

The Regional Director issued a Notification of Trespass Determination on December 15, 2020, (December 2020 Decision)⁶ finding Tesoro in trespass on 34 allotted tracts on the Reservation.⁷ Tesoro timely filed a notice of appeal from the December 2020 Decision with the Board on December 30, 2020.⁸

On January 5, 2021, the Board issued a pre-docking notice⁹ in connection with Tesoro's Appeal. On January 13, 2021, the Assistant Secretary notified the Board that she was assuming jurisdiction over Tesoro's appeal pursuant to 25 C.F.R. § 2.20 and 43 C.F.R. § 4.332.¹⁰ On January 14, 2021, the Assistant Secretary issued a decision (January 2021 Decision) in the appeal affirming the Regional Director's December 2020 Decision and making it final for the Department.¹¹

Discussion

Immediately after the July 2020 Decision issued, and throughout the proceedings in this matter, the interested parties, on all sides, have raised several due process concerns, including the following:

1. In its July 31, 2020, Notice of Appeal and Statement of Reasons, Tesoro alleged that it did not have "reasonable and fair notice regarding the applicable regulatory damages, penalties, and corrective measures for a right-of-way holdover,"¹² and that the "Regional Director's penalties violate constitutional due process guarantees and constitute an unlawful taking."¹³ Tesoro also alleged that in May 2021, when the Superintendent and the Regional Director determined that good faith negotiations had terminated under 25 C.F.R. § 169.410, that they relied on the representations of one attorney representing a

⁶ Letter from Timothy LaPointe, Regional Director, Bureau of Indian Affairs, Great Plain Region, to Jeffrey A. Webb, Attorney for Tesoro, Norton Rose Fulbright US LLP (Dec. 15, 2020). The December 2020 Decision required Tesoro to pay \$2,247,457.00 for back rent and unauthorized use from June 18, 2013 to December 10, 2020, plus \$1,714,450.00 in interest at the rate of 8% for a total of \$3,961,907.00 and ordered Tesoro to cease and desist its use of the pipeline, without otherwise removing or disposing of it.

⁷ The December 2020 Decision addressed all 34 of the landowner tracts in issue as the Assistant Secretary had directed. The July 2020 Decision addressed only 23 of the landowner tracts.

⁸ Notice of Appeal and Statement of Reasons from Jeffrey A. Webb, Attorney for Tesoro, Norton Rose Fulbright US LLP, to the Interior Board of Indian Appeals (Dec. 29, 2020).

⁹ Pre-Docketing Notice, Order Concerning Service on Landowners, and Order for the Administrative Record, *Tesoro High Plains Pipeline Company LLC v. Great Plains Regional Director, Bureau of Indian Affairs* (Jan. 5, 2021).

¹⁰ Memorandum from the Assistant Secretary – Indian Affairs to the Honorable Thomas A. Blaser, Chief Administrative Law Judge, Interior Board of Indian Appeals (Jan. 13, 2021).

¹¹ Decision of the Assistant Secretary – Indian Affairs, *Tesoro High Plains Pipeline Company LLC v. Great Plains Regional Director, Bureau of Indian Affairs* (Jan. 14, 2021).

¹² Notice of Appeal and Statement of Reasons, from Jeffrey A. Webb, Attorney for Tesoro, Norton Rose Fulbright US LLP, to the Interior Board of Indian Appeals, p. 22 (July 31, 2020).

¹³ *Ibid.*

minority of allottees and did not give Tesoro or the other landowners, including the Tribe, an opportunity to be heard.¹⁴

2. On November 24, 2020, an attorney for one group of landowners raised due process concerns claiming that, despite having requested the administrative record from the BIA on November 3, 2020, he was unable to obtain a copy.¹⁵ He also requested a 30-day extension of the December 15, 2020, deadline for the Regional Director to issue his decision so that his clients could “have the same opportunity that has been granted to Tesoro to analyze the administrative record”¹⁶ Tesoro received the administrative record from the BIA on October 19, 2020.¹⁷
3. On December 4, 2020, an attorney for a different group of landowners joined in the request for 30-day extension of the Dec. 15, 2020, deadline on due process grounds.¹⁸ He also alleged that the Department violated his clients’ due process rights by failing to follow its own regulations and not allowing the parties to be heard prior to the Assistant Secretary issuing her decision.¹⁹
4. On February 15, 2021, the Chairman of the Fort Berthold Allottee and Land & Mineral Owners Association requested rescission and reconsideration of the January 2021 Decision alleging that the July 2020 Decision was vacated and the December 2020 Decision affirmed without an opportunity for the allottees to be heard.

The parties’ due process concerns were compounded because of BIA office closures due to the ongoing Coronavirus pandemic,²⁰ and enhanced security protocols in the District of Columbia before and after the Presidential Inauguration, which substantially hindered mail delivery services, causing documents, filings, and requests by the interested parties to cross each other in the mail.

Indian landowners, as well as right-of-way grantees, are entitled to appropriate due process. When the interested parties in a matter before the Department allege that they have not been

¹⁴ *Id.* at 10.

¹⁵ Letter from Dustin T. Greene, Attorney for Allottees, Kilpatrick Townsend & Stockton LLP, to Tara Sweeney, Assistant Secretary – Indian Affairs, U.S. Department of the Interior and Timothy LaPointe, Regional Director, Bureau of Indian Affairs, Great Plains Region, p. 1-2 (Nov. 24, 2020).

¹⁶ *Id.* at 2.

¹⁷ Letter from Jeffrey Webb, Attorney for Tesoro, Norton Rose Fulbright to Tara Sweeney, Assistant Secretary – Indian Affairs, U.S. Department of the Interior, p. 1 (Nov. 3, 2020).

¹⁸ Letter from Reed Soderstrom, Attorney for Allottees, Pringle & Herigstad, P.C., to Tara Sweeney, Assistant Secretary – Indian Affairs, U.S. Department of the Interior (Dec. 4, 2020).

¹⁹ *See* Petition to Rescind the January 14, 2021 AS-IA Decision and Petition for Reconsideration, from Reed Soderstrom, Attorney for 83 Interested Fort Berthold Landowners, Pringle & Herigstad, P.C., to Assistant Secretary – Indian Affairs, p. 1-2 (Feb. 10, 2020).

²⁰ *See* Sua Sponte Order Extending Deadline to Submit Administrative Record, *Tesoro High Plains Pipeline Company LLC v. Great Plains Regional Director, Bureau of Indian Affairs* (Oct. 2, 2020) (extending the deadline for the BIA to compile the administrative record due to BIA office closures caused by the Coronavirus pandemic).

afforded adequate due process, the Department should review the allegations, and if necessary, take corrective action. Here, it does not appear that the parties had a full, fair, and reasonable opportunity to be heard regarding the decisions made between July 2, 2020, and January 14, 2021, concerning the expired right-of-way occupied by Tesoro.

Decision

For the reasons discussed above, I hereby vacate the January 2021 Decision and October 2020 Decision issued by the Assistant Secretary, and the December 2020 Decision and the July 2020 Decision issued by the Regional Director and return this matter to the Regional Director for consideration. The Regional Director is directed to:

1. take such action as is necessary to address Tesoro's continued occupation of the expired right-of-way,
2. provide each of the interested parties with a full and fair opportunity to be heard in this matter, and
3. issue a new decision, as may be necessary and appropriate.

Because the Assistant Secretary's January 14, 2021, decision has been vacated, there is no final decision from which an appeal can be taken.



Dated: **MAR 12 2021**

Scott de la Vega
Acting Secretary