



INTERIOR BOARD OF INDIAN APPEALS

Town of Charlestown, Rhode Island and
Governor, State of Rhode Island and Providence Plantations
v. Eastern Area Director, Bureau of Indian Affairs

35 IBIA 93 (06/29/2000)

Judicial review of this decision:

Result upheld, *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003),
affirmed, 497 F.3d 15 (1st Cir. 2007) (en banc), reversed, *Carcieri v.*
Salazar, 555 U.S. 379 (2009)



United States Department of the Interior

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

TOWN OF CHARLESTOWN, RHODE ISLAND
and
GOVERNOR, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-88-A and 98-89-A

Decided June 29, 2000

Appeal from a decision to take land into trust for the Narragansett Indian Tribe of Rhode Island.

Affirmed.

1. Indians: Generally--Statutory Construction: Generally--Statutory Construction: Indians

The interpretation of a statute settling Indian land claims is controlled by the language of the particular statute concerned.

APPEARANCES: James E. Purcell, Esq., Normand G. Benoit, Esq., and Eugene G. Bernardo II, Esq., Providence, Rhode Island, for the Governor; Bruce N. Goodsell, Esq., for the Town; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director; John F. Killoy, Jr., Wakefield, Rhode Island, and Matthew S. Jaffe, Esq., Washington, D.C., for the Narragansett Indian Tribe; Kevin W. Meisner, Esq., Uncasville, Connecticut, for amicus curiae Mohegan Tribe of Indians of Connecticut. 1/

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Town of Charlestown, Rhode Island (Town), and Governor, State of Rhode Island and Providence Plantations (Governor), seek review of a March 6, 1998, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), deciding

1/ The Mohegan Tribe of Indians of Connecticut was granted amicus curiae status, but chose not to file a brief.

to take Assessor's Plat 117, Lot 119, located in Charlestown, Rhode Island, into trust status for the Narragansett Indian Tribe of Rhode Island (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The Board previously addressed a trust land acquisition dispute between the Town and the Tribe in Town of Charlestown, Rhode Island v. Eastern Area Director (Charlestown I), 18 IBIA 67 (1989). It repeats here part of the background discussion from Charlestown I.

In January 1978, the tribe filed two lawsuits in the United States District Court for the District of Rhode Island concerning its claim to approximately 3,200 acres of public and private land within the boundaries of the Town. A settlement was reached by the parties on February 28, 1978. In implementation of the settlement agreement, both Congress and the Rhode Island Legislature enacted legislation. Rhode Island Indian Claims Settlement Act of 1978, as amended, 25 U.S.C. §§ 1701-1716 * * * (Settlement Act [or Rhode Island Settlement Act]); Narragansett Indian Land Management Corporation Act of 1979, as amended, R.I. Gen. Laws §§ 37-18-1 through 37-18-15. Pursuant to the settlement agreement and the implementing Federal and State legislation, approximately 900 acres of State-owned land and approximately 900 acres of privately-owned land [settlement lands] were to be transferred to the Narragansett Indian Land Management Corporation (corporation), which was to be chartered by the State.

The tribe received Federal acknowledgement in 1983. By notice published in the Federal Register on February 10, 1983, the Assistant Secretary - Indian Affairs issued a determination pursuant to 25 CFR Part 83 that the tribe existed as an Indian tribe. 48 FR 6177 (Feb. 10, 1983). In 1985, the Rhode Island Legislature enacted legislation providing for expiration of the corporation and transfer of settlement lands to the Federally acknowledged tribe. P.L. 1985, ch. 386, R.I. Gen. Laws §§ 37-18-12 through 37-18-14.

18 IBIA at 68.

In Charlestown I, the Town objected to trust acquisition of the settlement lands. The Board affirmed the decision to acquire the lands in trust because it found "nothing in the Settlement Act that precludes trust acquisition of the settlement lands or imposes any requirements for their acquisition beyond those contained in 25 CFR Part 151." Id. at 71.

As relevant to this appeal, by application dated July 17, 1997, the Tribe requested that BIA take a parcel of land containing approximately 32 acres into trust for it. This parcel was not part of the settlement lands, but rather had been acquired from private developers in 1991 by the Narragansett Indian Wetuomuck Housing Authority (NIWHA). NIWHA made the purchase with funds from the Department of Housing and Urban Development (HUD) for the purpose of providing low-income housing. NIWHA transferred title to the parcel to the Tribe, and the Tribe leased the parcel back to NIWHA. The parcel is separated by a road from other trust lands owned by the Tribe. The application for trust acquisition stated at pages 4-5:

NIWHA specifically purchased this parcel of land because it was far more suitable for Tribal housing than the Tribe's existing trust lands. As stated by NIWHA to HUD, some of the Tribe's trust lands are unsuitable for development as they are located over the Tribe's sole-source aquifer, are wetlands associated with Indian Cedar Swamp, Schoolhouse Pond and Deep Pond, or are listed on, or eligible for listing on, the National Register of Historic Places. Further, only 225 acres of the Tribe's Settlement Lands are available for development. [2/]

This parcel of land, however, is quite suitable for development. In fact, the prior owners sought and obtained clearance from various State and local entities to construct a residential subdivision on the property.

Moreover, in order for the Tribe and NIWHA to obtain funding for the development of low-income housing for Tribal members, HUD must be satisfied that there exists an imminent need to "remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income . . ." See, United States Housing Act of 1937, 42 U.S.C. Sec. 1401 and 1437; and the Indian Housing Act of 1988, 42 U.S.C. Sec. 1437(a)(a) [sic; probably should be sec. 1437aa].

Despite opposition from both the Town and the Governor, by letter dated March 6, 1998, the Area Director notified the Tribe of his intent to take the parcel into trust.

2/ Section 12 of the settlement agreement required that all of the State-contributed settlement lands "be permanently held for conservation purposes." Section 14 required the development of a land use plan for all of the settlement lands under which "[a]t least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses."

Appellants appealed separately to the Board, but filed a joint opening brief. The Board granted a request from the Area Director to supplement the administrative record, and authorized Appellants to file a supplemental opening brief. Appellants did so. The Area Director and the Tribe filed separate answer briefs.

After the conclusion of briefing, Appellants submitted a copy of Connecticut v. Babbitt, 26 F.Supp.2d 397 (D. Conn. 1998). In their transmittal letter, they made additional arguments based on Connecticut v. Babbitt and requested a stay of this appeal pending the issuance of a decision in Connecticut v. Babbitt by the United States Court of Appeals for the Second Circuit. Both the Area Director and the Tribe responded to Appellants' new arguments and opposed a stay, contending that Connecticut v. Babbitt was not dispositive here. Appellants repeated their request for a stay. The Board denied Appellants' request.

Discussion and Conclusions

Decisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based on an exercise of discretion. Rather, it 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). See also McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-39 (1999); City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 103-04 (1999). In regard to BIA discretionary decisions, the appellant bears the burden of proving that the Area Director did not properly exercise his discretion. Lincoln City, 33 IBIA at 104, and cases cited therein.

However, the Board has full authority to review any legal challenges that are raised in a trust acquisition case. In regard to BIA's legal determinations, the appellant bears the burden of proving that the Area Director's decision was in error or not supported by substantial evidence. Id.

Appellants here challenge several legal conclusions which the Area Director reached as well as his exercise of discretion. The Board first addresses those arguments that clearly challenge the Area Director's decision on legal grounds.

Appellants argue that the acquisition of land in trust without the consent of the State is unconstitutional under Article I, sec. 8, cl. 17, of the United States Constitution and under the Eleventh Amendment. The Board interprets this argument as seeking a determination that 25 U.S.C. § 465, the statutory authority for this trust acquisition, is unconstitutional.

The Board has stated on many occasions that, as part of the Executive Branch of Government, it lacks authority to declare an act of Congress unconstitutional. See, e.g., Lincoln City, 33 IBIA at 105; Village of Ruidoso, New Mexico v. Albuquerque Area Director, 32 IBIA 130, 133 (1998). The Board lacks jurisdiction to address this argument.

Appellants contend that the Secretary lacks authority to take any land into trust for the Tribe other than the 1,800 acres which were authorized in the Settlement Act. They argue:

[The Settlement Act] precludes a finding that land outside of the Settlement Lands, (or lands, as in this instance, which were once identified by the Tribe as potential private settlement lands), may be deemed “Indian country” or may be intended to become unrestricted sovereign Indian trust land. The Settlement Act fully and completely resolved the Tribe’s land claims and established the boundary of the Tribe’s Indian country in Rhode Island. In other words, it has always been the position of [Appellants] that [25 U.S.C. § 1705(a)(3) 3/] extinguished all of the Tribe’s claims and limited the boundaries of its Indian country to the Settlement Lands themselves. It was Congress’ plain intent in the Settlement Act to set definite limits to the Tribe’s Indian country, and to extinguish any claim to greater boundaries. Such Congressional intent must prevail, barring a specific act of Congress expanding such boundaries.

Appellants’ Opening Brief at 10. 4/

Appellants contend that their position is supported by Connecticut v. Babbitt, *supra*. The question in Connecticut v. Babbitt was whether the Connecticut Indian Land Claims Settlement Act of 1983 (Connecticut Settlement Act), Pub. L. No. 98-134, 97 Stat. 851, 25 U.S.C. §§ 1751-1760, allowed the Secretary to acquire lands in trust for the Mashantucket Pequot Tribe beyond those authorized as settlement lands in the Connecticut Settlement Act.

3/ This provision is quoted in text below.

4/ The State of Rhode Island made the same argument in Narragansett Indian Tribe v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996). The court specifically declined to address the argument, stating:

“The importance of this dispute over whether the Settlement Act terminates the Tribe’s ability to increase the territory over which it possesses sovereignty is manifest. * * * Nonetheless, we leave this question * * * for another day. * * * [W]hile it is at heart a question of statutory interpretation, we nonetheless prefer to address the Settlement Act question at a time when the parties, and the court below, have addressed it more fully.”
89 F.3d at 914.

The court began its discussion in Connecticut v. Babbitt by noting:

Congress has enacted numerous settlement acts. See 25 U.S.C. § 1701 et seq. One of them contains a provision expressly precluding the federal government from relying on any other authority to acquire land in trust for the benefit of the Indians. See Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(e) [5/]. Another contains a provision expressly preserving the federal government's authority to take land into trust for the benefit of the Indians under [25 U.S.C.] § 465. See Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. § 1773c [6/]. The [Connecticut] Settlement Act does not contain such an express provision one way or the other.

26 F.Supp.2d at 400. The court found that the question before it, like the question now before the Board, was “whether the area under the sovereignty of the Tribe can be expanded against the wishes of the State and the Towns without congressional approval.” Id.

The primary statutory provision at issue in Connecticut v. Babbitt was 25 U.S.C. § 1754(b)(8). That subsection provides:

Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

The court concluded that the phrase “acquired under this subsection” was ambiguous as to whether it referred to any lands acquired outside the settlement lands or whether it referred

5/ 25 U.S.C. § 1724(e) provides in pertinent part: “Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.”

6/ 25 U.S.C. § 1773c provides:

“In accepting lands in trust (other than those described in section 1773b of this title [the settlement lands]), for the Puyallup Tribe or its members, the Secretary shall exercise the authority provided him in [25 U.S.C. § 465], and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations, as those standards now exist or as they may be amended in the future.”

only to lands that were both outside the settlement lands and acquired with Federal funds provided pursuant to the Connecticut Settlement Act. The court therefore looked to extrinsic aids to statutory construction. It ultimately held that the legislative history supported an interpretation of the subsection and the Connecticut Settlement Act as prohibiting the trust acquisition of any lands except the settlement lands.

Appellants urge the Board to reach the same conclusion as to 25 U.S.C. § 1705(a)(3). Subsection 1705(a) provides in pertinent part:

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title [concerning the enactment of specified State legislation], he shall publish such findings in the Federal Register and upon such publication—

* * * * *

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presented or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

[1] Although it finds several similarities between the Connecticut and the Rhode Island Settlement Acts, the Board concludes that the specific language used in 25 U.S.C. § 1754(b)(8) and 25 U.S.C. § 1705(a)(3) is too dissimilar to be directly analogous. The Board concludes that Connecticut v. Babbitt, while instructive as to the type of individualized statutory interpretation necessary in the present appeal, is not dispositive here. It therefore considers Appellants' substantive argument.

Appellants contend that 25 U.S.C. § 1705(a)(3) did two things: (1) it resolved, or extinguished, the Tribe's land claims, and (2) it limited to the settlement lands the boundaries of the trust land which the Tribe could hold.

In making this argument, Appellants do not analyze the language of 25 U.S.C. § 1705(a)(3), or any other section of the Settlement Act. Nor do they refer to the legislative history. Instead, they discuss the background of the enactment of the Settlement Act. They

assert that the agreement on which the Settlement Act was based was intended “to end the dispute and resolve not only the Tribe’s land claims, but also establish the boundaries of the Tribe’s new settlement land in Rhode Island.” Appellants’ Opening Brief at 12. They further argue that the Tribe “agreed to the extinguishment of any further right to claim lands within Rhode Island as part of their original ‘Indian country.’” Id. The Board agrees with these statements, which are merely different ways of saying that the Settlement Act extinguished the Tribe’s aboriginal land claims and established the settlement lands.

However, Appellants go a step further and contend that it “was Congress’ plain intent in the Settlement Act to set definite limits to the Tribe’s Indian country, and to extinguish any claim to greater boundaries.” Id. at 10. Appellants here argue that Congress prohibited the Tribe from acquiring any lands in trust other than the settlement lands.

Both the Area Director and the Tribe disagree with this aspect of Appellants’ interpretation of subsection 1705(a)(3). They contend that the subsection merely extinguished the Tribe’s right to sue for additional lands under a claim of aboriginal title.

The Board has carefully read subsection 1705(a)(3) in light of Appellants’ arguments. It finds that the subsection explicitly refers to the extinguishment of aboriginal title and of any claims arising under aboriginal title. However, the subsection does not in any way refer to the acquisition of lands other than the settlement lands. The Board finds no support in the language of the subsection for Appellants’ reading of it as precluding the trust acquisition of other lands for the Tribe in the event the Tribe were to be Federally acknowledged.

As mentioned above, Appellants cite nothing from the legislative history of the Settlement Act in support of their position. The section of the bill which became 25 U.S.C. § 1705 is discussed in H.R. Rep. No. 1453, 95th Cong., 2d Sess. (House Report), reprinted in 1978 U.S. Code Cong. and Admin. News 1948, 1955:

Section 6 provides for the extinguishment of (1) aboriginal title to land and (2) all claims based upon any interest in or right involving such lands (including but not limited to claims for trespass or claims for use and occupancy), on behalf of the Narragansett Indians, regardless of where such land is located * * *.

See also, Id. at 1951. Like the statute itself, the House Report fails to mention any intent to place restrictions on the Tribe’s ability to acquire lands outside the settlement lands or to preclude the trust acquisition of such lands if the Tribe were to be Federally acknowledged. In its review of the legislative history, the Board found nothing which suggested that Congress intended to impose such limitations.

The settlement agreement which preceded enactment of the State and Federal implementing legislation is included as an appendix to the House Report. It states in section 15:

[T]he plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this [settlement agreement], but will have the same right to petition for such recognition and services as other groups.

One of the services provided to recognized tribes is the holding of land in trust. Another service, unless otherwise restricted, is the consideration of requests to acquire land in trust. Section 15 of the settlement agreement would have been a logical place for the parties to set out any restrictions which they intended to place on the Secretary's authority to acquire additional land in trust for the Tribe. The fact that no such restrictions appear here--or elsewhere in the settlement agreement--suggests that none were intended.

Based upon the language of the statute and its legislative history, the Board concludes that 25 U.S.C. § 1705(a)(3) does not prohibit the Secretary from acquiring lands other than the settlement lands in trust for the Tribe.

Citing Village of Ruidoso, New Mexico v. Albuquerque Area Director, 32 IBIA 130 (1998), Appellants argue that the Area Director erred by failing to consider the possible use of this parcel for gaming purposes under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2121. This argument appears to have two aspects, one of which challenges the decision on legal grounds, while the other challenges the Area Director's exercise of discretion. The Board addresses these aspects of the argument separately.

Appellants note that the Tribe has attempted unsuccessfully to develop a gaming operation in Rhode Island, and contend that BIA "must be constructively presumed to be aware of" the Tribe's activities in furtherance of its interest in having a gaming operation. Opening Brief at 22. They argue that BIA must always consider the possibility of gaming in any trust acquisition "unless the trust taking specifically precludes a future gaming use." Id. at 23. Appellants contend that 25 C.F.R. § 1.4(b) authorizes such a restriction.

25 C.F.R. § 1.4(b) provides in pertinent part:

The Secretary * * * may in specific cases or in specific geographical areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section [i.e., those "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water

rights”] as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property.

The Area Director requested an interpretation of 25 C.F.R. § 1.4(b) from the Solicitor’s Office when the Governor raised this argument before him. In a November 5, 1997, memorandum, the Southeast Regional Solicitor advised the Area Director that the regulation could not be applied as the Governor argued. The Regional Solicitor stated:

This regulation is narrowly written. It does not purport to effect changes in the fundamental jurisdictional status of the Indian land. For example, the Bureau may not presume to make Indian land subject to state civil and criminal jurisdiction. This is a prerogative that has been reserved to Congress, and it may not be usurped administratively. See 25 U.S.C. § 1321 et seq. (consent of the United States is granted to the states to assert criminal and civil jurisdiction over Indian lands upon the consent of the affected tribe); see also Kennerly v. District Court of Montana, 400 U.S. 423, 424 n.1 (1971), where the Court held that even a tribe may not grant civil jurisdiction to a state in a manner that has not been authorized by Congress.

Therefore, we must conclude that the Bureau does not possess authority under 25 CFR 1.4(b) to make the lands now proposed for trust acquisition subject to the civil and criminal jurisdiction of the State of Rhode Island. The most that the Bureau can do, after consultation with the tribe, is to apply certain land use laws and regulations to tribal lands. It is important to note that if the Bureau acts upon the discretionary authority contained in 25 CFR 1.4(b), the laws and regulations are not applicable by virtue of their own force, and we entertain serious doubts about the ability of the state or local government to enforce them. Rather, such laws and regulations would be enforceable by the tribe and the Bureau.

Regional Solicitor’s Nov. 5, 1997, Memorandum at 2.

This memorandum was included in the supplemental administrative record. Appellants had an opportunity to address the analysis in the memorandum in both their supplemental opening brief and in a reply brief. They did not do so. The Board finds that Appellants have failed to carry their burden of proving error in the legal interpretation of 25 C.F.R. § 1.4(b).

Furthermore, Appellants ignore the fact that 25 C.F.R. § 1.4(b) is discretionary. They have not even attempted to show that the Area Director did not properly exercise his discretion in declining to take any action under this regulation.

Appellants continue their Ruidoso argument by contending that the Area Director did not properly consider this trust acquisition application under the standard which the Board set out in Ruidoso. They assert that

there is a distinct possibility, considering the unlikely prospect that the housing project can or will ever be brought to fruition as it is presently proposed, [Z/] and with the failure of the * * * Tribe to achieve its gaming objective elsewhere in the state, that this parcel, if taken into trust free of the civil and criminal laws and jurisdiction of the State of Rhode Island * * * may well be selected for future IGRA gaming activities.

Appellants' Opening Brief at 22.

In Ruidoso, there was evidence that, despite its statements concerning how it intended to use the property it sought to acquire in trust, the tribe might actually have been considering using the property for gaming purposes. The Board held:

In order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property.

32 IBIA at 139. See also Lincoln City, 33 IBIA at 107.

The Board has held that mere speculation by a third party that a tribe might, at some future time, attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust. See, e.g., Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director, 34 IBIA 235, 238 (2000); Town of Ignacio, 34 IBIA at 41.

Appellants have not cited anything in this case which suggests that the Tribe intends to use this parcel for a purpose other than housing. Their speculations do not carry their burden of proving that the Area Director did not properly exercise his discretion by considering only the proposed use of this parcel which the Tribe articulated.

Z/ This suggestion is addressed further below.

Appellants raise two arguments based on the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465. They first argue that, before deciding whether to acquire this land in trust, the Area Director was required by 16 U.S.C. § 1456(c) to obtain a determination from the Rhode Island Coastal Resources Management Council (CRMC) that the Tribe’s proposed construction of a 50-unit housing development was consistent with CRMC’s coastal zone regulations. 8/ Appellants contend that because the Area Director did not obtain this determination, he violated 25 C.F.R. § 151.10(b), (c), and (f). 9/

The Board interprets this to be an argument that the Area Director did not properly exercise his discretion under 25 C.F.R. § 151.10(b), (c), and (f) because he did not prepare a Federal Consistency Determination for a 50-unit housing development before deciding to acquire this parcel in trust.

8/ 16 U.S.C. § 1456(c)(1)(C) provides:

“Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the state agency agree to a different schedule.”

9/ 25 C.F.R. § 151.10 provides in pertinent part:

“The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

* * * * *

“(b) The need of the * * * tribe for additional land;

“(c) The purposes for which the land will be used;

* * * * *

“(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 the land in trust status.

“(h) The extent to which the applicant has provided information that allows the Secretary to comply with [the National Environmental Policy Act and Departmental provisions relating to hazardous substances determinations].”

The Tribe responds that it “fully acknowledges that the development of its housing project must comply with the CZMA.” Tribe’s Answer Brief at 24. It contends, however, that the question before the Board is not whether the housing development comports with the coastal zone regulations, but “whether the BIA complied with the CZMA in its action to accept the land in trust for the Tribe.” Id. The Tribe continues in footnote 16: “[T]here is a significant difference between the act of accepting the land in trust and the future construction and occupancy of the homes.” The Tribe states that the CRMC “considered all relevant factors at a public hearing and determined that the act of taking the land in trust by the BIA did not violate the requirements of the CZMA.” Id.

Although they had an opportunity to do so by filing a reply brief, Appellants did not respond to or dispute the Tribe’s assertion that the appropriate State agency has determined that the trust acquisition of this land does not require a Federal Consistency Determination under the CZMA.

The Board agrees with the Tribe that there is a distinction between the trust acquisition and the ultimate use of the land. It finds that Appellants have failed to show that the Area Director erred in the exercise of his discretion under 25 C.F.R. § 151.10(b), (c), and (f) by not preparing a Federal Consistency Determination for the proposed housing project before deciding to acquire the parcel in trust.

Appellants continue their CZMA argument by contending that the Area Director violated 25 C.F.R. § 151.10(e), (f), (g), and possibly (h) because, without the Federal Consistency Determination required under the CZMA, “HUD approval and funding of a 50 unit development is seriously flawed.” Appellants’ Opening Brief at 8.

Although it is somewhat at a loss as to how to characterize this argument, the Board finds that the determinative factor here is that it does not have review authority over decisions made by HUD. If the land is ultimately used for the construction of less than 50 residential units, and if HUD believes that that different usage causes a problem for it, then the matter must be resolved between HUD and the Tribe. This argument is not, however, relevant to the question of whether the Area Director properly exercised his discretion in determining to acquire the land in trust.

Appellants contend that the Area Director erred because the Tribe’s trust acquisition application proposed a deed description that failed to provide for drainage easements held by the Town.

Citing Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. 349, 365 (D.R.I. 1995), the Tribe acknowledges that the “Town clearly has a deeded property interest

in the easement which is inalienable without its consent.” Tribe’s Answer Brief at 27. However, the Tribe notes that, in an August 22, 1996, letter from the President of the Town Council to the Area Director, the Town recognized that the Tribe’s plans for the property require re-engineering and relocation of the drainage easement.

The Area Director states: “The Bureau is always amenable to working with interested parties to ensure that their interests are protected. It is a certainty in this case that had the Town indicated its concern to the Bureau, the deed would have been redrafted. * * * [T]he Town of Charlestown is issued an open invitation to confer with the Bureau and [counsel] with regard to deed language.” Area Director’s Answer Brief at 8.

Again, Appellants did not respond to or dispute these statements.

The Board finds that, whether this argument is characterized as a legal challenge to the trust acquisition decision or as an attack on the Area Director’s exercise of his discretion, Appellants have failed to show that the Area Director erred in his consideration of the trust acquisition application because of the wording of the deed in regard to the Town’s drainage easement.

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 Area Director’s March 6, 1998, decision is affirmed. 10/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

10/ All motions not previously addressed are denied.