UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 11-1745

STATE OF SOUTH DAKOTA, et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION

THE HONORABLE ROBERTO A. LANGE
United States District Court Judge

APPELLANTS' BRIEF

MARTY JACKLEY
ATTORNEY GENERAL

Kirsten E. Jasper
John P. Guhin
Assistant Attorneys General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
kirsten.jasper@state.sd.us
Attorneys for Appellants

SUMMARY AND REQUEST FOR ORAL ARGUMENT

The State asks this Court to reverse the decision below in *State of South Dakota v. United States Department of Interior*, which found that the former Tribal Chairman and current member of a small Tribe can decide whether to grant multiple applications by his Tribe to place land into trust for the benefit of his Tribe, consistent with the Due Process Clause of the United States Constitution. ___ F.Supp.2d ___ (D.S.D. 2011).

The State is asking that the Department's decision to accept 366 acres into trust status be remanded and heard by an impartial and disinterested adjudicator to assure the appearance and reality of fairness. If the decision below is sustained, the State and local units of government will have been permanently deprived of a portion of their tax base, deprived of the local right to zone and regulate the lands in question (25 C.F.R. § 1.4(a)), and, at least as argued by the federal defendants, deprived of criminal and civil jurisdiction over the lands at issue.

The State and local units of government request twenty minutes for the presentation of oral argument.

TABLE OF CONTENTS

	PAGE
SUMMARY AND REQUEST FOR ORAL ARGUMENT	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUE	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	10
STANDARD OF REVIEW	11
ARGUMENT	
WHETHER THE DUE PROCESS CLAUSE PROHIBITS A CURRENT MEMBER AND FORMER MULTI-TERM CHAIRMAN OF THE TRIBE FROM ADJUDICATING WHETHER TO GRANT THE TRIBE'S MULTIPLE LAND IN TRUST APPLICATIONS.	12
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE	28
ADDENDUM	

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES CITED:

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 17

Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009) passim

Coalition for Fair and Equitable Reg., 297 F.3d 771 (8th Cir. 2002) 11

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) 25

Clements v. Airport Authority of Washoe County, 69 F.3d 321 (9th Cir. 1995) 25

Deretich v. Office of Administrative Hearings, 798 F.2d 1147 (8th Cir. 1986) 16

Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991) 18

Dusenbery v. United States, 534 U.S. 161 (2002) 14

Gibson v. Berryhill, 411 U.S. 564 (1973) 16

In re Morgan, 573 F.3d 615 (8th Cir. 2009) 9, 14

In the Matter of Murchison, 349 U.S. 133 (1955) 18

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 10, 15, 16

Pritchett v. Barnhart, 288 F. Supp. 2d 1224 (N.D. Ala. 2003) 24

St. Luke's Methodist Hosp. v. Thompson, 315 F.3d 984 (8th Cir. 2003) 12

Sierra Club v. EPA, 252 F.3d 943 (8th Cir. 2001) 12

Sierra Forest Legacy v. Rey, 577 F.3d 1015 (9th Cir. 2009) (*Noonan, J. concurring*) 16

South Dakota v. United States Department of the Interior, 401 F. Supp. 2d 1000 (D.S.D. 2005), *affirmed on other grounds*, 487 F.3d 548 (8th Cir. 2007) 16

State of South Dakota v. United States Department of the Interior, ___ F.Supp.2d ___ (D.S.D. 2011) i, 1, 9

Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) 23

Tumey v. Ohio, 273 U.S. 510 (1927) 18

Valley v. Rapides Parish School Bd., 118 F.3d 1047 (5th Cir. 1997) 15, 16

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 14

Ward v. Monroeville, 409 U.S. 57 (1972) 17, 25

Withrow v. Larkin, 421 U.S. 35 (1975) 11, 18, 19

FEDERAL STATUTES CITED:

5 U.S.C. §§ 701-706 11

5 U.S.C. § 706(2) 11

5 U.S.C. § 706(2)(B) 12

25 U.S.C. § 465 3, 13, 22

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

OTHER REFERENCES:

25 C.F.R. § 1.4(a) i

25 C.F.R. § 2.4 13

25 C.F.R. § 2.4(e) 13

25 C.F.R. § 151 7

25 C.F.R. § 151.9 13

25 C.F.R. § 151.10 13

43 C.F.R. § 4.331 13

http://findarticles.com/p/articles/mi_hb5088/is_1199411/ai_n18491654 2

Roberts County, South Dakota, et al. v. Acting Great Plains Regional Director, 51 IBIA 35 (December 30, 2009) 8

JURISDICTIONAL STATEMENT

After a final agency decision was issued, the State of South Dakota, the City of Sisseton, the County of Roberts, the Sisseton School District No. 54-2, and Wilmot School District No. 54-7 (hereinafter "the State") filed a Complaint in the United States District Court, District of South Dakota on May 5, 2010. JA 7-20. 28 U.S.C. § 1331 provided the District Court with jurisdiction over the matter. An Opinion and Order was entered on February 3, 2011, in the United States Department of the Interior's (the Department) favor. *State of South Dakota v. United States Department of the Interior*, ___ F.Supp.2d ___ (D.S.D. 2011), JA 24-44; Add. 1-24. The judgment followed on February 4, 2011. JA 45; Add. 25. The State timely filed a Notice of Appeal on April 4, 2011, on behalf of the State. Doc. 35. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE

WHETHER THE DUE PROCESS CLAUSE PROHIBITS A CURRENT MEMBER AND FORMER MULTI-TERM CHAIRMAN OF THE TRIBE FROM ADJUDICATING WHETHER TO GRANT THE TRIBE'S MULTIPLE LAND IN TRUST APPLICATIONS?

Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009)

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)

Withrow v. Larkin, 421 U.S. 35 (1975)

Ward v. Monroeville, 409 U.S. 57 (1972)

STATEMENT OF THE CASE AND FACTS

Russell Hawkins (Hawkins), a member of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation[1] (the Tribe) and former multiple-term Chairman of the Tribe, was appointed to the Office of Superintendent of the Sisseton Agency, Great Plains Region, Bureau of Indian Affairs (BIA) in 2001. JA 61, 178, 180; AR 164-165.

Prior to this appointment, Hawkins was Chairman of the Tribe, with his last term expiring in 1997—the passing of a mere four years. JA 10; (http://findarticles.com/p/articles/mi_hb5088/is_1199411/ai_n18491654. In 1989, while Hawkins was Chairman, the Tribal Council passed an ordinance which claimed tribal jurisdiction over all

[1] The Tribe was formerly known as the Sisseton-Wahpeton Sioux Tribe.

lands[2], including fee lands, within the cities of Peever and Sisseton. JA 52. One of the parcels at issue here (the Smith parcel) actually falls within the Sisseton city limits. JA 52, 60, 64-73.

In January 2001, almost simultaneously with Hawkins' appointment, the Tribe passed three resolutions requesting to place parcels[3] of land into trust status. JA 53-58. The Tribe used the resolutions to request that the BIA place the parcels in trust status pursuant to 25 U.S.C. § 465 for the benefit of Hawkins' Tribe. JA 53-58. This process was again repeated in May 2001, this time seeking the placement of the Smith parcel (six acres) into trust status for the benefit of Hawkins' Tribe. JA 59-60. As Hawkins was superintendent of the Sisseton Agency, he would make the initial decision regarding whether the 366 acres of land should be placed in trust status.

Upon submission of the requests, the Tribe told Hawkins that it and its members (including Hawkins) would reap substantial benefits from the acquisition of the land in trust. JA 53-58; AR 1692, 3069-3070, 3079, 3799-3800, 5494, 5502. The State was

[2] These lands were not all Indian country or Indian territory. JA 52.
[3] The three parcels are known as Peters (80 acres), Gardner (200 acres) and German (80 acres). JA 53-58.

notified and submitted to Hawkins comments and evidence opposed to placing the land in trust.[4] JA 10; AR 1255-1480, 2726-2951, 3911-4136, 5137-5362. The State argued Hawkins should be recused due to actual and perceived bias in favor of the Tribe. *Id.* The argument was based on the specific facts that Hawkins had served multiple terms as the requesting Tribe's Chairman and was a member of the Tribe making the applications. *Id.* The State further argued Hawkins would benefit from the acquisitions individually, as a tribal member, as well as to the extent that the Tribe, as a whole, would benefit. AR 1276.

Hawkins sought guidance from his supervisor regarding whether he should step down, while at the same time emphasizing his desire to make the land in trust decisions. JA 61. Hawkins admitted he was a former Chairman for the Tribe and a tribal member. *Id.* Hawkins made no direct comment on the legitimacy of the State's claim as to his bias. Rather, Hawkins told the Regional Director that "I think as Superintendent I should sign these decision letters once they are written and ready to be sent to

[4] The State actually responded to eight land in trust applications then pending before Hawkins.

the Tribal Chairman." *Id.* He expressed his desire to sign the letter—"I want to sign off on these decision letters"—but was nonetheless asking for "input" on the matter. *Id.*

The Acting Regional Director, in her November 22, 2006, response, stated that the State's claim that Hawkins could not be expected to be a neutral decision maker had no validity. JA 62-63. However, she did not expand the reasons for this conclusion other than to point to the general delegation of authority granted to an agency superintendent. *Id.* She resolved that provided the designated criteria for acquisition are met, Hawkins could approve the fee to trust applications. *Id.*

The only direct response to the assertion of bias was that "[t]here is no statute or law that states employees of the Bureau of Indian Affairs are not allowed to work on the reservation in which they are enrolled members. We do not see any issues or conflict of interests with Superintendent Russell Hawkins as the Approving Official for on-reservation fee to trust acquisitions for the Sisseton Wahpeton Oyate Tribe." JA 63. This response did not address the constitutional claim of bias, the facts at issue, or the State's argument in this matter. JA 62-63.

Thereafter, on January 25, 2007, Hawkins, displaying his concurrence that his Tribe would substantially benefit, approved the taking of the Smith, Peters and Gardner parcels into trust. JA 64-73, 74-82, 83-93. A few days later, Hawkins also approved the taking of the German parcel. JA 94-103. Not only did Hawkins agree with the benefits asserted by his Tribe, but he discovered additional benefits. With regard to the Gardner parcel, he noted the benefit his Tribe would receive from the buffalo farm and gravel pit located there. JA 85. Hawkins found the Peters parcel provided additional benefit to his Tribe as it was a "hilly and wooded area," and the Smith parcel would contribute to medical care for his Tribe by providing physician housing. JA 76, 66.

Each of Hawkins four decision letters had an identical response regarding the claim of bias:

> The State's comments about Superintendent Russell Hawkins and the BIA are biased against the State and favor the Tribe because Mr. Hawkins is a Tribal member and former elected Tribal Chairman holds no validity whatsoever.
>
> According to 3 IAM Great Plains Regional Addendum, Delegation of Authority, Release No. 0502, 3.1 Authority delegate to all Superintendents states, "Subject to the limitations, exceptions, and restrictions set forth in this addendum, Agency Superintendents are authorized to

> exercise the authorities delegated to the Regional Director as cited below." Specifically Section O. - Real Estate Services, Item 4, Sub item (8) on reservation fee to trust transactions.
>
> There is no statute or law that states employees of the Bureau of Indian Affairs are not allowed to work on the reservation in which they are enrolled members.

JA 71-72, 81, 91, 101.

The State timely appealed these decisions to the Regional Director of the Great Plains Region, BIA. Since an Acting Regional Director had already determined Hawkins was able to decide the matters, the State requested the Regional Director's office recuse itself as it had already determined a central claim without the State's participation. JA 104-109. This request was also denied and the May 4, 2007, memorandum restated that Hawkins had been advised that the applications had to be reviewed under the criteria provided in 25 C.F.R. § 151, "and that [Hawkins'] employment with the Tribe did not create inherent bias which disqualifies him from making decisions which affect tribal interests." JA 110-111. The memorandum ended by noting the Regional Director will conduct an "independent review" which "will necessarily cure any possible taint of bias." JA 111.

After briefing, the Acting Regional Director affirmed Hawkins' decisions with regard to each of the four parcels. JA 112-123, 124-137, 138-150, 151-165. The Acting Regional Director found the State had not provided any "specific facts" as to Hawkins' bias and further rejected the request that the Regional Director's office be recused. JA 116, 129, 142-143, 156. The Acting Regional Director finally repeated her finding that the State had not "submitted any substantial information to document that any BIA decision maker . . . has disregarded any federal regulations or laws." JA 119, 132, 145, 159.

The State appealed these decisions to the IBIA, where they were consolidated[5] for briefing. AR 290-293, 2037-2040, 3221-3224, 4460-4463. The IBIA affirmed Hawkins decision. *Roberts County, South Dakota, et al. v. Acting Great Plains Regional Director,* 51 IBIA 35, 53 (December 30, 2009). JA 166-186. With regard to Hawkins, the IBIA acknowledged the status of Hawkins' "membership in the Tribe" and acknowledged he was a "former multi-term tribal Chairman." JA 178, 180. Further, the IBIA found

[5] The consolidation order also included a parcel of land referred to as the Brooks parcel, but that parcel is not at issue here.

these facts did not demonstrate "either the appearance of bias or actual bias." JA 180. The IBIA concluded that the "State . . . has not met its burden of showing that [Hawkins] should have been disqualified 'based on the appearance of or actual bias.'" *Id.*

The IBIA also rejected the argument that the Regional Director had impermissibly determined the issue of Hawkins' bias before it was properly before it. JA 181. In a footnote, the IBIA also pointed to itself as a guarantor of "due process" because of its "independent review." JA 180, n.10. The State appealed the matter to federal district court through a Complaint filed on May 3, 2010. Doc. 35. After dueling summary judgment motions, briefing and argument, the Honorable Roberto A. Lange found "the facts of this case neither create an unconstitutional probability of bias nor overcome the 'presumption of honesty and integrity' on the part of Superintendent Hawkins" and affirmed the acceptance of 366 acres into trust. *State of South Dakota v. United States Department of Interior*, ___ F.Supp.2d ___ (D.S.D. 2011) (citing *In re Morgan*, 573 F.3d 615, 624 (8th Cir. 2009)). JA 34; Add. 1-24.

SUMMARY OF ARGUMENT

This Court should reverse the determination by the BIA and upheld by the district court to accept 366 acres into trust status, as Hawkins, who made the initial decision on behalf of the BIA, was biased. The Due Process Clause requires that a tribunal be impartial and disinterested in order to ensure a party is not deprived of a protected interest without a fair and meaningful proceeding. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The test for an impartial adjudicator is whether considering the specific matter would create a possible temptation "not to hold the balance nice, clear and true." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct 2252, 2261 (2009).

Given the facts of this case and the type of matter presented to Hawkins, he was or would have been tempted to tip the balance in the Tribe's favor as: (1) Hawkins was a member of the Tribe which submitted multiple requests to place land in trust after Hawkins' appointment as Superintendent of the Sisseton Agency; (2) Hawkins had served several terms as the Chairman of the Tribe making the requests, the last being a mere four years before the requests; and (3) while Hawkins was Chairman, the Tribe passed an Ordinance

which attempted to gain jurisdiction over the city of Sisseton, an end which approving one of the parcels into trust in this case arguably would accomplish. The specific facts of this case coupled with the fact that Hawkins was to determine whether to place 366 acres of land into trust for the benefit of his Tribe, clearly creates a realistic perception of (if not actual) unfairness if Hawkins is permitted to be the adjudicator. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Failure to provide the State with an impartial and disinterested decision maker is a violation of due process.

STANDARD OF REVIEW

This matter is brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. Generally, review of agency decisions is limited and may be set aside if "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2). Here, however, the State's challenge is centered on the Due Process Clause of the Constitution. Constitutional claims relating to the action of agencies are entitled to de novo review. *Coalition for Fair and Equitable Reg.*, 297 F.3d 771, 778 (8th Cir. 2002). Therefore, this matter merits de novo review. This Court likewise reviews de novo the district court's

decision whether an agency action violates the APA. *St. Luke's Methodist Hosp. v. Thompson*, 315 F.3d 984, 987 (8th Cir. 2003). Under the APA, a reviewing court is required to "decide all relevant questions of law" and "hold unlawful and set aside agency action, findings and conclusions found to be . . . not in accordance with law[.]" 5 U.S.C. § 706(2)(B). As allowing an adjudicator who was not neutral or disinterested is not in accordance with the Due Process Clause, this decision must be set aside.

To the extent a reviewing court generally "gives agency decisions 'a high degree of deference,'" that does not apply to this case as the BIA and Department's area of expertise for purposes of deference does not apply as the question here—was there impermissible bias—is not in the agencies' area of expertise nor does it turn on their interpretation of agency regulations. *See Sierra Club v. EPA*, 252 F.3d 943, 947 (8th Cir. 2001) (citations omitted).

ARGUMENT

The Due Process Clause prohibits a current member and former multi-term Chairman of the Tribe from adjudicating whether to grant the Tribe's multiple land in trust applications.

A. *Administrative Structure for Land in Trust Cases, Pursuant to 25 U.S.C. § 465.*

A tribe or individual wishing to have land taken into trust must first make a written request. 25 C.F.R. § 151.9. The BIA then notifies the local governments that would be affected by the loss of land seeking their comment and impact statements. 25 C.F.R. § 151.10. When a request is made to place land into trust status, the decision is generally made by the local agency's Superintendent. The agencies are divided into regions, which are headed by a Regional Director. If a party is aggrieved by the Superintendent's determination, it may appeal the matter to the Regional Director. 25 C.F.R. § 2.4. In this case the Sisseton Agency is under direction of the Great Plains Regional Office of the BIA. Transcript 8. If a party is aggrieved by the Regional Director's decision, an appeal may be filed with the IBIA. 25 C.F.R. § 2.4(e); 43 C.F.R. § 4.331. The IBIA may only overturn the Regional Director's decision upon a showing of an abuse of discretion. Transcript 8.

B. *Requirements of the Due Process Clause.*

"The Due Process Clause [...] prohibits the United States ... from depriving any person of property without 'due process of law.'"

Morgan, 573 F.3d at 623 (citing *Dusenbery v. United States*, 534 U.S. 161, 167 (2002)). In order to establish an unconstitutional deprivation of property, a party must show they "(1) have protected property interests at stake and (2) were deprived of such property interests without due process of law." *Morgan*, 573 F.3d at 623 (citation omitted).

1. *The State's Protected Property Interest.*

There is no dispute about whether the State has legitimate interests in the land sought to be placed in trust. The State has a sovereignty interest, as well as criminal and civil jurisdiction interests, interests in its physical territory, and in its ability to enforce its own legal codes over its lands, its right to tax the properties at issue, right to zone and its right to otherwise regulate the lands in question for the good of the whole community. *See Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

All of these rights are profoundly undermined by the attempt of the federal defendants to unilaterally, without the consent of the State or local units of government, take these lands into trust.

2. *Deprivation of Due Process of Law.*

Marshall establishes that the "Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." 446 U.S. at 242 (1980); *See also Caperton*, 129 S.Ct. 2252 (2009). The "requirement of neutrality" works to promote "participation and dialogue by affected individuals in the decision making process." *Marshall*, 446 U.S. at 242 (citations omitted). Furthermore, the "neutrality requirement" works to "guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.*

Marshall found that the neutral tribunal guarantee also operates for other purposes: "it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Id.* (internal citations omitted).

There can be no doubt that the requirement of neutrality applies to proceedings of administrative agencies. *Valley v. Rapides*

Parish School Bd., 118 F.3d 1047, 1052 (5th Cir. 1997) ("The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer.") Indeed, the requirement has been held to apply to land in trust proceedings, such as this one. *South Dakota v. United States Department of the Interior*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005), *affirmed on other grounds*, 487 F.3d 548 (8th Cir. 2007) (finding "[t]he Department of Interior's review of an application to take land in trust is subject to the due process clause and must be unbiased.") *See also Marshall*, 446 U.S. at 242 (hearing before an administrative law judge); *Gibson v. Berryhill*, 411 U.S. 564, 578-580 (1973) (applying to determinations of a state licensing board); *Deretich v. Office of Administrative Hearings*, 798 F.2d 1147, 1151-1153 (8th Cir. 1986). *See also Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1024 (9th Cir. 2009) (*Noonan, J. concurring*) ("Almost as elementary is the extension of this principle [against "impaired impartiality"] to administrative adjudicators.")

3. *Hawkins realistically may have a tendency not to hold the balance nice, clear and true.*

The Supreme Court recently reiterated, and elaborated on, the proper approach to be taken when evaluating a claim that due process prohibits a decision maker from sitting on a particular case. *Caperton*, (relying heavily on *Ward v. Monroeville*, 409 U.S. 57 (1972)). *Caperton* reiterated that the demands of the Due Process Clause go beyond simply assuring that the decision maker receives "no money," as a result of his decision making. 129 S.Ct. at 2260 (citing *Ward*, 409 U.S at 60). That fact "did not define the limits of the principle." *Id.*

The actual test was different—it turned on whether the adjudicator "might face" "possible temptation." *Caperton,* 129 S.Ct. at 2260 (internal quotes omitted). *Caperton* found that it was "not required to decide whether in fact [the justice] was influenced." *Id.* at 2261 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). In other words, it was not the actual *fact* of bias which was at issue. *Caperton* echoed the long-standing test: "The proper constitutional inquiry is 'whether sitting on the case [. . .] would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Caperton*, 129 S.Ct. at 2261 (quoting *Lavoie*, 475 U.S. at 825, in turn quoting *Ward,* 409

U.S. at 60, in turn quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (internal quotation marks omitted)).

When an adjudicator "wants" and "desires" to decide a matter, that is a clear indication he is not indifferent on the subject matter. In his memo to the Regional Director, Hawkins expressed, in writing, his clear desire to make the multiple land into trust decisions: "I want to sign off on these decisions letters[.]" JA 61. While a judge's prior association with a party does not in itself create a reasonable basis to find him or her impartial, the link here is not mere "association." *See Doyle v. Arlington County School Board*, 953 F.2d 100, 103 (4th Cir. 1991). Hawkins not only is a member of the Tribe making a request before him, but Hawkins was the Tribe's Chairman four years prior to the request. His seat at the table was hardly cooled, especially considering he served several terms and signed an ordinance which purported to pull the City of Sisseton within the Tribe's jurisdiction—an end which would also be met by accepting the Smith parcel, here, in trust. Hawkins has shown not only a clear preference toward the Tribe over the State, but a "probability of unfairness." *See Withrow*, 421 U.S. at 47. *Cf. In the Matter of Murchison*, 349 U.S. 133 (1955). "[E]xperience

teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47.

The Court further found that a "realistic appraisal" must be made to determine the risk of bias. "In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weaknesses,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 129 S.Ct. at 2263 (quoting *Withrow*, 421 U.S. at 47).

Caperton further explained that while it could not be defined with precision what kind of interest was sufficient to disqualify, it "was important that the test have an objective component." 129 S.Ct. at 2261. Furthermore, while it was desirable that the decision maker himself or herself attempt to determine whether he or she was biased, that was not sufficient. The decision maker in *Caperton*, in fact, determined four times that "no actual bias had been established" and that no one had been able to "point to any conduct or activity on [his] part which could be deemed 'improper.'"

Id. at 2262. *Caperton* emphasized that the Supreme Court did not "question his subjective findings of impartiality and propriety." *Id.* at 2263. Critically, the Court did not "determine whether there was actual bias." *Id.*

In terms of the undisputed facts of this particular case, given a realistic appraisal of psychological tendencies, an average decision maker would experience a temptation not to hold the balance "nice, clear and true." In other words, it is realistic that the Tribe would start off in a more (however slight) favorable position then the State, as:

- Hawkins is a lifelong member of the Tribe (a small tribe[6]) seeking his approval of land to be placed in trust.
- Hawkins served multiple terms as the Chairman of the Tribe now before him.
- Hawkins' last appointment as Chairman ended four years before the initial requests were made — the year he was appointed Superintendent.
- The Tribe, in seeking a favorable decision from its tribal member Superintendent, asserted that it and its members (of which Hawkins is one) would reap substantial benefits from the acquisitions.

[6] The 2000 census found approximately 3,600 Native Americans live in the area of the former Lake Traverse Reservation. However, not all would be members of the Tribe. AR 1347.

- The acceptance of the Smith parcel into trust would fulfill a tribal goal adopted when Hawkins was Chairman. In March of 1989, with Hawkins as chair, the Tribe adopted Ordinance No. SWST-ORD-79-02A, which stated that the Tribe would exercise jurisdiction "over all members and nonmembers only in Indian Country . . . which includes, but is not limited to all Trust lands . . . but also includes the Cities of Sisseton and Peever. . . ." JA 52. The Resolution thus emerges as a long term goal of the Tribe and its then chairman. Hawkins arguably was able to partially fulfill this goal by the acquisition of placing the Smith parcel in trust[7].

It is realistic and reasonable to ascertain that Hawkins experienced temptation not to hold the balance "nice, clear and true" when his small tribe approached him to gain a substantial benefit. If, given a close case, would the gavel be more likely to fall on the side of the Tribe given Hawkins' history? The answer is clear: the average man, no matter how well-intentioned, given a realistic psychological appraisal, *would* experience a temptation to see things the way his small Tribe wanted him to. This is especially true given the timing of the events. The Tribe passed the resolution to seek placement of the 366 acres in trust and Hawkins was appointed as the person to make those decisions, four short years

[7] Whether merely placing lands into trust within a disestablished reservation actually makes them "Indian country," as Hawkins apparently thought, is disputed, but that question need not be resolved here.

after he had served as the Tribe's chairman. The perception of partiality to the Tribe was also evidenced in Hawkins' decisions where he delineated benefits to the Tribe beyond what the Tribe asserted upon application. JA 64-73, 74-82, 83-93, 94-103. As the partiality is evident, Hawkins should have been disqualified, and allowing his decision to stand deprives the State of a meaningful hearing and thus due process.

The need for an impartial decision maker is intensified because of the malleability of BIA regulations and the BIA's wide discretion in making 25 U.S.C. § 465 determinations. AR 1001. As the GAO report of July 2006 states, "the criteria in the regulations provide [the] BIA with wide discretion in deciding to take land in trust, primarily because they are not specific, and [the] BIA has not provided clear guidelines for applying them." AR 1001. Therefore, it is even more important that the decision maker be neutral and independent than it would be in a case in which an agency was applying regulations with clear limits. Finally, once an application to take land into trust has been approved by the Superintendent, it is rarely overturned through the administrative appellate process. AR 1000.

All the State seeks is an even playing field. This case could be likened to what would occur at Target Field if after the final playoff game against the Yankees, the stadium discovered the head umpire was not only a lifelong member of the Yankees' fan club, but also a former member of the Yankees' coaching staff. There would be a great number of distressed fans questioning the close calls and outspoken members expressing that the game was unfair and slanted in favor of the Yankees. Rather, if a former county commissioner had made this decision, the Tribe (in the State's shoes) would be making the same arguments of bias. The perception left in both of these alternative fact scenarios is that the process was not fair or meaningful.

4. *Hawkins was prohibited to act as decision maker because of actual bias against the State.*

The foregoing argument is not dependent on a finding of actual bias. As *Caperton* makes clear, actual bias "if disclosed, no doubt would be grounds for appropriate relief." 129 S.Ct. at 2263. In addition to the argument above, actual bias can be shown by the actual course of the administrative "proceedings" and the "surrounding circumstances" of the proceedings at issue. *Stivers v.*

Pierce, 71 F.3d 732, 741, 742 (9th Cir. 1995). Evidence of actual bias appeared here through the systematic disregard of the State's evidence and arguments. *See Pritchett v. Barnhart*, 288 F. Supp. 2d 1224, 1242 (N.D. Ala. 2003). Hawkins relied, in all four cases, on the delegation of authority in 3 IAM Great Plains Regional Addendum and concluded: "There is no statute or law that states employees of the Bureau of Indian Affairs are not allowed to work on the reservation in which they are enrolled members." JA 71-72, 81, 91, 101. Hawkins entirely failed to respond to the State's repeated and extensive argument that it is the *Due Process Clause* which demands a neutral decision maker. Further, Hawkins asserted that the State's argument is that no tribal member may be "allowed to work on [that tribe's] the reservation" in which he is enrolled as a member. *Id.* This is not the State's argument and in no way reflects it. The question is *not* whether any employee of the BIA at Sisseton can be a member of that Tribe. The question is more specific than that; it is whether the person who makes the land in trust decisions, thereby allowing the Tribe to permanently and unilaterally deprive the State of civil and criminal jurisdiction, tax revenues, ability to zone and so on, can be that same small

Tribe's member and repeat-term Chairman. The answer to this question, one which Hawkins *refused* to directly answer, is no.

C. *The availability of review by higher levels in the BIA and in this Court is constitutionally irrelevant.*

The Supreme Court found that a procedure was not constitutionally acceptable "simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Ward*, 409 U.S. at 61-62. Similarly, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* the Court found that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. [J]ustice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." 508 U.S. 602, 617-618 (1993) (citations and internal quotation marks omitted). *Clements v. Airport Authority of Washoe County* likewise makes that point, finding that "any bias in the administrative process [. . .] was not 'cured' by the subsequent judicial review in state court." 69 F.3d

321, 333 (9th Cir. 1995). *See also, id.* at 333, n.16. Because there can be no "cure" by any subsequent action, it follows that the "harmless error" rule is also not applicable.

CONCLUSION

For the foregoing reasons, the decision of the department upholding the BIA should be vacated and the matter remanded for consideration by an unbiased decision maker in the first instance.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ *Kirsten E. Jasper*
Kirsten E. Jasper
John P. Guhin
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
kirsten.jasper@state.sd.us
john.guhin@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's brief contains 5,194 words using bookman old style typeface in 14 point type.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010, and it is herewith submitted in PDF format.

3. I certify that the brief submitted herein was scanned for viruses and that the brief is, to the best of my knowledge and belief, virus free.

Dated this 9th day of June, 2010.

/s/ Kirsten E. Jasper
Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of June, 2010, a true and correct copy of Appellant's Brief and the accompanying Addendum were submitted to the Eighth Circuit Court of Appeals and served upon John E. Arbab and Cheryl Schrempp Dupris via the CM/ECF electronic filing system, and will serve Amy S. Tryon, U.S. Dept. of Justice/ENRD, P.O. Box 44378 (L'Enfant Station), Washington, DC 20026-4378, by first-class mail, postage prepaid, at Pierre, South Dakota, upon the Eighth Circuit's filing of the brief.

/s/ *Kirsten E. Jasper*
Kirsten E. Jasper
Assistant Attorney General