



INTERIOR BOARD OF INDIAN APPEALS

Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v.
Portland Area Director, Bureau of Indian Affairs

27 IBIA 48 (11/30/1994)

Related Board cases:

27 IBIA 1

27 IBIA 47



United States Department of the Interior

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

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA,
AND SIUSLAW INDIANS

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-168-A

Decided November 30, 1994

Appeal from a decision to take land in trust for the Coquille Tribe.

Affirmed.

1. Indians: Lands: Trust Acquisitions

The Coquille Restoration Act provides that the Secretary shall accept up to 1,000 acres in Coos and Curry Counties, Oregon, in trust for the Coquille Tribe if conveyed or otherwise transferred to the Secretary, provided that, at the time of acceptance, there are no adverse legal claims on the property. 25 U.S.C. § 715c(a) (Supp. I 1989).

APPEARANCES: Dennis J. Whittlesey, Esq., Washington, D.C., for appellant; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; R. Randall Harrison, Esq., Tacoma, Washington, and Hans Walker Jr., Esq., and Marsha Kostura, Esq., Washington, D.C., for the Coquille Economic Development Corporation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians seeks review of a June 22, 1994, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), to take a 12.42-acre tract of land in North Bend, Oregon, into trust for the Coquille Tribe. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

In 1989, Congress enacted the Coquille Restoration Act, providing for the restoration of the Federal trust relationship with the Coquille Tribe and its members. 25 U.S.C. §§ 715-715g (Supp. I 1989). ^{1/}

^{1/} All further references to the United States Code are to the 1988 edition or its supplements.

25 U.S.C. § 715c provides:

(a) Lands to be taken in trust

The Secretary shall accept any real property located in Coos and Curry Counties not to exceed one thousand acres for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary: Provided, That, at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to his authority under [the Indian Reorganization Act (IRA)].

(b) Lands to be part of the reservation

Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the Tribe and shall be part of its reservation.

(c) Lands to be nontaxable

Any real property taken into trust for the benefit of the Tribe under this section shall be exempt from all local, State, and Federal taxation as of the date of transfer.

In the summer of 1993, the Coquille Tribe requested BIA to take approximately 1,125 acres into trust for it. BIA sought comments from Coos County, the City of Coos Bay, the City of North Bend, and appellant. Appellant objected to the acquisition. See Appellant's Resolution 93-029, dated August 11, 1993.

On October 9, 1993, the Coquille Tribe withdrew its original request and, by Resolution CY9375, sought the trust acquisition of 941.7 acres in Coos County, including the tract at issue in this appeal. Appellant filed another response with BIA, specifically objecting to acquisition of the tract at issue here. See Appellant's Resolution 93-045, dated October 25, 1993.

On June 22, 1994, the Area Director approved the Coquille Tribe's trust acquisition request. He issued two decisions, noting that there were substantial differences in the location and nature of the tracts. In one decision, he approved the acquisition of approximately 930 acres. 2/ In the other, he approved the acquisition of the 12.42-acre tract at issue here.

In the decision on appeal here, the Area Director stated that the only approval criterion in 25 U.S.C. § 715c, under which the trust acquisition

2/ Appellant appealed this decision but later withdrew the appeal. Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 26 IBIA 258 (1994).

request had been made, is that "there [be] no adverse legal claims on such property including outstanding liens, mortgages, or taxes owed." Even so, he continued, he would also address the factors in 25 CFR 151.10 concerning trust acquisitions. ^{3/} In connection with that analysis, he discussed appellant's objections, stating in part:

Most of the objections of [appellant] relate to their aboriginal claims for uncompensated lands, unresolved water rights, and unrelinquished subsurface mineral rights. These are all rights and claims [appellant] is trying to establish since there were never any payments made to them and their treaty with the United States was never ratified. Related to these unresolved aboriginal claims are their objections regarding fractionation of their ancestral homelands, Coos village sites and burials within the proposed Coquille lands, and [appellant's] Tribal Consolidation Area approved by the Portland Area Office on April 6, 1992.

Although they claim that approval of the Tribal Consolidation Area recognizes their aboriginal territory, it is clear that the intent of such consolidation areas is only to provide a tool to expedite obtaining lands within the area for economic development and other purposes. In addition, the Cow Creek's Tribal Consolidation Area already overlaps much of the Coos Consolidation Area. The intent is not to provide exclusive territory for any tribe, but to assist tribes in their economic development efforts.

[Appellant] also states in Resolution 93-045 that the land under consideration is environmentally contaminated. This fact is recognized by the Site Assessment prepared for Sun Industries by Environmental Management Consultants (EMC). However, at the time of the Level I Contaminant Survey by Siletz Agency staff, the contaminants were being removed * * *. A Level II report prepared by EMC on February 7, 1994, indicated that all issues reviewed in their Level I Report had been resolved, meeting current federal and state environmental standards * * *.

Although we find [appellant's] arguments to be strong and appealing, it is clear that the intent of Congress in the Coquille Restoration Act was not to limit the placement of the Coquille Reservation except within Coos and Curry Counties. Although [appellant] had been restored in 1984 by Congress, and although the Reports to the Senate and House of Representatives related to the Coquille Restoration Act recognized the Coquille territory as being mainly the Coquille River area, the Congress did not seek to separate the Coquille and Coos Tribes in their legislation, but

^{3/} 25 CFR Part 151 contains BIA's regulations governing the acquisition of land in trust for Indians and Indian tribes. Section 151.10 lists the factors to be considered in evaluating trust acquisition requests.

instead put them in overlapping territories. In fact, all of the five restored tribes in Western Oregon have overlapping service areas with other tribes.

(Area Director's Decision at 4-5).

With respect to compliance with the National Environmental Policy Act (NEPA), the Area Director stated:

Since the Coquille Tribe has not proceeded far enough in its planning process to determine the exact use of the subject property, there is not enough information to analyze in an Environmental Assessment. As such, the proposed conversion is a land conveyance categorically excluded from [NEPA] compliance pursuant to Department of the Interior Manual 516, Appendix 4.4-I.

Obviously, actions will take place in the future which will call for NEPA compliance. The Coquille Tribe plans to prepare an Environmental Assessment (EA) for each action which requires Bureau funding or approval, or to prepare a comprehensive EA as part of their Comprehensive Land-Use Plan.

Id. at 6-7.

With respect to compliance with the Indian Gaming Regulatory Act (IGRA), he stated:

The Tribe is seeking approval of this fee-to-trust action under the authority of the Coquille Restoration Act, not [IGRA] by the Secretary of the Interior. Therefore, we do not believe any compliance with IGRA is necessary at this point. Obviously, IGRA must be complied with if the Tribe moves forward with that possible use of the property, including concurrence of the Governor of the State of Oregon that such a use would be in the best interest of the Tribe and would not be detrimental to the surrounding community. A compact approved by the Governor would also be necessary for Class III gaming.

Id. at 7.

The decision concludes: "I attest that I have reviewed this transaction and the case file is documented and in compliance with all of the above stated regulations and facts. I further state that I will not approve this transaction until I have received satisfactory title evidence in accordance with Title 25, CFR Part 151.12." Id. at 9. On a page following the Area Director's signature, this statement is made:

The request for conversion of 12.42 acres of fee land in North Bend, Oregon, to trust status as part of the Coquille Indian Reservation is approved. Title acceptance by the Superintendent, Siletz Agency may be accomplished provided all procedural and

regulatory requirements are met, and provided clearance of title evidence is received from the Office of the Regional Solicitor, Portland Northwest Region.

Id. at second page 9. 4/

Appellant appealed this decision to the Board. 5/ The appeal was docketed on August 29, 1994, at which time the Board allowed intervention by CEDCO. On October 31, 1994, the Board granted CEDCO's motion for expedited consideration. Briefs have been filed by appellant, the Area Director, and CEDCO.

Motion to Dismiss

Early in these proceedings, CEDCO filed a motion to dismiss this appeal on the grounds that appellant lacked standing. CEDCO also sought dismissal of the appeal filed by the City of North Bend on the same grounds. Both appellants were given an opportunity to respond to the motion in their opening briefs.

CEDCO's argument in support of its motion is based primarily on the merits of this appeal, rather than on standing per se. The Board has, on several occasions, recognized the standing of local governments to appeal BIA decisions to acquire land in trust, when the acquisitions were within the boundaries of that local government. E.g., Town of Charlestown, Rhode Island v. Eastern Area Director, 18 IBIA 67 (1989); Day County, South Dakota v. Aberdeen Area Director, 17 IBIA 204 (1989); City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). These decisions make it clear that, had the City of North Bend chosen to pursue its appeal, it would have been deemed to have standing to do so.

The Board has not previously addressed the standing of an Indian tribe to appeal a trust acquisition for another tribe. While reaching no general conclusions concerning the standing of tribes in this kind of appeal, the Board finds in this case that: (1) CEDCO having raised the issue of appellant's standing, bore the burden of showing that appellant lacked standing and (2) CEDCO failed to make such a showing. 6/ The Board therefore denies CEDCO's motion to dismiss.

4/ Both the page signed by the Area Director and the following unsigned page are numbered "9."

5/ The City of North Bend also appealed the decision. On Oct. 31, 1994, the City withdrew its appeal, informing the Board that it had reached an agreement with the Coquille Tribe and the Coquille Economic Development Corporation (CEDCO) concerning the provision of municipal services. The City's appeal was dismissed on Nov. 2, 1994. City of North Bend, Oregon v. Portland Area Director, 27 IBIA 1 (1994).

Copies of the "Agreement for Municipal Services" have been furnished to the Board by the Area Director and CEDCO. The copies show that the City executed the agreement on Oct. 25, 1994.

6/ The Board notes that the Area Director considered appellant to be entitled, as a local government, to receive notice of the proposed trust acquisition.

Discussion and Conclusions

In its brief on appeal, appellant contends that the Area Director's decision is invalid because (1) the Coquille Tribe had no interest in the property on the date of the decision; (2) the property contains a public right-of-way and a nonvacated street; (3) the property is encumbered by a lease between the Coquille Tribe and/or CEDCO and a gaming management company; (4) the property is not "restored land" under IGRA; (5) the trust acquisition is a major Federal action requiring an environmental impact statement (EIS) under NEPA; and (6) the Coquille Tribe had not executed an agreement with the City of North Bend for payments in lieu of taxes. 7/

Appellant first contends that the Coquille Tribe's option to purchase the tract had expired prior to the date on which the Area Director issued his decision and that the Area Director's decision was therefore based on the incorrect assumption that the Tribe had an interest in the property. Appellant appears to be contending that the Coquille Tribe was required to possess an interest in property in order for the property to be eligible for trust acquisition. Appellant does not cite any authority in support of such a contention. There is no requirement in the Coquille Restoration Act, or in any other Federal statute of which the Board is aware, that a tribe own an interest in property before the property can be conveyed to the United States in trust for the tribe.

Appellant's second contention is that a public right-of-way and nonvacated street on the property constitute an encumbrance which precludes trust acquisition. 8/ The Area Director's decision did not address title matters. Instead, the Area Director indicated that his acceptance of the land in trust would depend upon his receiving satisfactory title evidence. 9/ Because the Area Director's decision did not address title issues, those issues are not before the Board.

Appellant's third contention concerns a purported lease between the Coquille Tribe and/or CEDCO and a gaming management company, which appellant contends is another encumbrance precluding trust acquisition. 10/

7/ Appellant appears to have abandoned many of the arguments it made before the Area Director.

8/ The Board notes that, in withdrawing its appeal, the City of North Bend stated that it "has agreed to vacate the portion of 'Wharf' [Street] which is contained within said property."

9/ The Area Director evidently followed the two-step procedure established in 25 CFR Part 151, in which an initial trust acquisition determination is made prior to requiring the applicant to produce title evidence. See 25 CFR 151.11, 151.12. Under this procedure, the applicant need not go to the expense of acquiring title evidence until it knows that BIA is willing to accept the land in trust.

10/ Appellant filed an objection to the administrative record under 43 CFR 4.336, contending that the lease should have been a part of the record. Appellant conceded that it did not know whether the Area Director had the lease before him when he issued his decision.

CEDCO denies that any such lease exists. Appellant does not explain how an encumbrance on title could be created in the circumstances it posits--that is, where a lease is executed by an entity which does not own the property. In any event, this argument, like the last one, concerns title, and title issues are not before the Board. 11/

Appellant's fourth contention is that this property is ineligible for trust acquisition because it is not "restored land" under IGRA.

25 U.S.C. § 2719 provides:

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and

* * * * *

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when

(A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials

fn. 10 (continued)

The Area Director's response indicated, inter alia, that no such lease was in the materials before him when he made his decision. Moreover, at the time he submitted the record, the Area Director certified that it included all information and documents utilized by him in rendering his decision. See 43 CFR 4.335. The Board has no basis for doubting the Area Director's statements.

11/ Another title issue is raised in appellant's reply brief. There, appellant contends that 2.6 acres of the 12.42-acre tract are tidelands owned by the State of Oregon and thus ineligible for trust acquisition. For the reasons noted above, this issue is also not before the Board.

of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

Both the Area Director and CEDCO contend that the question of whether the tract at issue here qualifies for gaming under IGRA is irrelevant to this appeal because the Area Director made no determination concerning gaming. The Board agrees that compliance with IGRA is not at issue here although, as all parties recognize, such compliance will be required before gaming operations may be established on this tract. IGRA does not, by its terms, restrict trust acquisition of land. Rather it prohibits gaming on certain lands acquired in trust after October 17, 1988. The Area Director's decision did not address the question of whether gaming will be permissible on this tract, and therefore that issue is not presently before the Board.

Appellant's fifth contention is that trust acquisition of this tract is a major Federal action requiring an EIS under NEPA. This is so, appellant contends, because of the development plans that the Coquille Tribe and CEDCO have for the property.

The Area Director and CEDCO respond, first, that NEPA does not apply at all to this trust acquisition because the Area Director's duty to accept the land in trust is ministerial. Further, they argue, even if NEPA is applicable, it is not the trust acquisition itself, but rather the future development of the tract, that may have an impact on the environment. Therefore, they contend, it was appropriate for the Area Director to delay evaluation under NEPA until a decision had been made on the use of the tract.

In support of their argument that the Area Director's action is ministerial, the Area Director and CEDCO cite, *inter alia*, Goos v. I.C.C., 911 F.2d 1283, 1296 (8th Cir. 1990), in which the United States Court of Appeals for the Eighth Circuit stated:

As we held in South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir.), cert. denied, 449 U.S. 822 * * * (1980), "[m]inisterial acts . . . have generally been held to be outside the ambit of NEPA's EIS requirement. Reasoning that the primary

purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempted from the requirement." Accord * * * Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) ("The EIS process is supposed to inform the decisionmaker. This presupposes he has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over the outcome.")

The Area Director and CEDCO contend that the Coquille Restoration Act gives the Secretary no discretion concerning the acquisition of 1,000 acres in Coos and Curry Counties, of which the present tract is a part. In particular, they note the contrast between the statutory provision concerning acquisition of the first 1,000 acres and the provision concerning further acquisitions. Appellant responds that the "'dual structure' of the act was meant not to establish distinct **procedures** for placing the first 1,000 acres in trust but rather was simply intended merely to clarify the size of the Coquille Tribe's entitlement" (Appellant's Reply Brief at 9-10 (emphasis in original)).

[1] The Board agrees with the Area Director and CEDCO that the language of the first sentence of 25 U.S.C. § 715c(a), especially when compared to the language of the following sentence, makes it clear that the Secretary lacks his usual discretion where acquisition of the first 1,000 acres is concerned. The Board concludes that the Secretary's trust acquisition of this tract is essentially ministerial.

Even if NEPA requirements apply to this acquisition, however, it does not follow that the Area Director erred in declining to require an EA at this point. The Area Director was clearly aware that development of some sort was anticipated and that an EA would be required in connection with that development. It is now apparent that an EA was already in the works at the time of the Area Director's decision. The EA was prepared by CEDCO for a proposed business lease of the tract for an entertainment complex. Based on the EA, the Acting Superintendent, Siletz Agency, BIA, issued a finding of no significant impact (FONSI) on October 24, 1994. 12/

Clearly, to have required a separate EA for the trust acquisition itself would have been wasteful and unnecessary. Cf. National Indian Youth Council v. Andrus, 501 F. Supp. 649, 674-80 (D.N.M. 1980), aff'd 664 F.2d 220 (10th Cir. 1981) (Surveys for archaeological sites under the National Historic Preservation Act not required prior to grant of lease where potentially site-disturbing activities will not occur until a mining plan is approved.) The Board finds that, in the circumstances here, it was

12/ Copies of the EA and the FONSI have been furnished to the Board by both CEDCO and appellant. The EA indicates that CEDCO began to prepare it in June 1993. Appellant has attempted to appeal the FONSI to the Board. On Nov. 30, 1994, the Board dismissed the appeal as premature. Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Acting Superintendent, Siletz Agency, 27 IBIA 47 (1994).

not error for the Area Director to approve the trust acquisition without requiring an EA.

Appellant's final argument is that, at the time of the Area Director's decision, the Coquille Tribe had not executed an agreement with the City of North Bend for payments in lieu of taxes. Appellant contends that the Area Director improperly based his decision upon the assurances of the Coquille Tribe that an agreement would be executed.

Appellant does not cite any statute or regulation requiring that such an agreement be executed before land can be taken in trust. Nor is the Board aware of any such requirement. The Board finds that it was not error for the Area Director to approve the trust acquisition without requiring that the Coquille Tribe execute an agreement for payments in lieu of taxes. 13/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's June 22, 1994, decision is affirmed. 14/

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

13/ The Oct. 25, 1994, "Agreement for Municipal Services" between the City of North Bend, the Coquille Tribe, and CEDCO provides for such payments to be made to the City by the Tribe and CEDCO.

14/ All outstanding motions and requests are denied. All arguments not specifically addressed in this decision have been considered and rejected.