



INTERIOR BOARD OF INDIAN APPEALS

Beverly C. Cloud v. Alaska Regional Director, Bureau of Indian Affairs

50 IBIA 262 (10/22/2009)

Related Board case:
51 IBIA 206



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

BEVERLY C. CLOUD,)	Order Vacating Decision and Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 07-86-A
ALASKA REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	October 22, 2009

Beverly C. Cloud (Appellant) appeals to the Board of Indian Appeals (Board) from a February 2, 2007, decision of the Alaska Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director determined that a purported sale of Allotment No. A-067524, USS 7889, containing 5.0 acres, more or less, from Willis Roehl (Willis), now deceased, to Appellant was null and void for lack of approval by BIA, and he declined to approve the sale retroactively. It is undisputed that the sale was never submitted to or approved by BIA prior to Willis's death.

The Regional Director declined posthumous approval of the sale based on his finding that there was no compliance with the regulatory requirements for a sale. Specifically, Willis did not submit an application to BIA to sell his allotment, 25 C.F.R. § 152.23; Willis did not submit an application for a deferred payment sale, *id.* § 152.35; Willis did not receive fair market value for his allotment, *id.* § 152.25(a), and Willis and Appellant were not blood relatives for purposes of considering the proposed transfer as a gift, *id.* § 152.25(d); and no deed was prepared or executed for the transfer of title. In his brief before the Board, the Regional Director concedes that strict compliance with the regulations is not required for BIA to approve land conveyances after the death of the grantor. See *Wishkeno v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 11 IBIA 21 (1982). We agree. Because the Regional Director has not considered whether to approve the transaction in light of the factors set forth in *Wishkeno*, we vacate the Regional Director's decision and remand this matter for his further consideration in light of the Board's decision.

Undisputed Facts

In March 1966, BIA filed a Native allotment application with the Bureau of Land Management (BLM) on behalf of Willis, a Native Alaskan (Athabascan), for a particular allotment of land in Pedro Bay, Alaska. *See In re Pedro Bay Corp.*, 78 IBLA 196, 197 (1984). While his application was pending before BLM, Willis built a modest 400 sq. ft. residence with no interior plumbing on the allotment in or about 1964. *In re Pedro Bay Corp.*, 111 IBLA 271, 273 (1989). In 1990 — nearly 25 years after the application was filed and after protracted administrative efforts — Willis was awarded the 5-acre allotment, Allotment No. A-067524, pursuant to the Alaska Native Land Allotment Act of 1906, Act of May 17, 1906, Ch. 2469, 34 Stat. 197, 48 U.S.C. § 357 (1952).¹ *See* Native Allotment Certificate No. 50-90-0424, July 31, 1990. Willis was given a deed to the allotment, conveying restricted title:

[P]ursuant to the [Act of May 17, 1906], as amended, the land above-described shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until . . . the Secretary of the Interior or his delegate, pursuant to the provisions of the . . . Act of May 17, 1906, as amended, approves a deed of conveyance vesting in the purchaser a complete title to the land.

Id.

In 1995, Willis contacted Appellant, also a Native Alaskan (Eskimo),² to offer to sell his allotment to her. Willis's daughter (Sherry Roehl Foss) was married to Appellant's brother (Alvin Foss), and the two families were friends. Closing Brief of Katie Roehl (Katie), Feb. 8, 2002, at 4; *see also* Declaration of Katie Roehl at ¶ 16 (Appellant and her

¹ This Act subsequently was amended by the Act of Aug. 2, 1956, Ch. 891, § 1(a) to (d), 70 Stat. 954, and was moved to 43 U.S.C. § 270-1 (1964). Although the Act subsequently was repealed by subsection 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (2006), a savings provision was included for applications for allotments that were then pending. Willis's application fell within this savings provision and, thus, his application continued through the review and approval process.

² Appellant's enrollment form shows that she is enrolled with Pedro Bay Village (Bristol Corporation), which is a Federally-recognized Native Alaskan entity. *See* 74 Fed. Reg. 40,218, 40,223 (Aug. 11, 2009).

parents were friends of the Roehl family).³ Appellant wanted a fish camp in Pedro Bay, Willis heard that she was looking for land, and, according to Appellant, the two negotiated a price for the sale of Allotment No. A-067524. Initially, Willis sought \$50,000 for his allotment, but ultimately Appellant and Willis agreed on a sales price of \$35,000. The record does not reflect what, if any, efforts were made by Appellant or by Willis to determine the fair market value of the allotment. On March 16, 1996, Willis and Appellant entered into an “Earnest Money Receipt and Agreement” pursuant to which Willis acknowledged receipt of \$10,000, and Appellant agreed to pay an additional \$25,000, at which time Willis was to give Appellant the deed to the allotment.

It is undisputed that Appellant paid the agreed-upon purchase price of \$35,000, albeit in installments between March and June 1996. The first check, in the amount of \$10,000, was made payable to Willis and, according to Appellant, Katie was present when Appellant delivered the check. The next two checks, in the amounts of \$8,000 (accompanied by \$2,000 cash⁴) and \$15,000, were made payable to Katie. A statement appears on each check that refers to the purpose for which the check is written: The statement, “Re: down payment on Pedro Bay 5 acres” appears on the first check; the statement, “Re: Beverly Cloud land purchase” appears on the second check; and the statement, “to Willis: final payment,” appears on the final check.

Appellant maintains that Willis told her to make the last two checks payable to Katie; Katie maintains that Willis told her to cash the checks and give him the money. Katie further maintains that she did not know what the money was for. Appellant says that Katie was present when she delivered the balance due on the sale; that Katie was aware of the sale; and that Katie had no objections to the sale. Katie admits she was in the house at the time Appellant came by, but states she remained in another room unaware of the nature of Appellant’s business with Willis. Although Katie and her two sons, Henry and William Joe Roehl, claim that they “were never informed of Willis selling [Allotment No. A-067524] to [Appellant] until afterwards,” they also state that “[b]efore Willis sold the land to [Appellant], Henry offered to buy the land from Willis. Willis refused[,] stating that [Appellant] could provide the money that he needed faster.” Letter from Katie, Henry, and William Joe Roehl to Pedro Bay Realty, May 2, 2002. The family claims that Willis had an alcohol and marijuana abuse problem, of which Appellant was aware, and that “drug dealers” were after him for money that he owed them. *Id.*

³ Katie is Willis’s widow and a Native Alaskan (Eskimo).

⁴ The record contains a handwritten receipt for \$10,000 signed by Willis on May 31, 1996.

Willis gave Appellant the original deed to his allotment. On the bottom of the second page of the deed, Appellant handwrote the following statement for Willis's signature:

**I am gift deeding this property:
U.S. Survey No. 7889, Alaska situated on the Northeasterly
shore of Pedro Bay on Iliamna Lake. (5.0 Acres)
To Beverly C. Cloud.
I am gift deeding this property to Beverly C. Cloud for the following
reason: to provide my grandchildren, Beard[,] Vera and Alvin D. Foss
(minors) access and a connection to their Athabascan heritage through
their aunt Beverly C. Cloud.
I am doing this of my own free will.**

The above statement was signed by Willis, and his signature was notarized on May 31, 1996.⁵ The parties do not dispute that the signature is Willis's.

Appellant apparently began using Allotment No. A-067524 in 1996, and it is undisputed that her use and occupancy has continued since that time. Willis died intestate on October 17, 1998. It is undisputed that neither Appellant nor Willis sought BIA approval of the conveyance prior to Willis's death.⁶ There is also no indication in the record that Willis ever objected to Appellant's use or occupancy of his allotment prior to his death, and the record also does not reflect any objection by Willis's family until Appellant put forth her claim to the property.

Because BIA had not approved any conveyance from Willis to Appellant, BIA's land records continued to reflect ownership of Allotment No. A-067524 in Willis. Therefore, his trust estate, which apparently consisted only of Allotment No. A-067524, was referred to the Office of Hearings and Appeals for probate in or about 2000. *See* Decision, entered Feb. 2, 2007, in *In the Matter of the Estate of Willis Roehl*, No. P000020234IP (formerly, No. IP SL 283H 99). For purposes of probate, BIA had an appraisal performed for Allotment No. A-067524 to determine the value of the allotment as of the date of Willis's death. The resulting appraisal, dated July 1, 1999, valued the property at \$40,000 as of

⁵ Appellant attached the original deed — with its handwritten and signed note — to her opening brief to the Board.

⁶ Appellant maintains that Willis was supposed to submit the paperwork to BIA and that she asked him on several occasions to do so.

October 17, 1998,⁷ based on 3 sales of similar residential properties between 1989 and 1992.⁸ The appraisal contains a statement that it “is the result of a limited appraisal process in that certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practices [USPAP] were invoked.” *See* Restricted Appraisal for Probate, July 1, 1999, at 1.⁹

Appellant apparently became aware that Allotment No. A-067524 was being probated as part of Willis’s trust estate, and she filed an objection to the inventory of his estate. Appellant claimed that she is now the owner of Allotment No. A-067524; Katie and her family disputed Appellant’s claim. Two hearings were held, on September 1, 2000, before Administrative Law Judge James Heffernan, and on August 16, 2001, before Indian Probate Judge Kathleen Switzer.¹⁰ On March 27, 2002, after the probate proceeding was reassigned to Administrative Law Judge Harvey C. Sweitzer, Judge Sweitzer issued an interim order directing Appellant to seek approval of the sale from the Pedro Bay Village Council, which had contracted with BIA to perform BIA’s realty functions. *See* Interim Order, Mar. 27, 2002, *Estate of Roehl*, No. P000020234IP, at 2.¹¹

⁷ The appraiser valued the land at \$30,000 (\$6,000 per acre) and the improvements at \$10,000, for a total of \$40,000.

⁸ The sale prices of comparable properties ranged from \$4,494 per acre to \$6,203 per acre.

⁹ Subsequently, two additional appraisals were performed, one on October 3, 2002, and another on October 28, 2005, in accordance with USPAP standards. These appraisals valued the property at \$44,206 as of September 12, 2002, and \$56,000 as of May 10, 2005. The record only contains pages 1, and 4-6 of the 2002 appraisal; as for the 2005 appraisal, the record only contains the Appraisal Review portion.

¹⁰ According to BIA, the tapes of these hearings were either lost or destroyed and, thus, the testimony was not considered by BIA in rendering its decision in this matter. The Board located the tape recordings, which are in the custody of the Probate Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia. The Board has not reviewed these tapes or considered them in the course of this appeal.

¹¹ Federally-recognized Indian tribes and Native Alaskan entities may contract with a Federal agency to perform those services that ordinarily would be provided to these Federally-recognized entities by the Federal agency. *See* 25 U.S.C. § 450f; Regional Director’s Decision at 2 n.1. Presumably, the Council is the governing body of Pedro Bay Village.

By letter dated May 13, 2002, Appellant submitted information to the Pedro Bay Village Council, as directed by Judge Sweitzer, and requested approval of the transaction.

On or about May 5, 2003, Katie sent a letter to Pedro Bay Realty¹² in which she stated that Willis had been dependent on marijuana and in debt to drug dealers who, she said, supplied his habit. Letter from Katie to Pedro Bay Realty, May 5, 2003. She stated her belief that “Willis never intended to transfer the land to [Appellant].” *Id.* She based her belief on the language signed by Willis on the deed in which he indicated that he wanted the land “to provide a connection and a link ‘for [our] grandchildren,’” and that the “link” would be severed by transferring the allotment to Appellant because “it would no longer be in a part of our lineal heritage.” *Id.* Katie asserted that Appellant “took advantage of Willis” because Appellant “knew that Willis would sell his land to her for less than its value . . . to satisfy [his] addictions.” *Id.* The record does not contain any evidentiary basis for Katie’s various assertions.

The record contains a two-page document, dated May 13, 2003, entitled “Report of Investigation, Negotiated Sale, Native Allotment Number A-67524, Willis Roehl D.O.D. 10-17-98” (Report). It was prepared by Pedro Bay Realty, and included a recommendation against approval of the sale because no effort was made to obtain approval of the transaction prior to Willis’s death. The Report asserts that “[i]n reviewing the material supplied to this office it appears obvious that [Appellant] was fully aware of [Willis’s] alcohol and drug abuse history, along with his financial problems when she entered into the ‘alleged sale’.” Report at 2. The report does not identify the evidentiary source(s) for these assertions.

On February 2, 2007, the Regional Director issued his decision declining to approve the sale.¹³ He determined that Appellant and Willis did not comply with the procedures set out at 25 C.F.R. Part 152 for sales transactions of trust lands: they did not contact BIA or Pedro Bay Realty in advance of entering into any transaction, as set forth in 25 C.F.R. § 152.23, and no application for deferred payment plan was submitted, *id.* § 152.35. The

¹² Although it is not entirely clear from the record, it appears that “Pedro Bay Realty” is an arm of Pedro Bay Village and performs the realty duties for which Pedro Bay Village contracted with BIA.

¹³ It appears from the record that the Regional Office initially requested the Superintendent, West-Central Alaska Agency, BIA, to issue a decision disapproving the sale. *See* Memorandum from Regional Office Trust Services to Superintendent, West-Central Alaska Agency, Jan. 25, 2007. For reasons that are not disclosed in the record, the Superintendent apparently did not issue a decision.

Regional Director determined that fair market value was not paid for the allotment and the transaction could not be processed as a gift transaction because Appellant and Willis were not blood relatives and did not share a special relationship, as required by 25 C.F.R. § 152.25(d). Finally, he found that no deed was prepared or executed for the transfer of title, which he determined barred him from approving the transaction. The Regional Director found it significant that neither Appellant nor Willis sought approval of the transaction from BIA prior to Willis's death: "This [fact] would indicate [Willis's] possible intent to keep ownership of his restricted land regardless of his condition at the time. This is further substantiated by the fact that [Willis] accepted less than the appraised value for his land, if he intended to sell at all." Regional Director's Decision at 3. Finally, the Regional Director could not "ignore" Willis's "long history of illness [which] may have put him at a disadvantage in understanding . . . the consequences . . . of the purported sale." *Id.*

Thereafter, Appellant appealed the Regional Director's decision to the Board. Appellant submitted an opening brief; Katie and the Regional Director both submitted answer briefs; and Appellant filed a reply brief that addressed both answer briefs.

Discussion

I. Summary

The subject conveyance clearly was a sale transaction notwithstanding the language, "I am gift deeding this property," written on the deed itself: An earnest money agreement was signed by Willis and Appellant that sets forth an agreed-upon purchase price after negotiations, and a substantial amount of money was paid for the conveyance consistent with the earnest money agreement.

However, we conclude that BIA has not adequately evaluated Appellant's request for retroactive approval of the attempted conveyance. Therefore, we vacate the Regional Director's decision and remand this matter for further consideration in light of our decision. In reaching this conclusion, we first observe that we find it evident that the Regional Director based his decision on the lack of compliance by Willis and Appellant with the procedural requirements of 25 C.F.R. Part 152. The Regional Director now concedes, and we agree, that the absence of strict compliance with the regulations need not be fatal to a request for posthumous approval of a negotiated sale of trust land.

Even if the Regional Director had based his decision on other factors — that fair market value was not paid for the allotment or that Willis had a "long history of illness" — which we do not find were set forth as the basis of his decision, the decision reflects a lack

of thoughtful consideration of these factors, and the record lacks substantial evidence supporting the underlying factual determinations.

2. Standard of Review

BIA's authority to approve conveyances is discretionary, *see Kent v. Acting Northwest Regional Director*, 45 IBIA 168, 174 (2007), and includes the authority to consider whether to approve conveyances that come to BIA's attention after the death of the grantor, *see Wishkeno*, 11 IBIA at 32. We review the exercise of BIA's discretion to determine whether BIA's decision comports with the law, whether the decision is supported by substantial evidence, or whether it is adequately explained. *Kent*, 45 IBIA at 174. In the course of our review of discretionary decisions by BIA, we will not substitute our judgment for BIA's. *Id.* It remains Appellant's burden to demonstrate that BIA abused its discretion by identifying errors of law or fact. *Id.*

Notwithstanding our authority and precedent to the contrary, Appellant urges us to render our own judgment approving or disapproving the conveyance. In support of her position, Appellant cites several Federal court decisions, none of which address the Board's authority. The Board's authority is constrained by regulation. Pursuant to 43 C.F.R. § 4.312, the Board is authorized to "adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of . . . [a] BIA official." *See also id.* § 4.318 (Board's scope of review is limited to the issues that were before BIA, although the Board has the inherent authority to redress manifest injustice or error). The Board will reverse where there is an error of law and there is no room for discretion by BIA, *see San Carlos Apache Tribe v. Western Regional Director*, 41 IBIA 210, 219-20 (2005), or where the Regional Director concedes that his decision is erroneous in whole or in part, *see Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 233-34 (2008). But where, as here, the Board has not been delegated the discretion to decide certain matters, we view our authority as constrained to determining whether there are any laws or regulations to guide BIA's exercise of discretion and, if so, whether BIA's decision comports therewith, and whether, as a factual matter, the decision is supported by the record. The Board's role is to determine whether BIA's approval or disapproval is proper and, if it is not, to remand the matter for BIA's further consideration. *See Kent*, 45 IBIA at 178-79.¹⁴

¹⁴ We agree with Appellant that BIA does not have unfettered discretion to approve or disapprove sales of Indian trust lands. As *Wishkeno* and our decision today make clear — and as the Regional Director concedes in his brief — BIA's exercise of its discretion in approving land sales is subject to administrative review.

3. BIA's Decision to Disapprove the Sales Conveyance

Although we agree with the Regional Director that this transaction was a sale and not a gift transaction, we vacate his decision and remand this matter to him for further consideration consistent with this decision. As BIA concedes, strict compliance with the procedural requirements for sales conveyances, *see* 25 C.F.R. Part 152, is not required as a predicate to BIA's exercise of discretion to approve a conveyance of Indian trust interests after the death of the grantor. Answer Brief at 7-8. Because we find that the sole basis for the Regional Director's decision to disapprove the conveyance was the lack of strict compliance with the regulations, which is no longer possible in light of the death of the grantor, we cannot uphold his decision.

a. Sale Transaction Versus Gift Transaction

We affirm the Regional Director's conclusion that the subject transaction was a sales transaction and not a gift deed transaction but for reasons other than those set forth in his decision. The Regional Director, relying on 25 C.F.R. § 152.25(d), determined that Willis could not give his allotment to Appellant because they are not blood relatives. He also determined, with no discussion, that no special relationship existed between Appellant and Willis; the Regional Director did not consider whether special circumstances existed that would justify a gift transaction.

Notwithstanding the Regional Director's incomplete consideration of subsection 152.25(d), it is clearly evident that the parties contemplated an arms-length transaction: Appellant explains the negotiations that occurred between herself and Willis, and the record contains an executed "Earnest Money Receipt and Agreement" that documents the parties' understanding that Appellant was to pay \$35,000 in return for Willis's deed to Allotment No. A-067524. In addition, the first payment check — made payable to Willis and dated March 18, 1996, in the amount of \$10,000 — bears the notation, "Re: down payment on Pedro Bay 5 acres." Similarly, the second check — made payable to Katie and dated May 31, 1996, in the amount of \$8,000 — bears the notation, "Re: Beverly Cloud land purchase." The last check — made payable to Katie and dated June 24, 1996, in the amount of \$15,000 — bears the notation, "to Willis: final payment." The only suggestion in the record that the transaction is other than a sales transaction is the statement handwritten by Appellant on the deed itself and signed by Willis that says "I am gift deeding this property." The parties do not seriously argue that this transaction was a gift, and we find that the evidence of a sales transaction is substantial.

b. BIA's Consideration of the Sales Transaction

It is well established that conveyances of Indian trust lands must be approved by the Secretary of the Interior (Secretary) or his authorized representative for a conveyance to be valid and enforceable. *See* 25 U.S.C. § 404; 43 U.S.C. § 270-1 (repealed¹⁵); 25 C.F.R. § 152.22; *see also Kent*, 45 IBIA at 174, and citations therein. Unless and until the Secretary has approved a conveyance, an attempted conveyance is null and void; once approved, the approval is retroactive to the date of the conveyance. *Wishkeno*, 11 IBIA at 26-27, 32. The Secretary's authority is delegated to BIA, *see Kent*, 45 IBIA at 174, and regulations governing conveyances of Indian trust lands are found at 25 C.F.R. Part 152. While BIA has wide latitude with respect to its exercise of discretionary authority to approve conveyances, that discretion is not boundless and must be exercised in accordance with the regulations.

BIA owes a fiduciary duty to the owner of the trust interest in determining whether to approve a conveyance of trust property. *Kent*, 45 IBIA at 174. Where the owner/grantor is deceased at the time that BIA reviews the transaction, BIA's duty remains due to the grantor and not to the grantor's heirs, even where the heirs are Indian or Native Alaskan. *See id.* ("In approving a conveyance of trust land, BIA acts as trustee for the Indian owner"); *Bitonti v. Alaska Regional Director*, 43 IBIA 205, 216 n.13 (2006). Therefore, BIA's duty is to determine whether the grantor reasonably understood and intended for the conveyance to occur. *Kent*, 45 IBIA at 174; *Willis v. Northwest Regional Director*, 45 IBIA 152, 167 (2007). If there is reasonable doubt that the grantor intended to convey his trust property, a decision by BIA to disapprove the conveyance will be upheld. *See Kent*, 45 IBIA at 174.

In *Wishkeno*, the Board considered whether to approve a conveyance of Indian trust lands after the grantor had died. As in the instant appeal, BIA was not aware of the purported transaction until after the death of the Indian grantor when the grantee produced a copy of the warranty deed at the probate of the grantor's Indian trust estate. Thus, there was no application submitted to BIA for the conveyance. As in the instant appeal, the warranty deed purported to convey lands held in trust from the grantor to the grantee. The Board held in *Wishkeno*

¹⁵ Although section 270-1 was repealed, any applications for allotments that were grandfathered pursuant to the savings clause were, if approved, subject to the terms of section 270-1. Section 270-1 required title to the allotment to be restricted against alienation and required any conveyance to have the approval of the Secretary. *See* 43 C.F.R. § 1617(a).

that the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.

Wishkeno, 11 IBIA at 32. In determining whether the consideration for the conveyance is “adequate,” BIA may approve conveyances “for less than the appraised fair market value or for no consideration when . . . some . . . special relationship [other than spouse, sibling, or lineal ancestor or descendent] exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.” 25 C.F.R. § 152.25(d). In addition, BIA cannot ignore evidence, if any, of the grantor’s incompetence at the time of the transaction. *See, e.g., Leon v. Albuquerque Area Director*, 23 IBIA 248, 255 (1993), *aff’d sub nom. Leon v. Babbitt*, No. 93-664-M (D.N.M. Apr. 18, 1994). Although the *Wishkeno* appeal addressed a gift deed transaction, the Board has extended its reasoning to sales transactions. *See Thornburg v. Acting Anadarko Area Director*, 18 IBIA 239, 240-41 (1990). We turn now to a discussion of the Regional Director’s decision.

i. Noncompliance with 25 C.F.R. Part 152

The Regional Director declined to approve the sale of Willis’s allotment to Appellant because neither Appellant nor Willis attempted to comply with the regulatory requirements governing the sale of trust or restricted interests in real property before Willis’s death. In particular, the Regional Director cited the failure of both Appellant and Willis to contact BIA or Pedro Bay Realty to obtain and submit a sales application, 25 C.F.R. § 152.23, 43 C.F.R. § 2561.3(b), and to obtain approval of their deferred payment plan, 25 C.F.R. § 152.35.

The purpose of submitting a sales application to BIA is to enable BIA to assist the owner with the proposed transaction and to enable BIA to begin the process of determining whether to approve the transaction, *see* 25 C.F.R. § 152.22, by examining whether the sale is, in fact, intended by the owner, whether the sale is in the best interest of the owner, *id.* § 152.23, and whether the negotiated purchase price meets the property’s fair market value by arranging for an appraisal and by considering certain additional factors, if the negotiated price is less than fair market value, *see id.* §§ 152.24, 152.25. The purpose of submitting a deferred payment plan is to enable BIA to approve a deed, but hold it in escrow and withhold delivery until all payments have been made. *See id.* § 152.35. Where an owner has agreed to a sale of his trust or restricted interest, has accepted full payment for his

interest, and dies without apprising BIA of the transaction, it is then impossible to comply with the normal regulatory requirements.

But, as the Regional Director concedes in his answer brief before the Board, such strict compliance is not required. *See Estate of George Levi*, 26 IBIA 50, 53 (1994) (BIA was unaware of gift transaction until probate of the grantor's estate; BIA approved the deeds "even though there were technical problems with the conveyances"); *Leon*, 23 IBIA at 256-57. An appraisal of the property's value can still be obtained, and documents and other evidence may exist to show the deceased grantor's intent, the agreed purchase price, the full payment of the agreed price, and other relevant details of the transaction. Other criteria for the approval of land conveyances become moot in the wake of the grantor's death, e.g., whether the transaction is in the grantor's best interest. *See* 25 C.F.R. § 152.23; *see also Kent*, 45 IBIA at 177 (the best interest of the grantor becomes moot after grantor's death); *Willis*, 45 IBIA at 162-63 (same).

To the extent that the Regional Director's decision is predicated on Willis's failure to comply with the regulations by notifying BIA in advance of his sales agreement with Appellant, or even thereafter, our decisions make clear that strict compliance is not required where the grantor is deceased. Therefore, we cannot affirm the Regional Director's decision on the grounds that the sale transaction was not processed in strict compliance with the regulations governing such transactions. Although the Regional Director relies on this ground for denying approval of the conveyance, his decision nevertheless addresses certain other relevant criteria, to which we now turn.

ii. *Wishkeno* Factors

In addition to rejecting the sale to Appellant for failure to comply with the foregoing regulatory requirements, the Regional Director also argues that he rejected the sale because the consideration — \$35,000 — did not meet fair market value. Answer Brief at 8; *see also* Decision at 3. Even assuming that the Regional Director relied on this ground for declining approval of the sale, which we do not find that he did, the Regional Director does not identify what he believes to be the appraised value of the land, and we do not find an appraisal in the record that was conducted for the purpose of a negotiated sale that values the allotment at the time of the transaction in 1996. Therefore, we cannot affirm the Regional Director's decision on this alternate ground.

Whether or not the deceased grantor received adequate consideration for his trust or restricted land interest is a threshold consideration in determining whether to approve a sales transaction on behalf of a deceased grantor and is one of the criteria identified by the

Board in *Wishkeno*. *Wishkeno*, 11 IBIA at 32; *see also* 25 C.F.R. § 152.25. The record contains three appraisals that value the allotment (1) at the time of Willis's death in 1998 (\$30,000 for the land; \$10,000 for the residence), (2) in 2002 (\$35,000 for the land; \$9,206 for the residence), and (3) in 2005 (\$56,000 for land and residence, combined). The appraisals were each obtained for a different purpose: The 1998 appraisal was a "restricted/limited appraisal report . . . for probate purposes only"; the 2002 appraisal was prepared for the purpose of assisting a negotiated sale of the property; and the 2005 appraisal was performed to determine fair rental value of the property. The Regional Director agrees that the appraisal must value the property as of the date of the parties' transaction in March 1996, and not as of a later date. Regional Director's Answer Brief at 9. Only after the property has been valued as of the date of the parties' transaction can the Regional Director determine whether or not the parties' negotiated sale price of \$35,000 approximates the fair market value of the property within the meaning of 25 C.F.R. § 152.25(a).¹⁶

In addition, Appellant argues that to the extent that the parties' negotiated sale price is less than fair market value, the Regional Director should have considered whether "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," as set forth in 25 C.F.R. § 152.25(d). Appellant maintains that she and Willis shared a special relationship because they were related through the marriage of Willis's daughter, Sherry, to Appellant's brother, Alvin, and are further related through the three children born to Sherry and Alvin.¹⁷ Appellant points out that Willis agreed to convey his property to Appellant so that the children would have "access and a connection to their [Native Alaskan] Athabascan heritage." Warranty Deed at 2. Appellant also contends that "special circumstances" exist because Appellant is a bona fide purchaser of Appellant's allotment and because Willis died without seeking BIA's approval of the transaction, which "greatly disadvantaged

¹⁶ Appellant invites us to assume a linear increase in value for the property. That is, since the appraised value of the property rose \$4,000 between 1998 and 2002, Appellant suggests that we can assume its value would have been approximately \$2,000 less than its 1998 appraised value at the time of the sales transaction in 1996 (i.e., \$38,000). This argument fails if for no other reason than it is speculative.

¹⁷ In her closing brief in the probate of Willis's estate, Katie refers to Alvin as Sherry's "ex"-husband. Closing Brief at 4. Documents submitted by Appellant to the Board suggest otherwise, i.e., that they were still married at the time of Sherry's death in 1992. *See* Exh. A to Appellant's Reply Brief (memorial flyer for Sherry Foss, which identifies her husband, Alvin, as one of her survivors).

[Appellant].” Opening Brief at 33. She further contends that she is unable to recover the \$35,000 that she paid to Willis for the property.

Appellant is correct that if the Regional Director determined that the purchase price was less than fair market value, he should have considered whether a special relationship or special circumstances existed that sufficiently accounted for the difference, if any, that there may have been between the purchase price and fair market value of the allotment at the time of the purchase agreement in 1996. It should have been evident to the Regional Director, through the handwritten statement signed by Willis on the warranty deed, that he and Appellant had a common interest in the children of his daughter and her brother, and the Regional Director should have addressed whether this connection constituted either a “special relationship” or “special circumstances” within the meaning of subsection 152.25(d) and, if so, whether it might offset or account for the difference, if any, between the negotiated price and fair market value. On remand, the Regional Director should consider these issues and the arguments of the parties.¹⁸

iii. Grantor’s Intent and Competency

Finally, the Regional Director suggests that the fact that Willis never sought BIA approval of the transaction in the 2 years between the final payment of the purchase price in May 1996 and his death in October 1998 “would indicate [Willis’s] possible intent to keep ownership of his restricted land” Decision at 3. The Regional Director also expressed a “concern” that Willis’s “long history of illness may have put him at a disadvantage in understanding . . . the consequences . . . of the purported sale [of his allotment to Appellant].” *Id.* In addition, the Regional Director added that Willis’s attempt to convert the transaction from a sales transaction to a gift transaction “brings [to] mind his competenc[y].” *Id.* at 4. The Regional Director does not address any of these points further. We do not understand the Regional Director to have concluded that Willis, in fact, did not understand or intend the consequences of the sale. Indeed, we have reviewed the administrative record and, as it is presently constituted, it does not support a determination that Willis was incompetent at the time of the transaction or that he did not intend to sell his land to Appellant.

¹⁸ With respect to the final two factors set out in *Wishkeno*, we note that there is no dispute that Willis received from Appellant the negotiated purchase price of \$35,000 for Willis’s allotment. Finally, it appears that the Regional Director determined that Appellant acted with “the best of intentions,” Decision at 4, which suggests that he found “no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.” *Wishkeno*, 11 IBIA at 32.

No medical evidence is tendered in support of any assertion that Willis was incompetent at the time of the transaction.¹⁹ To the extent that his family relates various events in support of this assertion, no dates are provided for these events and the statements are self-serving. The Regional Director's reliance on Willis's failure to seek BIA approval of the sale as probative of a lack of intent to sell is nothing more than speculation. It just as easily indicates an inattention to detail, even when he failed to do so with admitted prodding by Appellant, and it could also indicate that he did not believe he needed BIA's approval to sell his land. In contrast, Willis accepted significant funds from Appellant on three separate occasions without, apparently, renegeing on the parties' sales agreement; he signed 2 documents 2 months apart that reflect his intent to convey the allotment to Appellant; and the record does not contain any suggestion that he objected to Appellant's occupancy of the allotment at any time before his death. On remand, the Regional Director should consider these facts and any additional evidence, including the declarations submitted by the parties to the Board and transcripts of the hearings held in Willis's estate, to reach a reasoned determination as to Willis's intent and competency with respect to the attempted sale.²⁰

Conclusion

We vacate the Regional Director's decision and remand this matter for further consideration consistent herewith. The Regional Director denied approval of the Appellant's and Willis's transaction because Willis did not comply with the regulations governing such conveyances. As the Regional Director concedes, strict compliance is not required, and it remains for the Regional Director to fulfill his duty towards the grantor by determining whether the grantor intended to sell his allotment to Appellant; whether —

¹⁹ Indeed, the Board has held that alcoholism, without more, is an insufficient basis for finding incompetency. *See Estate of Frederick Harry Jerred*, 49 IBIA 147, 162 (2009) (medical diagnosis of alcohol dementia does not, without more, preclude a determination of testamentary capacity); *Iron Eyes v. Acting Great Plains Regional Director*, 49 IBIA 64, 72-73 (2009) (evidence of chronic alcoholism is insufficient to find mental incapacity without a showing that grantor was intoxicated at the time he executed gift deeds conveying his trust lands).

²⁰ The Regional Director also found it significant that Appellant did not initiate the approval process prior to Willis's death. But, a grantee cannot compel BIA to consider and approve a conveyance of trust or restricted land interests during the lifetime of the grantor because BIA, as trustee, owes its fiduciary duty to the grantor, not to the grantee, even where the grantee also is Indian or Native Alaskan. *Bitonti*, 43 IBIA at 216 n.13.

after consideration of all of the evidence, including testimony in *Estate of Roehl* — Willis was competent to agree to sell his allotment; and whether the negotiated sales price was consistent with the fair market value of the allotment in 1996 and, if not, whether a special relationship or special circumstances existed to offset the difference between the fair market value and the sales price.

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 vacates the Regional Director's February 2, 2007, decision and remands this matter to him for further consideration and the issuance of a new decision.²¹

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Lisa Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.

²¹ Appellant also argues that the statutory requirement of Secretarial approval for the sale of Indian trust lands is unconstitutional. Regardless of whether she argues this claim on behalf of Willis or his estate, *see* Reply Brief at 4, or on her own behalf, the Board lacks jurisdiction to declare a Federal statute unconstitutional. *See Kansas v. Acting Southern Plains Regional Director*, 36 IBIA 152, 152[**] (2001), and cases cited therein.

[** So in original. Should read "154."]