



INTERIOR BOARD OF INDIAN APPEALS

State of Kansas v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

53 IBIA 32 (02/11/2011)



United States Department of the Interior

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

STATE OF KANSAS,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-040-A
ACTING SOUTHERN PLAINS)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	February 11, 2011

The State of Kansas (State) appeals to the Board of Indian Appeals (Board) from a December 15, 2008, decision (Decision) of the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he affirms the April 17, 2001, decision of the Superintendent of BIA's Horton Agency (Agency) to accept a tract of land — known as the Buck (PT-56) property located in Jackson County, Kansas — into trust for the Prairie Band Potawatomi Nation (Nation). Jackson County, Kansas (County), joins in the State's brief in this matter.¹ Because the State does not show error in the Regional Director's decision, we affirm the Regional Director's decision.

¹ The County intended separately to appeal the Regional Director's decision to the Board, as the administrative record received by the Board from BIA for this appeal contains a signed original of the County's appeal. No other original or copy of the County's appeal was received by the Board, and the administrative record was received by the Board after the 30-day deadline for filing appeals had expired. See 43 C.F.R. § 4.332(a) (notices of appeal to the Board are required to be filed *with the Board* within 30 days of receipt of decision); *Siemion v. Rocky Mountain Regional Director*, 48 IBIA 249, 257 (2009). The County has not made any argument to the Board that its appeal should be considered despite being advised by the Board (in response to the County's inquiry) that the Board had not received an appeal from the County within the 30-day appeal period. Therefore, we treat the County as an interested party in this appeal and not as an appellant.

Factual and Procedural Background

The Nation acquired the Buck (PT-56) property in August 1998. It consists of 96 acres of unimproved grasslands located outside and noncontiguous to the exterior boundaries of the Nation's reservation and approximately one mile east of the Nation's original reservation boundaries. *See* 25 C.F.R. § 151.2(f) (definition of "Indian reservation").² A few months after purchasing the property, the Nation applied to BIA to have the parcel taken into trust. According to the Nation's resolution, PBP 99-06, the land will be used for cattle ranching and farming, which will provide increased employment opportunities for tribal members. The Nation deemed trust status to be advantageous for the land because it would assist the Nation in restoring its original tribal land base, permit the Nation to avail itself of BIA's conservation and agricultural advisory services for the land, and protect and preserve the land in perpetuity for the Nation.

The Agency provided notice of the trust acquisition request to the State and the County, and BIA received information and objections to the proposed acquisition from both governments. The Agency performed an environmental review and concluded that the proposed acquisition was "categorically excluded" from further consideration under the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* An environmental site assessment was performed, and no evidence of contaminants was found. Following his review of the proposed acquisition, comments, and objections, the Superintendent issued his decision to accept the Buck (PT-56) property into trust on April 17, 2001. The Superintendent analyzed the proposed acquisition as an off-reservation fee-to-trust acquisition pursuant to 25 C.F.R. § 151.11.

The State and the County both appealed the decision to the Regional Director, raising numerous objections. Over 7 years later, on December 15, 2008, the Regional Director affirmed the Superintendent's decision. As relevant to the present appeal, the Regional Director found that the Buck (PT-56) parcel met "a specific need of the [Nation] to expand its Tribal Land Management Program" for agricultural purposes. Decision at 2;

² The property is described as the West 96 acres of the Northeast Fractional quarter of Section 27, Township 8 South, Range 15 East of the Sixth (6th) Principal Meridian, Jackson County, Kansas, less highway right-of-way beginning at the North Quarter Corner of said Section 27, containing 1.18 acres, including 0.60 acre[] of existing public road right-of-way (0.58 acre[] of additional right-of-way).

see also 25 C.F.R. § 151.10(b) & (c).³ The Regional Director determined that, given the contributions made by the Nation to the community (e.g., fire protection, road/bridge construction and maintenance, senior citizen meals and services), there is no evidence of a “severe negative impact” on tax revenue that would result from accepting the parcel into trust. Decision at 4; *see also* 25 C.F.R. § 151.10(e). The Regional Director found that there were no known jurisdictional issues or potential land use conflicts. He found that the Nation has “an active law enforcement program.” Decision at 4; *see also* 25 C.F.R. § 151.10(f). He accepted the Superintendent’s assertion that his agency could absorb any additional responsibilities that may develop following the acceptance of the subject parcel into trust. Decision at 4; *see also* 25 C.F.R. § 151.10(g). With respect to the off-reservation fee-to-trust acquisition factors, the Regional Director found that the parcel was within the State’s borders and “very accessible to the reservation.” Decision at 5; *see also* 25 C.F.R. § 151.11(b). Finally, the Regional Director held that the uses set out for the parcel were consistent with the Nation’s desire to expand its economic development agriculture program. Decision at 5-6; *see also* 25 C.F.R. § 151.11(c).

The State submitted a timely appeal to the Board and, thereafter, an opening brief in which the County joined. *See* n.1. The Regional Director responded with an answer brief. No reply brief was filed.

Discussion

We consider the State’s cursory arguments, laid out in its three-page brief, and find them unpersuasive. We decline to consider one argument because it is raised for the first time on appeal. We reject the State’s remaining arguments on the merits.

First, the State argues that BIA failed to consider adequately the need and purpose for taking the Buck (PT-56) property into trust. We decline to address this argument because it was not first raised before the Regional Director. Second, the State claims that BIA did not adequately consider the cumulative impacts to the County resulting from the Nation’s larger land acquisition program. BIA is not required to consider cumulative impacts and, moreover, the State fails to show any that there is any adverse impact. The State also claims that the Regional Director did not consider the “unfairness” to the County in light of its responsibilities for roads, but the record shows otherwise. Opening Brief at 2. Third, with respect to jurisdictional conflicts, the State maintains that BIA did not consider

³ As part of BIA’s required consideration of off-reservation fee-to-trust acquisitions, BIA must consider the criteria required for on-reservation fee-to-trust acquisitions, found in 25 C.F.R. § 151.10. *See* 25 C.F.R. § 151.11(a).

the effect on jurisdictional enforcement that might result from having a pocket of trust land surrounded by fee lands nor did BIA consider whether the parcel's use will remain compatible with the surrounding fee lands. We reject these arguments because the State does not identify any specific issues beyond its conclusory concern for "checkerboard" jurisdiction nor does it do more than speculate that the land's use could change in the future. Fourth, the State maintains that the record does not support the Regional Director's conclusion that BIA will be able to discharge any additional duties required upon taking the parcel into trust. We disagree, as we find that the record adequately supports the Regional Director's consideration of this issue. Finally, the State claims that the Regional Director's decision should be vacated and remanded for renewed consideration because of the lapse of time the matter has been under consideration. We reject this argument because the State fails to direct our attention to any change in circumstances that would merit reconsideration by BIA. We therefore affirm the Regional Director's decision.

1. Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's judgment in discretionary decisions. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of BIA's discretionary authority, including any limitations on its discretion that may be established in regulations. *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the requirements set forth in 25 C.F.R. § 151.11 (which incorporates the factors found in § 151.10) must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *See City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287, 294 (2010), *jud. rev. pend'g sub nom. City of Yreka v. Salazar*, No. 2:10-CV-01734-WBS-EFB (E.D. Cal.). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't. of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008). Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't. of the Interior*, 401 F. Supp.2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or

bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246-47.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate. *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. At all times, appellants bear the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

2. Need and Purpose for the Land (25 C.F.R. § 151.10(b), (c))

The State argues that there is no showing that trust status either is needed for the land or furthers the Nation's purposes for the land. We decline to consider the argument because the State raises this argument for the first time on appeal to the Board. The scope of appeals before the Board ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. We see no reason to depart from that rule here. We do note, however, that the same argument previously has been considered and rejected in numerous cases. *See, e.g., Cass County*, 42 IBIA at 248; *see also South Dakota*, 423 F.3d at 801 ("it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance").

3. Impact of Removal from Tax Rolls (25 C.F.R. §§ 151.10(e), 151.11(d))

Although the State concedes that the property tax loss resulting from taking the Buck (PT-56) property into trust is "a de minimis amount", *see* Opening Brief at 2, the State argues, on behalf of the County, that BIA failed to consider the cumulative impacts on the County resulting from the loss of tax revenue it would otherwise continue to receive if the land were to remain in fee status.⁴ The State argues that "[n]owhere is [the] County able to address the overall effect of the [Nation's] land acquisition program." *Id.* The State also argues that the Decision failed "to note the unfairness to [the] County [inasmuch as] the parcel is served by roads maintained by [C]ounty funds." *Id.*

⁴ We will presume, without deciding, that the State may raise arguments on behalf of the County.

We reject the State’s arguments. First, as the Regional Director points out, the regulations do not require that BIA conduct a “cumulative impacts” analysis. Subsection 151.10(e) directs BIA to consider the impact of the removal of “*the* land” from the tax rolls and is silent concerning consideration of any cumulative impacts that may result from other possible trust acquisitions, each of which must also be evaluated under Section 151. Therefore, the Board consistently has rejected arguments that BIA must undertake a separate “cumulative impacts” analysis. *See, e.g., Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 51 (2009), *jud. rev. pend’g sub nom. State of South Dakota v. U.S. Dep’t. of the Interior*, CIV No. 10-3007 (D.S.D.); *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 81-82 (2009). On the other hand, in response to a similar argument raised in another case, the Board has noted that prior trust acquisitions necessarily will be reflected in the baseline condition, e.g., the County’s tax base against which the effects of the trust acquisition must be compared by BIA. *See State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA at 294 n.8. And we have not ruled out the possibility that BIA’s proper exercise of discretion may, under certain circumstances, require consideration of the collective impact of multiple simultaneous fee-to-trust applications. *See Roberts County*, 51 IBIA at 51 n.13. But in the present case, the State makes only a general allegation that BIA should have considered this acquisition in relation to “a much larger ongoing land acquisition program” by the Nation, Opening Brief at 2, but provides no details whatsoever. We therefore find no basis to conclude that BIA’s exercise of discretion in considering § 151.10(e) was defective.

Moreover, contrary to the State’s assertions, the State (and County) had two opportunities to bring any cumulative impacts to BIA’s attention through the comment period preceding the Superintendent’s decision and, failing that, through an appeal to the Regional Director.⁵ The record shows that both the State and the County were sent letters in 1999 informing them of the fee-to-trust application for the Buck (PT-56) property and requesting information and comments within 30 days. Although both the State and the County responded, no information concerning any cumulative financial (or other) impact was provided. The parties merely informed BIA that current taxes on the parcel were then \$240.44 and commented that “[t]he impact and the tax burden [resulting from the land passing into trust status] . . . will no doubt have a deteriorating effect upon the County’s tax base and the services offered to all it[’s] citizens.” *See, e.g.,* letter from County to Agency, June 21, 1999, at 2-3 (AR, Tab 6). The State (and County) had a further opportunity to comment in its appeal to the Regional Director but again failed to provide any information beyond conclusory statements and current tax information for the parcel.

⁵ Of course, any comments may also be made in the course of BIA’s consideration of other fee-to-trust acquisition applications.

Finally, we disagree with the State's complaint that the Regional Director ignored "the unfairness to [the] County [of the removal of the parcel from the tax rolls]," given the County's maintenance of roads. Opening Brief at 2. The Regional Director found that "[t]he benefits to the [Nation] and [the] offset of the tribal management of government services such as law enforcement, fire protection, *road and bridge construction and maintenance*, social daycare/headstart and senior citizen programs diminish the responsibility of the [C]ounty and [S]tate for residents of the [Nation's] Reservation." Decision at 6 (emphasis added). Moreover, in his brief, the Regional Director points out that in 1999 the Nation showed that it expended over \$1.6 million on roads.⁶ The State does not dispute the Nation's asserted expenditures on roads or the fact of its contribution to the maintenance of reservation roads. Therefore, we conclude that the Regional Director adequately considered the issue of roads and road maintenance.

4. Jurisdictional Conflicts (25 C.F.R. § 151.10(f))

The State argues that the Regional Director's consideration of zoning issues is inadequate because it did not consider the fact that the parcel would be an "island" surrounded by lands subject to the County's zoning or consider whether the use of the Buck (PT-56) property "will remain compatible with surrounding land use." Opening Brief at 3. We reject the State's argument because the State fails to articulate, much less offer evidence to show, why the existence of separate zoning authorities for the subject parcel and the surrounding properties is a present concern. The State's fear that zoning may change in the future is entirely speculative, and the Regional Director cannot rest his decisions on matters of speculation. *See, e.g., City of Eagle Butte*, 49 IBIA at 82 (in a fee-to-trust decision, "[t]he Regional Director . . . has no obligation to consider [appellant's] speculation about what might happen in the future").⁷

⁶ The record also reflects that the Nation budgeted over \$1.85 million for roads in 2000, and estimates spending approximately \$29 million between 1997 and 2005 on roads. *See* Letter from Nation to Agency, Jan. 22, 2001, at 2, 3 (AR, Tab 23).

⁷ Moreover, as the Regional Director points out, the Nation previously has advised of a change in zoning for a parcel during the pendency of an appeal from BIA's decision to accept the parcel into trust, which prompted BIA to seek a remand of the appeal from the Board to provide the County and State the opportunity to comment and for BIA to reconsider the application. *See Jackson County, Kansas v. Acting Southern Plains Regional Director*, 49 IBIA 199, 199-200 (2009) (The Nation withdrew the Preston PT-115 tract from fee-to-trust consideration because the Nation "is considering changing the tribal
(continued...)

5. BIA's Ability to Assume Trust Duties for the Parcel (25 C.F.R. § 151.10(g))

The State argues that the record lacks support for the Regional Director's determination that BIA will be able to discharge any necessary duties to and concerning the Buck (PT-56) property if it is accepted into trust. The State contends that the Regional Director reversed the burden of proof by finding no evidence in the record "to contradict" the Superintendent's finding that BIA is equipped to handle additional responsibilities associated with the trust acquisition. The State points out that it has taken BIA 10 years to reach a final decision on the Nation's fee-to-trust application for the property, which the State argues is evidence of BIA's inability to handle the additional duties attendant to taking the Buck (PT-56) property into trust. We disagree.

First, this issue is a managerial judgment that falls within BIA's administrative purview. Contrary to the implication made by the State's argument, we do not construe § 151.10(g) to necessarily require BIA to include in the record specific evidence, e.g., projected future appropriations and staffing, to demonstrate that BIA will be equipped to handle additional responsibilities associated with a trust acquisition. Of course, if a trust acquisition might reasonably result in significant additional responsibilities, BIA may well need to explain its consideration of this factor in more detail than if the additional responsibilities are minimal. Here, the Superintendent determined that, because the Buck (PT-56) parcel is undeveloped (agricultural) and is located one mile from the Nation's reservation, BIA would be able to discharge its duties as steward for the land. *See* Superintendent's Decision, Apr. 17, 2001, at 2 (AR Tab 37); Memorandum, Agency Field Representative to Regional Director, Jan. 25, 2000, at 2 (AR Tab 16). The factual basis asserted by the Agency, which is not contradicted by the State, is a sufficient factual predicate for the Regional Director to determine whether BIA will be able to discharge its role as trustee for the property. We think nothing more in the record is required.

⁷ (...continued)

zoning related to this tract, and [the] parties should be afforded the right to comment on the proposed acquisition in light of the [actual] planned use"). Thus, the Nation is aware of the potential impact that such changes may have on surrounding fee lands, and has exhibited a willingness to entertain dialogue with local governments concerning changes to land use.

Second, we are not prepared to simply assume, as the State would have us do, that the length of time this particular appeal was pending before BIA constitutes evidence that BIA does not have the ability to assume additional trust responsibilities for this parcel.⁸

We conclude that BIA has made a reasoned determination that it will be able to discharge any additional duties necessarily required in its role as trustee for the Buck (PT-56) property.

6. Staleness and Denial of Due Process

The State's last argument maintains that the length of time that this fee-to-trust acquisition request has been pending renders the Regional Director's decision defective and must be remanded for a new analysis based on current information. In its entirety, the State's argument on staleness is:

5. The decision is so untimely as to amount to a denial of due process.

The [Nation's] initial resolution requesting fee to trust acquisition was in January, 1999. The process to date has taken over ten years. Any analysis of the 25 CFR 151.10 and 151.11 factors is hopelessly outdated.

Opening Brief at 3. In response, the Regional Director argues that the State does not show how it has been prejudiced by the delay or how the delay amounts to a denial of due process. We agree. The State's bare bones assertion is not accompanied by any evidence of changed circumstances affecting or concerning the Buck (PT-56) property that would render the Regional Director's decision defective in the absence of considering the changed circumstances. Moreover, there is no evidence in the record that while the appeal was pending before the Regional Director, the State sought to supplement its appeal with new

⁸ Nothing in the record or in the Regional Director's decision explains the 7-year gap between the appeals filed by the State and the County from the Superintendent's decision in 2001 and the Regional Director's decision in 2008. In his Answer Brief to the Board, the Regional Director blames the delay on the appeals filed by the State and the County. The Regional Director does not explain this comment and we find no support in the record for this comment.

evidence. Therefore, we reject the State's argument that the Regional Director's decision is somehow defective simply due to the passage of time.⁹

Conclusion

For the reasons set forth above, we conclude that the State of Kansas has not met its burden of showing error in the Regional Director's decision to accept the Buck (PT-56) property into trust.

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 December 15, 2008, decision to take the Buck (PT-56) property into trust for the Prairie Band Potawatomie Nation.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

 // original signed
Steven K. Linscheid
Chief Administrative Judge

⁹ If anything, the State and County have benefitted from the delay because taxes presumably have continued to accrue and be paid on the property.