



INTERIOR BOARD OF INDIAN APPEALS

James E. Smith v. Acting Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

38 IBIA 182 (10/31/2002)

Judicial review of this case:

Reversed and Remanded to BIA, *Miami Tribe of Oklahoma v. United States*, 374 F. Supp. 2d 934 (D. Kan. 2005), *as amended by* 2005 U.S. Dist. LEXIS 29468 (D. Kan. Nov. 23, 2005), vacated and remanded, 656 F.3d 1129 (10th Cir. 2011)

Board Decision on Remand:

47 IBIA 259

Affirmed:

Miami Tribe of Oklahoma v. United States, 679 F. Supp. 2nd 1269 (D. Kan. 2010).



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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JAMES E. SMITH,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 02-63-A
ACTING EASTERN OKLAHOMA	:	
REGIONAL DIRECTOR, BUREAU	:	
OF INDIAN AFFAIRS,	:	
Appellee	:	October 31, 2002

This is an appeal from a January 11, 2002, decision of the Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which denied the application of Appellant James E. Smith to gift convey an interest in the Maria Christiana allotment, Miami No. 35, Miami County, Kansas (the allotment), to the Miami Tribe of Oklahoma (Tribe). For the reasons discussed below, the Board affirms the Regional Director's decision.

Appellant holds a 3/38 restricted interest in the allotment. In July 2001, he wrote to BIA, stating that he wished to give 1/3 of his interest to the Tribe. In November 2001, he completed an application for gift deed. He advised BIA staff by telephone that his reason for wanting to make the gift was that he wished to do something for the Tribe and its members.

The Regional Director denied Appellant's application on January 11, 2002. In most respects, his decision tracks the January 5, 1995, decision in which he denied a similar request made by Earline Smith Downs. 1/ See Downs v. Acting Muskogee Area Director, 29 IBIA 94 (1996). However, unlike Downs at the time of the 1995 decision, Appellant is a member of the Tribe. 2/ Therefore, whereas the Regional Director had found that Downs did not have a

1/ Downs sought to gift convey a one percent interest in the same allotment to the Tribe, while retaining a 15.4592 percent interest in herself.

2/ On Dec. 4, 1995, the Tribe revised its Constitution, making the heirs to the allotment eligible for membership. The revised Constitution was approved by the Acting Deputy Commissioner of Indian Affairs on Feb. 22, 1996.

special relationship with the Tribe within the meaning of 25 C.F.R. § 152.25(d), 3/ he found that Appellant does have a special relationship with the Tribe. Even so, he denied Appellant's application, explaining:

As set out in my earlier analysis of a similar conveyance request by [Downs], highly fractionated ownership interests greatly complicate [BIA's] land management efforts and the successful discharge of the Federal government's trust responsibility. My concerns regarding tract management, competing interests between the Tribe and the individual Indian landowners, and the potential for land use conflicts are also true for this request. Additionally, [BIA's] position remains unchanged that Indian landowners receive at least fair market value when disposing of their property, and that Indian tribes should pay fair market value for allotted land purchases unless special circumstances warrant otherwise. I am not informed of any special circumstances that would justify a gift of a portion of your undivided interest to the Tribe.

Further, I believe the business development lease approved on December 8, 1999, gives the Tribe the necessary tool to undertake the development of a gaming facility and improve the potential for significant revenue for the Indian landowners. I can understand your stated desire to benefit the Tribe, but I feel the existing business lease with the Tribe will accomplish this. The recent history and the gaming-related aspects of this tract continue to cause me concern over the propriety of such a transaction. While the proposed gift conveyance may fall within the requirements of § 152.25(d), it does not outweigh my finding that the conveyance of a portion of your undivided interest to the Miami Tribe would not be in either your, or the other owners, long-range best interest. Accordingly, it is my determination that the proposed gift conveyance is not in the long-range best interest of either you or the other Indian owners of the allotment.

Regional Director's Jan. 11, 2002, Decision at 2.

3/ 25 C.F.R. § 152.25(d) provides:

"Gifts and conveyances for less than the appraised fair market value. With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance."

The Regional Director also found that the conveyance of only 1/3 of Appellant's interest to the Tribe would conflict with the policy of the Indian Land Consolidation Act (ILCA) Amendments of 2000 (Act of Nov. 7, 2000, Pub. L. No. 106-462, 114 Stat. 1991) because it would increase the fractionation of the allotment.

Appellant appealed the Regional Director's decision to the Board. The Tribe sought and was granted permission to intervene.

As noted above, the situation here is similar to that in Downs. In Downs, the Board stated that, in considering an application for gift conveyance, BIA was required to make a careful examination of the circumstances surrounding the application. The Board then stated:

While a careful pre-approval examination is required, however, the determination of whether or not to approve a proposed gift conveyance is a matter within the discretion of BIA. Thus, as in the case of other BIA discretionary decisions, the Board's role here is to determine whether BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's.

29 IBIA at 97. The Board found in Downs that the Regional Director had made the necessary careful examination and that his decision was supported by the record. The Board therefore affirmed the Regional Director's denial of Downs' gift deed application.

For the most part, Appellant and the Tribe make no attempt to distinguish the situation here from the situation in Downs. Rather, they simply repeat the arguments made and rejected in the earlier case. It appears possible, however, that they intended to argue that this case may be distinguished from Downs with respect to ILCA considerations.

In Downs, the Board affirmed the Regional Director's conclusion that the proposed conveyance was in conflict with the policy of ILCA because it would increase fractionation. As indicated above, the Regional Director reached a similar conclusion in his decision in this case. In their briefs before the Board, Appellant and the Tribe suggest that there is now a plan to consolidate the fractional interests of some of the heirs to the allotment through conveyances to the Tribe. They do not contend that the Tribe presently owns an interest in the allotment. However, they state that heirs representing 25.8% of the interests in the allotment have signed agreements to transfer their interests to the Tribe. Appellant's Brief at 7, par. 29; Tribe's Brief at 7, par. 29. Neither Appellant nor the Tribe contends that this information was made available to the Regional Director, and the record does not show that it was. Clearly, the Regional Director cannot be faulted for not considering information that was not provided to him.

The Board has a well-established practice of declining to consider information presented for the first time on appeal, e.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 114-15 (2000), and so declines to consider the statements made by Appellant and the Tribe concerning the intentions of other heirs. 4/ The Board finds that Appellant and the Tribe have failed to distinguish this case from Downs with respect to ILCA considerations.

Appellant and the Tribe make two arguments that were not made in Downs: (1) BIA has a non-discretionary duty to approve the transfer under 25 U.S.C. § 2216(c) and (2) BIA's denial of Appellant's request is an unconstitutional taking of property and a violation of due process under the Fifth Amendment to the United States Constitution.

25 C.F.R. § 2216(c) provides:

Acquisition of interest by Secretary

An Indian, or the recognized tribal government of a reservation, in possession of an interest in trust or restricted lands, at least a portion of which is in trust or restricted status on November 7, 2000 and located within a reservation, may request that the interest be taken into trust by the Secretary. Upon such a request, the Secretary shall forthwith take such interest into trust.

Appellant and the Tribe argue that this provision is applicable here because Appellant is an Indian and the allotment in which he holds an interest is within a reservation. Neither Appellant nor the Tribe provides any support for their contention that the allotment is within a reservation. Indeed, the materials they submit indicate that it is not within a reservation. Further, even if the allotment were within a reservation, Appellant's interest does not appear to be one covered by the provision because it is in restricted status. 5/

4/ Even if the Board were to consider this new information, the bare statements made by Appellant and the Tribe would have little weight given the lack of any supporting evidence.

Oddly, although Appellant states that he, like other heirs, has executed an agreement to convey his interest to the Tribe, he fails to furnish a copy of his agreement to the Board. He also fails to explain why, if he intends to convey his interest to the Tribe, his present gift deed application covers only 1/3 of his interest.

5/ The legislative history of 25 U.S.C. § 2216(c) indicates that it applies only to interests which have lost their trust or restricted status. See S. Rep. No. 106-361 at 22 (2000):

“Subsection [2216(c)] addresses situations where some or most of a parcel is held in trust, but some undivided interests in the same parcel have passed out of trust. In these situations, when the land is located within a reservation, the Secretary is to take these lands [sic] into

The Board need not reach these issues, however. 25 U.S.C. § 2216(c) is not relevant here because it addresses acquisitions, rather than dispositions of trust/restricted property. As the Regional Director made clear, his decision concerned only Appellant's request to dispose of restricted property. While recognizing that the entire transaction, had it proceeded, would have included both a disposition by Appellant and an acquisition by the Tribe, the Regional Director specifically stated that he would not consider the acquisition aspect of the proposed transaction in light of his decision concerning the disposal aspect.

To the extent Appellant and the Tribe may have intended to argue that the Regional Director erred in considering only the disposal aspect of the proposed transaction, the Board rejects that argument. Once the Regional Director determined not to approve the disposal aspect, it would have been a useless exercise to consider the acquisition aspect. He did not err in ending his inquiry upon determining not to approve the disposal.

Appellant and the Tribe contend that the Regional Director's decision is unconstitutional because it is an abrogation of the right to pass property. In support of their contention, they cite Hodel v. Irving, 481 U.S. 704 (1987), in which the Supreme Court held that the original escheat provision of ILCA effected an unconstitutional taking of property.

Although they frame their argument as a constitutional challenge to the Regional Director's decision, it is apparent that they are actually challenging the constitutionality of 25 C.F.R. § 152.25(d), as well as the several Federal statutes which make conveyances of trust and restricted land subject to approval by the Secretary of the Interior. To the extent that there is an abrogation of the right to pass property here, that abrogation was effected by Federal statute, not by the Regional Director.

The Board has no authority to declare a Federal statute or regulation unconstitutional. E.g., Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 154 (2001), and cases cited therein. Therefore, the Board lacks jurisdiction to address this argument.

As was the case in Downs, the Regional Director made a careful examination of the circumstances surrounding Appellant's gift deed application. The Board finds that the record provides support for the Regional Director's decision.

Appellant bore the burden of proving that the Regional Director did not properly exercise his discretion. E.g., Yerington Paiute Tribe v. Acting Western Regional Director,

fn. 5 (continued)

trust forthwith. These provisions will facilitate greater consolidation and assist in the administration of interests in trust or restricted lands.”

36 IBIA 261, 264 (2001); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 39 (1999). Neither Appellant nor the Tribe has made such a showing here.

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 Regional Director's January 11, 2002, decision is affirmed. 6/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

6/ Arguments made by Appellant or the Tribe but not discussed in this decision have been considered and rejected.

All pending motions are denied.