



INTERIOR BOARD OF INDIAN APPEALS

County of Mille Lacs, Minnesota v. Midwest Regional Director,  
Bureau of Indian Affairs

37 IBIA 169 (03/25/2002)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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COUNTY OF MILLE LACS, MINNESOTA,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 02-1-A
MIDWEST REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 25, 2002

Appellant County of Mille Lacs, Minnesota, seeks review of an August 24, 2001, decision of the Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning taking the E $\frac{1}{2}$  SW $\frac{1}{4}$  and the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , section 30, T. 43 N., R. 27 W., 4th P.M., Mille Lacs County, Minnesota, together containing 120 acres more or less, into trust for the Mille Lacs Band of Ojibwe Indians (Band). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

On or around January 3, 1995, the Band purchased in fee simple the parcels of land at issue here. By resolution adopted on March 30, 1999, the Band requested that BIA accept the land in trust for the Band. The Band indicated its intent to use the parcels for housing for tribal members, a motor pool, and a wastewater treatment facility. By letters dated August 1, 1999, the Band, under its authority as a self-governance tribe, sent letters to various State and local governmental entities requesting comments on the proposed trust acquisition. This notice is required by 25 C.F.R. § 151.10. Only Appellant filed comments. Appellant raised several objections to the proposed trust acquisition: (1) the Band did not show a need for the land to be placed in trust because its financial condition improved dramatically with the operation of its casino; (2) trust acquisition would have a negative impact on Appellant because of the removal of the land from the tax rolls, the inability of Appellant to recoup such losses, and the fact that Appellant's zoning ordinances would not apply to trust land; (3) because Appellant's zoning ordinances would not apply to trust land, the parcels could be used for purposes injurious to neighboring landowners; (4) law enforcement jurisdictional problems might arise; and (5) the cumulative impact of all trust acquisitions for the Band should be considered.

The Band responded to Appellant's objections in a March 3, 2000, letter to the Regional Director. On February 12, 2001, the Superintendent, Minnesota Agency, BIA (Superintendent), notified interested parties of his intention to take the land into trust. Appellant filed an appeal with the Regional Director. On August 24, 2001, the Regional Director affirmed the Superintendent's decision.

Appellant appealed to the Board. Appellant, the Band, and the Regional Director filed briefs.

The Board first reiterates the standard of review and burden of proof in trust acquisition cases:

[D]ecisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. Rather, the Board reviews such 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, 96 I.D. 328, 330 (1989)].

City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999), *aff'd*, City of Lincoln City v. United States Department of Interior, Civil No. 99-330-AS (D.Ore. Apr. 17, 2001). When an appellant challenges BIA's exercise of discretion, it "bears the burden of proving that the [Regional] Director did not properly exercise his discretion." *Id.* However, when an appellant challenges legal determinations that BIA may have made in connection with a trust acquisition decision, it "bears the burden of proving that the [Regional] Director's decision was in error or not supported by substantial evidence." *Id.*

Most of Appellant's arguments challenge the Regional Director's interpretations of law. The Board will discuss those arguments first.

Appellant contends that the Regional Director has not shown that there is statutory authority for this trust acquisition because 25 U.S.C. § 465, the statute under which BIA approved the trust acquisition, is unconstitutional. In support of this argument, Appellant cites South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1995).

As Appellant admits, South Dakota was vacated by the United States Supreme Court. 519 U.S. 919 (1996). Therefore, the Eighth Circuit's decision in South Dakota is not precedential. See United States v. Roberts, 185 F.3d 1125, 1136 (10th Cir. 1999). Furthermore, since the Supreme Court issued its order in South Dakota, the Tenth Circuit has explicitly rejected the reasoning in South Dakota, and has found 25 U.S.C. § 465 constitutional. Roberts, *supra*. The Supreme Court declined to review Roberts. 529 U.S. 1108 (2000). See also City of Lincoln City, *supra*, slip op. at 23 (following Roberts).

Despite the fact that the only precedential Federal court cases addressing the constitutionality of section 465 hold the statute constitutional, and despite the Board's consistent holdings that it lacks authority to declare an Act of Congress unconstitutional (see, e.g., Oklahoma Petroleum Marketers Association et al. v. Acting Muskogee Area Director, 35 IBIA 285, 287

(2000), and cases cited there), Appellant nevertheless argues that the Board has a duty to determine whether section 465 is constitutional. In support of this argument, it cites 5 U.S.C. § 3331, which provides:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law.

Appellant argues that "an officer in a judicial position must certainly, consistent with the 5 U.S.C. § 3331 [sic], adjudge the constitutionality of acts when the question is legitimately brought before him." Opening Brief at 6-7.

The Board is a quasi-judicial forum within the Executive Branch of government, not a court within the Judicial Branch. After more than two centuries of constitutional interpretation, it is well-settled law that the Judicial Branch, not the Executive Branch, has the authority and responsibility to determine whether laws are constitutional. Contrary to Appellant's argument, the Board's members would be violating their oath of office if they were to undertake the analysis which Appellant requests because they would be attempting to perform a function that is not within the authority of the Executive Branch of government. The Board rejects Appellant's argument and continues to hold that it lacks authority to determine the constitutionality of an Act of Congress.

Appellant alternatively argues that the use of this land for a wastewater treatment facility is inconsistent with the purposes for which 25 U.S.C. § 465 authorizes the acquisition of land in trust. Appellant contends that the statute was enacted only to authorize the acquisition of land for landless Indians. Appellant acknowledges that the Board rejected this argument in Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 155 (2001). It contends, however, that Kansas was incorrectly decided.

As was the case in Kansas, most of Appellant's argument is devoted to quotations from the legislative history of the Indian Reorganization Act (IRA), of which 25 U.S.C. § 465 is a part. Appellant contends that the legislative history shows that Congress intended to limit trust acquisitions to landless Indians.

In Kansas, the Board both rejected the State of Kansas' reliance on the legislative history of the IRA and found that the argument that the IRA authorized trust acquisitions only for landless Indians had been explicitly rejected by at least four Federal courts. See United States v.

29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir.), cert. denied, 439 U.S. 965 (1978); City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F.Supp. 342, 345-46 (D.D.C. 1978). Appellant acknowledges the existence of these cases, but contends that they indicate that there are limits on the Secretary's discretion, and that the Secretary can only take land into trust "for Indians who were *landless* and or [sic] at least unable to support themselves." Opening Brief at 9. Appellant argues that the Band, which already has some trust land, has income from its casino, and has developed the ability to obtain grants for infrastructure development, does not qualify as "landless Indians."

Despite Appellant's extensive discussion, the Board finds that Appellant raises nothing that causes it to reconsider its decision in Kansas.

The Board turns to legal arguments based on the regulations. Appellant contends that the Band's reservation was disestablished and that this proposed acquisition is therefore an off-reservation acquisition subject to greater scrutiny under 25 C.F.R. § 151.11. In support of its disestablishment argument, Appellant cites Mille Lacs Band v. United States, 229 U.S. 498 (1913).

Both the Superintendent and the Regional Director believed that this proposed acquisition should be addressed as an on-reservation acquisition under 25 C.F.R. § 151.10. The Regional Director specifically rejected Appellant's argument that the Band's reservation had been disestablished. He also observed that, even if a judicial determination of disestablishment had been made, as Appellant argued it has, the tract would still be considered "on-reservation" for purposes of 25 C.F.R. Part 151 because the definition of "Indian reservation" in 25 C.F.R. § 151.2(f) includes, in the case of a judicial determination of disestablishment, "that area constituting the former reservation of the tribe as defined by the Secretary."

Because the tract at issue here would fall within the definition of "Indian reservation" in 25 C.F.R. § 151.2(f) regardless of whether the Band's reservation has been disestablished, the Board finds no need to address Appellant's disestablishment argument. The Board rejects Appellant's contention that this tract should have been considered "off-reservation" under Part 151.

In regard to the analysis under section 151.10, Appellant argues that the Regional Director erred because he "did not recognize that a cumulative analysis regarding the impact of the removal of the land from the county tax roles [sic] should have been made pursuant to 25 C.F.R. § 151.10(e)." Opening Brief at 3. Appellant presents this argument as a conclusion, with no legal analysis.

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 added. The plain language of the regulation simply does not require the analysis for which Appellant argues.

Appellant contends that the Regional Director improperly construed 25 C.F.R. § 151.10(b), which requires BIA to consider “[t]he need of \* \* \* the tribe for additional land.” Appellant contends that the question of whether a tribe needs land is different from the question of whether any land which the tribe has must be held in trust, and argues that, because the Band cannot show that it must be protected against its own improvidence or that it is not competent to handle its own economic affairs, it does not qualify to have land taken into trust.

Appellant provides no legal analysis supporting its contention that a tribe must show that it needs to be protected against its own improvidence or that it is not competent to handle its own economic affairs in order to have land taken into trust for it. In fact, the Board rejected a very similar argument in Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director, 34 IBIA 149 (1999), where it stated:

Appellant clearly disagrees with the Area Director as to whether the Tribe needs additional land. Nothing in 25 C.F.R. § 151.10(b), however, suggests that the only legitimate need for additional land is one which stems from financial difficulties. 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.

As is clear in this case, the Band is in precisely the situation which the Board described in Avoyelles Parish; *i.e.*, its existing land base is fully developed to the extent feasible, and it needs additional land to provide the infrastructure necessary to support its members and its economic development as well as to provide service to local non-tribal communities and to protect the environment.

The Board finds that Appellant has failed to carry its burden of proving error in the Regional Director’s legal interpretation of 25 C.F.R. § 151.10(b).

Appellant contends that the Regional Director failed to give proper notice to affected local governmental entities because he did not notify either Minnesota Public School District No. 480 or the East Central Regional Development Commission. Appellant contends that the land falls within the jurisdiction of the school district and that school districts have regulatory authority to compel or excuse school attendance. It argues that the Commission has the power to impose taxes on the land and that the Commission’s governing board consists of elected county commissioners from each of six counties, including Appellant. Appellant cites the Board’s order in South Dakota v. Great Plains Regional Director, 37 IBIA 4 (2001), in support of this argument.

Although Appellant asserts that “[c]learly, the \* \* \* Regional Director ‘should have known’ that the school district and the \* \* \* Commission were required to be noticed under 25 C.F.R. 151.10,” Opening Brief at 20, as both the Regional Director and the Band note,

Appellant itself did not consider these entities to be interested parties when it filed its notice of appeal with the Regional Director or its notice of appeal with the Board because it did not serve those documents on either entity. Instead, Appellant raised the issue for the first time in its opening brief before the Board. The Board has a well-established rule of not considering issues raised for the first time on appeal. See, e.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996). Therefore, it is not required to consider this issue.

As dicta, the Board finds that Appellant failed to make an adequate showing that either the school district or the Commission are “local governments having regulatory jurisdiction over the land to be acquired” within the meaning of 25 C.F.R. § 151.10. It also finds that Appellant’s reliance on South Dakota v. Great Plains Regional Director is misplaced. In that case, the Board vacated a trust acquisition decision and remanded the case at the Regional Director’s request so that she could give notice to a township and a city that had not been given an opportunity to comment on the trust acquisition. The Board noted that the Regional Director “disputed Appellants’ contention that [a school district] was also entitled to notice,” but noted that the Regional Director had agreed to provide notice anyway on remand “in order to avoid the delay that would result from full briefing of this question before the Board.” 37 IBIA at 4. South Dakota v. Great Plains Regional Director does not stand for the proposition that a school district must be notified of a trust acquisition request.

The Board now turns to Appellant’s arguments which challenge the Regional Director’s exercise of discretion. In addition to the legal argument addressed earlier concerning the scope of the analysis required by 25 C.F.R. § 151.10(e), Appellant also asserts that the Regional Director violated that subsection because he did not properly consider the impact of the removal of these parcels from the tax rolls. Appellant argues that “the Band is clearly in a better position to financially shoulder the tax burden on this land than [Appellant].” Statement of Reasons before the Regional Director at 1; quoted in Opening Brief at 3.

The Superintendent’s decision stated:

According to the information provided in the [Band’s] letter of March 3, 2000, the Band has paid a total of \$102,990.00 to [Appellant] for 1999 real estate taxes. This amount is representative .7% of the 1999 total tax base for [Appellant]. The Band’s role as taxpayer or tax generator in Mille Lacs County, is not limited to its role as a property owner. Through an agreement with the State of Minnesota, signed September 22, 1997, the Band pays to the state one-half of its sales tax revenues generated by the Grand Casino, of which [Appellant] receives 10%.

Superintendent’s Feb. 12, 2001, Decision at unnumbered 2-3.

The Band elaborated on this discussion when the matter was pending before the Regional Director, noting that the taxes levied against the parcels it sought to have taken into trust were

\$1,526 for 1999, or 0.01%, i.e., one-hundredth of one percent, of Appellant's total income from property tax assessments. It stated that, in contrast, Appellant's 10 percent share of the revenues that the Band paid to the State under the agreement mentioned in the Superintendent's decision amounted to nearly \$95,000. The Band also asserted that it had relieved Appellant's taxpayers of significant financial obligations through its ability to secure Federal funding for infrastructure development and its use of its own and Federal funds to provide schools, law enforcement services, a health clinic, solid waste removal services, and other governmental services. It also argued that its business activities had contributed significantly to economic growth within the area, which had led to reductions in tax rates for Appellant's citizens.

In his decision, the Regional Director noted:

[W]e concur [with Appellant] that the Band should shoulder its fair share of the costs to provide governmental services to residents in the community. Further, we concur that the Band's casino generates a substantial revenue stream. However, the casino revenues are not permanently guaranteed and the Band is attempting to diversify its business investments. But in order to develop more diverse business revenues in a meaningful way, the Band must first increase its capacity to handle waste water via the proposed project. The revenue streams from the Band's businesses are needed by the tribal government to pay for governmental services on its trust lands and to meet basic needs of its members, such as housing and waste management. While the Band does not pay taxes directly to [Appellant] for services for trust lands, the Band has a history of sharing costs of governmental services via mutual support agreements for law enforcement and other services in amounts that far exceed the anticipated loss in tax base. As [Appellant] points out, the Band is also eligible for federal grants to help pay for governmental services, such as the proposed WWTP [wastewater treatment plant]. However, the entire cost of the WWTP and Band collection system is roughly double the grant amount from the [United States Environmental Protection Agency (EPA)] and the Band is responsible to pay the cost share. Note that if the WWTP is funded by the Band and [EPA], [Appellant] is relieved of the enormous financial burden of providing a modern WWTP that will also help protect the public's sole source of groundwater in the area. These governmental services are very expensive to provide and yet will also be enjoyed by County citizens living in the vicinity on non-trust lands at no cost to [Appellant].

Regional Director's Aug. 24, 2001, Decision at 5-6.

The Board finds that Appellant has failed to show that the Regional Director did not properly exercise his discretion in regard to his consideration of the factors set out in 25 C.F.R. § 151.10(e).

In addition to the legal argument Appellant raised under 25 C.F.R. § 151.10(b), it also argued that the Regional Director improperly considered “[t]he need of \* \* \* the tribe for additional land.” Appellant argues that the Regional Director’s “general reference \* \* \* to the health, welfare and social needs of the \* \* \* Band is clearly not sufficient.” Opening Brief at 11.

In addressing this subsection, the Superintendent stated:

The \* \* \* Band has formulated a Strategic Plan (1998) for the Band’s economic development and the creation of an infrastructure to meet the increasing needs of the Band’s growing membership. There exists an urgent need for a wastewater system to protect and promote the fragile and unique environment of the area and the health of the area residents. The Mille Lacs Regional Wastewater Plan brochure, which depicts the system the Band proposes to develop, and the health and environmental problems it will resolve [sic].

Superintendent’s Feb. 12, 2001, Decision at unnumbered 2.

25 C.F.R. § 151.3(a)(3) 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.” In his August 24, 2001, decision, the Regional Director determined that this trust acquisition was necessary to facilitate each of those goals. Appellant has not shown that the Regional Director did not properly exercise his discretion in regard to the determination of the Band’s need for additional land.

Appellant objects to the Regional Director’s consideration of the factor set out in 25 C.F.R. § 151.10(f). This subsection requires BIA to consider “[j]urisdictional problems and potential conflicts of land use which may arise” because of a trust acquisition. Appellant presents an extensive discussion in which it argues that placing land into trust will not result in its becoming “Indian country” within the meaning of 25 U.S.C. § 1151.

The Board finds Appellant’s discussion of “Indian country” essentially irrelevant to the question of whether or not the Regional Director gave proper consideration to jurisdictional problems that might arise and to potential conflicts of land use. In reaching his conclusion on these issues, the Regional Director considered possible questions over law enforcement jurisdiction, the Band’s existing successful cooperative agreements with local governmental entities providing law enforcement, the Band’s expressed intent to extend those agreements to cover these parcels if they are taken into trust, and the fact that the Band’s proposed use of the parcels was consistent with county zoning. Appellant again disagrees with the Regional Director’s conclusion. However, Appellant has not shown that the Regional Director did not properly exercise his discretion in regard to his consideration of the factors set out in 25 C.F.R. § 151.10(f).

Finally, Appellant contends generally:

For the most part, the balance of the reasons submitted by [Appellant] in support of the initial appeal are not squarely addressed by the decision of the Midwest Regional Director or are only mentioned in passing. \* \* \* As a result, [Appellant] will continue to rely on the Statement of Reasons as originally submitted which are incorporated here by reference. \* \* \* In this light, these reasons lend additional support to the argument of [Appellant] that this decision should be remanded and reversed.

Opening Brief at 21.

The Board has reviewed the issues which Appellant set out on pages 2 through 4 of its Statement of Reasons to the Regional Director. It finds that all of those arguments have either been explicitly addressed or are not relevant to the decision of whether or not these parcels should be acquired in trust.

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 August 24, 2001, decision is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge