INTERIOR BOARD OF INDIAN APPEALS

Kialegee Tribal Town v. Muskogee Area Director, Bureau of Indian Affairs

19 IBIA 296 (04/17/1991)

United States Department of the Interior

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

KIALEGEE TRIBAL TOWN OF OKLAHOMA
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-110-A, 90-131-A Decided April 17, 1991

Appeals from decisions concerning acquisition of land in trust status.

Affirmed. 13 IBIA 302 (1985) clarified.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

   The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

   Under 25 CFR 151.8, the written consent of the governing tribe of a reservation is required before land within the reservation may be taken in trust for another tribe.

APPEARANCES: M. Allen Core, Esq., Tulsa, Oklahoma, for appellant; Tim Vollmann, Esq., Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for appellee; Joseph R. Membrino, Esq., Washington, D.C., and James Wilcoxen, Esq., Muskogee, Oklahoma, for amicus curiae, Cherokee Nation of Oklahoma.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kialegee Tribal Town of Oklahoma seeks review of a May 18, 1990, decision of the Muskogee Area Director and a June 26, 1990, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (both hereafter Area Director; BIA). In his May 18 decision, the Area Director declined to consider a request to take certain land in trust for appellant without the concurrence of the Muscogee (Creek) Nation (Nation). In his June 26 decision, he declined to assign the beneficial title of certain trust land to appellant without the concurrence of the Nation. For the reasons discussed below, the Board affirms the Area Director's decisions.

Background

Appellant is one of three Creek tribal towns organized under the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. §§ 501-510 (1988). 1/ It has a constitution approved by the Assistant Secretary of the Interior on April 14, 1941, and ratified by the members of the town on June 12, 1941. It also has a corporate charter approved by the Assistant Secretary on July 23, 1942, and ratified by town members on September 17, 1942.

The Nation is also organized under the OIWA; it has a constitution approved by the Acting Deputy Commissioner of Indian Affairs on August 17, 1979, and ratified by the members of the Nation on October 6, 1979.

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1/ The other two are Alabama-Quassarte Tribal Town and Thlopthlocco Tribal Town. The three organized tribal towns are recognized by the Department of the Interior as entities separate from the Nation, entitled to receive BIA funding and services directly, rather than through the Nation. See Letter from Assistant Secretary - Indian Affairs to John G. Ghostbear, Nov. 30, 1989. See also Memorandum from Assistant Solicitor, Tribal Government and Alaska, to Commissioner of Indian Affairs, Mar. 23, 1981; Memorandum from Solicitor to Commissioner of Indian Affairs, July 15, 1937. Although the towns are separate from the Nation, dual town-Nation enrollment is apparently common. See Assistant Secretary's Nov. 30, 1989, letter; Assistant Solicitor's Mar. 23, 1981, memorandum.

In addition to the three Federally recognized towns, there are, according to the Area Director, approximately 40 other Creek tribal towns (Area Director's Brief at 10). The tribal towns were discussed in Harjo v. Andrus, 581 F.2d 949, 951 n.7 (D.C. Cir. 1978):

"The Creek Nation, historically and traditionally, is actually a confederacy of autonomous tribal towns, or talwa, each with its own political organization and leadership. Membership in a town is a matter of birthright rather than residence, each Creek being, by birth, a member of his mother's town, or, if his mother is non-Indian, a member of his father's town. Originally, there were four 'mother' towns, but the number was expanded by a transfer of town fires, until, by the time of the adoption of the [Nation's] 1867 Constitution, there were approximately forty-four talwa in existence. Tribal towns can also merge or dissolve, and there is at present some doubt as to the exact number of towns that are politically active."

Under the 1867 constitution, representation in the Nation's legislative body was by tribal town. The court of appeals in Harjo held that a tribal referendum should be conducted to determine whether representation under a then proposed constitution would be by tribal town or by geographic district. 581 F.2d at 951-53. Apparently the "geographic district" option prevailed in the referendum; Article VI of the Nation's 1979 constitution provides for representation in the National Council by geographic district.

Article II, section 5, of the 1979 constitution provides: "This Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions."

By letters of April 5 and 26, 1990, to the Area Director, appellant sought the trust acquisition of two parcels of land, both located in Tulsa County, Oklahoma, within the boundaries of the former Creek Indian Reservation. Appellant stated that both would be used for economic development purposes, including a bingo operation, smokeshop, arts and crafts shop, gas station, convenience store, and tribal town office. Appellant stated that it presently had no land. Further, it stated:

> This acquisition will cause no new jurisdictional problems. The Tribal Town will have land to exercise jurisdiction over. The Town knows that and is prepared to assume the responsibility that goes along with the exercise of that sovereign authority. The Muscogee Creeks exercise no authority over [those tracts] now and will not after the Tribal Town acquires it.

On May 18, 1990, the Area Director informed appellant that its request could not be considered without the concurrence of the Nation, as required by 25 CFR 151.8, because the parcels in question were located within the boundaries of the Nation's former reservation.

By letter of June 11, 1990, appellant requested that the beneficial title of certain lands in McIntosh County, Oklahoma, be assigned from the Nation to appellant. Appellant stated that the lands had been purchased for appellant's benefit under authority of the OIWA but that appellant had elected not to take formal beneficial title because, at the time, during World War II, all its able-bodied men were off to war.

On June 26, 1990, the Area Director declined to assign title to appellant without the concurrence of the Nation, for the same reasons given in his May 18 letter.

Appellant's notices of appeal from these two decisions were received by the Board on June 19, 1990, and July 23, 1990. The appeals were consolidated by Board order of August 14, 1990. Briefs were filed by appellant, the Area Director, and, as discussed immediately below, the Cherokee Nation of Oklahoma as amicus curiae.

Amicus Curiae

The Cherokee Nation of Oklahoma moved for leave to appear as amicus curiae under 43 CFR 4.313, on the grounds that appellant's claims "raise issues that challenge the well-being and integrity of the Cherokee Nation's government and economy." The Nation states that a claim similar to appellant's claim here is made in United Keetoowah Band of Cherokee Indians v. Secretary of the Interior, No. 90-C-608-B (N.D. Okla. complaint filed July 16, 1990), in which the United Keetoowah Band seeks to have the Secretary take land in trust for it.

43 CFR 4.313(a), concerning amicus curiae, intervention, and joinder, states that it "shall be liberally construed." Accordingly, the Cherokee Nation's motion is granted and its brief is accepted.

Discussion and Conclusions

[1] In Baker v. Muskogee Area Director, 19 IBIA 164, 168, 98 I.D. 5, 7 (1991), the Board stated:

> In several recent decisions, the Board has discussed its role in reviewing BIA decisions concerning the acquisition of land in trust status. See, e.g., Ross v. Acting Muskogee Area Director, 18 IBIA 31 (1989); Eades v. Muskogee Area Director, 17 IBIA 198 (1989); City of Eagle Butte, South Dakota v. Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In City of Eagle, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's. Cf. State of Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The Board concluded, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-196, 96 I.D. at 330, and cases cited therein. The Board has also held that it has jurisdiction to review a discretionary BIA decision to the extent it reaches a legal conclusion. See, e.g., Honaghaahnii Marketing and Public Relations v. Navajo Area Director, 18 IBIA 144, 148 (1990); Simmons v. Deputy Assistant Secretary - Indian Affairs (Operations), 14 IBIA 243, 247 (1986).

In this case, the Area Director declined to consider appellant's trust acquisition request on the grounds that the consent of the Nation was required under 25 CFR 151.8. His conclusion that the Nation's consent was necessary is a legal conclusion subject to Board review.

Appellant argues before the Board that: (1) the Secretary has authority to acquire land in trust for appellant, and appellant's governing documents do not require the consent of a third party for such acquisition; (2) appellant already has authority to exercise jurisdiction throughout the former Creek Reservation because appellant's members own trust or restricted lands throughout the reservation; (3) the requested acquisitions will not affect the Nation's jurisdiction because the parcels are presently under state rather than tribal jurisdiction; therefore, consent of the Nation should not be required; (4) the lands in McIntosh County were purchased for the benefit of appellant and are improperly being held for the benefit of the Nation; and (5) the issue in this appeal was decided, favorably to appellant's position, in Thlopthlocco Tribal Town v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 302 (1985), and is now stare decisis.

If appellant's last argument is correct, it is possible that its other arguments need not be addressed. Therefore the Board considers that argument first.

Thlopthlocco Tribal Town involved that tribal town's application for the trust acquisition of land within the boundaries of the former Creek

Reservation. 2/ The Deputy Assistant Secretary evaluated the request under 25 CFR 151.3(a)(3), which concerns off-reservation acquisitions for tribes. The Board held that this was error and that the Deputy Assistant Secretary should have evaluated the request under 25 CFR 151.3(a)(1), concerning on-reservation acquisitions. 3/ The Board did not address the consent requirement in section 151.8.

Appellant apparently reads Thlopthlocco Tribal Town as holding that the former Creek Reservation was the tribal town's reservation for purposes of 25 CFR Part 151, making unnecessary the Nation's consent to the town's trust acquisition. The Board's analysis in that decision is somewhat imprecise, and appellant's interpretation is arguable. However, it does not appear that the Board actually intended to hold that the former Creek Reservation was Thlopthlocco's reservation, but only that land within it was "on-reservation" as opposed to "off-reservation." Since the question of consent by the reservation's governing tribe was not raised as an issue in that appeal, it was simply not addressed. While it appears that the issue of consent was not decided in Thlopthlocco Tribal Town, the decision is admittedly ambiguous. Accordingly, the Board now clarifies that decision by holding that it did not decide the issue of whether the Nation's consent was required before land within the former Creek Reservation could be acquired in trust for Thlopthlocco Tribal Town.

The Board proceeds to appellant's other arguments. Appellant's first argument is that the Secretary has authority to acquire land in trust for it and that its governing documents do not require the consent of a third party for such acquisitions. The Area Director states that he has no quarrel with this argument but notes that the consent requirement derives from a source outside appellant's governing documents, i.e., the regulations in 25 CFR Part 151. The Board accepts appellant's statements as correct but agrees with the Area Director that they have no particular relevance to the issue on appeal here.

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2/ Thlopthlocco Tribal Town, alone among the Creek tribal towns, has a land base, consisting of scattered parcels acquired in trust for it under the OIWA. The land at issue in Thlopthlocco Tribal Town was apparently not adjacent to, or even in the vicinity of, any existing town lands. See 13 IBIA at 303.

3/ 25 CFR 151.3(a) provides:

"Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing."

Some of appellant's contentions suggest that it is challenging the wisdom of the regulatory consent requirement. 4/ To the extent that this appeal challenges the regulation itself, the Board lacks jurisdiction over it. The Board has no authority to disregard a duly promulgated Departmental regulation or to declare it invalid. E.g., Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990).

Appellant's second argument is that it already has authority to exercise jurisdiction over some lands within the former Creek reservation, i.e., trust or restricted lands owned by its members. Appellant does not explain the relevance of this argument to the issue on appeal here. 5/ An implication of the argument, however, is that the former Creek Reservation is appellant's reservation for purposes of 25 CFR Part 151. That argument is addressed below.

Appellant next argues that its requested trust acquisition will not cause jurisdictional conflicts with the Nation and therefore the Nation's consent should not be required. The possibility of "[j]urisdictional problems and potential conflicts of land use which may arise" is one of several factors which must be considered by BIA in evaluating a trust acquisition request. See 25 CFR 151.10(f). In this case, however, because the Area Director made a threshold determination that appellant's request could not be considered at all without the Nation's concurrence, he never reached the point of considering possible jurisdictional problems. The issue of jurisdictional conflicts, therefore, is not before the Board. Further, the question of whether the Nation's consent should be required cannot be resolved by the Board, for the reasons discussed above, to the extent that it relates to the wisdom of the existing regulatory requirement. The only issue before the Board is whether, under 25 CFR Part 151 as presently written, the Nation's consent is required.

[2] 25 CFR 151.8 provides:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that

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4/ Appellant contends, for instance: "Inasmuch as both [appellant and] the Secretary [are] bound by terms of [appellant's] organizational documents, the Secretary should be supporting and encouraging these acquisitions, not requiring approval from a third party" (Appellant's Opening Brief at 3).

5/ The Area Director suggests that appellant may be seeking a ruling from the Board that appellant exercises governmental jurisdiction over lands of its members within the former Creek reservation. He states that the plaintiff in United Keetoowah Band, supra, makes a similar allegation in that case.

The Board reaches no conclusions in this decision concerning whether or not appellant has governmental jurisdiction over lands of its members.

> such consent will not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

Section 151.2(f) provides:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the state of Oklahoma or where there has been a judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.

For purposes of this appeal, the relevant portion of the "Indian reservation" definition is the latter portion, i.e., "that area of land constituting the former reservation of the tribe as defined by the Secretary."

The former Creek Indian Reservation has consistently been recognized by the Federal government as the Nation's reservation, over which the Nation has authority to exercise jurisdiction. (This is true even though Federal recognition of the nature of the Nation's jurisdiction has varied.) See, e.g., Treaty of August 7, 1856, 11 Stat. 699; Treaty of June 14, 1866, 14 Stat. 785; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; Buster v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). See, generally, Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. Harjo v. Andrus, supra.

The Nation's approved constitution asserts jurisdiction over the reservation. See, e.g., Article I, section 2, which provides:

> The political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by The Muscogee (Creek) Nation and the United States of America; and such jurisdiction shall include, however not limited to [sic], properties held in trust by the United States of America and to such other properties as held by the Muscogee (Creek) Nation, such property, real and personal to be TAX-EXEMPT from Federal and State taxation, when not inconsistent with Federal law.

See also, e.g., Article VI, section 7(h), which authorizes the Nation's legislative body, the National Council, "[t]o lay and collect taxes within the boundary of The Muscogee (Creek) Nation's jurisdiction from whatever source derived." The Board has held that it is bound by the Secretary's approval of a tribal constitution. Estate of Peter Alvin Ward, 19 IBIA 196, 205-07, 98 I.D. 14, 19-20 (1991); Edwards, McCoy & Kennedy v. Acting Phoenix Area Director, 18 IBIA 454 (1990). In this case, it is not necessary to

rely solely on that approval. The Secretary's longstanding recognition of the former Creek Reservation as the Nation's reservation is manifest. Accordingly, it must be considered the Nation's reservation for purposes of 25 CFR Part 151.

Appellant does not contend that it ever had its own reservation or that it now has its own "former reservation" within the meaning of 25 CFR 151.2(f). 6/ As noted above, however, appellant may intend to argue that the entire former Creek Reservation is not only the Nation's but also appellant's reservation for purposes of Part 151. Appellant fails to support such an argument, producing no evidence whatsoever that the Secretary has ever considered the former Creek Reservation to be appellant's reservation. The Board finds that the former Creek Reservation is not appellant's reservation within the meaning of section 151.2(f) because it is not "that area of land constituting the former reservation of [appellant] as defined by the Secretary."

Because the former Creek Reservation is the Nation's reservation, and not appellant's reservation, section 151.8 requires the written consent of the Nation before land within the reservation may be taken in trust for the benefit of appellant. Accordingly, the Board finds that the Area Director's decision of May 18, 1990, should be affirmed.

Appellant's fourth argument is directed only to the Area Director's June 26, 1990, decision, which concerns certain lands in McIntosh County, purchased by the Secretary under authority of the OIWA, apparently in the late 1930's and early 1940's. 7/ Appellant contends that these lands were purchased for appellant's benefit and are improperly being held in trust for the Nation. Title to these lands, appellant states, is held by the United States "in trust for the Creek Tribe until such time as the use of the land is assigned by the Secretary of the Interior to a tribe, band, or cooperative group organized under the [OIWA], or to an individual Indian, then in trust for such tribe, band, group or individual" (Appellant's Opening Brief at 6). Appellant seeks to have beneficial title assigned from the Nation to appellant.

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6/ Although there is some suggestion in the record that appellant has a traditional geographic area within the former Creek Reservation--in the vicinity of Wetumka, Hughes County, Oklahoma--appellant does not attempt to analogize this area to a reservation. Indeed, the lands appellant seeks to have taken in trust are in Tulsa County, a considerable distance from Wetumka.

7/ Section 1 of the OIWA, 25 U.S.C. § 501 (1988), provides: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership."

This section is now implemented by the regulations in 25 CFR Part 151.

Appellant has not produced evidence that the lands were purchased for its benefit. It concedes as much in its opening brief but argues: "[S]hould appellant demonstrate that it was the intended beneficial owner [of] the land, the assignment should be made to [appellant] without requiring the concurrence of the [Nation's] National Council" (Appellant's Opening Brief at 7).

The Area Director argues that, under the deed language quoted by appellant, BIA's authority to assign title is discretionary and, further, that "[t]he exercise of that discretion is now informed by the regulations in 25 CFR Part 151, including section 151.8 which requires the consent in writing of the [Nation]" (Area Director's Brief at 8-9). 8/

The Board agrees with the Area Director that BIA's assignment authority under the deed is discretionary. Arguably, 25 CFR Part 151 applies to this requested assignment; it is not necessary to this decision to find that it does, however. Even if the consent requirement in section 151.8 is not specifically applicable here, BIA's discretion under the deed is broad enough to authorize it to require the consent of the Nation in this case, where (1) the land is within the Nation's reservation; (2) the Nation has had beneficial title to the land for 50 years; and (3) the Nation, having organized under the OIWA, is itself an eligible assignee under the deed. The Board finds that the Area Director's June 26, 1990, decision should be affirmed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's May 18 and June 26, 1990, decisions are affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

8/ From the materials submitted by appellant, as well as the Area Director's statements, it appears that the Secretary made a number of land purchases in eastern Oklahoma under authority of the OIWA. The Area Director states that title was commonly taken in the name of one of the Five Civilized Tribes (Cherokee, Chickasaw, Choctaw, Creek and Seminole) in language similar to that quoted by appellant. He further states that the beneficial title to most such lands has not been assigned away from the original beneficiary tribe; he notes, however, that some lands were assigned to Thlopthlocco Tribal Town after it organized under the OIWA (Area Director's Brief at 8).