



INTERIOR BOARD OF INDIAN APPEALS

Gila River Indian Community v. Commissioner of Indian Affairs
and Henry Martinez, Jr.

8 IBIA 150 (08/18/1980)



United States Department of the Interior

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

GILA RIVER INDIAN COMMUNITY
v.
COMMISSIONER OF INDIAN AFFAIRS
AND HENRY MARTINEZ, JR.

IBIA 80-9-A

Decided August 18, 1980

Appeal from decision by Acting Deputy Commissioner of Indian Affairs affirming decision by Phoenix Area Director to grant fee patent to appellee.

Reversed.

1. Indian Lands: Allotments: Generally--Indian Lands: Patent in Fee: Generally

Under 25 CFR Part 121 the issuance to qualified applicants of fee patent title to trust allotments is a discretionary act of the Secretary. Thus, where both an applicant for issuance of a fee patent to trust lands and the tribe of which he is a member have addressed policy arguments to the Secretary to move his discretion regarding termination of an allotment's trust status, it is error to refuse to decide the issue presented on its merits.

APPEARANCES: Rodney B. Lewis, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 27, 1978, appellee Henry Martinez, Jr., applied for issuance of a fee patent to 33.03 acres of Indian trust lands of which he is the beneficial owner. On December 26, 1978, his tribe, the appellant Gila River Indian Community (tribe), sought to delay final agency action on appellee's patent application pending before the Phoenix Area Director, Bureau of Indian Affairs (Director). The tribe, having previously been afforded a delay to pursue purchase negotiations for the land with appellee pursuant to provision of 25 CFR 121.2, asked for a further delay of 60 days. The Director, however, adhered to an earlier announced decision to issue a fee patent to appellee unless the parties could agree on terms for

purchase of the allotment before January 15, 1979. On January 15, 1979, the tribe appealed to the Commissioner the Director's refusal to grant a further delay. Issuance of a fee patent to appellee's allotted land was stayed pending completion of the administrative appeal process within the Department. On appeal to the Commissioner, both parties argued that policy considerations respecting tribal self-determination and individual self-determination were at stake and should ultimately dispose of the question concerning the application. The Commissioner, however, rejected the arguments of the parties, and determined that where an individual Indian whose competence is not questioned seeks to obtain fee title to his allotted lands, the Secretary is obliged to issue the patent in fee. (Decision of Acting Deputy Commissioner Theodore C. Krenzke, dated August 21, 1979.)

Indeed, appellee's competence to receive the trust land in fee is conceded by the tribe. Appellee is a self-employed businessman who seeks to raise money to put into his business, which he operates on the tribal reservation. The tract he seeks to remove from trust status has been valued by tribal appraisers at \$2,000 per acre. Appraisers for appellee, however, set a \$4,000 value for each acre in the allotment. The qualifications of both sets of appraisers is unquestioned; both are apparently competent professionals. Additionally, appellee has received a firm offer to buy, in the amount of \$3,800 per acre, from a non-Indian purchaser, provided the land is taken out of trust status. The tribe has offered appellee \$2,000 per acre for the allotment, based upon the tribal appraisal, and stands firm on that offer.

The tribe contends the decision to issue a fee patent to appellee's allotment is erroneous because it adversely affects the ability of the tribe to consolidate the tribal land base, and consequently will result in a misuse of agricultural lands for unsuitable purposes not contemplated by the tribal plan for the reservation. The tribe argues that issuance of the fee patent is contrary to the provisions of the Indian Reorganization Act, the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 (1976), and takes the position it was denied a reasonable opportunity to acquire appellee's land by circumstances which forced the tribe into an inferior bargaining posture. Finally, the tribe maintains the Director failed to follow proper administrative procedures when notice of the proposed transfer of land from trust status was given to adjoining allotment holders in the vicinity of appellee's trust property. The tribe now seeks an order denying appellee's application for issuance of a fee patent to the trust land, and an order requiring the parties to submit to binding arbitration to determine the value of appellee's trust property for purposes of acquisition by the tribe.

[1] These same basic issues were previously considered by the Department in Oglala Sioux Tribe v. Commissioner of Indian Affairs

and Richard Tall, 7 IBIA 188, 86 I.D. 425 (1979), appeal pending sub. nom. Oglala Sioux Tribe v. Hallett, Civ. No. 79-5118 (D.S.D., filed Nov. 7, 1979). In Oglala, as here, there was no question concerning the competency of the owner of the trust property: The question concerned the nature of the appropriate Departmental action to be taken where transfer of land from trust status to unrestricted ownership was proposed. In Oglala, however, unlike this case, the tribe did not actively resist the application for fee patent title by the landowner during the administrative appeals process. The decision in Oglala noted that the regulatory history of the applicable rule set out at 25 CFR 121.2, permitting action to be withheld on applications to remove allotments from trust status, makes the issuance of fee patents to individual allotment holders discretionary with the Secretary. ^{1/} The decision further points out that by providing the possibility of delay in the application process the regulation permits a third alternative to outright approval or rejection of applications for fee patents to allotted trust land. (Oglala at 205, 206-207, and see 7 IBIA 207, n.12.)

It is not correct to argue, as does the tribe, that the Indian Reorganization Act, which ended the granting of allotments to individual Indians (25 U.S.C. § 461 (1976)), should be construed to prohibit the issuance of fee patents contemplated by the General Allotment Act, Act of February 8, 1887, 24 Stat. 389, 25 U.S.C. § 348 (1976). Indeed, the Indian Reorganization Act, as amended, 25 U.S.C. § 483 (1976), provides expressly for the granting of fee patents to Indian owners of trust property, but only at the discretion of the Secretary (Act of May 14, 1948, 62 Stat. 236; Oglala at 208, n.13).

The arguments advanced by the tribe reveal that the issues sought to be addressed by the parties involve questions of Indian affairs policy rather than law. Both parties have sought to move the discretion of the Secretary to obtain their desired objectives--either issuance or denial of a fee patent--under 25 U.S.C. § 483 (1976) and 25 CFR 121.5. The clear position of the tribe is that the consolidation of the tribal land base and the encouragement of tribal planning and control over the reservation should outweigh the purely personal interest of appellee and

^{1/} The Board was particularly influenced by the official statement of the Bureau of Indian Affairs issued April 18, 1972, in 37 FR 8384 on the occasion of regulatory reform of 25 CFR Part 121. There, former Commissioner of Indian Affairs Louis R. Bruce stated: "Under the present regulations if an applicant is competent, the issuance of a fee patent is mandatory. This revision [25 CFR 121.5(a)] would reflect the authority derived from the authorizing acts and allow the exercise of discretion in the issuance of fee patents * * *."

require that the application be denied. The counter arguments of appellee further emphasize that matters of policy rather than law are at stake. He argues that his individual self-determination and independence are inseparable from the interests of his tribe as a whole. He concludes that the encouragement and support of his small business by issuance to him of a fee patent to his allotment will create more jobs and foster greater development of the reservation upon which it is situated than will the preservation of the trust status for his allotment.

A balancing of these competing interests, both of which are favored by Departmental policy implementing numerous statutory requirements, involves the exercise of the discretionary powers of the Secretary. The Handbook of Federal Indian Law by Felix Cohen observes, at pages 108-109, that the termination of trust status of allotted lands is perhaps the single most significant act the Secretary can take in the administration of Indian lands. And where, as here, the only issues raised on appeal involve questions of policy, the exercise of Secretarial discretion is necessarily invoked. (25 CFR 2.19; 43 CFR 4.1(b)(2))

As pointed out in the Oglala decision at 7 IBIA 207, 208, the determination whether to convert trust land to fee status can only be decided by the Secretary on a case-by-case basis. Here, the parties have squarely presented that issue for determination to the Agency. Its ultimate determination requires an evaluation of the competing interests as defined by the opposing parties: The Agency may legitimately consider other factors than competency in order to reach a decision, including consideration of what effect issuance of a fee patent will have upon the consolidation of the tribal land base. Solicitor's Opinion, M-36184, 61 I.D. 298, 301-302 (1954); Oglala at 207-208. The necessity to balance competing interests between Indian tribes and tribal members is, as is described in Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), not an unusual circumstance in Indian affairs matters. Nor does the fact alone that an Indian is determined to be competent dispose of the question whether issuance to him of a fee patent to his allotment is proper. As pointed out by the court in Pero, "[T]he issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs." (99 F.2d at 34)

In summary, the question which must be decided on its merits is whether issuance of a fee patent to appellee is appropriate or desirable. Relevant to that question, as a minimum, is consideration of the effect the termination of trust status will have upon appellee, the tribe, and other Indians. 25 CFR 121.2. 2/

2/ The Commissioner, in finding that the issuance of a fee patent was a "ministerial duty," relied in part upon this Board's opinion

Pursuant to the authority delegated to the Board of Indian Appeals, 43 CFR 4.1, the decision of the Commissioner of Indian Affairs dated August 21, 1979, is reversed. The matter is remanded to the Commissioner with directions to evaluate the contentions of the parties on their merits and to determine the issue presented as a matter requiring the exercise of Secretarial discretion, based upon considerations of policy relevant to the question whether the trust allotment should be terminated. ^{3/}

This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge

fn. 2 (continued)
in Administrative Appeal of Kevern, 2 IBIA 123, 80 I.D. 804 (1973). Kevern, however, merely recognizes practices of the Department under prior, more restrictive regulations. Those rules now in effect appearing at 25 CFR Part 121 did not apply to and were not construed by Kevern. Kevern is now, therefore, virtually limited to its own facts as is explained more fully in the Oglala Sioux decision at 7 IBIA 205, 206.

^{3/} In its decision in Oglala, rendered September 5, 1979, the Board noted that publication of rules concerning when a fee patent application may appropriately be approved or disapproved would facilitate the exercise of discretion required in such cases. 7 IBIA 210. This case reaffirms the value such rules could have to the Bureau and all Indians. Further, while a combination of factors in Oglala rendered it inadvisable for an evidentiary hearing to be held, the Commissioner may wish to consider whether such a hearing might not be appropriate in this case. At the Commissioner's request, the Office of Hearings and Appeals could assign an Administrative Law Judge to develop an evidentiary record for use of the Commissioner in resolving this matter.