



INTERIOR BOARD OF INDIAN APPEALS

Kickapoo Tribe in Kansas v. Shawnee Superintendent, Bureau of Indian Affairs

13 IBIA 339 (12/16/1985)



United States Department of the Interior

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

KICKAPOO TRIBE OF OKLAHOMA

v.

SUPERINTENDENT, SHAWNEE AGENCY, BUREAU OF INDIAN AFFAIRS

IBIA 86-18-A

Decided December 16, 1985

Appeal from a decision of the Shawnee Agency Superintendent holding that despite the approval of the Kickapoo Tribe of Oklahoma, the Secretary could take no more than 100 acres into Indian trust status on behalf of the Texas Band of Kickapoo Indians.

Docketed; Reversed.

1. Indians: Lands: Acquired Lands

Under 25 U.S.C. § 1300b-14 (1982), the Secretary of the Interior has authority to take more than 100 acres in Maverick County, Texas, into Indian trust status for the benefit of the Texas Band of Kickapoo Indians.

APPEARANCES: Kurt Blue Dog, Esq., Madison, Wisconsin, for appellant; Ronald L. Esquerra, Acting Deputy Assistant Secretary--Indian Affairs, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On December 9, 1985, the Board of Indian Appeals (Board) received the administrative record in an appeal filed by the Kickapoo Tribe of Oklahoma (appellant). The appeal was referred to the Board by the Acting Deputy Assistant Secretary--Indian Affairs pursuant to 25 CFR 2.19(a)(2). Appellant seeks review of an April 19, 1985, decision of the Shawnee Agency Superintendent, Bureau of Indian Affairs (BIA, appellee), holding that appellant could place no more than 100 acres in Indian trust status on behalf of the Texas Band of Kickapoo Indians (band). Appellee's decision was based on an interpretation of the provisions of the Texas Band of Kickapoo Act, January 8, 1983, Pub. L. 97-429, 96 Stat. 2269, 25 U.S.C. § 1300b-14 (1982) (Act). ^{1/} For the reasons discussed below, the Board reverses that decision.

Background

A general history of the band is succinctly stated in the Act's findings of fact and declaration of policy, 25 U.S.C. § 1300b-11:

^{1/} All citations to the United States Code are to the 1982 edition.

(a) Congress finds that the Texas Band of Kickapoo Indians is a subgroup of the Kickapoo Tribe of Oklahoma; that many years ago, the Band was forced to migrate from its ancestral lands to what is now the State of Texas and the nation of Mexico; that, although many members of the Band meet the requirements for United States citizenship, some of them cannot prove that they are United States citizens; that, although the Band resides in the State of Texas, it owns no land there; that, because the Band owns no land in Texas, members of the Band are considered ineligible for services which the United States provides to other Indians who are members of federally recognized tribes because of their status as Indians except when the members of the Band are on or near the reservation of the Kickapoo Tribe of Oklahoma; that members of the Band live under conditions that pose serious threats to their health; and that, because their culture is derived from three different cultures, they have unique needs including, especially, educational needs.

(b) Congress therefore declares that the Band should be recognized by the United States; that the right of the members of the Band to pass and repass the borders of the United States should be clarified; that services which the United States provides to Indians because of their status as Indians should be provided to members of the Band in Maverick County, Texas; and, that land in the State of Texas should be taken in trust by the United States for the benefit of the Band.

Section 1300b-14 authorizes the acquisition of land in Indian trust status for the band:

(a) Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title [the Indian Reorganization Act of June 18, 1934, 48 Stat. 984] are hereby made applicable to the Band: Provided, however, That the Secretary is only authorized to exercise his authority under section 465 of this title with respect to lands located in Maverick County, Texas.

(b) The Secretary is authorized and directed to accept no more than one hundred acres of land in Maverick County, Texas which shall be offered for the benefit of the Band with the approval of the Tribe. Nothing in this subsection shall be construed as limiting the authority of the Secretary under section 465 of this title.

On December 20, 1984, appellant informed appellee that it planned to make final payment on a 125-acre tract in Maverick County, Texas, on January 8, 1985. Appellant requested that the entire tract be taken into trust for the Band, on the basis of the second sentence in section 1300b-14(b) and the Act's legislative history.

By memorandum dated January 16, 1985, appellee requested from the Tulsa Regional Solicitor, U.S. Department of the Interior, an opinion on BIA's

authority to take more than 100 acres into trust. The Regional Solicitor responded on March 25, 1985, stating at page 2 of his memorandum the conclusion that there was

no reasoning which supports the suggestion * * * that the Secretary can accept lands in excess of one hundred acres by, in effect, reaching back and exercising the authority of Section 5 of the Indian Reorganization Act [25 U.S.C. § 465] which is expressly denied him. Neither the plain and unambiguous language of Section 5 of Public Law 97-429, nor any necessary implication which can be drawn from such language, grants such power to the Secretary.

Basing his decision on the Regional Solicitor's opinion, appellee informed appellant on April 19, 1985, that BIA could take no more than 100 acres into trust.

On May 13, 1985, Allen E. Smith, an attorney in McAllen, Texas, told appellee that he had taken title to the 125-acre tract as trustee for the band, "pending delivery of the trust property to the United States of America as successor-trustee at such time as the United States of America declares that it is ready to accept such trust."

By letter dated May 17, 1985, appellant sought review of appellee's decision by either the Anadarko Area Director or the Deputy Assistant Secretary. Appellant expressed its belief that because appellee's decision was based on a Regional Solicitor's opinion, review by the Anadarko Area Director would necessarily result in affirmance.

The Washington Office, BIA, requested an interpretation of section 1300b-14 from the Director of the Office of Congressional and Legislative Affairs (Director). The Director responded by memorandum dated August 27, 1985, concluding that the Regional Solicitor's opinion was in error. The Director stated that section 1300b-14(b) was a special provision requiring the Secretary to take up to 100 acres in Maverick County, Texas, into trust if approved by appellant; but that subsection (a) extended the Secretary's general discretionary authority under the Indian Reorganization Act to take land into trust for the band, provided the additional land was also in Maverick County. He stated that the legislative history supported this interpretation.

On September 16, 1985, the Acting Deputy Assistant Secretary informed appellant that the Washington Office would handle the matter because of the delay in responding to the appeal. The Acting Deputy Assistant Secretary was, however, not able to issue a decision within the timeframe established in 25 CFR 2.19, 2/ and accordingly, on December 2, 1985, he referred the

2/ Section 2.19(a) states:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now, Deputy Assistant Secretary--Indian Affairs (Operations)] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

appeal to the Board pursuant to 25 CFR 2.19(a)(2). In his transmittal memorandum, the Acting Deputy Assistant Secretary indicated his belief that appellee's decision was incorrect and should be reversed.

The Board received the administrative record on December 9, 1985. The appeal is hereby docketed under the above case name and number.

Discussion and Conclusions

Under ordinary circumstances, the parties to this appeal would be allowed briefing times in accordance with 43 CFR 4.311. Here, however, the Acting Deputy Assistant Secretary has indicated that he believes the decision below is incorrect and should be reversed. Additionally, the administrative record shows that because appellant has held this land in fee since January 8, 1985, it is daily incurring a tax liability to the State of Texas. Under these extraordinary circumstances, justice is best served by a speedy resolution of this matter; and the Board, upon its own motion, has granted the appeal expedited consideration.

[1] The Board has fully reviewed the Regional Solicitor's March 25, 1985, opinion; the August 27, 1985, memorandum from the Director; and the relevant legislative history. The Board agrees with the Director's interpretation of section 1300b-14, which it hereby quotes in pertinent part and adopts as its opinion:

Subsection (a) [of section 1300b-14] * * * is a general provision of law that extends application of the 1934 Act [Indian Reorganization Act] to the Band except that the Secretary's discretionary authority under section 5 of that Act only applies to land in Maverick County, Texas.

Subsection (b) is a special provision that requires the Secretary to take into trust up to 100 acres in Maverick County if offered for the benefit of the Band and approved by the Tribe. The last sentence is added to make sure that this subsection is not construed as a limitation on the general authority provided in subsection (a).

If the meaning of the provision requires resort to the legislative history, the interpretation in the preceding two paragraphs is supported by the legislative history. At the time of the December 21, 1982 acceptance by the House of Representatives of the Senate amendments to the bill (H.R. 4496, 97th Congress) that was enacted as the Texas Band of Kickapoo Act, the manager of the bill on behalf of the House Interior and Insular Affairs Committee (Rep. Kazen) stated:

Mr. Speaker, after reviewing the Senate rewrite of the bill, it is the opinion of the committee that this rewrite only brings technical changes to the bill as passed by the House.

It is therefore the view of this committee that section 5 as rewritten by the Senate still mandates the Secretary of the Interior to accept 100 acres in trust for the benefit of the Texas Band of Kickapoo Indians. Furthermore this committee interprets the second sentence of section 5(b) as allowing the Secretary at his discretion to accept in trust for the benefit of the band any additional lands over and above the 100 acres he is directed to accept under the first sentence of this subsection.

I also find that the language of the Senate Report (which is only partially discussed in the Regional Solicitor's memo) on the bill to be consistent with the interpretation of the House Committee.

A final point is that the Regional Solicitor's interpretation requires rendering meaningless the last sentence of section 5(b) and such a result is not consistent with the rules of statutory construction.

Aug. 27, 1985, memorandum at pages 1-2. (Emphasis in original.) Assuming arguendo that the statute is ambiguous, the above construction is also consistent with the long-standing rule of statutory construction that ambiguities in statutes enacted for the benefit of Indians should be resolved in favor of the Indians and as the Indians understood them. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 19, 1985, decision of the Shawnee Agency Superintendent is reversed. The Bureau of Indian Affairs acting for the Secretary, has authority to take more than 100 acres in Maverick County, Texas, into Indian trust status for the benefit of the Texas Band of Kickapoo Indians.

//original signed
Bernard V. Parrette
Chief Administrative Judge

I concur:

//original signed
Jerry Muskrat
Administrative Judge