as the land would remain in trust. Subsection 2216(f)(1)(B) permits the Nation to acquire an interest in trust property for fair market value where no purchase price is established for the interest that is the subject of an application to transfer out of trust

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[21] To the extent that section 152.2 conditions notification to tribes on the Secretary's determination that "removal [from restricted or trust status] would adversely affect the best interest of other Indians, or the tribes," the subsequent enactment of 25 U.S.C. § 2216, renders such a determination by the Secretary nugatory. As discussed in greater detail *infra*, subsection 2216(f) imposes a requirement on the Secretary to permit the Nation to match any offer contained in an application to sell, exchange, or convey trust property where the effect of the Secretary's approval of the application would remove the property from trust status and without regard to the best interest of the Nation or other Indians.

status, e.g., a gift transaction. Therefore, we find no basis for the Nation's argument that it has a right to purchase the property at fair market value *prior* to advertising the lands for public bid.

Ultimately, the Nation appears to argue that, somehow, the bid sale threatened the Nation's land consolidation efforts, the Nation's jurisdiction, and the Nation's self governance. Inasmuch as the Nation was given the opportunity to match A&M's bid, which the Nation has agreed to do, it is not evident that these interests of the Nation are implicated. Although the Nation undoubtedly has an interest in acquiring those lands within its reservation boundaries that currently are in fee or for which an application is pending to take the land out of trust status, and in acquiring such lands for the best price that it can negotiate, nothing in subsection 2216(f) or section 152.2 entitles the Nation to a right of first refusal to purchase for the appraised fair market value, and thus to preclude the market value from being defined in an open and competitive bidding or negotiation process.

VII. Nation's Right to Match Under 25 U.S.C. § 2216(f)

A&M contests the Regional Director's decision, pursuant to 25 U.S.C. § 2216(f), to grant the Nation the opportunity to match A&M's highest bids on 20 parcels and be awarded the sales of these parcels. A&M argues that the plain language of subsection 2216(a) bars the applicability of subsection 2216(f) because A&M is a non-Indian entity.[22] We disagree. The plain language of subsection 2216(a) precludes its application to A&M.

We begin our analysis by comparing the two subsections. Subsection (a) is a statement of Congressional policy:

> (a) **Policy**
>
> It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions —
>
> (1) involving individual Indians;
>
> (2) between Indians and the tribal government that exercises jurisdiction over the land; or

[22] If subsection 2216(f) is inapplicable, then the Nation would not have a right to match A&M's high bids for the allotments. The only other tribal right to match exists pursuant to section 152.27 and arises only where the owners consent to a tribal right to match, which undisputedly did not occur here.

> (3) between individuals who own an interest in trust and restricted land who wish to convey that interest to an Indian or the tribal government that exercises jurisdiction over the parcel of land involved; in a manner consistent with the policy of maintaining the trust status of allotted lands. *Nothing in this section shall be construed to apply to or to authorize the sale of trust or restricted lands to a person who is not an Indian.*

Emphasis added; *see also* Pub. L. 106-462, § 102, *reprinted at* 25 U.S.C. § 2201 notes.[23] It is the last sentence, above, that A&M contends is a bar to the Nation's right to match, under subsection 2216(f), A&M's high bids because A&M is a non-Indian enterprise.[24]

The Nation and BIA, on the other hand, both argue that subsection 2216(f) was intended to further Congressional policy under subsection (a) by providing tribes with a right to acquire trust lands before the Secretary approves an application that would result in the lands losing their trust or restricted status. It is undisputed that a conveyance of trust allotments to A&M would result in the parcels passing out of Indian ownership and out of trust status contrary to Congressional policy.[25] If the last sentence of subsection 2216(a) does not control and the Nation is entitled to exercise a right to match under subsection 2216(f), the Nation's purchase of lands would fulfill Congress's policy, as set forth under subsection 2216(a), of "maintaining the trust status of allotted lands." *See* 25 U.S.C. § 2216(d) (conveyances that occur pursuant to section 2216, e.g.,

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[23] Section 102 contains Congress's statement of policy for its amendments to the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201 *et seq.*, and in enacting the American Indian Probate Reform Act: (1) to prevent the further fractionation of trust allotments made to Indians; (2) to consolidate fractional interests and ownership of those interests into usable parcels; (3) to consolidate fractional interests in a manner that enhances tribal sovereignty; (4) to promote tribal self-sufficiency and self-determination; and (5) to reverse the effects of the allotment policy on Indian tribes. Congress specifically found that the allotment policy had resulted in the loss of over 90,000,000 acres of tribal land.

[24] *See supra* at 189 n.6 for text of subsection 2216(f).

[25] The United States does not hold lands in trust for non-Indians. *See Bailess v. Paubrune*, 344 U.S. 171, 173 (1952) ("If [one] is not an Indian, the United States has no interest of hers in the land to protect" and the land passes out of trust upon issuance of the fee patent); *see also* 25 C.F.R. § 152.6 (if an interest in trust land has been devised or inherited by a non-Indian or an Indian to whom the United States owes no trust responsibility, the Secretary may issue a fee patent to such individual).

subsection 2216(f), "shall not affect the status of [the] land as trust or restricted land"). Nothing in the legislative history of section 2216 acknowledges the seeming contradiction between subsection (f) and the last sentence of subsection (a) as applied to *sales* of trust lands to non-Indians, nor does the history explain Congress's intent in adopting the two seemingly contradictory subsections.

We conclude that we need not resolve this contradiction because, under the facts of A&M's appeal, the last sentence of subsection 2216(a) simply does not apply. In plain language, section 2216 precludes the application of its provisions "to a *person* who is not an Indian." 25 U.S.C. § 2216(a) (emphasis added). For purposes of Chapter 24, which embodies ILCA, 25 U.S.C. § 2201 *et seq.*, and includes section 2216, "person" is defined as a "natural person." 25 U.S.C. § 2201(8). A&M, which is a company, is not a "natural person" and, thus, cannot claim protection under subsection 2216(a) from the Nation's statutory right to match under subsection 2216(f). Therefore, we conclude that subsection 2216(a) does not preclude the application of subsection 2216(f) to A&M's bids. And, because subsection 2216(f) states that "the Indian tribe with jurisdiction over the parcel *shall* have the opportunity [to match]," we also conclude that the Regional Director is required to sell the parcels to the Nation for the amount of A&M's bids.

Even if A&M were a "person" within the meaning of subsection 2216(a), its reading of the statute — that subsection 2216(a) bars subsection 2216(f) from applying to sales of trust lands to non-Indians — appears contrary to Congress's express policy and purpose in enacting ILCA as well as its subsequent amendments. The clear focus of the legislation was to facilitate the transfer of interests in Indian trust lands to Indians and to tribal entities, not only to reduce the fractionation of Indian ownership but to perpetuate Indian ownership of the lands and to restore lands that originally were tribal lands to tribal status. The right-to-match provision of subsection 2216(f) provides tribes with the opportunity to restore their original tribal land base. An enhanced tribal land base also enhances tribal sovereignty by accreting land to the tribes on which they can offer tribal services and engage in enterprises that promote tribal self-sufficiency and self-determination. If a tribe already owns an interest in a certain parcel, the tribe's purchase of additional interests in the same parcel reduces fractionation and promotes the consolidation of interests, possibly into usable parcels.[26] Ultimately, the right to match promotes "the policy of maintaining the trust

[26] Of course, whether or not a tribe already owns an interest in a parcel to which the right to match applies, once the tribe exercises the right and purchases an interest, there is no risk of the tribe's interest becoming further fractionated through devise, and the tribe may be able to acquire the remaining interests in the parcel or make other arrangements, e.g., through an exchange of land interests, to reduce fractionation.

status of allotted lands," as enunciated in subsection 2216(a). Thus, it appears incongruous that the last sentence of subsection (a) would bar tribes from intervening in a sale of trust land to a non-Indian purchaser.

This incongruity is all the more evident when we consider that the last sentence of subsection (a) refers only to *sales* to non-Indians and not to other conveyances, such as gift deeds or exchanges, that may be made to non-Indians. *See, e.g.*, 25 U.S.C. § 379; 25 C.F.R. § 152.23; *cf.* 25 C.F.R. § 152.2 (under certain circumstances, BIA may withhold approval of any application that would, if approved, cause land to pass out of trust status and extend "a reasonable opportunity [to other Indians or the affected tribe] to acquire the land from the applicant"). Thus, if an Indian were to execute a gift deed to or arrange an exchange of his interests in trust land with a non-Indian family member, e.g., a spouse or stepchildren, subsection 2216(a) would *not* bar the tribe's right to match under subsection 2216(f) and the tribe would have a right to purchase the interests for fair market value. But if the same Indian owner were to *sell* his trust interests to a complete stranger who is non-Indian, subsection 2216(a) would, as interpreted by A&M, preclude the affected tribe from matching the sale price and preserving the trust status of the land. We question whether such an interpretation of subsection 2216(a) accurately reflects the Congressional intent expressed in section 2216, when viewed as a whole.

Conclusion

For the reasons set forth in detail above, we affirm the Regional Director's decisions of July 23, September 14, and August 31, 2007. In these decisions, the Regional Director correctly determined, respectively, that the Nation was not the high bidder on 20 of the 26 allotments offered for sale on the Quinault Reservation, that the Nation was the high bidder on 6 allotments, and that all 26 allotments must be sold to the Nation pursuant to its election, under 25 U.S.C. § 2216(f), to match the high bids by A&M on the 20 parcels for which the Nation did not submit the highest bids.

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 affirms the Regional Director's decisions.

Debora G. Luther
Administrative Judge

I concur:

Steven K. Linscheid
Chief Administrative Judge

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Issued December 30, 2008
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