



INTERIOR BOARD OF INDIAN APPEALS

Isaac A. Bunney and Cheri L. Bunney v. Pacific Regional Director, Bureau of Indian Affairs

49 IBIA 26 (03/26/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

ISAAC A. BUNNEY AND)	Order Affirming Decision
CHERI L. BUNNEY)	
Appellants)	
)	
v.)	Docket No. IBIA 07-78-A
)	
PACIFIC REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS)	
Appellee)	March 26, 2009

Isaac A. Bunney and Cheri L. Bunney (Appellants or the Bunneys) have appealed the January 12, 2007, decision of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), accepting five parcels of land into trust for the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria (Tribe). The parcels encompass 297.18 acres of land in the unincorporated area of Tuolumne County, California, adjacent to the Tribe’s reservation.¹ Appellants, who own a non-exclusive easement for ingress and egress over Parcels Two, Three, and Five, assert that the Regional Director’s decision makes no provision for their easement and does not protect their rights to contribution from joint

¹ The Regional Director’s decision identifies the parcels by their Assessor’s Parcel Numbers (APN): Parcel One - APN 062-040-11, containing 104.49 acres in the W¹/₂ sec. 5, T. 1 N., R. 16 E., Mount Diablo Base & Meridian (MDB&M), Tuolumne County, California; Parcel Two - APN 062-050-58, containing 46.50 acres, and Parcel Three - APN 062-050-59, containing 64 acres, collectively embracing a portion of Lot 2 and the SW¹/₄NW ¹/₄ sec. 4, Lot 1, a portion of the SW¹/₄NE¹/₄, and a portion of the SE¹/₄NE¹/₄ sec. 5, T. 1 N., R. 16 E., MDB&M; Parcel Four - APN 060-050-02, containing only the surface rights to 2.5 acres within the SW¹/₄NE¹/₄ sec. 5, T. 1 N., R. 16 E., MDB&M; and Parcel Five - APN 087-020-08, containing 79.69 acres in the SE¹/₄SE¹/₄ sec. 32 and Lot 9, sec. 33, T. 2 N., R. 16 E., MDB&M. The decision also includes a non-exclusive easement and right-of-way for ingress and egress and the installation of public utilities along land 50 feet in width in sec. 5, T. 1 N., R. 16 E., MDB&M, which it designates “Parcel II.” Parcel One is sometimes referred to in the administrative record as the Thomas parcel; Parcels Two, Three, Four, and Five are also referred to collectively as the Coenenberg parcels.

users for maintenance and repairs or to enforcement of those rights in California state courts. Because Appellants have not shown that the Regional Director failed to properly exercise his discretion, that the decision is in error, or that decision is not supported by substantial evidence, we affirm the Regional Director's decision.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in his discretion. The regulations governing acquisitions of trust land permit such action “[w]hen the Secretary determines that the acquisition . . . is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h). These criteria are:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National

Factual and Procedural Background

The Bunneys acquired their non-exclusive easement pursuant to a July 3, 1984, easement deed from Vern Coenberg and Anton J. Coenberg. The easement deed was executed to fulfill the terms of a September 6, 1983, Stipulation and Judgment issued in *Bunney v. Taylor*, No. 21461, Superior Court of California, County of Tuolumne.² That Stipulation and Judgment granted the Bunneys a non-exclusive, 20-foot wide easement beginning at the intersection of Buchanan Road, a County public road, and a private paved road, then proceeding along the private road to a point 250 feet to the west of where the private road intersects an existing dirt road, and then proceeding along existing dirt tracks in a generally northerly direction across the Coenberg property to the Bunneys' property (¶ 4(a), (b)). The Stipulation and Judgment also (1) limited the easement to that necessary to serve a single family residence and guest house or small mobile home (¶ 4(c)); (2) placed the responsibility for all maintenance and upkeep of the easement (except for the portion along the paved private road) on the Bunneys (¶ 4(d)); (3) retained the rights of the Coenbergs to use the non-exclusive easement (¶ 4(e)); and (4) reserved the Coenbergs' right to realign the easement, provided the realigned easement continued to provide comparable access to the Bunneys (¶ 4(f)). The easement deed incorporated by reference these terms and conditions of the Stipulation and Judgment. The Bunneys currently use their property served by the easement to train horses and to run the guest ranch they developed in the 1990s.

The Tribe purchased the Coenberg property (now identified as Parcels Two through Five) from the Coenbergs by grant deed dated March 31, 2000; it purchased the Thomas parcel (now denominated as Parcel One) from the Thomases by grant deed dated August 20, 2001. All of the parcels, which the Tribe now owns in fee, adjoin the Tribe's reservation.

In November 2002, the Tribe filed a fee-to-trust application, requesting that BIA take the 5 parcels, encompassing approximately 297 acres, into trust. The application explained that the Tribe suffers a critical housing shortage and stated that the Tribe needs the additional trust land to provide additional housing for tribal members; to ensure the safety of existing residential and governmental facilities by providing additional access; to

² Copies of the Stipulation and Judgment and the easement deed are appended to the Tribe's fee to trust application at Tab 3D.

protect important cultural, spiritual, and historic sites; and to enhance the Tribe's economic development and self-sufficiency by enabling it to implement a tribal housing program. The application addressed in detail each of the criteria set out in 25 C.F.R. § 151.10 in support of the request. Appended to the application were copies of the title insurance policies for the parcels, which explicitly recognize the Bunneys' easement deed and the Stipulation and Judgment upon which the deed was based as exceptions from coverage under the policies. The Tribe accepted the exceptions to title in Resolution Nos. 00-18-02 and 00-19-02, dated April 22, 2002.³

Upon receipt of the application, the Central California Agency (Agency), BIA, notified various State and local officials of the application and sought their comments, as required by 25 C.F.R. § 151.10. BIA also notified the Bunneys of the fee-to-trust application. By letter dated February 10, 2003, the Bunneys' former attorney documented his earlier phone conversation with the Agency realty specialist, during which he had expressed the Bunneys' concern that their easement be protected should the trust acquisition application be approved and the Agency had responded that the title would remain subject to the easement if the application were approved. He stated that the Bunneys "have no opposition to the Trust application as long as their easement will remain intact and their ingress and egress rights to their property will be ensured." Letter from Thomas M. Marovich, Esq., to Terisa Draper, Realty Specialist, Central California Agency, BIA, Feb. 10, 2003, AR, Tab 26 at 1.

The Bunneys also received a copy of the June 2002 Draft Environmental Assessment (EA) prepared for the application in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). They submitted no comments on the Draft EA. Nor did they offer any comments on the July 2006 Final EA or the consequent Finding of No Significant Impact (FONSI), which BIA sent to them.

In his January 12, 2007, decision, the Regional Director approved the Tribe's fee-to-trust application to accept the five parcels into trust. After first explicitly noting both the Bunneys' comments in response to the notification of the application and BIA's assurance that their easement would remain in force and effect if the Tribe's acquisition were approved (Decision at 5), the Regional Director proceeded to consider each of the

³ At BIA's request, the Tribe subsequently rescinded those two resolutions and replaced them with Resolution Nos. 00-19-03 and 00-20-03, which, *inter alia*, identified the parcels by APN and reiterated its acceptance of the various exceptions to title in the title insurance policies, including the exceptions addressing the Bunneys' easement. *See* Administrative Record (AR), Tab 21.

criteria set out in 25 C.F.R. § 151.10. Specifically, he found (1) that the Tribe had established a need for additional trust land to facilitate tribal housing and self-determination (§ 151.10(b)); (2) that the Tribe proposed to use the land to construct an additional 62 1,500 to 3,000 square foot single family homes on lots ranging in size from 2 to 5 acres, a 12,000 square foot tribal senior center, a 30,000 square foot lodge for tribal guests, and a 12,000 square foot tribal security and fire station, and also planned on setting aside open space areas to conserve sensitive biological and cultural resources on the land (§ 151.10(c)); that Tuolumne County supported the acquisition and that the acquisition's impact on State and local governments' tax bases would be outweighed by the social and community needs of the Tribe (§ 151.10(e)); (4) that no jurisdictional problems or conflicts were anticipated as a result of the intended land use and the removal of State and local jurisdiction (§ 151.10(f)); (5) that BIA was equipped to handle any additional responsibilities resulting from the acquisition (§ 151.10(g)); and (6) that no contaminants or hazardous substances were present on the land and NEPA requirements had been satisfied (§ 151.10(h)).

Appellants timely appealed the Regional Director's decision. They also filed an Opening Brief and a Supplemental Brief (April Supplemental Brief). In response, BIA filed an Answer and Request for Dismissal. The Tribe, which had been granted intervenor status by Board order dated March 14, 2007, also filed an Answer and Request for Dismissal. Appellants filed a Response to the Answers and Requests for Dismissal. Upon reviewing the pleadings, the Board issued an order on June 26, 2007, directing the parties to confer to assess whether the appeal could be settled. Although the parties met, they were unable to reach an agreement. Following the unfruitful negotiations, BIA and the Tribe filed a Joint Statement and Motion to Dismiss and Appellants filed an additional Supplemental Brief (September Supplemental Brief). Briefing has now been completed and the case is ready for review.

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials regarding whether to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's judgment in discretionary decisions. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Instead, the Board reviews 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. *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *See id.*; *Eades v. Muskogee Area Director*, 17 IBIA

198, 202 (1989). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Department of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008) Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't. of the Interior*, 401 F. Supp.2d 1000 (D.S.D. 2005); *aff'd*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246-47.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations which the Board lacks authority to adjudicate. *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. Appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

Unless manifest error or injustice is evident, the Board is limited in its review to those issues raised before the Regional Director and does not consider arguments raised for the first time on appeal to the Board. 43 C.F.R. § 4.318; *see Jackson County*, 47 IBIA at 228; *Aitkin County*, 47 IBIA at 106 n.5.

Discussion

In their Notice of Appeal, Appellants aver that the decision makes no provision for their easement over Parcels Two, Three, and Five. They contend that to avoid taking their "property rights" without just compensation, the decision must incorporate their continued rights under the easement in perpetuity, including not only the rights of ingress and egress, but also the right to contribution from joint users of the easement, i.e., the Tribe, for maintenance and repairs and the right to enforce those rights in State court which, they submit, requires that the Tribe agree to be subject to the jurisdiction of the State courts. They expand upon that argument in their Opening Brief, citing California (CAL) Civil Code § 845 in support of their claim that they are entitled to contributions from the Tribe

for the maintenance of the easement.⁴ They insist that they cannot be placed in the position of having rights but no meaningful mechanism to enforce them, which they assert would happen if the land is taken into trust without careful and enforceable protections for their easement rights. They further bolster their argument in their Response to the Answers and Requests for Dismissal, asserting that the Tribe has caused substantial damage to the roadway since acquiring ownership of the property over which the easement runs. Any attempt on their part to restore the damaged road would be futile, Appellants maintain, because the increased use by the Tribe would destroy any such restoration efforts. They also complain about the Tribe's failure to communicate with them about its plans for the roadway, including the roadway's inclusion in the Indian Reservation Roads (IRR) Program and eventual replacement by a proper road, and speculate that they will ultimately lose adequate access to their property. They therefore ask that the land over which the easement runs be excluded from the property taken into trust.

In their April Supplemental Brief, Appellants for the first time aver that the transfer of the property into trust represents a serious environmental concern because, since the Tribe acquired the property in 2001, it has failed to comply with California environmental rules and regulations by creating an unauthorized waste dump/burn pile in an area adjoining their property, which not only is unsightly but also has negatively impacted their guest ranch business. They further contend that California law permits an action for nuisance against the waste dump/burn pile, and that placing the property into trust would deprive them of any remedy for the Tribe's actions which, they aver, could ultimately destroy the value of their property and thus constitute a taking of their substantial property rights. In their September Supplemental Brief, Appellants raise another issue for the first time. They point out that, although the Draft EA, which they admit they received several years ago, referred to an old shooting range which might contain hazardous materials, it relied on the Tribe's assurance that no excavation, development, or public use of the area would be allowed in order to reach its conclusion that there would be no hazards associated with the range. Appellants contend that, despite that previous assurance, the Tribe in fact has used that area extensively for burning and for heavy equipment — actions that, they claim, have put them at risk of personal injury and their property in danger of damage. They aver that

⁴ Although Appellants appear to focus on subsection (c) of CAL Civil Code § 845 which governs the situation when there is no agreement addressing maintenance and repair costs by joint users, there is such an agreement here. When there is an agreement, subsection (b) of CAL Civil Code § 845 states that the costs of maintenance and repair “shall be shared . . . pursuant the terms of any agreement entered into by the parties for that purpose.” *See* discussion, *infra*.

the Tribe's blindness to the hazards its actions pose to neighboring property owners should preclude it from taking this property into trust.

The environmental issues raised in both the April and September Supplemental Briefs were not raised in Appellants' comments on the trust acquisition. Nor did Appellants advert to these concerns in comments on either the Draft or Final EA, although the alleged conditions about which they complain purportedly date back to the time the Tribe acquired the property.⁵ This Board has a well-established practice of declining to consider arguments or issues raised for the first time on appeal to this Board. *County of Sauk*, 45 IBIA at 217 n.18; *Wasson v. Western Regional Director*, 42 IBIA 141, 156 (2006); *Shawano County v. Midwest Regional Director*, 40 IBIA 241, 246 (2005) (NEPA issues raised for first time on appeal); *Shoshone-Bannock Tribal Credit Program v. Portland Area Director*, 35 IBIA 110, 115 (2000); *Welk Park North v. Acting Sacramento Area Director*, 29 IBIA 213, 219 (1996). We adhere to this precedent and will not address these new issues raised in the supplemental briefs.

Turning to the issues properly before us, we find that Appellants' disagreement with and bald assertions concerning the Regional Director's decision do not satisfy their burden of showing that the Regional Director improperly exercised his discretion in approving the acceptance of the parcels into trust.

Appellants' contention that their easement rights have not been not adequately recognized or protected is belied by the record. Not only does the Regional Director's decision expressly acknowledge the existence of the easement and BIA's assurance that the easement will remain in force and effect if the land is in trust (Decision at 5), but Tribal Resolution Nos. 00-19-03 and 00-20-03 explicitly accept the exceptions to title listed in the title insurance policies that address the Bunneys' easement. Appellants have not shown that anything in the conveyance by the Tribe to the United States, in trust, will affect or deprive them of their easement rights, or that the Regional Director was required to do more than recognize those rights in agreeing to accept the property.

Although Appellants aver that they are entitled to contributions from the Tribe for the cost of maintaining and repairing the road, paragraph 4(d) of the Stipulation and Judgment incorporated into the easement deed squarely places the burden of such maintenance and repairs solely on them. The fact that CAL Civil Code § 845(c) requires

⁵ Notwithstanding Appellants' complaint that the trust acquisition will deprive them of a remedy in nuisance under State laws, they do not suggest ever having sought to invoke that remedy against the Tribe, despite their allegations of years of misdeeds by the Tribe.

the apportioning of such costs in the absence of an agreement assigning those costs does not help Appellants' cause because such an agreement does exist here and, under CAL Civil Code § 845(b), the terms of that agreement control the responsibility for those costs. Thus, Appellants have not shown that BIA's decision to accept title to the lands in trust will have any effect on their rights as granted in the easement deed. Indeed, most of Appellants' complaints are about Tribal actions that allegedly have been taking place while the Tribe has fee title, i.e., independent of the trust or fee status of the title.

In any event, we note that the Tribe recently undertook, at its own expense and under the supervision of the Tuolumne County road engineer, the grading and graveling of the road and that it plans on improving and paving the road within the next 2 to 3 years under a contract executed under the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 25 U.S.C. §§ 450 *et seq.* See BIA's and Tribe's Joint Statement at 1-2. These actions may well effectively moot Appellants' complaints about joint contribution and about the Tribe's alleged destruction of the easement.⁶ Appellants have failed to show that the Regional Director improperly exercised his discretionary authority to approve the acceptance of the parcels into trust or that the decision is in error or not supported by substantial evidence. We therefore affirm his decision.⁷

⁶ It is unclear from Appellants' arguments whether they are more concerned about tribal actions causing deterioration in the road or about tribal *improvements* to the road that might result in increased traffic. The fact that Appellants have an easement does not preclude the Tribe from improving the road to facilitate access to tribal lands, so long as Appellants' ingress and egress rights are protected, consistent with the terms of their easement.

⁷ Although the Tribe and BIA have moved to dismiss the appeal, purportedly premised on Appellants' failure to state a claim, we construe Appellants' arguments as asserting that the Regional Director abused his discretion in approving the trust acquisition without imposing *conditions* on the Tribe. In light of that construction, we have found it appropriate to decide the merits of the appeal rather than dismiss it. We therefore deny the motions to dismiss as moot.

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 decision of the Regional Director.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.