



INTERIOR BOARD OF INDIAN APPEALS

Andrew McCloud v. Acting Portland Area Director, Bureau of Indian Affairs

23 IBIA 203 (02/24/1993)



United States Department of the Interior

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

ANDREW McCLOUD,
Appellant

v.

ACTING PORTLAND AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Referring Appeal to the
: Assistant Secretary - Indian
: Affairs

:
: Docket No. IBIA 92-178-A

:
: February 24, 1993

Appellant Andrew McCloud seeks review of an April 28, 1992, decision issued by the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take certain land into trust for appellant's benefit. For the reasons discussed below, the Board of Indian Appeals refers this appeal to the Assistant Secretary - Indian Affairs.

Appellant is a member of the Puyallup Indian Tribe. He owns Lots 2 and 3, Block 10, McKenna Irrigated Tract, Thurston County, Washington, in fee status. He applied to have that land taken into trust status. By letter dated April 28, 1992, the Area Director declined the request, stating:

Title 25 of the Code of Federal Regulations, Part 151.3(b)(1) states

Subject to the provisions contained in the acts of Congress which authorized land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status when the land is located **within the exterior boundaries of an Indian reservation, or adjacent thereto.**

Since the property is neither within the boundaries of the Puyallup Reservation, nor adjacent to the Reservation, the proposed acquisition would be in conflict with the regulations. We therefore must deny your application. If we were able to approve the transaction, there may be a possible problem relating to your proposed future use of the property, i.e. to build additional permanent family homes. Such a change in use might require an environmental assessment before the transaction could be approved. [Emphasis in original.]

Appellant appealed this decision to the Board. Only appellant filed a brief. Appellant raised several arguments contending that the Area Director's decision violated statutory, treaty, and decisional law; improperly

failed to seek a waiver of the regulations; was arbitrary and capricious; and denied him substantive due process and equal protection. Appellant also requested an evidentiary hearing. Because of its disposition of this case, the Board denies appellant's request for a hearing and finds that it is not necessary to address each of his arguments.

The Board has recently considered two other fee-to-trust conversion requests. In each of those cases, the Area Director also denied the request based upon a conclusion that the land was not located adjacent to a reservation. In Maahs v. Acting Portland Area Director, 22 IBIA 294, 296 (1992), the Board vacated the Area Director's decision and remanded the case to him for further development of the record through a determination of the exact location of the property at issue. The Board stated:

The term "adjacent," which is not defined in 25 CFR Part 151, is a term of flexible meaning, as reflected in the definition in Black's Law Dictionary (5th ed. 1979): "Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch." [Emphasis in original.]

According to the appellant, the property in Maahs was separated from the Tulalip Reservation by a 30-foot-wide road. Following the Board's remand in Maahs, the Area Director requested guidance from the Deputy Commissioner of Indian Affairs concerning the interpretation of "adjacent" as it is used in 25 CFR 151.3(b)(1).

In Cross v. Acting Portland Area Director, 23 IBIA 149, 153 (1993), the Board referred another denial of a fee-to-trust conversion to the Assistant Secretary. The Board stated:

In light of the discretionary nature of the trust acquisition authority, and the Board's limited review authority over BIA's exercise of that discretion * * *, the Board is reluctant to impose an interpretation of the term "adjacent" upon BIA. Accordingly, the Board finds that it is appropriate to refer this appeal to the Assistant Secretary - Indian Affairs under 43 CFR 4.337(b) in order to give him the initial opportunity to interpret the BIA regulation in this regard.

Because the property in Cross was located approximately 1/2 mile from the Muckleshoot Reservation, the Board noted that it was less likely that the property would be found to be adjacent to the reservation than in Maahs. In addition, the Area Director had not acted on Cross' request for a waiver of 25 CFR 151.3(b)(1). The Board commented that "[t]he Assistant Secretary may also, of course, consider appellant's request for a waiver of the regulations, if he concludes that her property is not adjacent to the reservation" (23 IBIA at 153, n.6).

According to appellant, his property is located "within the 20 mile radius of Puyallup Reservation." Thus, it is even less likely here than in

Cross that there would be a finding that the property was adjacent to the reservation within the meaning of 25 CFR 151.3(b)(1). Indeed, it does not appear that appellant has specifically argued that his property is “adjacent to” the reservation.

Nevertheless, the Assistant Secretary already has two cases before him questioning the meaning of “adjacent to.” This is another such case, which could be helpful to the Assistant Secretary in reaching his decision. Under these circumstances and in the exercise of its authority under 43 CFR 4.318 and 4.337(b), the Board believes it is appropriate to refer this case to the Assistant Secretary. Also, as in Cross, the Assistant Secretary may wish to consider a waiver of the regulation if he determines that appellant's property is not adjacent to the reservation. ^{1/}

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.337(b), this appeal from the Acting Portland Area Director's April 28, 1992, decision is referred to the Assistant Secretary - Indian Affairs.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge

^{1/} In Cross, as in the present case, the Area Director found another potential problem with the trust conversion. The Board noted that, if the Assistant Secretary concluded that the property in Cross could otherwise be taken into trust, “he may wish to consider, or order the Area Director to consider on remand,” the additional concern (23 IBIA at 153, n.6).