



INTERIOR BOARD OF INDIAN APPEALS

Louis J. King, Jr. v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

46 IBIA 149 (12/13/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

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|---------------------------|---|--------------------------|
| LOUIS J. KING, JR., |) | Order Affirming Decision |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | Docket No. IBIA 06-2-A |
| EASTERN OKLAHOMA REGIONAL |) | |
| DIRECTOR, BUREAU OF |) | |
| INDIAN AFFAIRS, |) | |
| Appellee. |) | December 13, 2007 |

Appellant Louis J. King, Jr., appealed to the Board of Indian Appeals (Board) from an August 17, 2005, decision (Decision) of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director affirmed a January 31, 2005, decision of the Wewoka Agency Superintendent (Agency; Superintendent), denying Appellant’s fee-to-trust acquisition request for two parcels of land located in Seminole County, Oklahoma.¹ The Regional Director denied the application for several reasons, including a finding that Appellant did not need assistance in handling his affairs. Appellant contends that the Regional Director erred because she failed to advise Appellant of the information that was needed to support Appellant’s request and because the possibility exists that he may need assistance with his affairs at some future date. Appellant also argues that the Regional Director erred because she failed to act on Appellant’s request within the timeframe set out in 25 C.F.R. § 2.8. We affirm because (1) Appellant has not shown that he was prejudiced by the failure of the Regional Director to solicit more information in the fee-to-trust application; (2) the Regional Director considered whether Appellant needed assistance with his affairs at the present time, and the possibility that he may, at some future date, require assistance does not constitute grounds for finding error; and (3) the Regional Director’s failure to issue her decision sooner, in accordance with the timeframe set out in section 2.8, does not constitute grounds for this Board to grant Appellant relief on the merits of BIA’s decision.

¹ The parcels are described as the S½NW¼ of Section 28, T. 8 N., R. 6 E., containing 79.73 acres, more or less (Parcel 1), and the W½NE¼ NE¼ and NW¼ NW¼ of Section 27 (Parcel 2), T. 8 N., R. 6. E., containing 60 acres, more or less.

Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indians in his discretion. In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h). Relevant to this appeal, these criteria include consideration — if the land is to be acquired for an individual Indian — of the degree to which the appellant requires assistance in handling his affairs. 25 C.F.R. § 151.10(d).

Factual Background

Appellant, a 56-year old enrolled member of the Seminole Nation of Oklahoma at the time of the subject fee-to-trust application, owns fee interests in the two parcels at issue in this appeal.² By letter dated February 5, 2004, Appellant requested the Superintendent to accept the parcels in trust for him. Appellant lived in Oregon at the time of his request.

In May 2004, Appellant met with an employee at the Agency to discuss his fee-to-trust request. The Agency employee provided Appellant with an application to complete.³ The application solicits certain basic information, but does not request information relevant to the factors to be considered under 25 C.F.R. § 151.10(d).

On May 31, 2004, Appellant forwarded his completed application to the Superintendent. In the cover letter attached to the application, Appellant stated that although he did not currently reside on either parcel, his mother, Letha King, did live on Parcel 1. He explained that his “current post retirement plans are to relocate to this property.” Letter from Appellant to Superintendent, May 31, 2004.

By letter dated January 31, 2005, the Superintendent denied Appellant’s fee-to-trust request. The Superintendent evaluated each factor listed in 25 C.F.R. § 151.10. Although

² A letter from the Seminole County Assessor indicates that Appellant owns a ½ interest in Parcel 1 and his mother, Letha King, owns the other ½ interest. It is unclear from the record what interest Appellant owns in Parcel 2. However, the 2004 Tax Roll Information Report issued by the Seminole County Treasurer for Parcel 2 is addressed to both Appellant and his mother.

³ The application is captioned “USA in Trust - Application for Homesite,” and apparently is the form used by BIA for requests by individuals to take land into trust.

the Superintendent found that several factors might support the trust acquisition, he determined that others did not. In particular, the Superintendent found that the following factors weighed against the trust acquisition: (1) Appellant did not have a need for the land as he intended to retire to the land at some point in the future, 25 C.F.R. § 151.10(b); (2) Appellant is not incapacitated, is of sound mind, and is capable of attending to his own affairs, *id.* § 151.10(d), and (3) the acquisition would place additional responsibilities on the Agency, and the Agency is concerned that it could not adequately discharge these responsibilities, *id.* § 151.10(g).

Appellant appealed the Superintendent's decision to the Regional Director. Appellant first argued that he was not informed by the Superintendent of the criteria BIA would use to evaluate his fee-to-trust application. Next, Appellant disagreed with the Superintendent's conclusions as to subsections 151.10(d) and (g) of 25 C.F.R. As to the Superintendent's analysis of subsection (d) and his determination that Appellant was capable of attending to his affairs, Appellant stated that although he may at present be of sound mind, "if in the future I became incapacitated, it would be questionable or perhaps impossible for me to convey my true expectations or desire." Notice of Appeal and Statement of Reasons filed with the Regional Director. Appellant identified the "impetus of [his] request" as the "uncertainty of life and [his] future capacity as a senior when unforeseen health issues are a reality." *Id.* As to the Superintendent's analysis of subsection (g), Appellant stated that "such justification alone should not dissuade the BIA from fulfilling either [its] trust responsibility or their public service to individual Native Americans." *Id.* Finally, Appellant offered an additional reason for BIA to take the land into trust: Appellant stated that his ancestral cemetery is located on the subject property, and explained that he wanted to insure that "this sacred and culturally important site continue to be without interruption into the future long after [his] demise." *Id.*

During the pendency of his appeal before the Regional Director, Appellant sent a letter to the Regional Director, which he styled "Appeal from Inaction of Official," pursuant to 25 C.F.R. § 2.8. Appellant requested the Regional Director to grant his fee-to-trust acquisition request. On May 18, 2005, the Regional Director responded to Appellant's request for action, and stated that she would issue a decision by June 15, 2005. On July 5, 2005, Appellant again wrote to the Regional Director, noting that he had yet to receive a decision and demanding that one be issued.

Thereafter, on August 17, 2005, the Regional Director issued the decision that is the subject of the present appeal. The Regional Director concluded that the Superintendent properly evaluated Appellant's application by giving consideration to all factors listed in 25 C.F.R. § 151.10, and that the Superintendent's analysis of each factor was reasonable. With respect to subsection 151.10(d), she determined that, "a potential future need for

Government supervision of [Appellant's] affairs and possible future health care needs does not lend support to a present inability to manage [Appellant's] own affairs.” Decision at 2. The Regional Director also noted that Appellant's application did not reflect his educational level, work experience, or information indicating that he is presently in need of the protection and services provided by BIA. With respect to Appellant's family cemetery, the Regional Director noted that Appellant's concern for the presence of the cemetery was not raised before the Agency, and therefore she was not required to consider it; however, she determined that assuming the Superintendent had considered and rejected this argument, Appellant had not shown how any legal error would have been committed. Finally, the Regional Director provided a new justification for declining Appellant's request, finding that the acquisition in trust of Appellant's two parcels would not support the Government's policy of reducing further fractionation of Indian trust allotments and of reversing the effects of the allotment policy on tribes, as set forth in the Indian Land Consolidation Act Amendments of 2000, 114 Stat. 1992, Pub. L. No. 106-462. The Regional Director concluded that Appellant had not carried his burden of showing that the Superintendent did not properly exercise his discretion and affirmed the Superintendent's denial of Appellant's fee-to-trust acquisition request.⁴

Appellant appealed to the Board, and included a statement of reasons in his notice of appeal. Appellant also sent a letter to the Board in support of his appeal. No other briefs were filed.

Discussion

I. Standard of Review

The standard of review in trust acquisition appeals is well established. Decisions by BIA officials to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in such decisions. *Arizona State Land Dep't v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Eades v. Muskogee Area Director*, 17 IBIA 198, 200 (1989). Instead, the Board reviews discretionary decisions to determine whether BIA considered the legal prerequisites to the exercise of its discretionary authority, including any established limitations on its discretion. *Cass County v. Midwest Regional Director*, 43 IBIA 243, 246 (2006). The decision must reflect that the Regional Director considered the factors set forth in section 151.10, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *Skagit County v. Northwest Regional*

⁴ The Regional Director did not specifically address Appellant's challenge to the Superintendent's analysis of factor (g) of section 151.10.

Director, 43 IBIA 62, 63 (2006). The factors are not weighted or balanced in any particular way, nor must each factor be exhaustively analyzed. *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007).

Appellants bear the burden of establishing that BIA did not properly exercise its discretion. *Cass County*, 42 IBIA at 246; *Ketcher v. Acting Muskogee Area Director*, 33 IBIA 166, 167 (1999). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Arizona State Land Dep't*, 43 IBIA at 160.

II. Analysis

A. Summary

Appellant contends on appeal that BIA failed to provide him with sufficient guidance to complete his fee-to-trust application satisfactorily, including an explanation of what factors would be evaluated in the BIA decision process. Appellant points out that the application did not request information on education, work history, whether the applicant needed assistance in managing his affairs, nor was there a space for him to explain all the reasons he sought to have the land placed in trust, including the protection of the family cemetery. Appellant asserts that BIA "has been working diligently to . . . thwart [his] request rather than simply providing [him] with the assistance necessary to achieve [his] objective." Letter from Appellant to Board, Sept. 24, 2005, at 3. As for the Regional Director's consideration of the factors outlined in 25 C.F.R. § 151.10, Appellant acknowledges that he is currently able to manage his affairs, but asserts that in the future, he "may not be able to manage [his] affairs," and he might not be able to convey his wishes to someone else at that time. *Id.* Finally, Appellant contends that BIA committed legal error in failing to abide by the deadlines for issuing decisions contained in 25 C.F.R. § 2.8(b).

As explained in detail below, we conclude that Appellant has failed to satisfy his burden of proving the Regional Director did not properly exercise her discretion.

B. Information for the Fee-to-Trust Application

Appellant argues that BIA was required to, but did not, inform him of the criteria by which it would be reviewing his application. Appellant suggests that his fee-to-trust application cannot be denied because the application form did not request information about his education and work history or whether he currently owns trust or restricted property nor did it seek information concerning the existence of a family cemetery on the fee property or other reasons for requesting that the land be taken into trust.

We agree with Appellant that the application form is not tailored to seek information relevant to the factors found in section 151.10. Although we find that troubling, we do not conclude that it warrants a reversal of the Regional Director's decision because Appellant does not disagree with the factual conclusions on which the Regional Director based her decision to affirm the denial of Appellant's application.

First, Appellant argues that he was not asked by BIA at the time he completed his application to provide any information concerning his education or work history, the absence of which the Regional Director commented on in her Decision. However, on appeal to the Board, Appellant not only concedes that he presently is of sound mind and not in need of assistance with his affairs, he does not inform the Board of his educational or employment background.⁵ Consequently, there is no basis for us to conclude that this information could or would make a difference in BIA's review of Appellant's fee-to-trust application.

Similarly, Appellant argues that he was not asked to provide information on any trust property that he currently owns, which the Regional Director noted in her Decision. However, in his appeal to the Board, Appellant does not disagree with the Regional Director's conclusion that accepting the fee parcels into trust will not reduce the fractionation of any lands currently in trust and, moreover, does not inform the Board of any trust property he may own.

Finally, Appellant argues that he was not requested to provide any reasons for requesting the parcels to be taken into trust and, therefore, did not inform the Superintendent of his concern for the family cemetery. However, Appellant does not take issue with the Regional Director's conclusion that even if consideration were given to the presence of an ancestral cemetery on the fee land, it would not alter BIA's decision. Moreover, Appellant does not elaborate on any additional reasons for requesting trust status for the parcels. Thus, to the extent that the application could have requested any of the above information from Appellant or that BIA could have told him that he should provide such information, Appellant fails to demonstrate — by providing that information to the Board — that the information might have altered BIA's consideration of the trust acquisition criteria.

Moreover, we note that while the regulations require a written request to take land into trust, “[t]he request need not be in any special form but shall set out the identity of the

⁵ As discussed *infra*, Appellant maintains that in applying to BIA to take the parcels into trust, he is attempting to address his possible future need for assistance.

parties, a description of the land to be acquired, and the other information which would show that the acquisition comes within the terms of [25 C.F.R. Part 151].” 25 C.F.R. § 151.9. This regulation as well as section 151.10 are published and available to the public. It is well established that appellants are presumed to have knowledge of duly-promulgated regulations, including sections 151.9 and 151.10. *See Strom v. Northwest Regional Director*, 44 IBIA 153, 165-66 (2007). Thus, the burden remained with Appellant to determine what information and evidence were required to support his trust acquisition request.⁶

C. Regional Director’s Consideration of 25 C.F.R. § 151.10(d)⁷

With respect to the Regional Director’s consideration of the fee-to-trust criteria set forth at 25 C.F.R. § 151.10, Appellant specifically challenges only one rationale relied on by the Regional Director: that Appellant does not need assistance in handling his affairs. *See* 25 C.F.R. § 151.10(d). Appellant acknowledges that he currently does not need assistance in handling his affairs. *See* Letter from Appellant to Board, Sept. 24, 2005, at 2 (“I am currently able to manage my affairs”); Notice of Appeal and Statement of Reasons filed with the Regional Director (“I may at present be of sound mind and capable of attending to my own affairs”). He argues, however, as he did before the Regional Director, that the possibility exists that he may be incapable of doing so in the future. The Regional Director specifically rejected this argument, noting that a potential *future* need for Government supervision does not lend support to a *present* inability to manage Appellant’s own affairs.

Simple disagreement with or bare assertions concerning BIA’s decision are insufficient to carry an appellant’s burden of showing that the Regional Director abused her discretion. *Arizona State Land Dep’t*, 43 IBIA at 160. In addition, we note that BIA is not

⁶ Appellant also asserts that BIA’s actions in “thwart[ing his] request . . . cause[d him] to question [BIA’s] . . . commitment to executing . . . [BIA’s] public service and trust responsibility to individual[] Indians.” Letter from Appellant to Board, Sept. 24, 2005, at 3. To the extent that Appellant suggests that BIA owes him a trust responsibility to accept land into trust for him, he provides no support for such a duty and we know of none. Indeed, Appellant concedes in his Notice of Appeal that the decision to accept land into trust is discretionary. Notice of Appeal at 2. We therefore reject this argument.

⁷ Although the Regional Director did not specifically address Appellant’s argument concerning the Superintendent’s analysis of section 151.10(g), Appellant does not renew this argument before the Board. Therefore, the Board concludes that Appellant has abandoned this argument.

required to reach a particular conclusion as to each factor, but proof of BIA's consideration of each factor must appear in the record. *Skagit County*, 43 IBIA at 63. The Superintendent and the Regional Director both fully considered this factor. Moreover, after reviewing the record, we conclude that the Regional Director made a reasonable determination concerning Appellant's need for assistance in managing his affairs. Therefore, we conclude that Appellant has failed to carry his burden of showing the Regional Director did not properly exercise her discretion in denying Appellant's trust acquisition request.

D. BIA's Compliance with 25 C.F.R. § 2.8

Finally, we turn to Appellant's argument that BIA committed "legal error" by failing to comply with the time periods for issuing decisions set forth in 25 C.F.R. § 2.8(b). Notice of Appeal at 1. We disagree.

Section 2.8 provides procedures for appealing BIA's failure to act.⁸ In the present case, Appellant wrote to the Regional Director on May 4, 2005, demanding a decision on his appeal from the Superintendent's decision. The Regional Director responded on May 18, 2005, promising a decision by June 15, 2005. When the Regional Director failed to issue a decision by June 15, 2005, Appellant's remedy, as spelled out in 25 C.F.R. § 2.8, was to appeal to the Board. Instead, Appellant sent another letter to the Regional Director, to which the Regional Director responded by issuing her decision of August 17, 2005.

Once the Regional Director issued her decision on the merits, her action cured the failure to comply with section 2.8. *Cf. Strom*, 44 IBIA at 163 n.14; *see also Midthun v. Rocky Mountain Regional Director*, 43 IBIA 258 (2006) (generally discussing appeals under section 2.8). Failure to comply with the time periods set out in section 2.8 is not relevant to the merits of an appeal, does not mean that Appellant's application is automatically granted, nor does it require that we set aside or reverse the Regional Director's decision. It is a procedure for obtaining a decision; it does not provide a remedy for appellants who disagree with a regional director's decision. Once the requested decision issues or the

⁸ Section 25 C.F.R. § 2.8(b) provides in relevant part:

The [BIA] official receiving a request [for action] as specified in [25 C.F.R. § 2.8(a)] must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable [to the Board].

requested action occurs, section 2.8 no longer has any relevance and becomes moot. Therefore, section 2.8 does not provide a basis to grant relief to Appellant on the merits of BIA's decision.

We conclude that Appellant has not carried his burden of proving error in the Regional Director's decision, for which reason we affirm her 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 Board affirms the Regional Director's August 17, 2005, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge