



INTERIOR BOARD OF INDIAN APPEALS

Big Lagoon Park Co., Inc. v. Acting Sacramento Area Director,
Bureau of Indian Affairs

32 IBIA 309 (08/31/1998)

Disapproving:
11 IBIA 124



United States Department of the Interior

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

BIG LAGOON PARK COMPANY, INC.

v.

ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-85-A

Decided August 31, 1998

Appeal from a decision declining to rescind a trust acquisition made in 1994 for the Big Lagoon Rancheria.

Dismissed. Prieto v. Acting Sacramento Area Director, 11 IBIA 124 (1983) disapproved.

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

The Board of Indian Appeals lacks authority to order the divestiture of title to land held by the United States in trust for an Indian tribe.

APPEARANCES: Walter P. McNeill, Esq., Redding, California, for Appellant; Bart Miller, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Acting Area Director; Stephen V. Quesenberry, Esq., and LeAnn G. Bischoff, Esq., Oakland, California, for the Big Lagoon Rancheria; Daniel E. Lungren, Esq., and Peter H. Kaufman, Esq., Sacramento, California, for amicus curiae Pete Wilson, Governor of California.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Big Lagoon Park Company, Inc., ^{1/} seeks review of a December 9, 1996, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to rescind a trust acquisition made in 1994 for the Big Lagoon Rancheria (Rancheria). For the reasons discussed below, the Board dismisses this appeal for lack of jurisdiction.

Background

The Rancheria's original reservation, located in Humboldt County, California, contains approximately 9 acres. In 1985, the Rancheria began efforts to purchase and have taken into trust an 11-acre tract contiguous to its reservation, for the purpose of providing housing for tribal members.

^{1/} Appellant states that it is "a non-profit California corporation, which serves as the homeowners association for owners of over 70 residential and recreational cabins on Big Lagoon, in Humboldt County, California." Appellant's Opening Brief at 2.

Seeking funds to make the purchase, the Rancheria applied to the Department of Housing and Urban Development (HUD) for an Indian Community Development Block Grant (ICDBG). BIA supported the Rancheria's grant application. ^{2/} The Rancheria was awarded a grant in 1988 and thereupon purchased the tract, receiving title by deed dated December 28, 1988, from the Louisiana-Pacific Corporation.

On March 1, 1989, by Resolution 89-730, the Rancheria requested that BIA take the tract into trust. On the same date, the Superintendent notified the Humboldt County Assessor of the proposed acquisition, requested certain information, and invited comments. The Assessor responded to the Superintendent's inquiry but did not voice any objection to the proposed trust acquisition. On December 29, 1989, the Rancheria's Chairman executed a deed to the United States in trust for the Rancheria. BIA did not take the tract in trust at that time, however, but continued its review of the acquisition request, informing the Rancheria in November 1991 that an updated title report and an environmental assessment would be required.

Between 1989 and 1991, the Rancheria constructed two houses on the tract, financing the construction with a combination of HUD funds, BIA housing funds, and tribal funds. Two or three additional houses were planned but were not constructed due to financial difficulties experienced by the Rancheria.

On June 1, 1993, the Rancheria enacted Resolution 571-93, renewing its request to have the tract taken into trust. The resolution stated that the tract had been purchased for housing development and requested that it be taken into trust for the "collective benefit of the Tribe." On June 17, 1993, the Rancheria's attorney wrote to the Superintendent, Northern California Agency, stating:

By letter dated November 5, 1991, your agency indicated that the only documents needed to complete the fee to trust transfer process are an updated Preliminary Title Report, and an Environmental Assessment. The Big Lagoon Rancheria previously completed an Environmental Assessment and published a FONSI [Finding of No Significant Impact] based for [sic] the original land acquisition and housing development. It is our understanding and expectation that the Environmental Assessment completed relative to the original acquisition and land development will be sufficient for a FONSI with respect to the conversion of land into trust.

^{2/} Both the Area Director and the Superintendent, Northern California Agency, wrote to HUD in January 1988 in support of the Rancheria's grant application. The Superintendent's Jan. 13, 1988, letter stated at page 2:

"Based on preliminary analysis of the proposed land purchase, the concept of securing trust status for the property should be viewed favorably. The Tribe's future request will apparently meet the guidelines for securing trust status since the property is adjacent to the existing Rancheria with the Tribe having clear title."

On January 31, 1994, the Area Director signed a FONSI for the trust acquisition. Notice of the FONSI and the underlying Environmental Assessment was published in a local paper on February 8, 1994. The notice stated that the Area Office had "reviewed and adopted the environmental assessment for taking into trust eleven acres of land purchased by the tribe with monies received from [HUD]." The notice further stated that public comments would be accepted for 30 days following publication. Neither BIA nor the Rancheria received any comments.

On June 29, 1994, the Area Director formally accepted title to the tract in trust for the Rancheria.

On March 30, 1994, prior to the date of trust acquisition, the Rancheria entered into a gaming management contract with a company called Gaming World Arcata (GWA). The Rancheria submitted the contract to the National Indian Gaming Commission (NIGC) for approval in April 1994. In November 1994, the Rancheria withdrew the contract from the NIGC.

At some point, the Rancheria decided to construct a gaming facility on the 11-acre tract. In a declaration submitted in this appeal, the Rancheria's Chairperson states:

10. The Tribe and GWA discussed acquiring a 70-acre parcel east of the reservation which was owned by Louisiana Pacific.

11. * * * We considered purchasing the 70-acre parcel and applying for trust status under the IGRA [Indian Gaming Regulatory Act]. We estimated that the fee-to-trust process for the 70-acre parcel would take about one or two years, but [GWA] did not want the project to be delayed for that long and suggested using the 11-acre parcel, which we had purchased with the HUD monies and which held the new houses we had built. A representative from [BIA] advised us that once the grant was closed out, the HUD/[I]CDBG parcel would be treated the same as any other tribal lands. We believed this meant that we would no longer be constrained by the original purpose for which we bought the land, however we still preferred the idea of using other lands since we had constructed new homes on the 11 acres and tribal members had relocated there.

Declaration of Virgil Moorehead, June 30, 1997.

Under HUD regulations, specifically, 24 C.F.R. § 570.505, restrictions on use of property acquired with ICDBG funds expire five years after the project is closed out. HUD closed out the Rancheria's grant project in December 1990. Accordingly, HUD's restrictions on use of the 11-acre tract expired in December 1995. See June 25, 1996, letter from HUD's Deputy Assistant Secretary for Native American Programs to Carol Boyd.

In late 1995, having severed its connections with GWA, the Rancheria entered into an agreement with Spirit Gaming to construct a gaming facility on the 11-acre tract. Construction was begun in early 1996. However,

Spirit Gaming ceased funding the construction, the Rancheria cancelled the agreement, and "[t]he casino project is currently on hold." Chairperson's June 30, 1997, Declaration at ¶ 18.

In August 1996, Appellant filed in the Sacramento Area Office a document titled "Complaint and Petition for Review and Rescission of Acceptance of Conveyance of Land in Trust Status and for Environmental Review Required under the National Environmental [Policy] Act [(NEPA)]."

In response to Appellant's filing, the Area Director issued the decision on appeal here. In his December 9, 1996, decision, he stated:

The relief sought by [Appellant] is that [BIA] reconsider and rescind the "Acceptance of Conveyance" dated June 29, 1994 whereby title to the subject property was accepted into trust by the United States for the Big Lagoon Rancheria. The relief sought is stated as being based on the following six reasons: (1) fraud (alleged misrepresentations to the BIA as to intended land use), (2) mistake (BIA did not examine the intent or motive of the Rancheria), (3) illegality due to violations of NEPA (the environmental documentation and review did not consider gaming as a land use), (4) illegality due to violations of HUD land use restrictions (the casino project violates HUD's land use restrictions), (5) illegality due to violation of California Coastal Commission land use regulatory authority (the coastal management plan only allows for limited timber harvesting and residential housing), and (6) invalidity of statutory authority for taking the land into trust (the 1995 ruling in South Dakota v. [United States Dep't of the Interior], 69 F.3d 878 [(8th Cir. 1995)], held the Secretary had no authority to acquire lands in trust).

Area Director's Decision at 1. The Area Director discussed each of the issues raised by Appellant. With respect to the last issue, he stated:

As to the sixth and final issue, in the recent case involving a fee-to-trust application cited in your Complaint and Petition, the United States requested the U.S. Supreme Court to grant a Writ of Certiorari in the matter of Department of the Interior, et al. v. South Dakota et al., No. 95-1956. On October 15, 1996, the writ was granted and the case was remanded back to the Interior Secretary for reconsideration of the previous administrative decision. However, the Interior Department's position has been and continues to be that review of a trust acquisition that has been completed is precluded by the Quiet Title Act [(QTA)], 28 U.S.C. § 2409a. Although the impact of the South Dakota decision is presently being evaluated by the Department, we have not received any instructions that differ from that expressed above. Accordingly, we are not in a position to grant the relief sought even if we considered there was adequate justification to vacate our previous decision, and your request is hereby denied.

Id. at 3.

Appellant appealed this decision to the Board.

Upon establishing a briefing schedule, the Board requested the parties to address the question of the Board's authority to rescind a completed trust acquisition or order BIA to rescind it. During the briefing period, the Board learned of a notice published in the Federal Register titled "Land Status: Lower Brule Sioux Tribe." 62 Fed. Reg. 26551 (May 14, 1997). By order of June 2, 1997, the Board requested the parties to address "the relevance, or lack thereof, of the Federal Register notice to the issues in this appeal."

Shortly before Appellant's opening brief was due, the Board received a motion from the Governor of California, seeking to intervene or to participate as amicus curiae. In the interest of full development of the case, the Board granted the Governor amicus curiae status.

Both Appellant and the Rancheria have submitted documents which they seek to have added to the administrative record. The documents are accepted and made a part of the record.

Discussion and Conclusions

All parties and amicus have, in compliance with the Board's request, addressed the question of the Board's authority in this matter. Because that question is a threshold one here, the Board proceeds directly to it.

Appellant and the Governor contend that the Board has authority to rescind the trust acquisition or order BIA to rescind it. The Area Director and the Rancheria argue that the Board lacks such authority. Many of the parties' arguments revolve around the QTA, 28 U.S.C. § 2409a, which provides:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands.

The Area Director and the Rancheria take the position that this provision, as it has been interpreted in the Federal courts since Block v. North Dakota, 461 U.S. 273 (1983), precludes the Board from granting the relief sought by Appellant. That relief, as Appellant concedes, "does have the effect of divesting the United States of title to the 11 acre parcel and placing it back in the name of the Big Lagoon Rancheria." Appellant's Opening Brief at 12.

In Block, the Supreme Court held that the QTA provides the exclusive means by which an adverse claimant may challenge the United States' title to real property. In reaching that conclusion, the Court rejected North Dakota's contention that a suit which was time-barred under the QTA could

be maintained as an "officer's suit." ^{3/} It also rejected the notion that the Administrative Procedure Act (APA), 5 U.S.C. § 702, might provide a remedy. ^{4/}

Block did not involve Indian lands. However, in the course of its extensive analysis of the QTA, the Court discussed the Indian lands exception. In explaining its reasons for rejecting North Dakota's officer's suit argument, the Court observed: "If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory." 461 U.S. at 285. The Court also mentioned the Indian lands exception in its discussion of the legislative history of the QTA. Noting that the Executive Branch had proposed a revision of the original bill, the Court continued:

This Executive proposal, made by the Justice Department, limited the waiver of sovereignty in several important respects. First, it excluded Indian lands from the scope of the waiver. The Executive Branch felt that a waiver of immunity in this area would not be consistent with "specific commitments" it had made to the Indians through treaties and other agreements.

461 U.S. at 283.

In United States v. Mottaz, 476 U.S. 834, 843 (1986), the Supreme Court reconfirmed that "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the [QTA] does not waive the Government's immunity." In a footnote to this statement, the Court again referred to the position taken by the Executive Branch during the legislative proceedings resulting in enactment of the QTA:

^{3/} The Court explained that, prior to enactment of the QTA in 1972, "officer's suits" had been employed in title disputes with the Federal Government in attempts to circumvent sovereign immunity and that, "[i]n the typical officer's suit involving a title dispute, the claimant would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States." 461 U.S. at 281.

^{4/} With respect to the APA, the Court stated:

"We also reject North Dakota's claim that, even if the QTA pre-empted alternative remedies in 1972, Congress created a new supplemental remedy four years later when it amended 5 U.S.C. § 702 with Pub. L. 94-574, 90 Stat. 2721. That statute waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no 'authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.' The QTA is such an 'other statute,' because, if a suit is untimely under the QTA, the QTA expressly 'forbids the relief' which would be sought under § 702."

461 U.S. at 286 n.22.

In urging that such an exemption be included in the [QTA], the Solicitor for the Department of the Interior noted that excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent abridgment of "solemn obligations" and "specific commitments" that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent. See H.R. Rep. No. 92-1559, p. 13 (1972).

476 U.S. at 843 n.6.

Subsequent to Block, the Federal courts of appeal have decided a number of cases in which the Indian lands exception to the QTA has been directly at issue. Many of these cases were summarized in Alaska v. Babbitt, 75 F.3d 449 (9th Cir.), cert. denied, 117 S.Ct. 70 (1996), a case in which the State of Alaska sought to challenge a decision by the Department of the Interior involving a Native allotment application:

In Block, the QTA precluded the suit because it was time barred by the QTA's twelve-year statute of limitations. * * * In subsequent cases, courts have construed this language to mean that the APA does not waive immunity as to any claims that are otherwise precluded by the QTA)) for instance, claims precluded by the Indian lands exception. See Metropolitan Water Dist. of So. Cal. v. United States, 830 F.2d 139, 143-44 (9th Cir. 1987) (rejecting a suit challenging the Secretary of the Interior's authority to resurvey the boundary of an Indian Reservation), aff'd sub nom California v. United States, 490 U.S. 920 * * * (1988) (per curiam); Spaeth v. Secretary of the Interior, 757 F.2d 937, 942-43 (8th Cir. 1985) (holding that the QTA, not APA § 702, governs plaintiff's action, and remanding to determine whether the government can prove a substantial possibility that the lands in question are Indian lands); Florida v. United States Dept. of the Interior, 768 F.2d 1248, 1253-55 (11th Cir. 1985) [cert. denied 475 U.S. 1011 (1986)] (holding that APA's waiver of sovereign immunity was inapplicable to action challenging Department of Interior acquisition of land to construct museum to display artifacts and inter remains uncovered from Indian burial site). Thus, officer's suits brought under the APA have also failed to surmount the government's claim of sovereign immunity under the Indian lands exception.

75 F.3d at 453. Based upon its review of the caselaw, the Ninth Circuit affirmed the lower court's dismissal of the case for lack of jurisdiction, holding that "Alaska may not use the ultra vires exception to sovereign immunity to divest the United States of immunity in this case." Id. 5/

5/ Alaska had contended that, if the Department acted ultra vires in approving the allotment, sovereign immunity would not bar Alaska's suit. It attempted to distinguish "ultra vires" actions from the "officer's

See also, e.g., Alaska v. Babbitt, 38 F.3d 1068 (9th Cir. 1994) (holding, in a case involving a different Native allotment, that the QTA precluded Federal court review); 6/ Ducheneaux v. Secretary of the Interior, 837 F.2d 340 (8th Cir.), cert. denied, 486 U.S. 1055 (1988) (holding that the QTA deprives a Federal court of jurisdiction to partition trust property where partition would divest the United States of title to a portion of the property); Wildman v. United States, 827 F.2d 1306 (9th Cir. 1987) (holding that the QTA deprives a Federal court of jurisdiction where the United States has a colorable claim to land as trustee for Indians).

Appellant and the Governor contend that Federal court review of the trust acquisition in this case would not be barred by the QTA because BIA's action was ultra vires and/or because Appellant is not seeking to quiet title in itself. For the most part, they fail to address the cases discussed above. Instead, they place considerable emphasis on a district court decision, City of Sault Ste. Marie, Michigan v. Andrus, 458 F. Supp. 465 (D.D.C. 1978), in which the QTA was held not to bar a suit challenging a trust acquisition. As the Area Director and the Rancheria point out, however, Sault Ste. Marie was decided prior to the Supreme Court's seminal interpretation of the QTA in Block. In light of Block and the line of cases following it, Sault Ste. Marie appears to be of limited authority at this time.

Despite the general sense to be derived from the cases discussed above, however, there is presently no definitive answer to the question whether Federal courts are barred by the QTA from reviewing a completed trust acquisition in a case where, as here, the Secretary is alleged to have acted

fn. 5 (continued)

suits" discussed in Block, an attempt rejected by the Ninth Circuit, which explained:

"The Supreme Court has made it clear that suits alleging 'ultra vires' acts, actions that are outside the scope of a government officer's authority or are unconstitutional, are a subgroup of officer's suits as a whole. * * * [T]he Court has specifically proscribed officer's suits, including 'ultra vires' suits, as a means of divesting the government's sovereign immunity in quiet title actions relating to trust or restricted Indian land."

Id. at 452-53.

6/ In this case, the Ninth Circuit indicated that its decision in Metropolitan Water District had "expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." 38 F.3d at 1074.

See also Florida, 768 F.2d at 1254-55: "Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. [Footnotes omitted]."

unconstitutionally or in violation of Federal law. There is clearly some support for the view that the QTA is not a bar in such a case. See, e.g., Judge Murphy's dissent in the now-vacated Eighth Circuit decision in South Dakota, supra, 69 F.3d at 889-91. Cf. Florida, 768 F.2d at 1255 n.9 (suggesting a distinction between that case and Sault Ste. Marie). But see Alaska, 75 F.3d at 452-43, quoted supra, n. 5.

Of course, the Board is not called upon here to decide whether or not Federal courts would have jurisdiction over a case such as this one. Thus, the QTA is relevant here only if it applies directly to this proceeding or offers guidance to the Board in determining its own jurisdiction.

With respect to the applicability of the QTA to Board proceedings, the Area Director contends:

The QTA applies to judicial and administrative proceedings. Congress intended the QTA to be the exclusive means to challenge government title to real property. Block, 461 U.S. at 286. Thus "administrative appeals and judicial appeals under the [APA] are not available where the [QTA] applies." Mafrige v. United States, 893 F. Supp. 691, 699 (S.D. Tex. 1995) (citing McIntyre v. United States, 789 F.2d 1408, 1410 (9th Cir. 1986)). Any other reading of the QTA would allow the will of Congress to be thwarted by artful pleading.

Area Director's Brief at 10-11.

The Governor contends that neither Mafrige nor McIntyre involves the issue in this appeal and neither stands for the proposition that the QTA precludes administrative reconsideration of a completed trust acquisition.

While it is true that neither case involves the precise issue raised in this appeal, Mafrige offers support for the proposition that, where the QTA would bar litigation of an issue in Federal court, it would also bar an administrative appeal concerning the same issue. At the present time, however, the law is not clear enough to enable the Board to conclude that the QTA per se is an absolute bar to the Board's authority here. Even so, the principles enunciated in Block and Mottaz, and followed in subsequent lower court decisions, are relevant here in that they interpret Federal policy with respect to Indian lands and apply it in contexts comparable to this one.

With those principles in mind, the Board turns to the Governor's contention that the Board has jurisdiction in this case under the Department's authority to reconsider its own actions.

As the Governor points out, the Board has, in the past, held that BIA and the Board have the authority to revoke a completed trust acquisition upon presentation of "[c]onclusive evidence that the transaction did not meet the statutory or regulatory requirements." Prieto v. Acting Sacramento Area Director, 11 IBIA 124, 128 (1983). In Prieto, the Board approved BIA's

revocation of trust status for certain land which had been taken into trust for an individual Indian. The Board's decision, however, was reversed in Prieto v. United States, 655 F. Supp. 1187 (D.D.C. 1987). The District Court did not specifically hold that BIA and the Board lacked the authority to revoke a completed trust acquisition. It did, however, hold that "the Secretary exceeded his authority in reconsidering and in revoking the trust status of [Prieto's] land." 655 F. Supp. at 1192. Among the factors leading the court to that conclusion were the length of time that had passed from the time the land was placed in trust until the time BIA's action was challenged (nine months), the fact that the Indian landowner had acquired vested rights at the time her land was placed in trust, and the fact that she had acted in reliance upon the trust acquisition. ^{7/}

The Board's Prieto decision is no longer good law. To the extent that any part of that decision may have survived the District Court's decision, the Board now disapproves it.

The Board has had a more recent occasion to address the question of reconsideration of a trust acquisition decision. In Sycuan Band of Mission Indians v. Acting Sacramento Area Director, 31 IBIA 238 (1997), the Area Director had announced his intent to reconsider a decision to take land into trust, prior to his formal acceptance of title to the land. The Board held that the Area Director had authority to reconsider his original decision. In reaching that conclusion, the Board rejected the Sycuan Band's contention that it had acquired vested rights at the time the Area Director made his decision to take the land into trust. The Board found that the circumstances in Sycuan Band were easily distinguishable from cases where land was already in trust status. 31 IBIA at 245-46.

In Sycuan Band, the Board recognized that two distinct steps are involved in a trust acquisition. 31 IBIA at 245. The first step is the decision to take land into trust. 25 C.F.R. § 151.12. That decision is appealable under 25 C.F.R. Part 2. ^{8/} Under Sycuan Band, it is also subject to reconsideration by the Department prior to completion of the second step.

^{7/} Neither the Board's nor the District Court's Prieto decision discussed the QTA. This may have been, as suggested by the Area Director, because the Board's decision was issued before Block was decided. Given the lack of any reference to the QTA in the District Court's decision, it appears likely that the question of its effect was not raised to the court, even though Block had been decided by the time the court issued its decision. Under these circumstances, the lack of discussion of the QTA in these decisions cannot be construed as evidence that the Board or the District Court had determined that the QTA did not apply.

^{8/} Although 25 C.F.R. § 151.12(a) requires that a trust acquisition decision be issued in writing, there is no evidence that a written decision was issued in this case. While the Board does not condone this omission, it notes that, had a written decision been issued, it is unlikely that either Appellant or

The second step, which the land acquisition regulations term "Formalization of acceptance," is taken following examination of title evidence and correction of title defects. See 25 C.F.R. §§ 151.13, 151.14. The signature of an authorized Departmental official on the formal document of acceptance under section 151.14 effects the transfer of legal title to the United States and establishes a trust relationship between the United States and the Indian beneficiary with respect to the land described in the deed. It is also at that point that the vested rights discussed in Prieto (e.g., 655 F. Supp. at 1192, 1194), are created in the Indian beneficiary.

The Governor contends that the Board has authority to reconsider BIA's trust acquisition decision both under its own regulations and under the inherent power of Government agencies to reconsider their own decisions.

Neither of the Board regulations cited by the Governor, 43 C.F.R. §§ 4.312 and 4.318, deals specifically with reconsideration of decisions. The only Board regulation which specifically references reconsideration is 43 C.F.R. § 4.315, which concerns reconsideration of Board decisions and which establishes a 30-day deadline for requesting reconsideration. The Board has never construed either section 4.312 or section 4.318 as authorizing it to reconsider completed BIA actions.

In support of his argument concerning inherent authority of Government agencies to reconsider their decisions, the Governor cites Belville Mining Co. v. United States, 999 F.2d 989 (6th Cir. 1993), which involved a decision on reconsideration made by the Department's Office of Surface Mining,

fn. 8 (continued)

the Governor would have been sent copies, because neither had submitted comments during the consideration period, even after publication of notice on Feb. 8, 1994. Thus, the fact that no written decision was issued appears to be of little or no consequence here.

25 C.F.R. § 151.12(a) mentions appeals under 25 C.F.R. Part 2 only in the context of denials of trust acquisition requests. However, Part 2 provides that appeals from BIA decisions may be made under that part by "persons who may be adversely affected by such decisions." 25 C.F.R. § 2.3. Thus BIA decisions to take land into trust may be appealed under Part 2 by parties who believe they may be adversely affected by the acquisition. A number of such "third-party" appeals have in fact been filed with the Board. See, e.g., City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989); City of Escanaba, Michigan v. Acting Minneapolis Area Director, 19 IBIA 247 (1991) (dismissed for lack of jurisdiction over decision made by the Assistant Secretary - Indian Affairs); South Dakota v. Aberdeen Area Director, 22 IBIA 126 (1992) (dismissed for the same reason); San Diego County Board of Supervisors v. Sacramento Area Director, 28 IBIA 224 (1995), recon. denied, 28 IBIA 278 (dismissed as untimely); Village of Ruidoso, New Mexico v. Albuquerque Area Director, 31 IBIA 143 (1997) and 32 IBIA 130 (1998); Chapman v. Muskogee Area Director, 32 IBIA 101 (1998) (remanded at Area Director's request).

Reclamation, and Enforcement (OSM). As the Governor argues, the Sixth Circuit in Belville balanced a number of factors before concluding that OSM's decision on reconsideration, issued eight months after its original decision, had been made within a reasonable time. 999 F.2d at 1000-02. The Governor contends that a weighing of factors in the present case would lead to the conclusion that reconsideration should be undertaken here. He argues that, under Belville and Prieto, the vesting of rights in the Rancheria is not an absolute bar to reconsideration. While he appears to recognize that the timeliness of an agency's reconsideration decision has been a critical consideration in the cases challenging such decisions, including Belville, he does not specifically address the timeliness of the reconsideration request at issue in this case, a request which was made more than two years after the Area Director formally accepted title to the 11-acre tract.

Belville was not a case in which the plaintiff sought to compel OSM to reconsider a decision. Rather, OSM had already reconsidered a decision, and the plaintiff challenged its authority to do so. Not surprising, therefore, Belville dealt with the limitations on an agency's authority to reconsider a decision. The Governor points to nothing in Belville which indicates that, simply because an agency is not precluded from reconsidering a decision, it has an affirmative obligation to reconsider.

Moreover, Belville did not involve Indian trust lands. While Prieto did involve trust lands, the court in that case did not consider the QTA or Block. See n. 7. With respect to title questions where Indian lands are concerned, Block and Mottaz and their progeny have made it clear that, when the United States holds land in trust for Indians, it has taken upon itself solemn obligations and specific commitments to the Indian landowners with respect to that land. Thus, any Departmental decision to reconsider a completed trust acquisition is a decision to divest the United States of those obligations and commitments, clearly a decision which cannot be made lightly, if it can be made at all.

The Board finds nothing in Belville or Prieto to support a conclusion that reconsideration is warranted, much less required, in this case.

Before reaching any conclusion in this case, the Board must consider the judicial and administrative events which followed the Eighth Circuit's decision in South Dakota, *supra*, concerning a trust acquisition made for the Lower Brule Sioux Tribe.

On October 15, 1996, the Supreme Court vacated the judgment of the Eighth Circuit and remanded the case to that court "with instructions to vacate the judgment of the United States District Court for the District of South Dakota and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision." 117 S.Ct. 286 (1996).

On May 14, 1997, the Assistant Secretary - Indian Affairs published a notice in the Federal Register stating:

This notice implements the decision of the Supreme Court in remanding to the Department of the Interior the decision to acquire land in trust for the Lower Brule Sioux Tribe of Indians. In remanding the decision, the Supreme Court reopened the decision of the Secretary to acquire the land in trust. Therefore, as of December 24, 1996, when jurisdiction returned to the Department of the Interior, the land described below is no longer held in trust by the United States for the benefit of the Lower Brule Sioux Tribe.

* * * * *

* * * [T]he remand operates to take the land out of trust so that judicial review under the APA may be available when the Secretary makes a decision to accept or reject an application concerning the same parcels of land.

62 Fed. Reg. 26551-52 (May 14, 1997).

As indicated above, the Board asked the parties to discuss the relevance of this notice to the present appeal. All parties have complied with the Board's request.

The Area Director contends that the Lower Brule Sioux situation is distinguishable from this case because "in Lower Brule, litigation was initiated prior to land being taken into trust, i.e., before rights vested." Area Director's Brief at 2. Thus, he argues:

The Supreme Court's Lower Brule remand, and the subsequent Federal Register notice, simply rewind the litigation tape to the point in time when the lawsuit began, a time before title passed to the United States. The remand simply acknowledges, as it must, that the 1992 acquisition was made subject to contemporaneous litigation.

Id. at 19. The Rancheria agrees that the Lower Brule Sioux situation is distinguishable with respect to the stage at which a challenge to the trust acquisition was initiated. Both the Area Director and the Rancheria emphasize that, in this case, not only was the challenge initiated after the trust acquisition was completed, it was initiated more than two years later.

Appellant and the Governor contend that the position taken by the Area Director and the Rancheria in this case is inconsistent with the Government's position before the Supreme Court in South Dakota and as reflected in the subsequent Federal Register notice. The Governor also argues that, in remanding South Dakota to the Department, "the Court recognized that it ultimately had authority under the APA to order such reconsideration where, as in [South Dakota], the plaintiff did not seek to advance its own or another's title, and was challenging the constitutional and statutory validity of a decision to take property into trust." Governor's Reply Brief at 9.

In its petition for certiorari in South Dakota, the Government sought a remand with instructions, while at the same time taking the position that "[o]nce the property is actually conveyed to the United States, * * * a suit seeking to disturb title would be barred, because the [QTA] 'does not apply to trust or restricted Indian lands.'" Petition for Certiorari at 7. ^{9/} The Court granted the Government's request in a brief order, leaving unstated the authority under which it acted.

The source of the Court's authority, however, is not critical to the Board's determination of its own authority here. The language of the Court's order suggests that it was the action being taken by the Court which would remove the Lower Brule Sioux land from trust status. Certainly, Justice Scalia understood that the Court was being asked to "order[] the land acquisition undone." 117 S.Ct. at 288. It is clear from the May 14, 1997, Federal Register notice that the Department considered the remand itself, rather than any action taken by the Department, to have removed the Lower Brule Sioux land from trust status. See 62 Fed. Reg. 26551, quoted supra.

Thus, the Board does not view the events in South Dakota as evidence of any understanding on the part of either the Supreme Court or the Department that the Department itself has the authority to rescind a completed trust acquisition. To the contrary, if an inference can be drawn from these events, it is that the Department, at least, considered itself to lack such authority.

[1] In the absence of any explicit authority to reconsider a completed trust acquisition, the Board finds that it must determine its own authority here in accordance with the Federal policy reflected in the Indian lands exception to the QTA (whether or not the QTA applies per se to this proceeding). This is the same Federal policy which defines the Federal Government's responsibility for trust lands in general and which is based upon the "'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands." Mottaz, supra, 476 U.S. at 843 n.6. See also, e.g., Wildman, supra, 827 F.2d at 1309:

The 52.5 million acres held in trust by the United States for the Indians are the tribes' "single most important economic resource." F. Cohen, Handbook of Federal Indian Law (1982 ed.) 471. The interests held by the tribes as cestuis que trust are "a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation." Id. at 472. The land is the essential base of tribal culture, development, and society. Id. at 509. As trustee, the United States properly acts with the jealousy of a fiduciary to protect this base.

^{9/} The Board takes official notice of the petition for certiorari, which was made a part of the record in Village of Ruidoso, supra.

The Board is not a court of general jurisdiction and has only those authorities which have been delegated to it by the Secretary. Thus, its authorities with respect to Indian lands are not all-encompassing. It lacks, for instance, authority to determine the validity of title to Indian land and authority to rewrite a deed. Cherokee Nation v. Acting Muskogee Area Director, 29 IBIA 17 (1995); Leon v. Albuquerque Area Director, 23 IBIA 248 (1993), aff'd, Leon v. Babbitt, No. 93-664-M Civil (D.N.M. Apr. 18, 1994).

In light of the Federal policy discussed above and the Board's limited jurisdiction, the Board concludes that it lacks authority to order the divestiture of title to land held by the United States in trust for an Indian tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed for lack of jurisdiction. 10/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

10/ Appellant's requests for oral argument and evidentiary hearing are denied.