



## INTERIOR BOARD OF INDIAN APPEALS

City of Bloomfield, Nebraska and Knox County, Nebraska v.  
Acting Great Plains Regional Director, Bureau of Indian Affairs

61 IBIA 296 (09/29/2015)



# 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

CITY OF BLOOMFIELD, NEBRASKA;	)	Order Affirming Decision and
AND KNOX COUNTY, NEBRASKA,	)	Dismissing Appeal in Part
Appellants,	)	
	)	
v.	)	
	)	Docket Nos. IBIA 14-035
ACTING GREAT PLAINS REGIONAL	)	14-036
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	September 29, 2015

The City of Bloomfield, Nebraska (City) and Knox County, Nebraska (County) (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a September 27, 2013, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to acquire in trust, for the Ponca Tribe of Nebraska (Tribe), 0.32 acres of land, located in Knox County, Nebraska.<sup>1</sup> The Regional Director concluded that the acquisition requested by the Tribe was mandatory under the terms of the Ponca Restoration Act (Restoration Act), *see* 25 U.S.C. § 983b(c).

We affirm the Regional Director’s decision because we agree that the acquisition qualifies as a mandatory trust acquisition under the Restoration Act. It follows that, because it is a mandatory acquisition, the Regional Director was not required, as Appellants argue, to comply with the requirements applicable to discretionary trust acquisitions. Nor is it relevant, as Appellants contend, whether the acquisition is authorized under the Indian Reorganization Act (IRA), *see* 25 U.S.C. § 465, because the authority comes from the Restoration Act’s mandatory acquisition provision, not the IRA. To the extent Appellants contend that the Restoration Act’s mandatory trust acquisition provision is unconstitutional, or seeks to present a claim against the Tribe, the Board lacks jurisdiction,

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<sup>1</sup> The property is commonly referred to as the “Bloomfield property,” and is more particularly described as: Lots 7, 8, 9, and 10 in Block 1, Original Town of Bloomfield, Knox County, Nebraska, located in the SE1/4 SE1/4 of Section 3, T. 30 N., R. 3 W., 6th P.M., containing 0.32 acres, more or less.

and we dismiss those claims. We also dismiss the appeal with respect to claims for which Appellants lack standing.

### Background

In 1990, Congress restored the relationship between the United States and the Tribe<sup>2</sup> and, in doing so, included the following provision in the Restoration Act regarding trust land acquisitions:

The Secretary *shall accept* not more than 1,500 acres of any real property located in Knox or Boyd Counties, Nebraska, that is transferred to the Secretary for the benefit of the Tribe. Such real property *shall be accepted* by the Secretary (subject to any rights, liens, or taxes that exist prior to the date of such transfer) in the name of the United States in trust for the benefit of the Tribe and shall be exempt from all taxes imposed by the Federal Government or any State or local government after such transfer. The Secretary may accept any additional acreage in Knox or Boyd Counties pursuant to his authority under the [IRA] (25 U.S.C. 461 *et seq.*).

25 U.S.C. § 983b(c) (emphases added).

On January 11, 2012, the Tribe submitted a request to BIA to accept the Bloomfield property in trust as a mandatory trust acquisition under the Restoration Act. Letter from White to Kitto, Jan. 11, 2012 (Administrative Record (AR) Tab 9). Both the request from the Tribe and a supporting Tribal resolution recited the fact that the property is located in Knox County. *Id.*; Tribal Resolution, No. 12-02, Jan. 9, 2012 (AR Tab 9). BIA currently holds 152.34 acres in trust for the Tribe. Title Status Report, Sept. 6, 2013 (AR 6).

BIA has regulations that apply to the acquisition of land in trust for individual Indians and tribes. *See* 25 C.F.R. Part 151. Those regulations require BIA to provide notice, and an opportunity to comment, to state and local governments having regulatory jurisdiction over the subject property, “unless the acquisition is mandated by legislation.” 25 C.F.R. § 151.10. As a corollary to the notice provision, the regulations require BIA to consider certain criteria and requirements, which incorporate consideration of comments provided by state and local government, “when . . . the acquisition is not mandated.” *Id.* §§ 151.10, 151.11.

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<sup>2</sup> In 1962, Congress had enacted legislation terminating the Federal relationship with the Tribe. *See* 25 U.S.C. §§ 971–980.

On September 27, 2013, the Regional Director issued his decision on the Tribe's request, concluding that it met the requirements of the Restoration Act to make the trust acquisition mandatory. Letter from LaPointe to White, Sept. 27, 2013 (Decision) (AR Tab 7). Copies of the Decision were provided to Appellants. *See id.* at 2.

Appellants appealed the Decision to the Board, and the Board consolidated the appeals. Each Appellant filed a statement of reasons with its notice of appeal, but neither filed an opening brief. The Regional Director and the Tribe filed answer briefs. Neither Appellant filed a reply brief.

### Standard and Scope of Review

As relevant to the arguments raised on appeal, the Board reviews questions of law *de novo*. *State of Minnesota v. Acting Midwest Regional Director*, 47 IBIA 122, 125 (2008). The Board does not, however, have authority to review the constitutionality of a Federal statute, or the validity of a duly promulgated Departmental regulation. *Florida Tribe of Eastern Creek Indians v. Deputy Assistant Secretary – Indian Affairs*, 13 IBIA 269, 271 (1985); *Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director*, 17 IBIA 141, 142-43 (1989).

### Discussion

#### I. Introduction

The issues and arguments raised by Appellants on appeal may be grouped into six categories: (1) whether the acquisition is authorized, mandatory, and constitutional; (2) whether the Regional Director erred in failing to solicit and consider comments from Appellants on the effect of the acquisition on their revenue and services; (3) whether the Regional Director erred in failing to address compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*; (4) whether the acquisition violates the rights of local vendors and businesses; (5) whether the acquisition meets the title standards for land acquisition by the United States; and (6) whether the Tribe violated Appellants' due process rights in failing to provide certain documents to Appellants.

We conclude that the acquisition is authorized and mandatory, and that we lack jurisdiction to consider the Restoration Act's constitutionality. Our disposition of those issues effectively disposes of Appellants arguments in the second and third categories because they are premised on discretionary, not mandatory, action by BIA. We conclude that Appellants lack standing to raise the claims in the fourth and fifth categories, and we lack jurisdiction to review their allegations against the Tribe. We discuss each set of arguments in turn.

## II. The Acquisition is Both Mandatory and Authorized Under the Restoration Act, and the Board Lacks Jurisdiction to Review the Constitutionality of the Act

The County first argues, without explanation, that acquisition of the Bloomfield property is permissive, i.e., discretionary, rather than mandatory. County's Notice of Appeal and Statement of Reasons (County's SOR), Nov. 1, 2013, at 2. We disagree. With respect to acquisitions up to 1,500 acres, the language of the Restoration Act is mandatory: "The Secretary shall accept not more than 1,500 acres of any real property located in Knox or Boyd Counties, Nebraska." 25 U.S.C. § 983b(c). The language "shall accept" tracks similar language in other statutes that the Board has construed as making a trust acquisition mandatory, assuming any other requirements of the applicable statute are satisfied. See *Manistee County Board of Comm'rs v. Midwest Regional Director*, 53 IBIA 293, 297 (2011); *State of Minnesota*, 47 IBIA at 126-27; *Todd County, South Dakota v. Aberdeen Area Director*, 33 IBIA 110, 116 (1999); *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director*, 27 IBIA 48, 56 (1994). And it stands in marked contrast to the permissive authority granted in the last sentence of § 983b(c): "The Secretary *may* accept any *additional* acreage in Knox or Boyd Counties pursuant to [her] authority under the [IRA]." 25 U.S.C. § 983b(c) (emphases added).

In the present case, there are two requirements in the Restoration Act to make a trust acquisition mandatory: there is an overall 1,500-acre limitation and the land must be located in Knox or Boyd Counties. It is undisputed that both of these requirements are met. In addition, § 983b(c) applies to "any real property" located in the two respective counties, and thus we reject the County's additional argument that the Regional Director's interpretation of the Act as applying to the Bloomfield property is "wrong as applied to urban developed retail property as opposed to rural farm and pasture land." County's SOR at 2. The statute makes no such distinction.<sup>3</sup>

Appellants also argue that under the U.S. Supreme Court's decision in *Carciere v. Salazar*, 555 U.S. 379 (2009), BIA lacks authority to accept property in trust for the Tribe because, according to Appellants, the Tribe was not "under Federal jurisdiction" in 1934, as

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<sup>3</sup> Appellants also assert that the Tribe does not own the improvements on the Bloomfield property, and thus the trust acquisition does not include the buildings on the property. City's Notice of Appeal and Statement of Reasons (City's SOR), Oct. 28, 2013, at 3; County's SOR at 2. The Tribe agrees that the United States is taking title to the land, not the improvements, also explaining that the improvements are owned by a Tribally owned limited liability company. See Tribe's Answer Brief (Br.), Mar. 12, 2014, at 4. Appellants do not articulate how the fact that the U.S. is not taking the improvements in trust renders the Regional Director's decision deficient.

the Supreme Court held was required for purposes of taking property in trust for tribes pursuant to the IRA. Appellants' reliance on an IRA-based limitation is misplaced because mandatory acquisition of the Bloomfield property falls under separate authority found in the Restoration Act. The Restoration Act incorporates the IRA only for discretionary acquisitions of land separate from the 1,500-acre limit for mandatory acquisitions. Thus, the IRA and *Carciari* are not relevant to the acquisition.<sup>4</sup>

Appellants next contend that construing the Restoration Act as making the acquisition mandatory, so that the notice and comment process applicable to discretionary acquisitions does not apply, would render the Act unconstitutional. County's SOR at 2; City's SOR at 5. But once Congress has decided to make an action mandatory, and BIA has properly applied the statute, we have no authority to declare application of the statute unconstitutional. *Florida Tribe of Eastern Creek Indians*, 13 IBIA at 271. Thus, to the extent Appellants question the constitutionality of the Restoration Act, we lack jurisdiction to review that claim.

### III. The Notice and Comment Procedures of BIA's Trust Acquisition Regulations, and Associated Requirements for Discretionary Acquisitions, Do Not Apply to the Mandatory Acquisition

Because acquisition of the Bloomfield property falls under the mandatory acquisition provision of the Restoration Act, the regulatory requirements found in 25 C.F.R. Part 151 for notice and comment, and consideration of such comments and other information in the context of various criteria, do not apply. The provisions for both on-reservation and off-reservation acquisitions, by their express language, do not apply to mandatory acquisitions. *See* 25 C.F.R. § 151.10 (applicable "unless the acquisition is mandated by legislation"); *id.* § 151.11 ("The Secretary shall consider the following requirements . . . when . . . the acquisition is not mandated."). For that reason, the Regional Director's failure to give Appellants pre-decisional notice and an opportunity to comment, or to consider the factors applicable to discretionary acquisitions, provide no basis to set aside the Decision. Appellants' argument that the failure to incorporate such procedures violates their due process rights is, in effect, an attack on the validity of the regulations. The Board has no authority to set aside duly promulgated Departmental regulations. *Utu Utu Gwaitu Paiute Tribe*, 17 IBIA at 142-43.

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<sup>4</sup> That said, as the Tribe notes, the Secretary held an IRA election for the Tribe in 1934. *See* Tribe's Answer Br. at 14 (citing Haas, *Ten Years of Tribal Government Under I.R.A.*, United States Indian Service (1947)); *see also Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 71 (2011).

#### IV. NEPA Does Not Apply to the Mandatory Acquisition

Similarly, because the acquisition is a nondiscretionary action by BIA, we reject Appellants' argument that the Regional Director's decision is deficient for failure to recite compliance with NEPA. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (NEPA analysis not required for nondiscretionary Federal action). Under the Restoration Act, as long as the land is located within Knox or Boyd Counties, and falls under the acreage limit, BIA has no discretion to decide whether or not to accept it in trust, and thus no environmental analysis under NEPA was required.

#### V. Appellants Lack Standing to Assert Claims Based on Alleged Rights and Interests of Third-Party Vendors and Businesses

Appellants also contend that as a mandatory acquisition, without notice to or input from local vendors and businesses, the Regional Director's decision violates the due process rights of those vendors and businesses, and also runs afoul of language in the Restoration Act stating that the Act shall not be construed to alter or affect "any rights or obligations with respect to property," or "any rights or obligations under any contract." *See* 25 U.S.C. § 983b(d).

As a general rule, an appellant lacks standing to raise a claim based upon the rights and interests of another party, and we see no basis to conclude that Appellants have standing to assert the rights and interests of third-party private vendors or businesses.<sup>5</sup> *See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005) (explaining third party standing). Even if that were not the case, however, we would reject Appellants' arguments as without merit, as based on a misreading of § 983b(d), and as failing to identify any "rights or obligations" of the third-party vendors and businesses that purportedly were altered or affected by the Restoration Act.

#### VI. Appellants Lack Standing to Challenge the Marketability of Title to the Bloomfield Property

Appellants argue that there has been "no showing" that the Tribe has marketable title to the Bloomfield property, free from any exceptions "as required" by the Federal

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<sup>5</sup> We note that although both Appellants listed various local businesses and entities in their notices of appeal as "interested parties," neither appears to have considered them as such for purposes of serving copies of their notices of appeal. *See* 43 C.F.R. § 4.310 ("[a]ny party filing a notice of appeal . . . must serve copies on all interested parties").

standards for acquiring title to land. City's SOR at 5; County's SOR at 5. To the extent marketability of title is relevant to this acquisition, *see* 25 U.S.C. § 983b(c), Appellants lack standing to raise this claim because the interest protected by the Federal title standards is that of the United States, not third parties such as Appellants. *See Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 216 (2015).

#### VII. The Board Lacks Jurisdiction to Review Appellants' Claim Against the Tribe

In addition to arguing that the Regional Director failed to give them proper notice of the proposed acquisition, Appellants contend that the Tribe violated Appellants' due process rights by failing to provide them with requested documents, such as the Economic Development Plan prepared pursuant to the Restoration Act.<sup>6</sup> The Board lacks jurisdiction to review challenges to action or inaction of tribal officials, *Duane Wasson v. Pyramid Lake Tribal Council*, 51 IBIA 169 (2010), and thus we dismiss this claim.

#### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's September 27, 2013, decision with respect to the issues that Appellants have standing to raise and over which we have jurisdiction, and dismisses the appeal in remaining part.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>6</sup> Under the Restoration Act, the Tribe established an Economic Development Plan, which the Secretary was required to submit to Congress no later than 3 years after October 31, 1990, the date of enactment. 25 U.S.C. § 983h(a)(3). The plan was developed in consultation with state and local officials. *Id.* § 983h(b). According to the Tribe, the Economic Development Plan was submitted to Congress on November 8, 1993. Tribe's Answer Br. at 22.