



INTERIOR BOARD OF INDIAN APPEALS

Oglala Sioux Tribe v. Commissioner of Indian Affairs and Richard Tall

7 IBIA 188 (09/05/1979)

Also published at 86 Interior Decisions 425

Judicial review of this case:

Affirmed, *Oglala Sioux Tribe v. Hallett*, 540 F. Supp. 503 (D.S.D. 1982)

Affirmed, 708 F.2d 326 (8th Cir. 1983)



United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF OGLALA SIOUX TRIBE

v.

COMMISSIONER OF INDIAN AFFAIRS AND RICHARD TALL (PRU-10542)

IBIA 79-11-A

Decided September 5, 1979

Appeal from decision of Acting Deputy Commissioner of Indian Affairs upholding Area Director's approval of Indian's application for fee patent title to certain trust lands on the Pine Ridge Indian Reservation.

Affirmed.

1. Act of March 2, 1889--Indian Lands: Allotments: Generally

Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final proviso of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments--to be valid--required approval by the Oglala Sioux Tribe.

2. Act of June 30, 1834--Indian Lands: Allotments: Generally

Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.

3. Indian Lands: Allotments: Generally

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue.

4. Indian Tribes: Constitution, By-Laws and Ordinances

The Department is not bound by a tribal ordinance regulating trust property where such ordinance violates provisions of the tribal constitution and bylaws which the Secretary has sworn to uphold.

5. Indian Lands: Allotments: Generally

In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, as amended.

6. Indian Lands: Patent in Fee: Generally

Under regulations in effect before Apr. 24, 1973, issuance of a fee patent to a competent Indian applicant was considered by the Department to be mandatory. On the foregoing date, however, 25 CFR Part 121 was revised to reflect the authority derived from the authorizing acts and to allow the exercise of discretion in the issuance of fee patents.

APPEARANCES: Mario Gonzalez, Esq., for the Oglala Sioux Tribe, appellant; Richard Tall, pro se, respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation (appellant) has appealed from a decision of the Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., entered October 27, 1978, wherein Mr. Seneca upheld a determination by Area Director Harley Zephier, Aberdeen Area Office, Bureau of Indian Affairs, approving the application of Richard Tall (respondent) for patents in fee to three trust allotments comprising 698.80 acres of land on the Pine Ridge Reservation.

Respondent is a member of the Oglala Sioux Tribe. He is the beneficial owner of the following Oglala Sioux allotments: OS-6433, OS-2631, and OS-6795--legal title to which is held by the United States in trust for the Indian owner. These allotments were issued under authority of the Act of March 2, 1889 (25 Stat. 888), commonly known as the Sioux Agreement of 1889. On March 15, 1976, respondent applied to the Bureau of Indian Affairs to have the foregoing allotments patented to him in fee, in accordance with the provisions of section 11 of the Act of March 2, 1889, supra, which incorporates the rights and privileges conferred upon allotment owners under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. §§ 331-358 (1976); the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483 (1976); and Departmental regulations found in 25 CFR Part 121.

On May 21, 1976, the Pine Ridge Agency informed the Executive Committee of the Oglala Sioux Tribe in writing of the applications made by respondent and inquired as to the Committee's position regarding them. This procedure was apparently followed in conjunction with the provisions of 25 CFR 121.2 which provides in part as follows:

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

Respondent apparently holds OS-6795 (the May Patton allotment) subject to a condition that if the land is offered for sale before February 7, 1983, the Oglala Sioux Tribe shall be provided notice thereof and an opportunity to purchase the land within 60 days from the date of notice. BIA Title Status Report, OS-6795, p. 3. Reference to this feature of OS-6795 was cited by the Agency in its May 21, 1976, memorandum to the tribe.

On July 26, 1976, the Administrative Assistant to the President of the Oglala Sioux Tribe inquired of the Pine Ridge Agency as to the purchase price paid by respondent for the three allotments in question. The administrative record indicates that the requested information was furnished the tribe on August 10, 1976.

By letter dated February 28, 1977, respondent requested the Superintendent of the Pine Ridge Agency to inform him of the status of his fee patent applications. On March 23, 1977, the Agency Superintendent, Anthony Whirlwind Horse, issued a written decision denying respondent's applications. In support of this action the Superintendent stated:

In line with our policy in such matters, we have referred your applications for unrestricted title to the Oglala Sioux Tribe by memorandum dated May 21, 1976. We have received no word on any action they may have taken thereon. However, the Tribal Council has enacted an ordinance prohibiting the issuance of fee patents, or otherwise allowing trust lands to become alienated by sale to non Indians.

On April 8, 1977, respondent submitted an appeal to the Area Director, Bureau of Indian Affairs, Aberdeen Area Office, in accordance with 25 CFR Part 2, seeking reversal of the Superintendent's determination. On May 31, 1978, the Area Director issued a decision reversing the Superintendent. In effect, the Area Director's decision concluded that the tribal ordinance relied upon by the Superintendent in denying the applications at issue (Tribal Ordinance 76-05) was contrary to Article X of the Constitution and Bylaws of the Oglala Sioux Tribe as well as Federal law. The Area Director also ruled that the Oglala Sioux Tribe could appeal his decision as a party adversely affected thereby.

The Oglala Sioux Tribe, through counsel, filed an appeal from the Area Director's decision on June 30, 1978. The Acting Deputy

Commissioner of Indian Affairs affirmed the Area Director's decision on October 27, 1978.

An appeal was filed with the Board of Indian Appeals from the decision of the Acting Deputy Commissioner of Indian Affairs on January 8, 1979. Appellant maintains the following.

Foremost, the tribe alleges that the lands in question are the property of the Oglala Sioux Tribe.

In support of this contention appellant argues that allotments issued under authority of the Sioux Agreement of 1889 are null and void because there was never an election by a majority of the adult members of the tribe approving of the allotments. That such an election was required for allotments to become valid is said by appellant to be mandated by section 9 of the Act which states:

Sec. 9. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: Provided, That if any one entitled to an allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner: Provided, That these sections as to the allotments shall not be compulsory without the consent of the majority of the adult members of the tribe, except that

the allotments shall be made as provided for the orphans. [Emphasis supplied.]

Act of Mar. 2, 1889, 25 Stat. 891.

Second, the tribe contends it was error for the Bureau not to uphold the validity of Tribal Ordinance 76-05, the tribal enactment from which the Pine Ridge Superintendent determined that the patents in fee sought by respondent in this case could not be granted. 1/

1/ Tribal Ordinance 76-05, adopted by the tribal council on May 11, 1976, provides as follows:

“WHEREAS Article IV, Section 1(m) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect and preserve the property and natural resources of the tribe and to regulate the use and disposition of property upon the reservation, and

“WHEREAS Article IV, Section 1(n) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect the general welfare of the tribe, and

“WHEREAS the Oglala Sioux Tribal Council finds that the transfer of land on the Pine Ridge Indian Reservation from ownership by members of the Oglala Sioux Tribe to ownership by nonmembers has been detrimental to the Tribal economy and destructive to the well-being of the residents of the Reservation, and

“WHEREAS the Council further finds that it would be in the best interest of the Tribe for land available for purchase to be made available to members who now own little or no land, and

“WHEREAS the Tribal Council therefore deems it to be beneficial to the general welfare of the Oglala Sioux Tribe that the sale of trust land be regulated,

“NOW THEREFORE BE IT ORDAINED that the Oglala Sioux Tribal Council hereby adopt the following:

“Individual Trust Land Acquisition Ordinance

“Section 1. No trust land located within the exterior boundaries of the Pine Ridge Indian Reservation may be sold except to the Oglala Sioux Tribe or with the approval of the Oglala Sioux Tribe in accordance with the provisions of this Ordinance.

“Section 2. Any member who wishes to sell trust land on the Pine Ridge Indian Reservation and any member wishing to buy such land shall, before submitting their application to the Bureau of Indian Affairs, apply to the Executive Committee for approval of the transaction.

Third, appellant submits that the Bureau failed to obtain a proper showing from respondent which would justify awarding of fee patents to the subject lands.

Respondent, appearing pro se, submitted a reply brief in this matter on March 29, 1979. Although entitled to do so under 43 CFR 4.359(a) and the notice of docketing issued by the Board on January 23, 1979, the Bureau did not submit a timely brief in this controversy. 2/

fn. 1 (continued)

“Section 3. The Executive Committee shall deny approval of a sale transaction unless it finds that the purchaser

“ (a) is at least 18 years of age: and

“ (b) does not have land holdings which if added to the land to be purchased would result in the ownership by the purchaser of more than 1,280 acres:

“ (c) has not previously sold land which was once owned by him in trust to non-Indians, either by supervised sale or after obtaining a fee patent;

“ (d) agrees not to sell the land at any time to anyone other than the Oglala Sioux Tribe or a member thereof.

“Section 4. The Executive Committee may disapprove any applications which meet the standards of Section 3, if it finds that the transaction would not be in the best interest of the Tribe. In such case the Executive Committee shall set forth the reasons for its decision.

“Section 5. Any applicant who believes that the factual findings of the Executive Committee under Section 3 or the decision of the Executive Committee under Section 4 are wrong, may appeal the determination of the Executive Committee to the Tribal Council within thirty days from the date on which the applicant has been notified of the decision of the Executive Committee.

“Section 6. No sales of trust land by members of the Oglala Sioux Tribe to non-members shall be approved.”

2/ On August 14, 1979, comments and materials regarding this appeal were received from the Acting Area Director, Aberdeen Area Office. In addition to its untimeliness, a copy of the foregoing was not served upon the other parties as required by 43 CFR 4.358-4.359. Pursuant to the provisions of 43 CFR 4.24(a)(4), the Board has elected to place no reliance on the late papers submitted by the Acting Area Director in reaching its decision in this case.

Discussion, Findings and Conclusions

For the reasons set forth below, the Board affirms the decision of the Acting Deputy Commissioner of Indian Affairs approving Richard Tall's application for patents in fee.

With respect to appellant's claim that respondent's allotments are in fact the property of the Oglala Sioux Tribe, 3/ we find as follows. First, some meaning must be given to the tribal consent language found in the final proviso of section 9 of the Sioux Agreement of 1889. To our knowledge, this language has not been judicially construed. Assuming, in the light most favorable to appellant, that this proviso was made applicable to all allotments described in section 9 (except allotments to orphans) and not simply to allotments selected for but not by the Indian allottee (a procedure described in the first proviso of section 9), Congress may merely have been stating that no Indian could be compelled to accept any allotment as selected without tribal consent. However, we believe the most reasonable interpretation is that the final proviso of section 9 was intended to apply to the limited class of allotments described in the first proviso of section 9, viz., allotments selected for Indians entitled thereto who failed to personally make a selection within time limits prescribed by the Act.

3/ Appellant's position is that all allotments undertaken under authority of the Act of March 2, 1889, are null and void except those made to orphans. Appellant's Brief filed March 6, 1979, at 4.

[1] Further, even if the allotments at issue in this case were subject to the final proviso of section 9, we still find no language in this or other sections of the Act of March 2, 1889, evidencing an intention on the part of Congress that allotments--to be valid--required approval by the tribe.

Based on complete reading of the Act, we therefore hold that under the tribal consent provision of section 9 an Indian who failed to timely select an allotment in accordance with the Act could not be required to accept an allotment selected on his or her behalf unless a majority of the adult members of the tribe decided that such selection should stand. ^{4/} Thus, the rights secured by the final proviso of section 9 are personal to the allottee, not the tribe.

The foregoing is in keeping with the judicial repudiation of mandatory allotment processes. In United States v. Arenas, 158 F.2d 730 (9th Cir 1946), rehearing denied, Jan 14, 1947, cert. denied, 331 U.S. 842, the court said:

[A]ny statute authorizing the Secretary to force land in severalty upon the Indians should be strictly construed.

^{4/} Cf. section 2 of the General Allotment Act, 25 U.S.C. § 332 (1976), which provides for the selection of allotments for Indians who fail to select allotments on their own. The Supreme Court has upheld such allotments effected under other statutes. United States v. Wildcat, 244 U.S. 111 (1917).

Such legislation is in derogation of the general principles of law, which do not favor compulsory ownership of land--especially by persons in a restricted civil status.

158 F.2d 752.

The Supreme Court has routinely addressed allotment issues on the Pine Ridge Reservation without questioning the validity of the original allotments. Egan v. McDonald, 246 U.S. 227 (1918); United States v. Nice, 241 U.S. 591 (1916). In Reynolds v. United States, 174 F. 212 (8th Cir. 1909), the Appeals Court summarized the steps incidental to issuance of a trust patent under the Act of March 2, 1889:

The act providing for the allotment in severalty of lands within the reservation (Act March 2, 1889, c. 405, 25 Stat. 888) prescribes definitely (section 8) the number of acres each qualified claimant is entitled to, and provides (section 9) that all allotments shall be "selected" by the Indians, heads of families "selecting" for their minor children, and that the agents shall "select" for each orphan child. The making of the allotments is by special agents (section 10), whose duty it is to certify them in duplicate to the Commissioner of Indian Affairs, who in turn transmits one copy to the Secretary of the Interior. When the Secretary approves the allotments, he (section 11) causes patents to be issued in the names of the allottees.

174 F. 214.

Notably absent from the above summary is any indication that tribal consent was required for an allotment to take place.

Appellant has offered no legal authority or factual basis for its claim that tribal consent was necessary for the consummation of allotments on the Pine Ridge Reservation. Instead, appellant argues that the Bureau bears the burden of proving that the allotments were legal.

It is no doubt impossible for the Bureau to come forward with tangible evidence that the subject allotments were approved by tribal vote. Appellant submits the Bureau must do so (Appellant's Br. at 5). As previously stated, tribal consent regarding allotments under the Sioux Agreement seems only to have been required when an Indian allottee objected to an allotment selection made for but not by the Indian. Here, there is nothing in the administrative record to suggest that respondent's trust lands were allotted without the consent of the allottees.

[2] Appellant's contention that under the Act of June 30, 1834, 4 Stat. 733, 25 U.S.C. § 194 (1976), 5/ the burden of proof in this case cannot be assigned to the tribe is without merit. The issue framed by appellant, that the subject allotments are the property of the Oglala Sioux Tribe, does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians. Cf. Wilson v. Omaha Indian Tribe, 47 U.S.L.W. 4758 (decided June 20, 1979).

5/ This statute provides:

"[I]n all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

[3] The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue. Placid Oil Company, IA-153 (May 27, 1955). Accordingly, the Bureau correctly held in this case that the burden was on the tribe to prove that the trust patents at issue were not lawful. We conclude that the tribe has not met this burden.

Appellant's second contention is that Tribal Ordinance 76-05 prohibits trust patents from being converted to patents in fee and that the provisions thereof are binding on the Secretary.

On its face Tribal Ordinance 76-05 is primarily directed at curbing the sale of trust land to nonmembers of the tribe. Although the ordinance in fact says nothing about members of the tribe obtaining fee patents to individually owned trust land, appellant submits that the tribe ascribes such a purpose to the ordinance. 6/

Tribal Ordinance 76-05 was enacted by the tribal council under authority of Article IV, Section 1(m) of the Tribal Constitution and Bylaws of the Oglala Sioux Tribe. 7/ Appellant argues that enactments

6/ Notice of appeal of Area Director's Decision, filed June 30, 1978, at 3.

7/ The Oglala Sioux Tribe, which accepted the provisions of the Indian Reorganization Act (the IRA) (25 U.S.C. §§ 461-486 (1976)), adopted its constitution and bylaws on January 15, 1936, pursuant to 25 U.S.C. § 476 (1976). Article IV, Section 1(m) of the tribal constitution provides in part that the tribal council shall have the power "to regulate the use and disposition of property upon the reservation"

of the tribal council under authority of its constitution are binding on the Department, noting that former Secretary of the Interior Harold L. Ickes in approving the constitution, stated: "All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and bylaws." Constitution and Bylaws of the Oglala Sioux Tribe at 12.

[4] We reject appellant's argument that because the Department is committed to upholding the provisions of the tribe's constitution and bylaws it is also bound by whatever ordinances the tribe adopts regulating trust property on the reservation. Under the circumstances of this case, we hold that Tribal Ordinance 76-05, as interpreted by the tribe, violates Article X, Section 1 of the tribal constitution and bylaws. For this reason, if no other, the Secretary is precluded from abiding by the ordinance. 8/

8/ Article X, Section 1 of the tribal constitution and bylaws states as follows:

"Section 1. Allotted lands. Allotted lands including heirship lands, within the Pine Ridge Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be inherited by the heirs of the present owner, whether or not they are members of the Oglala Sioux Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, at his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in this constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Oglala Sioux Tribe either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided."

[5] In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, as amended. See 25 U.S.C. §§ 349 and 483. 9/

Appellant refers to Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978), as authority for the proposition that the Oglala Sioux Tribe has in personam jurisdiction over its members, including the authority to prohibit the issuance of fee patents. The holding in Conroy was that it was a proper exercise of tribal authority for the tribal court of the Oglala Sioux Tribe to order a division of trust property in a divorce proceeding between two members of the tribe. In referring to the Federal district court opinion which it sustained, the Appeals Court stated:

9/ 25 U.S.C. § 349 (1976) provides in pertinent part:

“[T]he Secretary of the Interior may, in his discretion, and he is so authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple,”

25 U.S.C. § 483 (1976) provides in pertinent part:

“The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee . . . with respect to lands or interests in lands held by individual Indians under the provisions of [the IRA and the Oklahoma Welfare Act].”

The Department has held that the authority of the Secretary under 25 U.S.C. § 483 to issue patents in fee is not limited to lands acquired for individual Indians pursuant to the IRA but extends to all trust lands held by individual Indians whose tribe has accepted the IRA. Solicitor's Opinion, M-36002 (June 7, 1950).

It is to be noted that the above decree does not purport, in and of itself, to order any conveyance of land, but rather to order an application to the Secretary to be made. Nor does it by its terms, or reasonable construction thereof, purport to affect the title which the United States, as trustee, holds in the real property. [Footnote omitted.]

575 F.2d 180.

So qualified, the Conroy decision does not in any manner sanction absolute tribal regulation of trust property.

Finally, and alternatively, appellant submits that the Bureau has failed to adduce the proper findings in approving respondent's fee patent applications.

Felix Cohen noted in his Handbook of Federal Indian Law at p. 108 that "[p]erhaps the most important power vested in administrative officials with respect to allotted land is the power to pass upon the alienation of such lands." We agree that this authority must be carefully exercised. 10/

The fundamental question before us is whether the Secretary may deny a fee patent to an Indian applicant possessed of trust land when

10/ In the recently published text, Federal Indian Law, by Getches, Rosenfelt, and Wilkinson (1979), the authors observe: "The ability to convey allotments free of trust has continued the erosive effect of the act [General Allotment Act] on the Indian land base long after Congress halted the issuance of new allotments." At 561.

the Indian has been adjudged competent under the Department's regulations. Here, no one questions that Richard Tall, who has previously received patents in fee to former trust lands, satisfies the competency requirements set forth in 25 CFR 121.1(e). ^{11/} That the question presented is not easily resolved is evident from the fact that Bureau policy on this matter has changed frequently. In addition, there is a lack of judicial guidance on the point.

[6] Present regulations of the Department which implement the fee patent provisions of 25 U.S.C. §§ 349, 372, and 483, among other acts, are contained in 25 CFR Part 121. In addition to the Secretary's authority to withhold action on fee patent applications as described in section 121.2, previously discussed, the regulation pertinent to this case is 25 CFR 121.5. This regulation provides in relevant part as follows:

Sec. 121.5 Issuance of patent in fee.

(a) An application may be approved and fee patent issued if the Secretary, in his discretion, determines that the applicant is competent. When the patent in fee is delivered, an inventory of the estate covered thereby shall be given to the patentee. (Acts of Feb. 8, 1887 (24 Stat. 388), as amended (25 U.S.C. 349); June 25, 1910 (36 Stat. 855), as amended (25 U.S.C. 372); and May 14, 1948 (62 Stat. 236; 25 U.S.C. 483), and other authorizing acts).

^{11/} The competency standards of 25 CFR 121.1(e) were derived from the Act of August 11, 1955 (69 Stat. 666), which, in turn, appears to be founded upon the judicially established test for competency set forth in United States v. Debell, 227 F. 760 (8th Cir. 1915). The Debell standard was reviewed in Miller v. United States, 57 F.2d 987 (10th Cir. 1932), wherein the court concluded that it was a standard "few white men would measure up to."

(b) If an application is denied, the applicant shall be notified in writing, given the reasons therefor and advised of his right to appeal pursuant to the provisions of Part 2 of this chapter.

There is no ambiguity in the above language. The regulation plainly conveys that an application may be approved by the Secretary if an Indian applicant is found competent. Further, an Indian whose application is denied is afforded a right to appeal therefrom pursuant to 25 CFR Part 2.

Any doubt about the purpose or effect of 25 CFR 121.5 is eliminated by reference to the official statement concerning this rule when it was published in proposed form. On April 18, 1972, former Commissioner of Indian Affairs, Louis R. Bruce, stated in the Federal Register:

Under the present regulations if an applicant is competent, the issuance of a fee patent is mandatory. This revision [25 CFR 121.5(a)] would reflect the authority derived from the authorizing acts and allow the exercise of discretion in the issuance of fee patents as it may now be exercised in the issuance of orders removing restrictions and certificates of competency.

See 37 FR 8384.

The present provisions of 25 CFR 121.5 became effective on April 24, 1973. See 38 FR 10080. In the Administrative Appeal of Frances M. Shively Kevern, 2 IBIA 123, 80 I.D. 804 (1973), a case

where this Board directly confronted the issue of an Indian applicant's right to a fee patent, the controlling regulations in effect were those rescinded by Commissioner Bruce through the action noted above. Since the Department's regulations are binding on the Boards of Appeal, Office of Hearings and Appeals, in adjudicating disputes (see Donald G. Jordan, 35 IBLA 290 (1978)), it was held in Kevern, *supra*, that the Bureau was required to issue a fee patent to the Indian applicant whose competency had been established. (The Administrative Appeal of Ethel H. Not Afraid v. Area Director, Billings, et al., 3 IBIA 235 (1975), a decision sustaining the denial of an allottee's application for issuance of fee patent as a discretionary act by the Director, distinguished the holding in Kevern, pointing out that Kevern was decided prior to the April 24, 1973 amendment of 25 CFR 121.5(a).)

That specific grounds are set forth in 25 CFR 121.2 concerning when the Secretary may withhold action on an application for fee patent title (*i.e.*, upon a showing that approval thereof would adversely affect other Indians or tribes) may not be construed as a sign that the Secretary does not contemplate that fee patent title can be denied to competent Indian applicants. As previously shown, 25 CFR 121.5(a) was intentionally changed in 1973 to make it clear that the Secretary has authority to deny fee patents to competent Indian applicants. In short, the "withholding" power established by section 121.2 merely

furnishes the Secretary with a third alternative to the immediate approval or disapproval of a valid application. 12/

Although current regulations clearly authorize the Secretary to deny fee patent applications, they are silent regarding the grounds upon which a competent applicant for fee patent title can have his or her application denied. In the absence of complete rules governing when a fee patent application may appropriately be denied, we hold that the considerations which permit the Secretary to withhold action on an application would, in certain circumstances, legally support a denial of an application. At various times it has been the active policy of the Department to deny fee patent applications when approval thereof would adversely affect the consolidation of Indian lands. As stated by former Acting Solicitor William J. Burke in a Solicitor's Opinion, rendered February 15, 1954 (61 I.D. 298, 302):

Indeed, there are other factors than competency that may legitimately be considered, and have been considered, by the Secretary in deciding whether to issue a patent in fee. Thus, it has been established policy to consider

12/ Based on the Board's informational review of a recent Bureau decision involving the same question before us, there is some question whether the BIA presently agrees with this interpretation of its regulations. As previously explained, however, the meaning of the regulations is not subject to debate. And, an agency cannot, consistent with the Administrative Procedure Act, 5 U.S.C. § 553, ignore its own rules and embark on a new course informally. Boston Edison Co. v. Federal Power Commission, 557 F.2d 845 (D.C. Cir. 1977).

whether the issuance of the patent would adversely affect the consolidation of Indian lands. 13/

Any conversion of trust land to fee status will of course result in a diminution of Federally protected Indian land. The extent to which any proposed conversion would result in such adverse effects on other Indians or tribes that the Secretary should not approve it is a question which can only be addressed on a case-by-case basis.

Another standard is found in Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), cert. denied 306 U.S. 643 (1939). There, the Appeals Court stated:

[T]he issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs.

* * * * *

[U]nder Section 349 [25 U.S.C.] it is obvious that the Secretary of the Interior in exercising his discretion to issue a patent in fee simple to a trust allottee ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the

13/ Support for use of this standard is found, among other places, in the Indian Reorganization Act. One of the provisions of this Act, which was enacted to curtail the allotment system and bolster tribal governments, was the indefinite extension of the trust period for individual allotments. 25 U.S.C. § 462. In addition, the 1948 amendment to the IRA expressly vests the Secretary with discretion in acting on requests for fee patent title. 25 U.S.C. § 483. (For an analysis of why 25 U.S.C. § 372 need not be construed as mandating the issuance of fee patent title upon a Secretarial determination of competency, see Acting Solicitor Burke's Opinion, supra at 61 I.D. 301-302.)

United States and become subject to the laws of the state in which he resides.

99 F.2d 34-35.

We agree that it is a valid consideration for the Secretary to determine whether issuance of a fee patent is in the best interest of the Indian applicant. To issue a fee patent under the Secretary's discretionary authority when such action is not in the best interest of the Indian applicant would be wholly inconsistent with the Department's fiduciary obligations as trustee.

Implicit in the above standard is recognition that the owner of a trust patent enjoys only those property rights specifically conferred by Congress. We summarize these to be a right to present use and occupancy of the land, protected by Federal supervision, and a future right to fee patent title if and when the trust status of the land is lifted.

Unfortunately, factual shortcomings in the administrative record before us render it exceedingly difficult to evaluate the merits of the Bureau's action in this case. The only reason given by Richard Tall for wanting fee title to his trust lands is that such title will improve his ranching operation. He does not state how. Mr. Tall does make it clear that he has no desire or intention to sell his lands to the tribe.

On the other hand, the record shows that the tribe was given ample opportunity to voice objection to the subject applications, filed over 3 years ago, prior to their approval by the Area Director. No objections or offers to purchase respondent's trust lands were submitted. Nor are there any objections of record from individual Indians claiming that the applications should, for any reason, be denied.

But for certain equitable and other considerations, this is the nature of case which should possibly be referred for an evidentiary hearing pursuant to 43 CFR 4.361(a), although no party has urged the necessity of a hearing. Richard Tall has been waiting well over 3 years for a final decision from the Department on his applications. He is now 60 years old and is surely entitled to a final decision at once if possible. Further, in the absence of published guidelines or rules concerning when a fee patent application may appropriately be approved or disapproved, the value of a hearing in this case is somewhat diminished. Lastly, while legal questions have arisen in the context of this appeal, the Secretary's power to approve fee patent applications is, pursuant to statute and rulemaking, discretionary. Exercise of this discretion has been delegated to Bureau officials, not the Office of Hearings and Appeals. Except upon special delegation from the Secretary, the Board is not authorized to review discretionary decisionmaking of the BIA. See 43 CFR 4.1(b)(2); 4.351; 4.353; 4.361(b); and 25 CFR 2.19. 14/ Under the circumstances, we shall dispose of this matter.

14/ The BIA did correctly observe that this case involved legal questions appealable to the Board by reference to such appeal rights in the decision of the Acting Deputy Commissioner.

Based on a complete review of the administrative record, including the arguments of the parties, and on the Board's understanding of the applicable law and regulations, we hold that it was not error for the Bureau of Indian Affairs to approve Richard Tall's fee patent applications. Such holding is based, inter alia, on a finding that such action is adverse neither to Mr. Tall nor to the Oglala Sioux Tribe, as evidenced by its response or lack thereof to the subject applications.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., dated October 27, 1978, is affirmed. This decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Frank Arness
Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge