



INTERIOR BOARD OF INDIAN APPEALS

Shawano County, Wisconsin, Board of Supervisors and Town of Red Springs, Wisconsin
v. Midwest Regional Director, Bureau of Indian Affairs

40 IBIA 241 (02/09/2005)

Related Board cases:

38 IBIA 72

38 IBIA 156

39 IBIA 215



United States Department of the Interior

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SHAWANO COUNTY, WISCONSIN, : Order Affirming Decision
BOARD OF SUPERVISORS and TOWN :
OF RED SPRINGS, WISCONSIN, :
Appellants, :
v. : Docket Nos. IBIA 02-127-A
MIDWEST REGIONAL DIRECTOR, : IBIA 02-129-A
BUREAU OF INDIAN AFFAIRS, :
Appellee. : February 9, 2005

Appellants Shawano County, Wisconsin, Board of Supervisors, (County) and the Town of Red Springs, Wisconsin (Town) seek review of a June 3, 2002, decision issued by the Midwest Regional Director, Bureau of Indian Affairs (Regional Director, BIA). ^{1/} The Regional Director's June 3, 2002, decision affirmed the October 12, 2001, decision of the Superintendent, Great Lakes Agency, Bureau of Indian Affairs (Superintendent, Agency), to take approximately 278 acres of land located in Shawano County, Wisconsin, in the Town of Red Springs, Wisconsin, into trust for the Stockbridge-Munsee Community, Wisconsin (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's June 3, 2002, decision to approve this trust acquisition.

Background

In 1994, the Tribe purchased in fee simple approximately 278 acres of land, divided in two parcels. The land, referred to as the Beyer property or the former Beyer property, is described as Parcel No. 1: NE1/4NW1/4NE1/4 (except the North 186.5 feet of the East 232.5 feet of NW1/4NE1/4), NW1/4SE1/4 (except part conveyed for road purposes described in

^{1/} The Board of Indian Appeals received and dismissed or decided four other appeals arising out of the Regional Director's June 3, 2002, decision: Lensby v. Midwest Regional Director, 38 IBIA 72 (2002) (dismissed for failure to prosecute); Shawano County Concerned Property Taxpayers Ass'n and Scott Seaborne v. Midwest Regional Director, 38 IBIA 156 (2002) (affirming Regional Director's decision that those two appellants lacked standing); and Governor, State of Wisconsin v. Midwest Regional Director, 39 IBIA 215 (2003) (dismissed based on appellant's withdrawal of his appeal).

volume 655 on page 658 as Document No. 421369) Section 22, and Parcel No. 2: NE1/4NW1/4, Section 26, all in Township 28N, Range 14E, Town of Red Springs, Shawano County, 4th P.M., Wisconsin, containing 278 acres more or less.

On April 9, 1996, the Tribe adopted Resolution 029-96, which requested that BIA process a trust application for the Beyer property. In the 1996 resolution, the Tribe indicated its intent to use the parcels to “provid[e] an area for tribal housing; for agriculture; reforestation and possibly for a wildlife preservation area.” The following day, on April 10, 1996, the Tribe requested that the Superintendent acquire the land in trust.

On April 19, 1996, the Agency requested more detailed information regarding the need for and purpose of the requested trust acquisition. The Tribe, in response, provided additional information on April 26, 1996. On April 29, 1996, the Agency solicited comments from state and local governments, including Appellants in this case. On May 8, 1996, the Agency requested further details from the Tribe regarding the proposed use of the property. The Tribe responded on May 23, 1996, indicating that at least 15 family or individual requests for housing were presently on the waiting list and that many more inquiries had not yet become formal requests. The Tribe addressed other uses of the land. At that time, the Appellants did not formally object to the trust acquisition. In a letter dated May 30, 1996, the County indicated that it will lose \$3,377 in tax revenues per year and also noted that it was not asserting a constitutional claim as to the Department’s determinations of trust status.

On June 3, 1996 and September 25, 1997, the Agency sought additional information from the Tribe to which the Tribe responded. On October 26, 1999, the Tribe met with the Assistant Secretary, Department of the Interior, regarding its current and future land-to-trust applications.

An Environmental Assessment (EA) prepared by BIA was forwarded to the Tribe on January 9, 2001. As referenced in the EA, the purpose of the proposed land acquisition is for “Tribal housing, forestry, and agriculture.” Each of these intended uses was specifically discussed in the EA. In addition to the use for housing, the EA noted that the forestry lands would contribute to the Tribe’s economic development, as well as the hunting and recreational pursuits of tribal members. The agricultural use was specifically to grow trees for the Tribe’s nursery. The EA also noted that taxes in 1999 were \$3,638.08. As no significant impacts were identified in the EA, on March 16, 2001, the Agency issued a Finding of No Significant Impact (FONSI). The Agency determined that the preparation of an environmental impact statement was not necessary.

On April 24, 2001, the Agency solicited comments from State and local governments, including Appellants, and extended the period of time within which comments could be received beyond the 30-day period, to July 26, 2001. On April 30, 2001, the proposed

acquisition was published for comment, describing the intention to construct possibly 23 homes on lots from 2.5 to 5 acres each. Both Appellants objected to the trust acquisition of the Beyer property. In a letter dated July 25, 2001, the County noted that taxes on this property were approximately \$4,000 in the year 2000. The County also noted that the Tribe had over 16,000 acres of land in the County which was held in trust and that three other tribes also held trust land in the County. The County further noted that the Tribe's reservation boundaries were in dispute in litigation pending before the U.S. District Court for the Eastern District of Wisconsin and that the proposed trust acquisition may involve land that is off-reservation which would necessitate closer scrutiny under the applicable regulations.

On August 3, 2001, the Agency forwarded to the Tribe the comments that it had received. The Tribe, in its August 9, 2001, response, disputed that the federal court litigation had any bearing on the trust application. The Tribe stated that it needed to restore its lost land base.

On October 12, 2001, the Superintendent notified interested parties of his intention to take the land into trust. Appellants filed an appeal with the Regional Director. On June 3, 2002, the Regional Director affirmed the Superintendent's decision.

After considering comments received as well as submissions from the Appellants, the Regional Director reviewed the eight criteria for trust acquisitions set forth in 25 C.F.R. § 151.10, subsections (a) through (h): (a) Section 465 of 25 U.S.C., the Indian Reorganization Act of 1934 (IRA), provided the acquisition authority for the trust acquisition, which Appellants had not challenged; (b) the Tribe's need for additional land was demonstrated by the fact that 13,077 acres of the Tribe's approximately 16,000-acre land base in trust was sub-marginal and unsuitable for development and the Tribe had demonstrated a need for additional trust land "to further promote the health, welfare, and social needs" of Tribal members; (c) the purpose of the acquisition was "for construction of additional affordable housing units for Tribal members and development of a forest management program, including a Tribal nursery and open areas," enhancing Tribal self-government and self-determination and benefitting the welfare and social needs of Tribal members; (d) land acquired for an individual was a criterion which was not applicable here; (e) the impact on the State and its political subdivisions resulting from the removal of this property from the tax rolls amounted to "a mere .003% of [the County's] entire [2002] budget" and "only about .25% of the Town of Red Springs's 2002 budget;" (f) the pending federal court litigation regarding the boundaries of the Tribe's reservation was not determinative of the land acquisition because whether or not the boundaries had been diminished, the acquisition would still be treated as on-reservation under 25 C.F.R. § 151.2(f), 2/ and, furthermore, there are no potential

2/ The Regional Director evidently made a typographical error in citing to section 152.2(f) instead of section 151.2(f). June 3, 2002, Regional Director Decision at 7.

conflicts of land use; (g) BIA is equipped to handle any additional responsibility resulting from the trust acquisition; and (h) there are no National Environmental Protection Act issues since no challenge has been made to BIA's FONSI based on an EA prepared for the proposed trust land acquisition. The Regional Director concluded by affirming the Superintendent's decision to acquire the Beyer property in trust for the Tribe.

This timely appeal followed in July 2002. ^{3/} Appellants, together, as well as the Tribe and the Regional Director, filed briefs with the Board. On appeal, Appellants level seven challenges to the Regional Director's decision: (1) BIA should have analyzed this trust application as an off-reservation acquisition as well as an on-reservation acquisition in light of the pending federal litigation involving the boundaries of the Tribe's reservation; (2) the County has environmental concerns about this trust acquisition and both Appellants voiced concerns over high nitrate levels in the groundwater and protection for future residents; (3) the placement of this property into trust contravenes the purpose set forth in the IRA; (4) Section 465 of the IRA is an unconstitutional delegation of power to the Department of the Interior; (5) there was insufficient showing of need to place the property into trust; (6) the purpose of the Tribe's acquisition of the total 278 acres is in question; and (7) the loss of tax revenue to Appellants is important due to the loss of future tax revenue if the land is developed and the cumulative effect on Appellants' continually decreasing tax base.

Discussion

The Board has set forth in numerous cases the standard of review in trust acquisition cases. Decisions of BIA officials whether to take land into trust are discretionary. The Board does not substitute its judgment in place of BIA's judgment in decisions which are based upon the exercise of BIA's discretion. Rather, the Board reviews such discretionary decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196 (1989), quoted in State of California v. Acting Regional Director, 40 IBIA 70, 76 (2004); see Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-39 (1999); City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 103-04 (1999); see also McAlpine v. United States, 112 F. 3d 1429, 1436 (10th Cir. 1997). With regard to BIA's discretionary decisions, the appellant bears the burden of proving that BIA did not properly exercise its discretion. City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA at 104.

^{3/} By order dated October 25, 2002, the Board referred what were, at that time, three remaining appeals for Alternative Dispute Resolution which proved unsuccessful. The Board lifted the stay and scheduled briefing on November 21, 2003.

The Board has full authority to review any legal challenges that are raised in a trust acquisition case. With regard to BIA's legal determinations, the appellant bears the burden of proving that BIA's decision was in error or that BIA's application of the legal determination was not supported by substantial evidence. State of California, 40 IBIA at 76; City of Lincoln City, 33 IBIA at 104.

First, Appellants contend that the pending federal court litigation in the Eastern District of Wisconsin places the boundaries of the Tribe's reservation in dispute and that BIA's conclusion that the acquisition was on-reservation is arbitrary and renders BIA's analysis incomplete. ^{4/} Instead, Appellants argue, the Regional Director should have more closely scrutinized the trust application under the additional criteria set forth under 25 C.F.R. § 151.11, which governs off-reservation acquisitions.

The Regional Director, in his June 3, 2002, decision addresses this jurisdictional argument, concluding that the pending federal court litigation over the reservation boundaries is not a determinative factor. He notes that 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land for Indians within or without reservation boundaries. The Regional Director reasoned that, whether or not the Tribe's reservation boundaries had been diminished, the trust acquisition would still be considered on-reservation under the regulatory definition of "Indian reservation," which includes areas disestablished or diminished by a final judicial determination. 25 C.F.R. § 151.2(f). Finally, the Regional Director notes in his decision that 25 C.F.R. § 151.10 applies because the land is adjacent or contiguous to land proclaimed as the Tribe's reservation by Act of Congress in 1972. 25 C.F.R. §§ 151.3(a)(1), 151.10. The Tribe concurs with the Regional Director.

The regulatory definition of reservation found in 25 C.F.R. § 151.2(f) is determinative of this issue. "*Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, * * * where there has been a final 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."

^{4/} In the district court litigation, the United States filed an amicus brief taking the position that the boundaries had not been diminished. The Board has learned on its own that the U.S. District Court for the Eastern District of Wisconsin decided this case on September 30, 2004, by granting the State of Wisconsin's motion for summary judgment. In an unpublished decision, the federal district court held that the Tribe's reservation, as defined by the Treaty of 1856, was diminished and disestablished by Congress. A notice of appeal was filed on October 29, 2004. An appeal is presently pending before the U.S. Court of Appeals for the Seventh Circuit, Case No. 04-3834. In any event and as discussed above, any final judicial resolution of this issue would not affect the present appeal before the Board.

The Board disagrees with Appellants' argument that the Regional Director should have analyzed the trust acquisition under the off-reservation criteria as well. The tract at issue here falls within the definition of "Indian reservation" in 25 C.F.R. § 151.2(f) regardless of whether the Tribe's reservation has been diminished or disestablished. The regulations define reservation to encompass the land in question here, whether or not the federal district court ultimately determines that the property has been disestablished or diminished. Thus, the Regional Director was correct in only analyzing this trust acquisition application as being on-reservation under section 151.10 and not off-reservation, under section 151.11. The Board has already analyzed this issue in another appeal and reaches the same conclusion. See County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 172 (2002).

Second, Appellants raise environmental concerns under NEPA. While Appellants' argument is not entirely clear, they appear to voice concern over the presence of high nitrate levels in the property's groundwater and whether the Tribe has an adequate solution to protect future residents in that area, yet they failed to raise any environmental concerns in their appeal to the Regional Director. Appellants explain the County was not even aware of the NEPA determination. As both the Tribe and the Regional Director correctly point out, Appellants failed to raise any NEPA argument before the Regional Director and the argument is now raised for the first time on appeal. Notice of the EA and FONSI was published on April 30, 2001, and the NEPA determination was set forth in the Superintendent's October 12, 2001, decision. Appellants concede that their failure to raise NEPA before the Regional Director was an oversight on their part. The Board agrees with the Tribe and the Regional Director and declines to address this argument for the first time on appeal. See, e. g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 115-16 (2000); Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996).

Third, Appellants argue that the placement into trust of the Beyer property amounts to a misapplication of the IRA, contravening its intended underlying policy. ^{5/} They contend that the policy of the IRA, 25 U.S.C. § 461, was to protect insolvent Indians from losing their land and that the status of this Tribe has improved since the IRA was enacted in 1934. The Tribe argues, in part, that the issue was not raised below. The Board agrees and declines to address this argument for the first time on appeal. See, e. g., Shoshone-Bannock Tribal Credit Program, 35 IBIA at 115-16; Welk Park North, 29 IBIA at 219.

Fourth, Appellants contend that the statutory authority under which BIA approved the trust acquisition, 25 U.S.C. § 465, constitutes an unconstitutional delegation of power to the

^{5/} Appellants also argue that the IRA is in conflict with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. While the Board questions the relevance of Appellants' argument to this appeal, the argument was not raised by Appellants before the Regional Director and, for that reason, the Board will not address it here.

Secretary of the Interior. In support of this argument, Appellants cite State of South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1995).

As Appellants' citation to that case notes, State of South Dakota was vacated by the United States Supreme Court. 519 U.S. 919 (1996). Therefore, State of South Dakota is of no precedential value. See United States v. Roberts, 185 F.3d 1125, 1136 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000). The Tenth Circuit in Roberts explicitly rejected the reasoning in State of South Dakota, finding that section 465 is a proper delegation of authority to the Secretary of Interior. See State of Iowa v. Great Plains Regional Director, 38 IBIA 42, 45-46 (2002); County of Mille Lacs, Minnesota, 37 IBIA at 170.

In any event, the Board has consistently held that it lacks authority to declare a statute unconstitutional. See e.g., Town of Charlestown, Rhode Island v. Eastern Area Director, 35 IBIA 93, 97 (2000), aff'd, Carcieri v. Norton, 290 F. Supp. 2d 167, 187 (D.R.I. 2003); County of Mille Lacs, Minnesota, 37 IBIA at 170-71; Oklahoma Petroleum Marketers Association v. Acting Muskogee Area Director, 35 IBIA 285, 287 (2000) and cases cited therein. Thus, the Board lacks jurisdiction to consider Appellants' argument.

The Board now turns to the remainder of Appellants' arguments which pose a challenge to the Regional Director's exercise of discretion. As noted earlier, the Board does not substitute its judgment for the discretionary decisionmaking of the Regional Director as long as the requisite factors listed in subsection 151.10 were properly considered.

Appellants contend that the Regional Director improperly applied 25 C.F.R. § 151.10(b), which requires BIA to consider "[t]he need of * * * the tribe for additional land." They argue that, at the most, the Tribe may need only 48 acres, which they calculate would be needed if every one of the 48 applicants on the waiting list for tribal housing units and tribal leases were to obtain a one-acre lot. As to the remaining acres, they question how the land would provide for the health, welfare, and social needs of the Tribe when the Tribe still has 2,923 acres of land in trust which is not considered sub-marginal. Appellants also argue that the Tribe is not precluded from developing the Beyer property which it now owns in fee simple in the same manner as it intends to develop that property if taken into trust. They note that the Tribe is no longer economically impoverished as it operates a casino, a logging operation, and a Tribal Medical Clinic which are financially remunerative.

The Regional Director, in his decision, noted that the Tribe relies on federal grants for land management assistance and, to qualify, the lands must be held in trust status. The Regional Director also found that placing the land into trust would enable the Tribe to exercise its governmental authority over the land and its uses, and protect it for future generations, consistent with the Tribe's right to make its own laws and be governed by them. The Regional

Director concluded that the additional trust land will further promote the health, welfare, and social needs of the Tribal community.

Section 151.3(a)(3) of 25 C.F.R. provides that land can be acquired in trust for a tribe “[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.” The Regional Director, in his June 3, 2002, decision determined that the Tribe’s need for this trust acquisition was, at least, based on tribal self-determination and Indian housing. ^{6/} Appellants have not shown that the Regional Director failed to consider the Tribe’s need for this land or failed to reach a reasonable conclusion based on the record. See Day County, South Dakota v. Aberdeen Area Director, 17 IBIA 204, 208 n. 3 (1989). Appellants have failed to meet their burden to show that the Regional Director improperly exercised his discretion in assessing the Tribe’s need for additional trust land.

Next, Appellants challenge the Regional Director’s analysis of the purpose of the Tribe’s 278-acre acquisition under 25 C.F.R. § 151.10(c). Appellants disagree with the Regional Director’s establishment of a nexus between a housing request and the total trust acquisition request of 278 acres. They also disagree that the remaining acres to be used for a nursery, forestry development, and open areas provide Tribal services which would somehow further the goal of the Tribe’s self-determination and self-government. Moreover, Appellants voice concern that the Tribe will use this trust acquisition as an avenue for future gaming operations.

Simple disagreement with the Regional Director’s reasoning is not enough for Appellants to sustain their burden of proof. State of South Dakota v. Acting Great Plains Regional Director, 39 IBIA 283, 291 (2004); Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 36 IBIA 14, 21 (2001). The Regional Director, in his decision, noted that the purpose of the acquisition was the construction of affordable housing units for Tribal members and development of a forest management program, including a Tribal nursery and open areas. These are proper purposes for trust acquisitions and supported by the record. The Regional Director considered the intended purpose of the acquisition when he concluded that the purpose benefits the welfare and social needs of tribal members and enhances Tribal self-government and self-determination. In addition, with respect to Appellants’ allegation that the property may be used as an avenue for future gaming operations, the Tribe has never represented that it intends to conduct gaming on

^{6/} The Board has previously held that a showing of financial need is not a necessary prerequisite to a Tribe’s need for the acquisition of land in trust. “A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed.” Avoyelles Parish Louisiana, Police Jury v. Eastern Area Director, 34 IBIA 149, 153 (1999).

this property. Moreover, the administrative record provides no support for this concern, which amounts to mere speculation.

Finally, with regard to loss of tax revenue, the County concedes that “the loss of current tax base if this land goes into trust is minimal.” Opening Br. at 9. Appellants note, however, that the loss would only be minimal if the property were to remain vacant and the Regional Director should have considered that future loss of tax revenues, based on the property as developed. Appellants also argue that the Regional Director should have considered the cumulative tax loss resulting from all tax-exempt lands within their jurisdictional boundaries.

With regard to Appellants’ argument that the future loss of revenue if the property is developed should have been reviewed, the Regional Director and the Tribe respond that BIA must consider only the loss of taxes actually assessed and paid on the property and need not consider speculative future tax losses. The Board has previously addressed this issue and agrees with the Regional Director and the Tribe. See Rio Arriba, New Mexico, Board of County Commissioners, 38 IBIA at 22.

With regard to Appellants’ argument that the Regional Director erred in only considering the impact of the proposed trust acquisition, but not the cumulative effect of Appellants’ loss of tax revenue attributable to all lands not on the tax rolls, the language of the relevant subsection is instructive here. Subsection 151.10(e) provides: “If the land to be acquired is in unrestricted fee status, [BIA must consider] the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.” (Emphasis supplied.) The Board has previously discussed and rejected the argument made by Appellants and has held that given the plain language of this subsection, analysis of the cumulative effects of tax loss on all lands within Appellants’ jurisdictional boundaries is not required. See State of South Dakota, 39 IBIA at 294-95; County of Mille Lacs, Minnesota, 37 IBIA 172; Ziebach County, South Dakota v. Acting Great Plains Regional Director, 38 IBIA 227, 230 (2002). The Board finds that the Appellants have failed to meet their burden of proving that the Regional Director did not properly exercise his discretion by not considering the cumulative effect of the removal of all trust lands from Appellants’ tax rolls.

The Regional Director, in his June 3, 2002, decision, balanced all the factors he is required to consider under 25 C.F.R. Part 151 and Appellants have failed to sustain their burden of proving otherwise.

Conclusion

Appellants fail to sustain their burden of proof as to both their legal challenges and their challenges to the Regional Director’s discretion in considering the requisite regulatory factors for trust acquisitions.

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 Board affirms the Regional Director's June 3, 2003, decision to approve the 278-acre trust acquisition for the Tribe.

// original signed
Colette J. Winston
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge