



## INTERIOR BOARD OF INDIAN APPEALS

Manistee County Board of Commissioners v. Midwest Regional Director  
Bureau of Indian Affairs

53 IBIA 293 (7/27/2011)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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|                            |   |                          |
|----------------------------|---|--------------------------|
| MANISTEE COUNTY BOARD OF   | ) | Order Affirming Decision |
| COMMISSIONERS,             | ) |                          |
| Appellant,                 | ) |                          |
|                            | ) |                          |
| v.                         | ) | Docket No. IBIA 09-106   |
|                            | ) |                          |
| MIDWEST REGIONAL DIRECTOR, | ) |                          |
| BUREAU OF INDIAN AFFAIRS,  | ) |                          |
| Appellee.                  | ) | July 27, 2011            |

The Manistee County Board of Commissioners (County) appeals to the Board of Indian Appeals (Board) from the April 29, 2009, decision (Decision) of the Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), that affirmed the decision of the Superintendent, Michigan Agency, BIA, to approve the acquisition of 12 tracts of land into trust on behalf of the Little River Band of Ottawa Indians (Tribe). We agree with the Regional Director that BIA had a statutory, nondiscretionary duty to accept these properties into trust pursuant to 25 U.S.C. § 1300k-4(b). Therefore, we affirm.

## Background

In 1994, Congress enacted legislation reaffirming Federal recognition of the Tribe, 25 U.S.C. § 1300k-2, and, *inter alia*, mandating the acquisition of

real property in Manistee and Mason Counties for the benefit of the [Tribe] . . . if conveyed or otherwise transferred to the Secretary [of the Interior (Secretary)], [and,] if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages or taxes owed,

*id.* § 1300k-4(b). Any land accepted by or transferred to the Secretary pursuant to § 1300k-4 is to be taken into trust. *Id.* § 1300k-4(d).

On September 5, 2006, BIA’s Michigan Agency received requests from the Tribe to take into trust the following 5 parcels collectively known as the High Bridge property and 7 parcels collectively known as the Old House property:

1. High Bridge (Parcel 8): The SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 30 acres more or less, excepting the following parcel:

A parcel of land in the E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, described as follows: Commence at the East  $\frac{1}{4}$  corner of said section and the place of beginning of this description; run thence S 89° 51' 31" W along the East and West  $\frac{1}{4}$  line of said section, 330.00 feet; thence N 1° 50' 44" W, 1326.32 feet; thence N 89° 51' 31" E, 279.88 feet to the Southwesterly line of an old railroad right of way; thence S 59° 17' 30" E along said right of way 59.44 feet to the East line of said section; thence S 1° 50' 44" E along said section line 1295.83 feet to the place of beginning. Bearings are based on the East line of Section 33 from the Southeast corner to the Northeast corner assumed as N 1° 50' 44" W.

2. High Bridge (Parcel 9): The SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, lying Southwesterly of the Southwesterly line of the former right of way of the Pere Marquette Railroad, containing 10 acres more or less.

3. High Bridge (Parcel 10): The S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$  and the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 80 acres more or less.

4. High Bridge (Parcel 11): The N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 20 acres more or less.

5. High Bridge (Parcel 12): The NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 33, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 40 acres more or less.

6. Old House (Parcel 13): The SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, excepting the railroad right-of-way, containing 40 acres more or less.

7. Old House (Parcel 14): The S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 34, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 80 acres more or less.

8. Old House (Parcel 15): The SE $\frac{1}{4}$ NW $\frac{1}{4}$  and the NE $\frac{1}{4}$  of of Section 35, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, excepting therefrom the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , containing 160 acres more or less.
9. Old House (Parcel 16): The SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 35, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 40 acres more or less.
10. Old House (Parcel 17): The N $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 35, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, containing 80 acres more or less.
11. Old House (Parcel 18): The N $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 35, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, excepting therefrom the N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ , containing 60 acres more or less.
12. Old House (Parcel 19): The N $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 36, Township 22 North, Range 14 West, of the Michigan Meridian, Manistee County, Michigan, excepting therefrom the N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , containing 60 acres more or less.

The administrative record does not reflect the existence of any adverse legal claims on any of the above properties. On February 8, 2008, the Superintendent issued his decision to accept each of the 12 parcels into trust pursuant to § 1300k-4(b).

The County appealed to the Regional Director, asserting that the loss of tax revenue would adversely impact the County and advocating for better communication with local jurisdictions concerning fee-to-trust acquisitions. On April 29, 2009, the Regional Director affirmed the Superintendent's decision. He conducted an independent review of the record, and determined that the parcels were all located in Manistee County and that there was no evidence of adverse legal claims against the properties. He concluded that the Superintendent gave proper consideration to the requirements set forth by Congress in § 1300k-4(b). Although the Regional Director acknowledged that the County "appealed based on the impact of the removal of tax revenues and requested communication prior to these types of decisions," Decision at 3, the Regional Director did not otherwise address or give consideration to the County's argument.

The County then appealed to the Board. We affirm.

## Discussion

Where, as here, Congress has mandated that certain land be taken into trust for a tribe, subject to certain conditions, that statute governs BIA's and the Board's consideration of a trust acquisition request rather than a general trust acquisition statute, e.g., 25 U.S.C. § 465, or its implementing regulations, 25 C.F.R. pt. 151. Because the minimal conditions placed by Congress for the Tribe's fee-to-trust acquisitions have been met, we affirm the Regional Director's decision.

### 1. Standard of Review

With the exception of issues challenging the constitutionality of statutes or regulations, over which the Board lacks jurisdiction, the Board reviews legal determinations *de novo*. *State of Minnesota v. Acting Midwest Regional Director*, 47 IBIA 122, 125 (2008). At all times, the burden of showing error in the Regional Director's decision rests with appellants. *Id.*

### 2. Mandatory Trust Acquisitions

Statutory authority is required for the United States to accept real property into trust on behalf of Indian individuals or tribes. *See, e.g.*, 25 C.F.R. § 151.3. This statutory authority may be discretionary, e.g., 25 U.S.C. §§ 465, 1773c, or it may be mandatory, e.g., 25 U.S.C. § 715c(a) (Coquille Restoration Act). If the acquisition is a discretionary one, BIA's discretion is guided by the factors set forth at 25 C.F.R. §§ 151.10 (on reservation acquisitions) or 151.11 (off reservation acquisitions). Mandatory acquisitions, however, typically are required by the terms of the statute, *see, e.g.*, Pub. L. No. 106-568, 114 Stat. 2919, Title VIII, Subtitle A, § 819 (2000),<sup>1</sup> or require the occurrence of certain events, *see* Pub. L. No. 88-196, 77 Stat. 349 (1963) (Isolated Tracts Act),<sup>2</sup> or turn on the

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<sup>1</sup> In relevant part, § 819 provides:

Notwithstanding any other provision of law, the Secretary . . . shall accept for the benefit of the Lytton Rancheria . . . the land described in that certain grant deed. . . . The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria . . . .

<sup>2</sup> Under the Isolated Tracts Act, Congress provided a statutory scheme whereby the Rosebud Sioux Tribe could sell or exchange certain tracts of land that were sufficiently isolated that it would be economically advantageous to the tribe to divest itself of these interests in favor of acquiring land within its approved land consolidation areas. *See Todd County v. Aberdeen Area Director*, 33 IBIA 110, 111 (1999).

absence of certain legal impediments, *see* 25 C.F.R. § 715c(a). In none of these latter events do the discretionary elements of part 151 play a role.

We conclude that § 1300k-4(b) is most analogous to the trust acquisition provisions in the Coquille Restoration Act, which we determined was a mandatory trust acquisition statute in *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director*, 27 IBIA 48, 56 (1994); *see also Todd County*, 33 IBIA at 116 (“The Coquille Restoration Act is a textbook example of a statute mandating the trust acquisition of land. It allows for no judgment at all on the part of the Secretary, but requires him to take certain land in trust, absent some legal impediment.”). The Coquille Restoration Act states:

The Secretary shall accept [into trust for the Coquille Indian Tribe] any real property located in Coos and Curry Counties not to exceed one thousand acres for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary: *Provided*, That, at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages, or taxes owed.

25 U.S.C. § 715c(a). Similarly and in the same unequivocal language, § 1300k-4(b) states that the Secretary “shall. . .accept any real property” for the Tribe subject to two conditions: The land must be located within Manistee or in Mason Counties *and* the land must be free of any adverse legal claims.<sup>3</sup> So long as these two conditions are met, the statute directs that the lands be taken into trust for the Tribe.

The County does not dispute that both of the conditions precedent are met here: Each of the 12 parcels is located in Manistee County and there is no evidence of any adverse claims against any of the parcels. Instead, the County reiterates the arguments before the Board that it raised before the Regional Director and which were not addressed by the Regional Director. The County suggests that the discretionary trust acquisition regulations, 25 C.F.R. §§ 151.10 and 151.11, may apply and that, if so, BIA failed to apply the factors set forth in the regulations.

Ordinarily, where the Regional Director fails to consider and address an argument raised by an appellant, the Board will remand the matter to him. However, we do so only where the decision by BIA is a discretionary one. *See, e.g., Jefferson County, Oregon, Board of*

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<sup>3</sup> It is well-established that “[s]hall” is a mandatory term, indicating the lack of discretion on the part of the Secretary.” *Churchill County v. United States*, 199 F. Supp. 2d 1031, 1033 (D. Nev. 2001).

*Commissioners v. Northwest Regional Director*, 47 IBIA 187, 200-01 (2008). In such matters of discretion, we do not substitute our judgment for BIA's. *Id.* at 200. Here, however, the Regional Director's failure to address the County's concerns is harmless for two reasons. First, once the conditions precedent were determined to be satisfied — i.e., the parcels determined to be located either in Manistee or Mason Counties and no adverse claims found against any of the 12 parcels — the statute does not admit of any further exceptions but directs BIA to take the properties into trust. The County's concerns regarding the financial impact from the loss of tax revenue resulting from the land passing into trust status and lack of communication from BIA about the acquisitions are irrelevant under the terms of the statute. Second, the discretionary fee-to-trust regulations expressly provide that their terms are inapplicable where the trust acquisition is mandatory. *See* 25 C.F.R. §§ 151.10 (these procedures do not apply where "the acquisition is mandated by legislation"), 151.11 (same). Therefore, the County's suggestion that BIA should apply the criteria found in these regulations to the Tribe's fee-to-trust application similarly is irrelevant.<sup>4</sup>

There is no dispute that the conditions precedent to taking these parcels into trust are satisfied. Thus, we conclude that the Regional Director appropriately determined that the conditions precedent to taking land into trust for the Tribe were satisfied. Once the conditions were determined to have been met, the Regional Director was required by law to accept the parcels into trust.

Therefore pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, pursuant to 43 C.F.R. §4.1 the Regional Director's April 29, 2009, decision is affirmed.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>4</sup> Notwithstanding the mandatory nature of the trust acquisition, the Regional Director is reminded that his decisions should address the arguments raised by an appellant if only to explain, e.g., that the arguments raised are inapplicable under the terms of a mandating statute.