



INTERIOR BOARD OF INDIAN APPEALS

Juanita Melsheimer v. Assistant Secretary - Indian Affairs

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United States Department of the Interior

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

JUANITA MELSHEIMER

v.

ASSISTANT SECRETARY FOR INDIAN AFFAIRS

IBIA 82-59-A

Decided April 14, 1983

Appeal from a decision of the Assistant Secretary for Indian Affairs holding that an inter vivos gift of restricted townsite land from one Alaska Native to another terminated the restrictions.

Reversed and remanded.

1. Board of Indian Appeals: Jurisdiction

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

2. Alaska: Townsites--Indian Lands: Restricted Allotment--Statutory Construction: Generally

The repeal of 43 U.S.C. § 733 (1970) (formerly 48 U.S.C. § 355a (1952)) by sec. 703(a) of the Federal Land Policy and Management Act of 1976 was intended to have future effect and not to alter rights or restrictions that had accrued under the provisions of the Alaska Native Townsite Act.

3. Indians: Generally--Statutory Construction: Generally

The fundamental principle of statutory construction that words are to be taken in their ordinary meaning unless they are technical terms or words of art is particularly applicable in the construction of statutes concerning Indians.

4. Alaska: Townsites--Indian Lands: Restricted Allotment--Statutory Construction: Generally

There is no indication of congressional intention that the restrictions upon land acquired under the Alaska Native Townsite Act be terminated upon a gift of that land from one Alaska Native to another.

APPEARANCES: Bruce C. Twomley, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On September 20, 1982, the Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs (BIA), forwarded to the Board of Indian Appeals (Board) a July 12, 1982, letter from counsel for Juanita Melsheimer (appellant) requesting reconsideration of a February 25, 1982, decision of the Assistant Secretary for Indian Affairs. That decision held that the inter vivos gift of restricted townsite land from one Alaska Native to another terminated the restrictions. The administrative record was simultaneously transmitted to the Board. The Board docketed the appeal on September 29, 1982. For the reasons discussed below, the Board reverses the decision.

Background

Appellant is a 62-year-old Aleut residing in the Village of English Bay, Alaska. The village is a recognized Native village pursuant to section 11(b)(1) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 698 (1971), 43 U.S.C. § 1610(b)(1) (1976). The townsite on which appellant resides, lot 2, block 5, tract A of United States Survey 4901, was patented pursuant to the Alaska Native Townsite Act, 44 Stat. 629, 48 U.S.C. § 355a-355e (1952), and title to the townsite was granted by restricted deed from the townsite trustee on December 12, 1972. By inheritance, the entire interest in this townsite descended to Ben Ukatish, appellant's nephew.

Appellant's home was damaged by fire. In order for her to obtain assistance from a Federal housing program, Ben Ukatish attempted to convey to appellant that portion of the townsite upon which her house sits. He executed a deed to appellant for portion A of the townsite on July 8, 1981. The deed stated that the property was conveyed to appellant subject to the same restrictions as appeared in the original townsite deed. No consideration for the deed was given or promised.

On October 7, 1981, the Juneau Area Director, BIA, refused to give effect to that portion of the conveyance which attempted to continue the restrictions upon the property. This decision stated the BIA's position to be "that any conveyance of a restricted townsite lot other than by probate or will removes the restrictions contained in the original deed." (Emphasis in original.)

The Assistant Secretary for Indian Affairs affirmed the Area Director's decision on February 25, 1982. The present appeal resulted from appellant's request for reconsideration of the Assistant Secretary's decision.

Jurisdiction

[1] The Board does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs. See Willie v. Commissioner of Indian Affairs, 10 IBIA 135, 138-39 (1982). However, regulations in 43 CFR 4.330 permit any matter relating to Indians to be referred to the Board by the Secretary, the Assistant Secretary for Indian Affairs, or the Commissioner of Indian Affairs (now Deputy Assistant Secretary--Indian Affairs (Operations)). This clarification of the regulations, made through formal Departmental rulemaking procedures in 1980-81, see 46 FR 7335 (Jan. 23, 1981), is consistent with the longstanding authority of the Board as set forth in 43 CFR 4.1(b)(2) to decide any matter pertaining to Indians that might be referred to it by the Secretary and to ensure that the Assistant Secretary and Deputy Assistant Secretary had the same referral authority.

The Assistant Secretary's February 25, 1982, decision concludes: "Since this decision is based on the interpretation of law, it will become final 60 days from receipt hereof unless an appeal is filed with the Board of Indian Appeals." This concluding language is a specific and proper referral of the matter to the Board pursuant to 43 CFR 4.330. The transmittal of the request for reconsideration to the Board constituted recognition that the request should be treated as an appeal under the terms of the Assistant Secretary's

decision. The Board holds that this matter is properly before it and that it has jurisdiction to consider it.

Discussion and Conclusions

The Assistant Secretary's decision in this case, like that of the Juneau Area Director, is based upon the construction of section 1 of the Alaska Native Townsite Act, 48 U.S.C. § 355a (1952). ^{1/} This section was transferred to 43 U.S.C. § 733 (1970) and was subsequently repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 703(a), 90 Stat. 2789, effective October 21, 1976. Section 701 of FLPMA contains savings provisions including “(a) Nothing in this Act, * * * or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].” 43 U.S.C. § 1701 note (1976).

[2] The Department of the Interior, through the Interior Board of Land Appeals, has accepted the construction of this repeal set forth in an opinion of the Alaska Regional Solicitor on February 20, 1979. See Marko and Yarrow Lewis, 46 IBLA 257 (1980); Royal Harris, 45 IBLA 87 (1980); Stu Mach, 43 IBLA 306 (1979). That opinion, quoted in Lewis, supra at 258, construed the repeal to be of the type “to destroy rights in the future. Existing rights were expressly saved by Section 701(a) * * *. The rights in existence on the date of repeal were the rights of individuals then in occupancy * * *.”

^{1/} Section 355a (1952) provides in pertinent part “[t]hat the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this section * * * shall vest in the purchaser a complete and unrestricted title from the date of such approval.”

The Board finds nothing in FLPMA or its legislative history suggesting a congressional intent to alter rights or restrictions that had accrued under the provisions of the Alaska Native Townsite Act. Therefore, the Assistant Secretary's decision was properly based upon 48 U.S.C. § 355a (1952).

Section 355a (1952) has been the subject of extensive Departmental debate. ^{2/} The question usually presented has been whether the sale of restricted townsite land from one Alaska Native to another terminates the restrictions. The earliest interpretation seems to have been that the restrictions could be retained in such a conveyance. Later interpretations have suggested that any sale, whether to another Alaska Native or a non-Native, terminates the restrictions.

The sale of restricted land is the type of conveyance clearly addressed in section 355a (1952). There is no indication in the administrative record or the decisions of the BIA in this case that the Department has ever considered whether or not the section permits the conveyance of land with its restrictions through a gift, the issue raised in the present appeal.

[3] A fundamental principle of statutory construction is that words are to be taken in their ordinary meaning unless they are technical terms or words of art. This canon of construction is particularly applicable in the interpretation of statutes concerning Indians. Squire v. Capoeman, 351 U.S. 1, 6-8 (1956).

^{2/} See, e.g., 1942 form deed; and memoranda of Mar. 30, 1954; Nov. 19, 1954; Mar 19, 1959; July 16, 1970; and Apr. 1, 1974.

In both common understanding and legal parlance there is a distinct and important difference between a sale and a gift. According to Webster's Collegiate Dictionary (1960) at page 746, a "sale" is "a contract whereby the ownership of property is transferred from one person to another for a sum of money or, loosely, for any consideration." In contrast, "gift" is defined at page 349 as "[a]nything given; a present." Similarly, Black's Law Dictionary (4th ed. 1968) at page 1503, defines "sale" as "[a] contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer,' (or purchaser) by which the former, in consideration of the payment of a certain price in money, transfers to the latter the title and the possession of property." Black's defines "gift" at page 817 as "[a] voluntary transfer of personal property without consideration. A parting by owner with property without pecuniary consideration. * * * A voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money."

[4] It is thus clear that both in its ordinary meaning and as a legal term, "sale" does not include "gift." If Congress had meant to cause the termination of the restrictions on Alaska Native townsite lands upon any change of ownership, it could easily have used a term such as "conveyance" that would have been all encompassing. This is not the case. The Board finds no indication that by providing for the termination of restrictions upon the sale of Alaska Native townsite lands, Congress also intended to cause the termination of those restrictions upon a gift of such land from one Alaska Native to another. 3/

3/ The most recent congressional enactment dealing with real property held by Indians, the Indian Land Consolidation Act, Act of Jan. 12, 1983, P.L. 97-459,

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and the referral of this case to the Board by the Assistant Secretary for Indian Affairs, 43 CFR 4.330, the February 25, 1982, decision of the Assistant Secretary for Indian Affairs is reversed. 4/ This case is remanded to the Bureau of Indian Affairs for appropriate action consistent with this opinion.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Franklin D. Arness
Administrative Judge

fn. 3 (continued)
§ 203, 96 Stat. 2515, indicates an intention to ease the acquisition and holding of land in trust and restricted status by all Indians regardless of the means through which the land was acquired.

4/ The Board has not considered the question, addressed in prior Departmental memoranda as noted earlier in this opinion, whether a sale of Alaska Native townsite restricted land from one Alaska Native to another terminates the restrictions on that land. Neither has it considered the application of the Indian Land Consolidation Act to this question. These issues were not raised in the present appeal.