



INTERIOR BOARD OF INDIAN APPEALS

Annie Wayka v. Anadarko Area Director, Bureau of Indian Affairs

31 IBIA 314 (12/30/1997)

Reconsideration denied:

32 IBIA 11

Related Board cases:

29 IBIA 233

29 IBIA 236

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29 IBIA 303

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31 IBIA 312

Reconsideration denied, 32 IBIA 12



United States Department of the Interior

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

ANNIE WAYKA,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	Docket No. IBIA 96-87-A
	:	
ANADARKO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	December 30, 1997

Appellant Annie Wayka seeks review of a May 17, 1996, decision issued by the Anadarko Area Director, Bureau of Indian Affairs (Area Director or Anadarko Area Director; BIA), concerning whether certain interests in lands on the Potawatomi Reservation in Kansas are held in trust for her by the United States. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision.

Appellant is a member of the Menominee Indian Tribe of Wisconsin (Tribe or Menominee Tribe). Federal supervision over the property and members of the Tribe was terminated on April 30, 1961, pursuant to the Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. §§ 891-902 (1970) (Termination Act). Federal supervision was restored as of December 22, 1973, by the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. §§ 903-903f (1994) (Restoration Act).

The Tribe is under the jurisdiction of the Minneapolis Area Director, BIA. Appellant, however, inherited interests in lands on the Potawatomi Reservation in Kansas, which is under the jurisdiction of the Superintendent, Horton Agency, BIA (Superintendent), and the Anadarko Area Director. Pursuant to an interpretation of the Termination Act issued by the Anadarko Field Solicitor on June 1, 1978, the Anadarko Area Director continued to hold the interests Appellant inherited in trust for her. In contrast, pursuant to opinions issued by the Aberdeen Field Solicitor on January 3, 1975, and by the Twin Cities Field Solicitor on January 3, 1990, the Minneapolis Area Director has treated land interests held by Menominee tribal members prior to or during the period of termination as having passed into fee status.

In June 1993, the BIA Central Office in Washington, D.C., brought this discrepancy to the attention of the Tulsa Field Solicitor, the successor to the Anadarko Field Solicitor. The BIA Central Office asked the Tulsa Field Solicitor to review the opinions issued by the Twin Cities and Anadarko Field Solicitors and to attempt to harmonize the positions. On August 4, 1994, the Tulsa Field Solicitor issued an opinion in which she adopted the position of the Aberdeen and Twin Cities Field Solicitors.

Based on the August 4, 1994, opinion, on November 4, 1994, the Superintendent notified Appellant that the interests she had inherited on the Potawatomi Reservation would no longer be held in trust. Appellant appealed that decision to the Area Director.

In his May 17, 1996, decision, the Area Director stated:

The controversy surrounding the above interests, held by [Appellant] on the Potawatomi reservation in Kansas, originates with the [Termination Act]. That legislation provides that federal supervision over said Indians terminated on April 30, 1961, and thereafter, individual members would not be entitled to any of the services performed by the United States for Indians because of their status as Indians; that all statutes of the United States which affect Indians because of their status as Indians would no longer be applicable to members of [the Menominee] tribe; and further, that the laws of the several States will apply to them and their members in the same manner as they apply to other persons within their jurisdiction. Therefore, any property owned by a member of the Menominee Indian Tribe prior to April 30, 1961, passed from restricted to unrestricted status. Furthermore, any restricted property inherited during the termination period passed into unrestricted status.

Subsequently, the [Tribe] on December 22, 1973 was restored as a Tribe by passage of the [Restoration Act]. However, any property owned by a member of the Tribe before and during the termination period did not automatically return to restricted or trust status. To restore restricted status to their property(s) it was necessary that individual Menominee Indian owners request that the Secretary do so. Section 3(a) of the [Restoration Act] makes the provisions of the Indian Reorganization Act (25 U.S.C. 461) applicable to Menominee tribal members, and thus a mechanism [exists] for transference of land to trust or restricted status. Otherwise, the interests remain non-trust. It is possible for certain Menominee Indians to hold true trust/restricted interests, however, if so, their interests were inherited subsequent to December 22, 1973, and either from non-Menominee lands or from non-Menominee Indians.

It appears the non-trust view reiterated above is the one accepted by the affected Tribe. Since passage of the [Restoration Act], the [BIA] Agency and Area Office with direct responsibility for service to the [Tribe] has for more than twenty (20) years treated Menominee interests acquired prior to restoration as non-trust property until restored by an affirmative act of the Indians. Also, we believe, to date, no challenge to that interpretation has been made by the [Tribe] or a Tribal member.

In this case, the Superintendent * * * advises that your successor interest in the subject property(s) was held in trust/ restricted status prior to April 30, 1961, and pursuant to provisions of the [Termination Act] did pass to unrestricted status.

Further, they advise that the record does not reflect a restoration of the interests to trust/restricted status subsequent to December 22, 1973. In addition, we have reviewed your Statement of Reasons and find no reason advanced that thwarts the Superintendent's basis for decision, which is proper application of the appropriate statutes.

May 17, 1996, Decision at 2-3.

Appellant appealed to the Board, and filed an Opening Brief. ^{1/} No other briefs were filed.

Appellant does not challenge the Area Director's statements that the interests she inherited on the Potawatomi Reservation were held by a Menominee Indian or Indians prior to December 22, 1973, and that the lands have not affirmatively been returned to trust status since the enactment of the Restoration Act. Therefore, this case raises only legal questions relating to the Termination and Restoration Acts.

Appellant first argues that, under well-established rules for interpreting statutes dealing with Indians, the Termination Act should be read narrowly and the Restoration Act should be read broadly. Appellant argues that "the Termination Act should be read and applied so as to not affect the status of individual allotted trust land since no reference is made to such land." Opening Brief at 3.

The Termination Act provided at 25 U.S.C. § 899 (1970):

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

^{1/} The Board received several other appeals from similarly situated individuals. These appeals have been separately addressed. See Warrington v. Anadarko Area Director, 31 IBIA 312 (1997); Burwell v. Anadarko Area Director, 29 IBIA 305 (1996); Neconish v. Anadarko Area Director, 29 IBIA 303 (1996); Kaquatosh v. Anadarko Area Director, 29 IBIA 240 (1996); Torres v. Anadarko Area Director, 29 IBIA 236 (1996); and Torres v. Anadarko Area Director, 29 IBIA 233 (1996).

Appellant's Opening Brief states that it was filed on behalf of Cecelia D. Neconish, Ronald J. Neconish, Virginia Neconish Waupoose, Anita M. Schneider, and Annie Wayka. As Appellant's counsel was informed both before and after the filing of that brief, the only one of these individuals with a pending appeal at the time the brief was filed was Annie Wayka.

Nothing in sections 891 to 902 of this title shall affect the status of the members of the tribe as citizens of the United States. [Emphasis added.]

The Board does not disagree with Appellant's general statement of the rule of statutory construction of legislation affecting Indians. However, the rule cannot be used to alter the clear meaning of a statute. *E.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). The narrow construction of the Termination Act which Appellant advocates is totally at odds with that statute's language and intent. The act, like others of the same time period, intended to end forever the special relationship between the United States and both the Menominee Indian Tribe and its members. The fact that interests in land owned by individual tribal members were not mentioned in the Termination Act is irrelevant. After termination, the United States no longer had any authority to, *inter alia*, hold land in trust for members of the Menominee Tribe. Despite Appellant's assertion to the contrary, this lack of authority does not depend on the location of the trust allotments in which Menominee tribal members may have held interests; it arises from the fact that, under 25 U.S.C. § 899 (1970), tribal members no longer had any special rights based on their status as Indians. In essence, members of the Menominee Tribe during the period the Tribe was terminated were in the same situation as non-Indians.

Apparently alternatively, Appellant contends that the Restoration Act should be broadly construed to return her interests in trust allotments to trust status. The Board disagrees. The Restoration Act restored Appellant's rights based on her status as an Indian. However, the absence of a Congressional directive in the Restoration Act to return individually owned interests to trust status means that the Department must follow its regulatory procedures for taking land into trust status, set forth in 25 C.F.R. Part 151. In general terms, those regulations require a request from the Indian owner and a decision by BIA to take the interests into trust.

The Board concludes that the Area Director correctly held that the Termination Act deprived him of authority to hold interests in land in trust for Appellant, and that the Restoration Act did not automatically return those interests to trust status. ^{2/}

Appellant argues that the Department is estopped from removing her interests in land from trust status. However, other than to contend that she is an innocent victim of the change in interpretation of the Termination Act, Appellant makes no attempt whatsoever to support this argument.

^{2/} This conclusion is not without precedent in other contexts. As the Board held in *Estate of Dana A. Knight*, 9 IBIA 82, 88 Interior Dec. 987 (1981), when an interest in trust land is inherited by a non-Indian, that interest passes out of trust and does not automatically return to trust status if it is subsequently inherited by an individual for whom the United States can hold land in trust status. *See also Bailess v. Paukune*, 344 U.S. 171 (1952).

The Board has previously addressed the question of estoppel against the United States. In Falcon Lake Properties v. Assistant Secretary - Indian Affairs, 15 IBIA 286, 298 (1987), it stated that

one who seeks to estop the Government must at least demonstrate that the traditional elements of estoppel are present. It is also clear that such a person bears a heavier burden than one who seeks to estop a private party. Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984); id. at 68 (Rehnquist, J., concurring).

The traditional elements of estoppel are:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Morris v. Andrus, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, 444 U.S. 863 (1979).

See also Kearny Street Real Estate Company, L.P. v. Sacramento Area Director, 28 IBIA 4, 18 (1995).

Appellant fails to establish any of the traditional elements of estoppel. In particular, she fails even to allege, let alone establish, that she has relied on the Area Director's former position to her injury. Cf. Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613, 619-20 (7th Cir. 1985) (Party failed to establish that he had acted in reliance on a Field Solicitor's opinion).

Appellant also asserts that her interests must continue to be held in trust because she was never issued a fee patent. Appellant was not issued a fee patent because of the Anadarko Field Solicitor's incorrect interpretation of the Termination Act. Although that interpretation and the consequent failure to issue Appellant a fee patent was error, such administrative error cannot supersede the Termination Act. As the Supreme Court stated in Baileys, 344 U.S. at 173, once interests in trust allotments are acquired by a person "not within the class whom Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the cestui." Although there was a considerable delay, the Area Director began the process of taking that ministerial act by notifying Appellant that her interests in Potawatomi allotments could not be held in trust.

Appellant contends that the Area Director's "change in position is being sought merely for purposes of administrative convenience or to reduce the chance litigation will occur." Opening Brief at 5. Although the Tulsa Field Solicitor's August 4, 1994, opinion does mention both administrative convenience and litigation possibilities, that opinion is not the decision under review in this appeal, but is instead the advice of counsel. In his

decision, the Area Director sought to correct what he concluded was an erroneous interpretation of law. The Board has held that the Department has not only the authority, but also the responsibility, to correct prior erroneous interpretations of law, so long as the deciding official clearly sets forth the reason for the change in interpretation and shows that the change is not arbitrary or capricious. Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992), and cases cited therein. The Area Director has met this standard here.

Appellant also contends that the Area Director erred in stating that the Tribe does not oppose the interpretation of the Termination Act set forth in the May 17, 1996, decision. In support of this contention, Appellant submits an October 24, 1996, letter from the Tribal Chairman.

Although the Board is interested in the Tribe's interpretation of the Termination Act, that interpretation is not controlling here. The question before the Board is not the interpretation of tribal law, but rather the interpretation of a Federal law by the Federal agency charged with that law's administration.

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 Anadarko Area Director's May 17, 1996, decision is affirmed. 3/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

3/ All motions and requests not previously addressed are hereby denied.