



INTERIOR BOARD OF INDIAN APPEALS

Sonney Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs

18 IBIA 239 (04/13/1990)



United States Department of the Interior

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

SONNEY THORNBURG

v.

ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-15-A

Decided April 13, 1990

Appeal from a decision declining to grant retroactive approval to a conveyance of restricted Indian land.

Affirmed.

1. Indians: Lands: Individual Trust or Restricted Land: Alienation

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

2. Board of Indian Appeals: Jurisdiction--Indians: Lands: Individual Trust or Restricted Land: Alienation

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Ken B. Privett, Esq., Pawnee, Oklahoma, for appellant; M. Sharon Blackwell, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Sonney Thornburg seeks review of an August 8, 1989, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to grant retroactive approval to a warranty deed executed on February 7, 1920, by Grant White, a member of the Pawnee Indian Tribe, now deceased. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Grant White was named as grantee in a warranty deed dated August 16, 1917, in which Kellous and Elva Elmore conveyed title to lots 3 and 4, block 9, Herriman Addition to the City of Pawnee, Oklahoma. On October 5, 1917, the Commissioner of Indian Affairs approved the expenditure of \$1,550 from funds in White's Individual Indian Money account to purchase the property.

The deed was recorded in Pawnee County on October 9, 1917. It included the following condition:

Subject to the condition that, while the title is in the grantee or heirs, no deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, shall be of any force or effect or capable of confirmation or ratification unless approved by the Secretary of the Interior.

The deed also contained the following notation: "The consideration for the within deed is paid with funds held in trust by the United States for the benefit of the grantee." This notation was signed by Ralph P. Stanion, Supt. & S.D.A.

By warranty deed dated February 7, 1920, White conveyed the property to John L. Lehew. The deed recites that White received \$1,800 as consideration for the conveyance. It does not bear the approval of the Secretary of the Interior.

The property eventually came into the hands of appellant, who, upon learning that he lacked marketable title, applied to the Superintendent, Pawnee Agency, BIA, for retroactive approval of the 1920 deed from White to Lehew. After receiving appellant's request, BIA staff searched the records of the agency, the Anadarko Area Office, and the National Archives for evidence of approval of the 1920 conveyance, but found no such evidence. BIA was also unable to find any records concerning the circumstances surrounding the 1920 conveyance.

By letter of April 24, 1989, the Superintendent declined to approve the 1920 conveyance. Appellant appealed this decision to the Area Director by letter dated May 3, 1989. The Area Director affirmed the Superintendent's decision on August 8, 1989.

[1] The Area Director cited the Board's decision in Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982), holding that the Secretary has the authority to grant retroactive approval to a conveyance of Indian trust or restricted property if he is satisfied that (1) the consideration for the conveyance was adequate; (2) the grantor received the full consideration bargained for; and (3) there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.

The Area Director found that the first requirement was satisfied because the consideration recited in the deed was adequate. 1/ She continued:

However, our records do not reveal that Mr. White did in fact receive the consideration involved. As to the third requirement, there is no indication of the state-of-mind of the grantor or of events that occurred at the time of the transaction that would dispel any suspicions of overreaching, fraud, or other illegality. Also, the documents relating to the conveyance do not indicate that Mr. White was represented by legal counsel. Presence of legal counsel might indicate that the legal ramifications of the conveyance had been fully explained. In view of the above, it does not appear that the evidence gathered surrounding this conveyance supports a finding of compliance with the second and third requirements.

(Area Director's Decision at 2). Appellant's appeal of this decision was received by the Board on October 16, 1989. 2/ Both appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant argues that all three requirements enunciated in Wishkeno have been met. A cancelled \$2 revenue stamp on the original deed, appellant argues, is evidence that consideration was paid. "Revenue stamps are not paid if consideration is not received. This is common knowledge and practice with county clerks within the state of Oklahoma" (Appellant's Brief at 1). Further, appellant contends, a notary's statement on the deed that White acknowledged he "executed [the deed] as his free and voluntary act and deed" is evidence that there was no coercion or overreaching on the part of the grantee.

The Area Director argues that the revenue stamp is evidence only that the state tax was paid, not that consideration was received by the grantor; and that, under Oklahoma law, the notary's signature may only be considered as evidence that White himself executed the deed. Further, citing Escalanti v. Acting Phoenix Area Director, 17 IBIA 290 (1989), the Area Director

1/ The Area Director based this conclusion on an appraisal prepared by the Area Chief Appraiser. The appraisal considered comparable sales during the period 1918-1923 and concluded that \$1,800 was market value at the time of the 1920 conveyance.

2/ Appellant did not receive the Area Director's Aug. 8 decision until Sept. 14, 1989. The Area Director twice attempted to send the decision to appellant's attorney by certified mail. Both times, it was returned unclaimed. Finally, on Sept. 14, a BIA employee hand-delivered the decision to the attorney.

Appellant's notice of appeal was postmarked Oct. 9, 1989, and was therefore timely under 43 CFR 4.332(a).

argues that the approval of conveyances of Indian trust or restricted land is committed to the discretion of BIA and that the Board may not substitute its judgment for that of BIA.

[2] The Board has held that its role in reviewing decisions concerning the approval of conveyances of Indian trust or restricted land is to ensure that proper consideration has been given to all legal prerequisites to the exercise of BIA's discretion. Escalanti, 17 IBIA at 294; White v. Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 142, 146 (1987); Wishkeno, *supra*. In Wishkeno, the Board remanded a case concerning the retroactive approval of a deed to the Deputy Assistant Secretary--Indian Affairs (Operations) for issuance of a new decision. The Board stated:

For the new decision to be legally sufficient it should seek to apply the legal standards recognized in this opinion as controlling in cases where Secretarial approval of deed conveyances is sought after the death of the grantor. A new decision which shows proper regard to the applicable law and the facts at hand, whatever those facts may be, will not be set aside by the Board as it is not the Board's function to substitute its judgment for that of the agency in matters committed to agency discretion.

11 IBIA at 33, 89 I.D. at 661. In this case, the Area Director followed the Board's dictate in Wishkeno. She considered the three requirements for retroactive approval set out in that decision but was not satisfied that the second and third requirements had been met. Given the length of time that has passed since the conveyance, it was and undoubtedly will continue to be difficult to find evidence concerning it. However, BIA staff searched all records available to it, and the Area Director considered all evidence submitted by appellant. The Area Director's judgment is not clearly against the weight of the evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Anadarko Area Director's August 8, 1989, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge