



INTERIOR BOARD OF INDIAN APPEALS

Ziebach County, South Dakota v. Aberdeen Area Director,  
Bureau of Indian Affairs

33 IBIA 239 (04/07/1999)



# United States Department of the Interior

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

ZIEBACH COUNTY, SOUTH DAKOTA, : Order Affirming Decision  
Appellant :  
 :  
v. :  
 : Docket No. IBIA 97-157-A  
ABERDEEN AREA DIRECTOR, :  
BUREAU OF INDIAN AFFAIRS, :  
Appellee : April 7, 1999

Appellant Ziebach County, South Dakota, seeks review of a June 20, 1997, decision issued by the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning an acquisition of land in trust for the Cheyenne River Sioux Tribe (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

The property at issue is described as the NE $\frac{1}{4}$  and SE $\frac{1}{4}$ , sec. 19, T. 12 N., R. 24 E., Black Hills Meridian, Ziebach County, South Dakota, containing 309.25 acres, more or less. According to Appellant, a fee patent on the SE $\frac{1}{4}$  was issued on May 7, 1920, to Lukas Held, purchaser of the allotted land of tribal member Many Brothers, and a fee patent on the NE $\frac{1}{4}$  was issued on October 5, 1923, to Allen West and Nancy West, heirs of tribal member Fred West. The Tribe currently owns both quarter sections in fee status.

On or about May 20, 1996, the Tribe applied to have the lands acquired in trust by the United States. In accordance with the trust acquisition regulations in 25 C.F.R. Part 151, by letter dated November 12, 1996, the Superintendent, Cheyenne River Agency, BIA (Superintendent), notified Appellant and the Governor of South Dakota of the acquisition request and of their right to comment on the request. The Governor did not respond. The Ziebach County Auditor responded in a letter dated December 4, 1996, stating:

The Ziebach County Commissioners recommend that the above described property remain in fee status so as not to deplete the tax base of Ziebach County.

The 1996 (8 months) property taxes currently due on the property are approximately \$650.83. The 1997 taxes are also due in advance of trust acquisition.

There are no special assessments or zoning on this property.

Ziebach County does provide road maintenance in this area.

By letter dated April 4, 1997, the Superintendent informed Appellant, among others, of his intention to acquire the land in trust. In his decision, the Superintendent discussed each of the factors listed in 25 C.F.R. § 151.10, with the exception of subsection 151.10(h).

Appellant appealed to the Area Director, who affirmed the Superintendent's decision on June 20, 1997. For the most part, the Area Director relies on the Superintendent's decision. The Area Director notes that "[t]he lands were former Cheyenne River Sioux Tribal lands, established by Section 2 of the Act of March 2, 1889 (25 Stat. 888)," and are located within the Tribe's approved consolidation area.

The Tribe filed an answer to Appellant's appeal to the Area Director. The answer was dated July 3, 1997, and was received by the Area Director on July 7, 1997. There is no indication in the record that the Area Director responded to the Tribe's answer.

Appellant appealed to the Board. On September 23, 1997, the Board stayed briefing in this matter pending a final decision in Village of Ruidoso, New Mexico v. Albuquerque Area Director. See 31 IBIA 143 (1997). Following the issuance of a final decision in Ruidoso, 32 IBIA 130 (1998), the stay was lifted, and the briefing schedule was reinstated. Only Appellant and the Tribe filed briefs.

The question of whether or not to acquire land in trust is committed to the discretion of BIA. On appeal,

[t]he Board does not substitute its judgment for BIA's in decisions based upon the exercise of discretion. Rather, the Board reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." [City of Eagle Butte, South Dakota v. Aberdeen Area Director,] 17 IBIA [192,] 196; 96 I.D. [328,] 330 [1989].

City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999), appeal filed, City of Lincoln City v. U.S. Department of the Interior, No. CV 99-330 AS (D. Ore. filed Mar. 10, 1999). See also McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997); Ruidoso, 32 IBIA at 103-04. An appellant seeking to challenge a discretionary BIA decision bears the burden of proving that BIA did not properly exercise its discretion. See, e.g., Ketcher v. Acting Muskogee Area Director, 33 IBIA 166, 167 (1999); May v. Acting Phoenix Area Director, 33 IBIA 125, 130 (1999); Lincoln City, 33 IBIA at 104.

Appellant argues that BIA abused its discretion in applying the factors listed in 25 C.F.R. § 151.10 in this case. Appellant first contends that the Tribe failed to show a need for the land as is required by 25 C.F.R. § 151.10(b). 1/ It argues:

[The] Tribe already owns significant tracts of land which are held in trust; and, it has lands which are in and adjacent to the Eagle Butte, South Dakota, community that would be far more suitable for a health care facility than the land in issue in this appeal. The specific “need” for this property to be placed in trust for a health care facility is therefore non-existent. \* \* \* [T]he total acreage of such property (320 acres or 1/2 sq. mile) is much too large for a health care facility to service approximately 5,500 tribal members. Therefore, placement of all such acreage into trust for a health care facility goes beyond any alleged ‘need’ and is excessive.

Opening Brief at 3-4.

In his decision, the Superintendent found that the Tribe had made an adequate showing of its need for this property to be acquired in trust. On appeal, the Tribe supports the Superintendent’s decision, stating at pages 7-8 of its answer brief :

The land will be the site of an updated ambulance headquarters facility, a comprehensive medical complex, and some residential housing. 2/ The Tribe and the Indian Health Service [have] determined that its present medical facilities are inadequate to meet the reservation’s modern medical needs. Further, the need for this particular area of land is great. The land is large enough to accommodate both the medical complex and the ambulance headquarters as well as any additional growth that may be needed to keep pace with the Tribe’s future medical needs. In addition, the land is centrally located within the Reservation and is near Eagle Butte--a population and trade center and the location of numerous Tribal government facilities and community service organizations. Perhaps most importantly, the land is located approximately one mile from U.S. Highway 212, two miles from State Highway 63, and lies adjacent to a small airstrip. Thus, the location of the land and its high accessibility makes it an ideal site for a medical complex.

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1/ Appellant identifies subsection 151.10(a) as addressing the need for the land. That subsection deals with statutory authority for the acquisition. The Board assumes that Appellant meant to reference subsection (b), which requires BIA to consider “[t]he need of \* \* \* the tribe for additional land.”

2/ At page 11 of its answer brief, the Tribe states that the housing will be for the families of hospital staff.

Appellant has shown that it does not agree with the choice of this particular land for the Tribe's medical complex. Such disagreement, however, does not prove that BIA failed to consider the trust acquisition request under 25 C.F.R. § 151.10(b).

Appellant next argues:

No need exists for a health care facility to be placed in trust by the Federal government as state law provides under SDCL 10-4-9.3 that any “[p]roperty owned by any corporation, organization or society and used primarily for human health care and health care related purposes is exempt from taxation.” Therefore, no financial burdens from county taxation will be placed upon the tribal health facility by keeping the whole property out of trust status.

Opening Brief at 4.

Appellant did not provide a copy of the statute it cites. Nor did it cite any state administrative or judicial precedent supporting its interpretation of the statute in light of the facts of this case.

The Board found a copy of the statute on the Internet at [www.lexislawpublishing.com](http://www.lexislawpublishing.com). As set out there, the entire section provides:

Property owned by any corporation, organization or society and used primarily for human health care and health care related purposes is exempt from taxation. Such corporation, organization or society must be nonprofit and recognized as an exempt organization under section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1986, and may not have any of its assets available to any private interest. Such property may be a hospital, sanitarium, orphanage, mental health center or adjustment training center regulated under chapter 27A-5, asylum, home, resort, congregate housing or camp. Congregate housing is health care related if it is an assisted, independent group-living environment operated by a health care facility licensed under chapter 34-12 which offers residential accommodations and supporting services primarily for persons at least sixty-two years of age or disabled as defined under chapter 10-6A. Supporting services must include the ability to provide health care and must include a food service which provides a balanced nutrition program. Such health care facility must admit all persons for treatment consistent with the facility's ability to provide medical services required by the patient until such facility is filled to its ordinary capacity and must conform to all regulations of and permit inspections by the South Dakota Department of Health.

Appellant's point in this argument is not immediately clear. First, it is not apparent if Appellant is alleging that BIA improperly considered one of the factors in 25 C.F.R. § 151.10. Although subsection 151.10(b) relates to the “need” for land, it requires consideration of “[t]he

need of \* \* \* the tribe for additional land,” and does not appear relevant to Appellant’s particular argument. No other subsection appears applicable.

Second, the argument appears to assume that the sole reason a Tribe would have for wanting land placed into trust is to avoid state and/or local taxation. As both the Superintendent and the Tribe note, however, “[t]rust status may also help the Tribe qualify for Federal health program funds.” Tribe’s Answer Brief at 11. See also Superintendent’s Apr. 4, 1997, Decision at 1. Trust status may also ensure that the land remains in tribal ownership. Tribe’s Answer Brief at 14-15.

Third, the argument appears to contradict another argument Appellant makes further down on the same page of its opening brief. In this second argument, Appellant contends that “the impact of removing such above described land from the tax rolls to Ziebach County would be great.” Opening Brief at 4. Appellant lists road maintenance, snow removal, police protection, welfare assistance, agricultural and residential extension services, community health services, schools, and various other services to the public as examples of services that would be affected by the loss of tax revenue. This second argument appears to be addressed to 25 C.F.R. § 151.10(e), which requires BIA to consider “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.”

The only logical reconciliation of these two arguments which the Board can deduce is that Appellant believes that only some of the property which the Tribe seeks to have acquired in trust would fall within the parameters of the State statute exempting health care facilities from taxation. This interpretation of the two arguments appears consistent with Appellant’s earlier contention that placing the entire tract into trust would be “excessive.” If only some of the property were tax exempt, then there would be tax revenue from the remainder of the property, if it were not held in trust.

In his decision, the Superintendent found that the total projected tax loss to Appellant if all of this property was acquired in trust would be \$975.51 per year. Appellant has not disputed this figure, nor has it provided information about what it believes would be its tax loss if part of the property was exempt from taxation under State law while the rest remained taxable. The Superintendent noted that the loss of \$975.51 per year in tax revenue would be offset by BIA and the Tribe providing certain identified services which Appellant now provides. In its answer brief, the Tribe agrees that it will provide police protection and some road maintenance services and that BIA will provide education, additional road maintenance, and child welfare programs.

The Board finds that Appellant has shown that it disagrees with BIA’s analysis of the impact of removing this property from its tax rolls, but finds that it has not shown that BIA either failed to consider that impact or erred in its analysis.

Appellant argues that BIA erred in “determin[ing] that no jurisdictional problems would be created by the property being placed in trust” and “that no potential conflict exists in land

use.” Opening Brief at 6. Appellant cites both civil regulation and criminal jurisdiction as potential problem areas. This argument appears to be addressed to 25 C.F.R. § 151.10(f), which requires that BIA consider “[j]urisdictional problems and potential conflicts of land use which may arise” from a trust acquisition.

The Superintendent stated at page 2 of his decision:

We do not anticipate jurisdictional problems as the tract is located within the established exterior boundaries of the Cheyenne River Sioux reservation. For the purpose of civil and criminal jurisdiction, the tract will be identical to any other tract of land held in trust for the tribe within the boundaries of the reservation.

Appellant’s argument again shows that it disagrees with BIA’s determination, but it does not show that BIA failed to consider this factor, or erred in its consideration.

Appellant contends that the Area Director erred in failing to verify whether the Tribe had provided the information necessary to allow compliance with Federal environmental and hazardous substance statutes and regulations. This argument is addressed to 25 C.F.R. § 151.10(h), which requires that BIA consider the extent to which an applicant has provided such information.

The Superintendent’s decision did not discuss subsection 151.10(h). The only copy of the Tribe’s environmental assessment for this proposed acquisition which is included in the administrative record is an attachment to the Tribe’s answer before the Area Director. The Tribe incorporated this document by reference in its answer brief to the Board. <sup>3/</sup>

Appellant does not argue that the Tribe’s assessment failed to provide the information required under 25 C.F.R. § 151.10(h). In the absence of any challenge to the adequacy of the assessment, the Board finds that Appellant has failed to show error in the Area Director’s decision.

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<sup>3/</sup> In footnote 2, page 7, of its opening brief, Appellant contends that the Tribe’s answer to the Area Director cannot be considered in this appeal because it was filed after the Area Director issued her decision. Even if the Tribe had not incorporated the assessment into its answer brief to the Board, the Board would not have accepted Appellant’s argument. The Area Director issued a premature decision because she failed to allow time for the filing of answers, as is required by 25 C.F.R. § 2.11(c). The Board has repeatedly reminded this Area Office not to issue premature decisions. See, e.g., Laducer-Bercier v. Aberdeen Area Director, 32 IBIA 104 (1998); Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, 28 IBIA 288 (1995); Scott v. Acting Aberdeen Area Director, 25 IBIA 115 (1994); Meeks v. Aberdeen Area Director, 23 IBIA 200 (1993); Jerome v. Acting Aberdeen Area Director, 23 IBIA 137 (1992); Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Aberdeen Area Director's June 20, 1997, decision is affirmed. 4/

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge

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4/ All arguments not specifically addressed were considered and rejected.