



INTERIOR BOARD OF INDIAN APPEALS

City of Isabel, South Dakota v. Great Plains Regional Director,
Bureau of Indian Affairs

38 IBIA 263 (12/31/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CITY OF ISABEL, SOUTH DAKOTA,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	Docket No. IBIA 02-52-A
	:	
GREAT PLAINS REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	December 31, 2002

Appellant City of Isabel, South Dakota (City), seeks review of a December 21, 2001, decision issued by the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the proposed trust acquisition of Lot 3, Block 3, City of Isabel, Dewey County, South Dakota, for Belva Frank, a member of the Cheyenne River Sioux Tribe. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Frank applied for trust acquisition of her lot on January 31, 2001. She stated that she was a widow living on a fixed pension. She indicated that she wanted to build another house on her lot and that her present house was in need of repairs.

By letter dated February 22, 2001, the Superintendent, Cheyenne River Sioux Agency, BIA (Superintendent), notified the Governor of the State of South Dakota (State), the Dewey County Commissioners (County), and the City about Frank's pending trust acquisition application and requested comments regarding the taxes, special assessments, governmental services, and zoning of the property.

On February 27, 2001, the County responded, stating that the current property taxes levied against the property were \$114.34 and that back taxes were owed in the amount of \$414.24. It noted that it provided law enforcement, school, road, and fire protection services to the property, but did not zone. The County also stated that it was, in general, opposed to the loss of taxable property.

The City responded on March 7, 2001. It also noted that Frank owed back taxes. It stated that placing the property in trust would decrease the amount it received in taxes and it therefore "vetoed" the proposed trust acquisition. The City made no other comments.

The State did not respond.

On July 31, 2001, the Superintendent notified the State, County, and City that he intended to acquire the land in trust. The City appealed to the Regional Director, who affirmed the Superintendent's decision on December 21, 2001.

The City then appealed to the Board. Both the City and the Regional Director have filed briefs on appeal.

The Board first repeats its standard of review and the burden of proof in trust acquisition cases. These were described in City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999), ^{1/} where the Board stated: “[D]ecisions 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 upon an 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)].”

Furthermore, when an appellant challenges BIA’s exercise of discretion, it “bears the burden of proving that the [Regional] Director did not properly exercise his discretion.” Id. However, when an appellant challenges legal determinations that BIA may have made in connection with a trust acquisition decision, it “bears the burden of proving that the [Regional] Director’s decision was in error or not supported by substantial evidence.” Id. See also County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 170 (2002); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-9 (1999).

The City contends that the Regional Director abused her discretion in regard to several of the factors set out in 25 C.F.R. § 151.10, which guides BIA’s trust acquisition decisions. The Board has held that BIA’s analysis of the factors listed in 25 C.F.R. § 151.10 must appear in the decision and/or the administrative record. See, e.g., Ziebach County, South Dakota v. Great Plains Regional Director, 36 IBIA 201 (2001).

As was the case in Ziebach County, South Dakota v. Acting Great Plains Regional Director, 38 IBIA 227 (2002) (Ziebach County II), the City bases several of its arguments on a withdrawn version of 25 C.F.R. Part 151 which was erroneously published in the 2001 edition

^{1/} Aff’d, City of Lincoln City v. United States Department of Interior, Civil No. 99-330-AS (D. Ore. Apr. 17, 2001).

of the Code of Federal Regulations. ^{2/} As the Board noted in Ziebach County II, the City's reliance on the withdrawn version of Part 151 is understandable. The Board will consider the City's arguments to the extent that they also relate to the criteria in the effective version of Part 151.

The City argues that the Regional Director's decision does not show proper consideration of Frank's need for additional land to be held in trust as is required by 25 C.F.R. § 151.10(b). In one argument, the City apparently contends that because Frank is older and retired, she does not need to have her land held in trust. In an alternative argument, the City contends: "Ms. Frank is a very competent individual who has owned her land in fee status for quite some time. There has been no showing that she needs any assistance in any of her affairs, or that she is incompetent in any manner." Opening Brief at unnumbered 3.

The Regional Director responds, and the administrative record shows, that Frank has a low fixed annual income, that her present home is in need of repairs, that she owes over \$400 in back taxes on this property, and that she owns no other trust property. The record shows not only that BIA considered these matters, but fully supports a conclusion that Frank needs assistance to prevent her loss of the property because of the unpaid taxes. The regulations do not require that an individual be "incompetent" in a legal sense in order to have land taken into trust. The Board finds that the City has not shown that the Regional Director failed to consider Frank's need for additional land to be held in trust.

The City cites County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), in support of an argument that the Regional Director incorrectly determined that, after trust acquisition, the land would not be subject to state and/or local jurisdiction. The Board has previously held that the Regional Director's statement of law is correct. Ziebach County II, 38 IBIA at 229.

The City appears to continue to argue that the back taxes will be lost. The Regional Director specifically stated that the land would not be acquired in trust until the back taxes were paid. The Board therefore rejects this argument.

^{2/} A revision of Part 151 was published as a final rule on Jan. 16, 2001. The preamble to the final rule stated that it would become effective on Feb. 15, 2001. 66 Fed. Reg. 3452 (Jan. 16, 2001). The effective date was extended on several occasions. On Nov. 9, 2001, the rule was withdrawn without having become effective. 66 Fed. Reg. 56608 (Nov. 9, 2001). In the meantime, however, the rule had been published in the 2001 edition of 25 C.F.R.

The 2002 edition of 25 C.F.R. corrects the error of the 2001 edition and includes the version of Part 151 which was in effect during all times relevant here.

The City contends that BIA did not properly consider issues relating to conflicts of jurisdiction. Such consideration is required by 25 C.F.R. § 151.10(f). The Regional Director responds that the land proposed to be acquired in trust is located within the boundaries of the Cheyenne River Sioux Reservation and that the Cheyenne River Sioux Tribe will have jurisdiction over the property. The Board finds that the City has failed to show that the Regional Director did not consider issues relating to conflicts of jurisdiction.

The City also contends that the Regional Director failed to comply with the requirements of 25 C.F.R. § 151.10(h), which concerns furnishing information that would allow BIA to comply with certain environmental requirements. In her decision, the Regional Director stated that the location of the property was sufficient evidence to permit BIA to comply with the environmental requirements. On appeal, the Regional Director contends that this proposed trust acquisition is subject to a categorical exclusion from further compliance with environmental requirements under 516 Departmental Manual (DM) 6, Appendix 4, section 4.4(I).

In the decision at issue in Ziebach County II, the Regional Director also stated that the location of the property was all the evidence necessary from the applicant. However, the Regional Director did not file a brief in that case and thus did not make the categorical exclusion argument she makes here. The Board stated in Ziebach County II: “While it may well be that the legal description [of the property] was the only information BIA needed from [the applicant], there is no evidence that BIA followed through and took the steps necessary to comply with the environmental requirements in subsection 151.10(h).” 38 IBIA at 231. The decision in Ziebach County II was being remanded to the Regional Director for reconsideration of other issues. Therefore, the Board instructed the Regional Director that if, upon reconsideration of those other issues, she again decided to take the land into trust, she was to show compliance with the environmental requirements in the record of her decision. 3/

516 DM 6 concerns compliance with the National Environmental Policy Act (NEPA). Appendix 4, section 4.4, provides in pertinent part:

In addition to the actions listed in the Department’s categorical exclusions in Appendix 1 of 516 DM 2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the

3/ The Board notes that, in other appeals it has received challenging BIA trust land acquisitions, information showing compliance with the environmental requirements normally appears in the record. This is true even when the proposed acquisition is of land which is currently occupied as a homesite and when no change in that use is planned.

action qualifies as an exception under Appendix 2 of 516 DM 2. These activities are single, independent actions not associated with a larger, existing or proposed, complex or facility. If cases occur that involve larger complexes or facilities, an [environmental assessment] or supplement should be accomplished.

* * * * *

I. Land Conveyances and Other Transfers.

Approvals of grants of conveyances and other transfers of interests in land where no change in land use is planned.

If the language of subsection 4.4(I) were the sole guide to the proper interpretation of that subsection, the Board would be inclined to agree that this trust acquisition is categorically excluded from further NEPA compliance, because no change in land use is planned. However, the preamble to the publication of Appendix 4 in the Federal Register includes several comments on subsection 4.4(I). As relevant to this case, the preamble states:

Comment: Question as to whether the categorical exclusion of land conveyances where no change in land use is planned might still allow for some degree of planned development or physical alteration of the land without triggering NEPA review.

Response: It is unrealistic to expect land to be conveyed with no plan whatsoever for its future use. Whether or not the conveyance is categorically excluded is a matter of judgement by the BIA official responsible for NEPA compliance as to how well the plan is established. The categorical exclusion does not, however, allow for any development or physical alteration to actually take place.

61 Fed. Reg. 67845 (Dec. 24, 1996). Emphasis added. Here, Frank intends to continue using the tract for her home, but she intends to build a new house. Therefore, there may be “development or physical alteration” on the tract.

Furthermore, NEPA is not the only environmental requirement referenced in 25 C.F.R. § 151.10(h). The regulation also includes hazardous substances determinations under 602 DM 2. No argument has been made that there is also a categorical exclusion under 602 DM 2 that would allow BIA to dispense with making a hazardous substances determination before it can accept title to the property.

The Board finds that BIA may or may not have fulfilled its environmental responsibilities in this case. However, it also finds that the County has not shown that BIA erred in concluding that Frank had complied with the duties placed on her by 25 C.F.R. § 151.10(h), by providing BIA with the information necessary for it to fulfill its environmental responsibilities. In the absence of other problems with the trust acquisition decision, the Board will not vacate the Regional Director's decision solely to require BIA to show that it has fulfilled those responsibilities. However, BIA is reminded to ensure that it has fulfilled all of its environmental, as well as other legal, responsibilities before it accepts title to the tract.

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 December 21, 2001, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge