



INTERIOR BOARD OF INDIAN APPEALS

Johnny Louis McAlpine v. Muskogee Area Director, Bureau of Indian Affairs

19 IBIA 2 (10/10/1990)

Judicial review of this case:

Dismissed for improper venue, (W.D. Okla.)

Dismissed, alternatively Affirmed, *McAlpine v. United States*, No. 95-1171-JTM,
23 Indian Law Reporter 3113 (D. Kan. Feb. 26, 1996)

Dismissal Reversed, affirmance Affirmed, 112 F.3d 1429 (10th Cir. 1997)



United States Department of the Interior

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

JOHNNIE LOUIS McALPINE

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-83-A

Decided October 10, 1990

Appeal from a decision declining to take land into trust status.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that these factors were considered must appear in the administrative record. A trust acquisition request can, however, be denied on the basis of less than all of the factors, if BIA's analysis shows that factor or factors weighed heavily against the trust acquisition.

APPEARANCES: Johnnie Louis McAlpine, pro se; William E. Haney, Esq., Acting Field Solicitor, Pawhuska, Oklahoma for the Muskogee Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Johnnie Louis McAlpine seeks review of a March 21, 1990, decision of the Muskogee Area Director, Bureau of Indian Affairs (BIA; Area Director), declining to take certain real property in the State of Kansas into trust status. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On January 17, 1990, appellant requested that the Superintendent, Osage Agency, BIA (Superintendent), acquire two tracts of land in the State of Kansas in trust for appellant's benefit. 1/ Appellant presented Corporate Deeds (General Warranty) showing that these properties were conveyed to

The United States Government, held in Trust for Johnnie Louis McAlpine, individual restricted Osage Indian, 1953 Census [Roll] No. 3447, subject to: the condition that while title to the above land shall remain in the Grantee or Grantee's Osage Indian heirs, or devisees who do not have a certificate of Competency, the same shall not be alienated or encumbered without the approval of the Secretary of the Interior, approved by the President.

The administrative record shows that Tract 1 was conveyed to appellant by Longhorn Properties, Inc., and Tract 2 was conveyed to him by Yates Center Raceway, Inc., in settlement of cases filed by appellant in Kansas State court. See McAlpine v. Yates Center Raceway, Inc., Case No. 88C31, and McAlpine v. Longhorn Properties, Inc., Case No. 88C39E (31st Judicial District, Court of Neosho County, Kansas, Aug. 10, 1988).

By letter dated February 9, 1990, the Superintendent declined to take the tracts into trust status. The Superintendent first noted that because appellant already owned the properties in fee status, appellant's request was for a fee to trust conversion. As reasons for declining the request, the Superintendent indicated: (1) the statutory authority cited for the trust acquisition, the Act of March 3, 1871, 16 Stat. 544, ch. 120 (1871 act), which was an annual appropriations act, was no longer valid authority for trust acquisitions; 2/ (2) there was no justifiable reason to place land

1/ Tract 1 consists of lots 50, 51, and 52, block 3, Burris Brothers' Second Suburban Addition to the City of Chanute, Neosho County, Kansas. Tract 2 is described as beginning at the northwest corner of the SW¹/₄ of sec. 7, T. 25 S., R. 16 E., sixth principal meridian, Woodson County, Kansas, running thence south 57 rods, thence east 84 rods, thence north 57 rods, thence west 84 rods to place of beginning.

2/ That act made the following appropriation, 16 Stat. at 557:

"For interest on three hundred thousand dollars, at five per centum per annum, to be paid semi-annually [to the Osage Tribe], in money or such articles as the Secretary of the Interior may direct, as per first article treaty of September twenty-nine, eighteen hundred and sixty-five, fifteen thousand dollars: Provided, That each half-breed or mixed-blood of the Osages, being twenty-one years of age, or the head of a family, shall, under such rules and regulations and on such proofs as shall be prescribed by the Secretary of the Interior, be entitled to enter, without cost, within the diminished reservation of the Osage Indians in Kansas, a tract of land, in compact form and by legal subdivisions, not exceeding one hundred and sixty acres, upon which such half-breed or mixed-blood have [sic] heretofore

in trust status in Kansas; (3) appellant did not show a need for land in trust status; (4) there was no compelling reason to take the land off the local tax rolls; and (5) BIA was not equipped to discharge the additional responsibilities that would result if these properties were taken into trust status.

Appellant appealed this decision to the Area Director, who, by letter of March 21, 1990, affirmed the decision. ^{3/} The Area Director stated that, contrary to appellant's arguments, appellant had no legal right to have land taken into trust for him. Instead, the Area Director held that any trust acquisition for appellant was governed by 25 U.S.C. § 465 (1988), ^{4/} which

fn. 2 (continued)

actually settled and made improvements: Provided, however, That such half-breed or mixed-blood so entering such land shall thereby forfeit all claim to lands within the Indian Territory which have been or shall be purchased out of the proceeds of the sale of the land of the Osages, in the State of Kansas: And provided further, That the land so entered shall not be alienable by such half-breed or mixed-blood without the consent of the Secretary of the Interior, approved by the President."

^{3/} It appears that the same day appellant filed an appeal with the Area Director, he also filed suit in Federal court. See *McAlpine v. Bush*, (case number illegible) (N.D. Texas Filed Feb. 21, 1990). In this suit, appellant seeks to have (1) the two tracts of land at issue in this appeal taken into trust, (2) cattle made available to Indian tribes pursuant to 25 CFR Part 102 [there is no Part 102 in 25 CFR], (3) the Nekawakontake clan of Kansas recognized by the United States as a band within the Osage Nation, and (4) the Dec. 31, 1881, Constitution of the Osage Nation recognized as good and enforceable law. Appellant also seeks the amount of \$1,000,000,000 in damages based upon (1) the refusal to take the Kansas properties into trust; (2) an alleged conspiracy to deprive the Osage Indians of their ability to profit, which caused appellant to be unable to live as a member of the Osage Nation and to conduct his affairs pursuant to Osage tribal law, custom, and heritage; (3) an alleged conspiracy to deprive the Osage Nation of cattle to which it is entitled; (4) the refusal of the United States to recognize the Nekawakontake clan and the Osage Constitution, resulting in appellant's inability to conduct his affairs as an Osage Indian and causing severe frustration and depression; and (5) an alleged conspiracy "to degrade American Indians, to terminate their very existence, and to deny them the land, cattle and other chattels, rights, protection, and privileges provided to them by various treaties, statutes, and regulations," all of which have resulted in appellant's "severe emotional and psychological damage, severe public humiliation and embarrassment, deep depression and serious pecuniary loss" (Petition at 3).

The Board has not been informed that this case has been decided or that it should stay its own decision pending a decision by the court.

^{4/} Section 465 states:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted

makes trust acquisitions subject to the discretion of the Secretary of the Interior. The Area Director stated at page 2 of his decision:

Our review, however, supports the Osage Agency Superintendent's findings that you have failed to adequately justify a need for the land and for federal supervision, and that the Bureau is unable to assume the additional responsibility of managing off-reservation trust property in Kansas. In addition, I find that the potential exists for jurisdictional problems and land use conflicts with the local governments, which need to be resolved prior to consideration for trust acquisition.

The Board received appellant's notice of appeal on April 17, 1990. The notice repeats the arguments raised to the Area Director. No additional briefs were filed.

Discussion and Conclusions

[1] The Board has extensively discussed its role in reviewing BIA decisions concerning the acquisition of land in trust status. See, e.g., Ross v. Acting Muskogee Area Director, 18 IBIA 31 (1989), and cases cited therein. The Board has stated that such decisions are committed to BIA's discretion and that it does not have jurisdiction to substitute its judgment for BIA's. The Board has concluded, however, that it has authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority.

Under its holdings, the Board must consider whether, in denying appellant's application, BIA properly followed the procedures set out in 25 CFR Part 151, which governs land acquisitions. 25 CFR 151.10 requires BIA to consider a number of factors in evaluating trust acquisition requests:

- (a) The existence of statutory authority for the acquisition of land in trust status and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;

fn. 4 (continued)

allotments, whether the allottee be living or dead, for the purpose of providing land for Indians.

* * * * *

"Title to any lands or rights acquired pursuant to section 465 shall * * * be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

All further citations to the United States Code are to the 1988 edition.

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status.

[2] With respect to BIA's analysis of these factors, the Board stated in City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196-97, 96 I.D. 328, 331 (1989):

Proof that these factors were considered must appear in the administrative record. Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. See also, State of Florida [v. United States Department of the Interior], 768 F.2d 1248, [1256 [(11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)]: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion however, BIA's final decision should be reasonable in view of its overall analysis of the factors listed in section 151.10.

The Board further noted that a trust acquisition request could be denied on the basis of less than all of the factors, if BIA's analysis shows that factor or factors weighed heavily against the trust acquisition. 17 IBIA at 197, 96 I.D. at 331, n.3.

Appellant contends he has a right to have this land taken in trust status under the 1871 act. That act, an annual appropriations act for the Indian Department, contained many special provisions relating to individual tribes, including the authorization for selection of Osage tribal lands in the state of Kansas set out in note 2, supra. The 1871 Act must, however, be read in context with other legislation relating to the then-prevailing land situation of the Osage Indians.

The United States entered into several treaties with the Osages. Although most of these treaties are not relevant to the present discussion, each had the intent of reducing the lands occupied by the tribe. As relevant here, under Article I of an 1865 treaty with the Osages, 14 Stat. 687

(Sept. 29, 1865), the tribe sold a strip of land along the eastern boundary of its reservation in Kansas to the United States for \$300,000 plus 5 percent annual interest. This portion of the prior reservation was to be sold in the same manner as public lands were conveyed at that time, the proceeds first reimbursing the United States for the agreed upon purchase price and survey costs, with the remainder being deposited in the Treasury for use under the direction of the Secretary of the Interior for the education and civilization of any Indians in the United States. Under Article II of the treaty, another strip of land along the northern boundary of the reservation was ceded to the United States in trust for the Osages, to be sold by the United States for the benefit of the tribe. Article XIV provided:

The half-breeds of the Osage tribe of Indians, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent issued to them in fee-simple, for eighty acres each, to include, as far as practicable, their improvements, said half-breeds to be designated by the chiefs and headmen of the tribe.

Finally, Article XVI stated:

It is also agreed by said contracting parties, that if said Indians should agree to remove from the State of Kansas, and settle on lands to be provided for them by the United States in the Indian territory on such terms as may be agreed on between the United States and the Indian tribes now residing in said territory or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian territory.

Land was obtained for an Osage reservation in what is now the State of Oklahoma. Section 12 of the Act of July 15, 1870, 16 Stat. 335, 362, provided that whenever the Osages agreed to move from Kansas to the reservation in Oklahoma, each member of the tribe would receive a 160-acre tract of land. The cost of purchase of this land was to come from the sale of tribal land in Kansas. The section further provided that the cost of removal and subsistence was to be reimbursed to the United States

from the proceeds of the sale of the lands of said Indians in Kansas, including the trust lands north of their present diminished reservation, which lands shall be open to settlement after survey * * * Provided, That the diminished reserve of said Indians in Kansas shall be surveyed under the direction of the Secretary of the Interior as other public lands are surveyed, as soon as the consent of said Indians is obtained as above provided, the expense of said survey to be paid from the proceeds of sale of said land.

The 1871 act was part of this on-going attempt to remove the Osages from Kansas to Oklahoma. In lieu of this move and an entitlement to 160 acres on the Oklahoma reservation, the 1871 act allowed Osages of less than full blood to claim a maximum of 160 acres "within the diminished reservation of the Osage Indians in Kansas," upon which they had already settled and made improvements.

Based upon an analysis of the 1871 act in its proper context, appellant's argument that the act authorizes his requested trust acquisitions must be rejected for three reasons. Initially, it is clear that the phrase "diminished reservation," as applied to the Osage reservation in Kansas, was used with great consistency by Congress. As is seen by even a cursory reading of the acts cited above, the phrase was used to refer to the lands remaining after the 1865 treaty. Thus, in order to fall within the meaning of the 1871 act, the land at issue must be located within the tribal lands not removed from the reservation by Articles I and/or II of the 1865 treaty.

The tracts which appellant seeks to have taken in trust are not located within the diminished reservation of the Osages in Kansas. Tract 1 is located within the strip of land sold to the United States under Article I of the 1865 treaty. Tract 2 appears to be located just east of Yates Center, Kansas, and may not have even been within the reservation as it existed immediately prior to the 1865 treaty. In any case, Tract 2 is located north of the northern boundary of the diminished reservation.

Second, the clear intent of the 1871 act was to allow Osages of less than full blood to remain in Kansas, upon tribal reservation land which they had already improved, rather than move to new tribal lands in Oklahoma. The 1871 act authorizes the allotment of then-existing tribal lands; it does not authorize the acquisition of new lands. The lands formerly part of the diminished Osage reservation in Kansas were surveyed and sold under authority of the Act of July 15, 1870, quoted supra. ^{5/} The Board is not aware of any remaining Osage tribal lands within the former diminished reservation in Kansas from which appellant could make a selection.

Finally, the 1871 act authorizes selection of land by individuals who had, before its passage, settled and made improvements on those lands. Appellant's title to the tracts in question dates only to 1988. He makes no allegation that he, or another eligible person from whom he claims title, had settled upon and improved these tracts prior to the passage of the 1871 act.

Even though he found that the 1871 act did not provide authority for the requested trust acquisition, the Area Director, on his own initiative, considered appellant's request under 25 U.S.C. § 465, part of the Indian Reorganization Act of 1934 (IRA). The IRA was intended to be a comprehensive revamping of, among other things, the acquisition of lands in trust for Indian tribes and individuals. See, e.g., Cohen's Handbook of Federal

^{5/} See, e.g., Act of March 3, 1873, 17 Stat. 530, 538.

Indian Law, 1982 edition, 41 n. 118, 144-51. The Area Director correctly stated that trust acquisitions under authority of section 465 are discretionary with the Secretary. See, e.g., Eades v. Muskogee Area Director, 17 IBIA 198, 201 (1989). He also properly considered the factors set forth in 25 CFR 151.10 in determining whether or not the Secretary's discretionary authority should be exercised in favor of this particular trust acquisition.

Although the administrative record is not extensive, it shows that the Area Director considered the factors in 25 CFR 151.10 before denying appellant's request. Both the Superintendent and the Area Director considered appellant's proposed use of the tracts in determining that there was no justification for removing them from the local tax rolls and that there were potential land use and jurisdictional conflicts. Both also noted that appellant had presented no evidence indicating that he needed assistance in handling his affairs.

Most significantly, however, both officials found that BIA was not equipped or staffed to discharge the additional responsibilities arising from an off-reservation trust acquisition in the State of Kansas. The ability of BIA to discharge the necessary trust functions on newly acquired trust property is an important consideration in determining whether or not a trust acquisition should be approved. The Board holds that the Area Director's decision not to approve appellant's request can be sustained on the basis of his determination that BIA could not adequately discharge the additional responsibilities resulting from the proposed trust acquisition.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 21, 1990, decision of the Muskogee Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge