INTERIOR BOARD OF INDIAN APPEALS

Confederated Salish and Kootenai Tribes of the Flathead Reservation
v. Northwest Regional Director, Bureau of Indian Affairs

35 IBIA 226 (11/09/2000)

Judicial review of this decision:

Summary judgment for defendant, *Confederated Salish and Kootenai Tribes v. Norton*, Case No. CV 01-018-M-DWM (D. Mont. Mar. 29, 2002)
Affirmed, No. 02-35491 (9th Cir. Sept. 15, 2003)

United States Department of the Interior

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

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
v.
NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 00-20-A Decided November 9, 2000

Appeal from a decision concerning a trust acquisition request made by the Confederated Salish and Kootenai Tribes of the Flathead Nation.

Affirmed.

1. Indians: Lands: Trust Acquisitions

Trust acquisitions for the Confederated Salish and Kootenai Tribes under the Act of July 18, 1968, Pub. L. No. 90-402, 82 Stat. 356, are "mandated by legislation" within the meaning of 25 C.F.R. § 151.10 only when the lands concerned are purchased with the proceeds from sales of tribal land under the Act.

APPEARANCES: John B. Carter, Esq., and Robert L. Hunter, Jr., Esq., Pablo, Montana, for the Confederated Salish and Kootenai Tribes; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Regional Director; Lake County, Montana, Board of Commissioners, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from an October 25, 1999, decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the request of the Confederated Salish and Kootenai Tribes of the Flathead Nation (Tribes) to have a 40-acre tract within the boundaries of the Flathead Reservation taken into trust for the Tribes. For the reasons discussed below, the Board affirms the Regional Director's decision.

Background

This appeal concerns the interpretation of the Act of July 18, 1968, Pub. L. No. 90-402, 82 Stat. 356 (1968 Act or the Act). The Act provides:

> [U]pon request of the [Tribes], acting through their governing body, the Secretary of the Interior is authorized to dispose of the following described tribal lands within the exterior boundaries of the [Flathead R]eservation by sale at not less than fair market value or by exchange: * * *
>
> [List of tracts omitted.]
>
> The net proceeds from the sale or exchange of lands pursuant to this section shall be used to acquire within a reasonable time additional lands within the reservation boundaries in accordance with section 2 of this Act.
>
> SEC. 2. Upon request of the [Tribes], the Secretary of the Interior is authorized to acquire Indian- or non-Indian-owned lands within the reservation boundaries for such tribes, and such lands may be held for tribal use or for sale to tribal members. Title to lands acquired pursuant to this authority shall be taken in the name of the United States in trust for the tribes or the tribal member to whom the land is sold.

In a resolution enacted on January 12, 1999, the Tribes' governing body accepted the donation of a 40-acre tract within the Flathead Reservation and requested that the tract be taken into trust. On June 2, 1999, the Tribal Chairman wrote to the Superintendent, Flathead Agency, BIA, asking that the requested trust acquisition be made under section 2 of the 1968 Act. The Chairman stated:

> Section 2 of the Act authorizes the Secretary of [the] Interior to take Reservation lands directly into trust title for the Tribes upon their request and to avoid the procedural requirements of [25 C.F.R. Part 151] for discretionary fee-to-trust transfers. The Flathead Act is a mandatory Act and is therefore free from those requirements. See Todd County, South Dakota v. Aberdeen Area Director, [33 IBIA 110 (1999)]. Please consider this the request of the Tribes to take the title to the referenced land into trust title in the name of the [Tribes] under the direct authority of the mandatory trust statute specific to the Flathead Nation.

In an undated decision received by the Tribes on July 9, 1999, the Superintendent stated that he was approving the Tribes' January 12, 1999, request. He discussed the proposed acquisition under the criteria in 25 C.F.R. § 151.10, thus impliedly rejecting the Chairman's interpretation of the 1968 Act as mandatory. 1/

1/ However, the Superintendent did not comply with the other requirement in 25 C.F.R. § 151.10 concerning non-mandatory acquisitions, i.e., the requirement to give notice of a trust

The Tribes appealed the Superintendent's decision to the Regional Director, contending that, because the requested trust acquisition was mandated by the 1968 Act, the Superintendent erred in analyzing the acquisition under the criteria in 25 C.F.R. § 151.10.

The Regional Director issued a decision in the appeal on October 25, 1999, in which he held that trust acquisition of the 40-acre tract was not mandated by the 1968 Act and that the Superintendent was therefore correct in analyzing the acquisition under the criteria in 25 C.F.R. § 151.10. The Regional Director vacated the Superintendent's decision, however, because of his failure to provide the notice required by that regulation.

In a lengthy discussion of the 1968 Act, the Regional Director first stated that, although the Act might be read narrowly (i.e., as authorizing the trust acquisition of lands only when those lands were purchased with funds derived from the sales authorized in section 1), the Department has adopted a broader interpretation, under which section 2 has been deemed to authorize trust acquisition of other lands as well. 2/ He continued:

> Because the 1968 Act contemplates two types of acquisitions, each must be separately analyzed to see if it is mandatory. The first type--acquisitions that will occur as a result of the disposal of lands--is mandatory. The Act states that all proceeds from the sale or exchange of the properties identified in Section 1

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fn. 1 (continued)
acquisition request to state and local governments.

25 U.S.C. § 151.10 provides:

"Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. * * * 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:

"[Criteria omitted]."

2/ For this interpretation, the Regional Director cited a Dec. 30, 1968, memorandum from the Billings Field Solicitor to the Billings Area Director, which stated in part:

"It would appear from the reading of the Senate and House Reports that the net proceeds from the sale or exchange of the lands in Section 1 must be used to acquire additional lands within the reservation boundaries in accordance with Section 2 of the Act and that the funds cannot be used for any other purpose.

"It also seems clear from the aforementioned reports that Section 2 of the subject Act is not restricted to the funds obtained from the sale of lands described in Section 1 but that any available funds may be used by the Tribes * * * to acquire * * * lands within the reservation boundaries for the Tribes and that the lands may be held for tribal use or for sale to tribal members."

> "shall be used to acquire" additional land within the Reservation in accordance with Section 2 of the Act. The words "shall be used to acquire ... additional lands" make those acquisitions mandatory. The reference to Section 2 describes how these mandated acquisitions will be held and authorizes their conveyance to tribal members. This is consistent with the Field Solicitor's opinion.
>
> In contrast, the second type of acquisition is not mandatory. As noted by the Field Solicitor, Section 2 authorizes additional tribal acquisitions, using funds unrelated to the disposal of lands, and provides that this land can be conveyed to tribal members. This authority stands independent of Section 1 and no language in Section 2 suggests that these types of acquisitions are mandated. Rather, they are merely "authorized."
>
> The legislative history supports this analysis. See H.R. Rep. No. 1552, 90th Cong., 2d Sess. (1968); S. Rep. No. 1143, 90th Cong., 2d Sess. (1968). The purpose of the legislation, as introduced, was to allow disposal of isolated tracts and acquisition of other tracts in trust for tribal use or for resale to tribal members. As explained in the Senate Report, "[t]he tribes plan to sell or exchange these specific tracts and reinvest the proceeds in their land-acquisition program. Although the Indian Reorganization Act of June 18, 1934 [(IRA)], contains ample authority for the Secretary to acquire lands for the use and benefit of the tribes, the authority contained in the bill is necessary if the tribes are to be permitted to sell the scattered tracts presently owned by the tribes, or to resell any of the acquired lands to individual members." The original purpose appears limited to transactions related to the scattered tracts. How ever, as a result of changes suggested by the Department of the Interior, Section 2 was added. The Assistant Secretary explained the purpose of Section 2 in his letters to the Congressional Committees. "[S]ection 2 ... would clarify the intended provisions of the bill. While the [IRA] contains ample authority for the Secretary to acquire lands for the use and benefit of the tribes, the authority contained in the proposed section is necessary if the tribes are to be permitted to resell any of the acquired lands to individual members." This language is a strong indication that the primary purpose of Section 2 was to authorize acquisitions that could subsequently be sold to individual members. There is no indication, however, that the additional acquisition authority was intended to be mandatory.

Regional Director's Oct. 25, 1999, Decision at 3-4.

The Regional Director then addressed an argument made by the Tribes concerning similarities between the 1968 Act and the Act of Dec. 11, 1963, Pub. L. No. 88-196, 77 Stat.

349 (Rosebud Sioux Act), which the Board found to be mandatory in Todd County, South Dakota v. Aberdeen Area Director, supra. 3/ On this point, he stated:

> The Rosebud Sioux Act is similar to the 1968 Act, and the [Tribes] argue[] that the conclusion drawn by the [Board] with respect to the Rosebud Sioux Act should also apply to the 1968 Act. We agree that the two statutes are similar. Both statutes allow the tribe to dispose of scattered parcels of little value to it, and to use the proceeds to acquire additional land that will, in effect, replace the disposed of lands. Both statutes require these replacement tracts to be acquired in trust status. However, the 1968 Act goes farther. It not only addresses acquisitions that will occur as a result of the disposal of lands, in Section 2 it also authorizes other, unrelated acquisitions for the Tribes that may be resold to tribal members. In contrast, the Rosebud Sioux Act does not contain any general acquisition authority. All acquisitions under that statute occur through either the disposal (by sale or exchange), or the mortgage, of isolated tracts. It does not cover the acquisition of land using funds unrelated to isolated tracts.

3/ The Rosebud Sioux Act provides:

"[N]otwithstanding any other provision of law, upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to exchange or to sell, by public or by negotiated sale, the tribal interests in isolated tracts of land located in Tripp, Gregory, and Lyman Counties, South Dakota, and held by the United States in trust for the tribe: Provided, (1) That the Secretary of the Interior certifies that the tract is isolated in that it is so located or situated that it would be to the economic advantage of the tribe to sell or exchange the tract; (2) that the amount of exchange value received by the tribe is not less than the fair market value of the tribal trust land and is accepted by the tribe; (3) that any proceeds from the sale of land under this Act are used exclusively for the purchase of land on the reservation within land consolidation areas approved by the Secretary of the Interior; (4) that title to any land acquired for the tribe under this Act by purchase or exchange shall be taken in the name of the United States in trust for the tribe; (5) that if the lands in an exchange are not of equal value the difference in value may be paid in money; and (6) that if an enrolled member of the Rosebud Sioux Tribe acquires the tribal trust land, title may be taken in the name of the United States in trust.

"Sec. 2. Upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to mortgage tribal interests in isolated tracts of land, in lieu of selling or exchanging them, and the proceeds of the loan secured by the mortgage must be used exclusively for the acquisition of land on the reservation within land consolidation areas approved by the Secretary of the Interior, title to the land acquired being taken in the name of the United States in trust for the tribe."

> We consider our interpretation of the 1968 Act as consistent with the analysis employed by the [Board] in Todd County. To the extent the 1968 Act contains language and intent similar to the Rosebud Sioux Act, the acquisitions thereunder are mandatory. Thus, those acquisitions that are intended to be replacements for the disposal of parcels identified in Section 1 are mandated. Because the Rosebud Sioux Act does not contain any general acquisition authority like that authorized in Section 2 of the 1968 Act, the [Board's] decision did not consider whether that type of authority is mandatory, and provides little guidance on its interpretation. In fact, the [Board] expressly declined to rule whether other laws for other tribes--not including the 1968 Act--were also mandatory. Todd County, 33 IBIA at 118 n.3.

Id. at 4-5.

The Tribes appealed the Regional Director's decision to the Board, again contending that trust acquisition of the 40-acre tract is mandated by the 1968 Act. Briefs have been filed by the Tribes, the Regional Director, and the Lake County, Montana, Board of Commissioners.

Discussion and Conclusions

[1] The Tribes argue: (1) The plain language of the 1968 Act shows that all trust acquisitions under the Act are mandatory, (2) Todd County requires that the 1968 Act be construed as mandatory with respect to all trust acquisitions under the Act, (3) the Department of the Interior has previously interpreted the 1968 Act as mandatory and is precluded from changing its interpretation, and (4) under applicable rules of statutory construction, the 1968 Act must be interpreted as mandatory.

For their "plain language" argument, the Tribes depend in large part upon the presence of the word "shall" in the second sentence of section 2, concerning the manner in which title is to be taken. They reason that, "[w]hen the Tribes (or individual Indians) request the Secretary to take land into trust pursuant to the [1968] Act, it 'shall be taken in the name of the United States in trust for the tribes or the tribal member to whom the land is sold.'" Tribes' Opening Brief at 5.

In response to this argument, the Regional Director contends that the Tribes ignore the part of the first sentence in which the Secretary is "authorized" to acquire land. He argues that "[a] Congressional grant of authority to take action implies discretion and an expectation that the federal agency will exercise judgment in taking that action." Regional Director's Brief at 4. He continues:

> [E]ach sentence relates to a different issue. The first sentence grants authority to acquire land, and the second sentence states how such land, if it is to be acquired, must be held. * * * It is perfectly reasonable for Congress to have granted the Secretary discretionary authority to acquire lands, but required that all lands so acquired be held in trust for either [the Tribes] or [their] members. See generally C. Dallas Sands, Sutherland Statutory Construction § 57.14 (4th Ed. 1973) ("When authority is granted to public officers to do a thing in a certain way, the manner of doing the thing is mandatory, . . . even though the doing of the thing in the first place may be discretionary.").

Id. at 4-5.

It is apparent that the Tribes' interpretation fails to account for the operative part of the first sentence. Thus it also fails to deal with the relation between the first and second sentences.

A construction similar to that of section 2 may be seen in the trust acquisition provision of the IRA, 25 U.S.C. § 465. As the Tribes recognize (see discussion immediately below), 25 U.S.C. § 465 is explicitly discretionary. 4/ It is also a textbook example of the principle described in the Regional Director's quotation from Sutherland. Despite the discretionary nature of the trust acquisition authority itself, 25 U.S.C. § 465 provides that title to lands acquired under the IRA shall be taken in trust. Indeed, the final sentence of 25 U.S.C. § 465 is virtually identical to the second sentence of section 2 of the 1968 Act. It is clear from 25 U.S.C. § 465 that inclusion of such language in a statute authorizing trust acquisitions does not mean that trust acquisitions under the statute are mandatory.

The Board concludes that the presence of the word "shall" in the second sentence of section 2 does not mean that trust acquisitions under the 1968 Act are mandatory.

4/ 25 U.S.C. § 465 provides:

"The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."

* * * * * * *

"Title to any lands or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

The Tribes also contend that the 1968 Act must be construed as mandatory because it lacks language, such as appears in 25 U.S.C. §§ 409a 5/ and 465, specifically stating that the Secretary's trust acquisition authority is discretionary.

The fact that specific words of discretion are absent, however, does not compel a conclusion that the trust acquisition authority is mandatory. A public official who is "authorized" to do something is ordinarily understood to have been granted the power or right to do that thing. As the Regional Director argues, such power is ordinarily understood to include the power to exercise judgment in connection with the action authorized. In the absence of other evidence showing that the grant of authority in section 2 was intended as a mandate, the term "authorized" in section 2 should be given its ordinary meaning. See, e.g., Sutherland at § 57.03: In determining whether a statute is mandatory or directory (i.e., permissive), "[t]he ordinary meaning of language should always be favored." 6/

The Board concludes that the lack of specific language of discretion in the 1968 Act does not mean that all trust acquisitions under the Act are mandatory.

The Board further concludes that nothing in the words of the 1968 Act shows that Congress intended all trust acquisitions under the Act to be mandatory.

Ultimately, however, it is not the particular words (or the lack of particular words) in the 1968 Act which is the most important determinant of the mandatory or permissive nature of the trust acquisition authority. Sutherland points out that, in determining the mandatory or permissive nature of a statute, even "[t]he ordinary meaning of words may be overruled to effectuate the purpose of the statute" and that "the controlling considerations are the intent of the legislature, the purpose of the act, the public policy to be promoted and the results that would obtain if one conclusion were followed to the exclusion of another." § 57.04. 7/

5/ 25 U.S.C. § 409a provides:

"Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is [disposed of in certain enumerated ways], the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

6/ All further citations to Sutherland are to the 5th edition (1992), which is the edition available to the Board.

7/ See also Sutherland § 57.02 ("To determine whether a statute is mandatory or directory, effect must be given the entire statute, its nature and object, and the consequences that would

In Todd County, the Board based its decision upon the Rosebud Sioux Act as a whole and upon the purpose of the Act, as shown in the Act itself and its legislative history. 8/ Further, the Board considered the consequences that would flow from construing the Act one way or the other, finding that a construction of the Act as discretionary would render the statutory scheme unworkable. In essence, the Board employed an analysis similar to that described in Sutherland.

Here, the same considerations favor an interpretation of the 1968 Act as mandatory with respect to trust acquisition of lands purchased with funds derived from sales of tribal land under section 1 of the Act. The Tribes state that they agree with the Regional Director's decision insofar as it held that this category of trust acquisitions is mandatory. The Lake County, Montana, Board of Commissioners also appears to agree with the Regional Director in this regard.

The Board finds that, under the analysis in Todd County, the 1968 Act is reasonably construed as "mandatory" legislation with respect to this category of acquisition. However, the tract at issue here, having been donated to the Tribes, does not fall within this category.

The broad trust acquisition authority in section 2 of the 1968 Act is not analogous to any authority included in the Rosebud Sioux Act. Therefore, Todd County does not resolve this appeal. Even so, an analysis similar to that employed in Todd County is useful here.

As discussed above, the Board has concluded that the language of the 1968 Act does not show that Congress intended all trust acquisitions under the Act to be mandatory.

The legislative history of the 1968 Act includes no explicit discussion of the mandatory/ permissive nature of the trust acquisition authority in the Act. However, as the Regional Director observed, the Senate and House reports are helpful in that they explain why the provisions of section 2 were considered necessary when trust acquisition authority already existed in 25 U.S.C. § 465. Both reports make it plain that Congress was aware of the existing trust

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fn. 7 (continued)
follow from each construction"); § 57.03 ("When the exact meaning may not be ascertained from the language of the statute, the courts, in the search to determine the legislative intent, look to the words, context, subject matter, effects and consequences as well as to the spirit and purpose of the statute").

8/ See also South Dakota v. Aberdeen Area Director, 35 IBIA 16 (2000), for further discussion of the Rosebud Sioux Act.

acquisition authority but adopted the present language of section 2 in order to authorize the Tribes to resell lands acquired under the Act to tribal members. 9/

The language of section 2 was recommended by the Assistant Secretary of the Interior, who stated that the Department's version "would clarify the intended provisions of the bill." 10/ The recommended language replaced sections 3 and 4 of the original bills (S. 2701 and H.R. 13780). The original bills each provided:

> [T]he [Tribes] may dispose of or acquire tribal lands within the exterior boundaries of the [Flathead R]eservation in trust on the conditions hereinafter set forth * * *.
>
> SEC. 2. Said [Tribes] may dispose of lands beneficially owned by them and held by the United States in trust only as to the following lands:
>
> [List of tracts omitted.]
>
> SEC. 3. Said [Tribes] may acquire Indian or non-Indian-owned lands in trust to hold for tribal use or for alienation to tribal members in trust. The authority herein contained is in addition to existing authority to acquire tribal lands.
>
> SEC. 4. Any transfer of lands hereunder shall be subject to the prior approval of the Secretary of the Interior or his authorized representative. [11/]

Nothing in the original bills suggests that trust acquisitions were to be mandatory. In fact, the language of the original section 4 makes it plain that the Secretary would have final say as to any transfers under the Act. Congress accepted the Department's recommended substitution for these two sections, impliedly agreeing that the amendment would clarify the intent

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9/ S. Rep. No. 1143 at 2, 4; H.R. Rep. No. 1552 at 4. As the House report notes, "Legislation is necessary because no Indian tribal lands can be disposed of without specific legislative authority." H.R. Rep. No. 1552 at 2. See 25 U.S.C. § 177.

10/ S. Rep. No. 1143 at 4; H.R. Rep. No. 1552 at 4.

11/ See 114 Cong. Rec. 15140, 19364 (1968).

of the original bills rather than change that intent. 12/ Because the intent was the same in the original and final versions, the language of the original version is helpful in determining the intent of Congress in the final version. The language of the original bills supports a conclusion that the 1968 Act was not intended to be mandatory.

As discussed above, the legislative history specifically refers to the IRA trust acquisition authority. That reference makes it particularly appropriate to consider Congressional intent in 1968 in relation to the IRA authority. 13/

The legislative history makes only one distinction between the trust acquisition authority in the pending legislation and the existing authority in 25 U.S.C. § 465))the pending legislation would authorize resales by the Tribes. A trust acquisition authority as broadly worded as the one in the pending legislation would, if mandatory in all cases, represent a significant departure from the authority in 25 U.S.C. § 465. Most likely then, Congress would have made some mention of this departure had it intended for all trust acquisitions under the pending legislation to be mandatory.

The Board finds that, in clearly explaining the purpose of section 2 and in failing to make a distinction between section 2 and 25 U.S.C. § 465 with respect to the mandatory or permissive nature of trust acquisitions, the legislative history of the 1968 Act supports a conclusion that Congress did not intend for all trust acquisitions under the 1968 Act to be mandatory.

12/ Congress also accepted the Department's recommendation for changes to sections 1 and 2 of the original bills. Id.

The final sentence of section 1 as enacted (requiring the use of proceeds from sales of tribal lands for the acquisition of new lands) was added by the House Interior Committee on its own initiative. H.R. Report No. 1552 at 2. The Board found no discussion in the legislative history of the reasons for the addition. As indicated in his decision, the Regional Director relied upon this sentence to conclude that the 1968 Act is mandatory with respect to lands subject to the provision.

13/ Sutherland observes in § 57.06:

"Related statutes in pari materia, may be important aids in determining whether a statutory provision is mandatory or directory, not only for the light they may shed on what the legislature intended but for the influence they may have on how people understand a statute. Thus, if the particular provision in question is a part of a general legislative scheme, a consideration of the entire scheme together may make the particular provision clear. If the construction, mandatory or directory, would produce conflict with other statutes, the opposite ruling would ordinarily be adopted."

Another consideration discussed in Todd County was the fact that the overall plan of the Rosebud Sioux Act, (i.e., sales or mortgages of isolated tracts and use of proceeds for purchase of replacement lands) would have been rendered unworkable had the trust acquisition authority been construed as discretionary in the manner argued by the appellant in that case. While similar considerations are present here with respect to lands purchased with proceeds of lands sold under section 1 of the 1968 Act, the same cannot be said of lands acquired by other means. No provision of the 1968 Act would be rendered unworkable if trust acquisition of lands in this broader category is deemed to be discretionary.

The Board concludes that, under the analysis employed in Todd County, the 1968 Act is properly construed as discretionary with respect to lands not purchased with the proceeds from sales under section 1. The Board therefore finds that the Regional Director was correct in his interpretation of Todd County.

Next, the Tribes argue that the Department of the Interior has previously taken the position that the 1968 Act is mandatory. Further, they argue that the Regional Director is precluded from changing the Department's earlier interpretation. As evidence of the Department's supposed earlier interpretation, the Tribes cite the Billings Field Solicitor's December 30, 1968, memorandum (quoted in footnote 2) and a July 21, 1972, memorandum signed by an Acting Assistant Billings Area Director (Area Director). 14/ For their argument that BIA may not change its position, the Tribes rely on Hopi Tribe v. Director, Office of Trust Responsibilities, 24 IBIA 65 (1993), in which the Board held that BIA had improperly reversed its interpretation of an attorney fee provision in the Navajo-Hopi Settlement Act.

14/ The Area Director's July 21, 1972, memorandum stated:

"The Senate and House reports as we interpret them clearly provide that the net proceeds from the sale or exchange of lands described in Section 1 must be used in the acquisition of additional lands within the reservation boundaries pursuant to Section 2 of the Act and may not be used for any other purpose.

"The word 'shall' as used in Section 1 is mandatory, while the word 'authorized' as employed in Section 2 is permissive. Further, nothing in Section 2 restricts the lands to be acquired under Section 1. It would follow, therefore, that Section 2 is intentionally broader than the acquisition provision of Section 1 thus providing an avenue for the acquiring of lands in the future in the same breath that it earmarks specific funds for a designated purpose.

"We believe this reading of the law is what Congress intended for Senate Report No. 1143 states as a purpose of the Act, the authority for the tribes to acquire Indian or non-Indian owned lands, in trust, for tribal use or conveyance to tribal members in trust. It appears to be simply dual purpose legislation authorizing the disposition of described lands with equal provision to acquire other lands for tribal use or resale to tribal members in trust."

Neither the Field Solicitor's memorandum nor the Area Director's memorandum discusses the question of whether all trust acquisitions under the 1968 Act are mandatory. 15/ To the extent the two memoranda are relevant here, however, they are consistent with the Regional Director's interpretation of the Act. In fact, the Area Director's memorandum specifically states that "[t]he word 'shall' as used in Section 1 is mandatory, while the word 'authorized' as employed in Section 2 is permissive."

The two memoranda are not evidence that the Department has previously construed the 1968 Act as mandatory with respect to all trust acquisitions under the Act. Further, as the Regional Director points out, the Tribes do not "identify any acquisitions, not using proceeds from the disposal of Section 1 lands, that have been treated as mandatory." Regional Director's Answer Brief at 6. Thus, the circumstances here are very different from those in Hopi Tribe, where (1) there was no doubt as to BIA's initial interpretation of the statutory provision at issue; (2) BIA had acted upon that interpretation, and (3) BIA had explicitly changed its interpretation.

The Board finds that the Tribes have failed to show that the Regional Director's decision represents a change in the Department's interpretation of the 1968 Act.

Finally, the Tribes contend that an August 2, 1968, memorandum to the Tribes from their attorney is evidence of the understanding of the Tribes in 1968 that all trust acquisitions under the Act would be mandatory. Citing Jones v. Meehan, 175 U.S. 1 (1899), and Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S.Ct. 1187 (1999), they contend that great reliance must be placed upon the Tribes' contemporaneous understanding of the Act. 16/

15/ It is not surprising that the memoranda did not discuss this question. It is only in recent years that the issue has come to have any practical significance for the Department's trust acquisition procedures. Prior to 1980, there were no regulations governing trust acquisitions, see Van Mechelen v. Portland Area Director, 35 IBIA 122, 124 (2000), and thus there was no requirement that specific criteria be considered in connection with any trust acquisition request. Further, it was not until 1995 that 25 C.F.R. § 151.10 was amended to make explicit distinctions between mandatory and discretionary trust acquisitions. See 60 Fed. Reg. 32874 (June 23, 1995).

16/ The cases cited by the Tribes concern the construction of treaties, and the Tribes appear to be referring to a rule of construction usually applied to treaties. In Minnesota, the Supreme Court stated the rule thus: "[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." 119 S.Ct. at 1201.

A related rule is more often cited where statutes are concerned: "'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their

Like the two Departmental memoranda discussed above, the tribal attorney's memorandum does not specifically address the question of whether trust acquisitions under the Act are mandatory. 17/ Further, the Tribes produce no tribal document which shows the Tribes' contemporaneous understanding of the attorney's memorandum.

The Tribes have not shown that, in 1968, they interpreted section 2 of the 1968 Act to mandate all trust acquisitions requested by the Tribes. Thus, even assuming the rule of construction cited by the Tribes is applicable to the construction of statutes, it cannot be applied in this case.

Further, in light of the discussion above, the Board concludes that the rule of construction described in County of Yakima is not applicable here because the 1968 Act is not ambiguous on the point at issue in this appeal. 18/ Rather, as discussed above, when the 1968 Act is considered as a whole, it is clear that the trust acquisition authority is not mandatory except with respect to lands purchased with the proceeds of sales under section 1.

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fn 16 (continued)
benefit.'" County of Yakima v. Confederated Bands and Tribes of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), quoting from Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

17/ The attorney's memorandum stated:

"You are now free to sell or exchange the identified acreage of isolated tracts, using the proceeds to acquire desired lands.

"But the bill contains in Section 2 a continuing authority which we believe would be of great long-range importance to the Tribes and their individual members. Section 2 reads as follows:

"[Quotation of section 2 omitted.]

"It is possible for you to purchase non-Indian-owned lands in trust under this provision, and for members to purchase tribally-acquired lands in trust. This can be coordinated with your Credit Program. We suggest that discussions be held with your Superintendent as to the precise manner of implementing this authority--which will, among other things, permit landconsolidation programs for the filling out of an economic unit. This is a rare authority in that heretofore the Senate has normally opposed the acquisition of fee lands in trust, thereby taking them off the local tax rolls. We congratulate you on this new authority."

18/ See, e.g., South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986): "The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist."

The Board finds that the Tribes have failed to show error in the Area Director's decision.

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 Regional Director's October 25, 1999, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge