



INTERIOR BOARD OF INDIAN APPEALS

Frances M. Shively Kevern

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF
FRANCES M. SHIVELY KEVERN

Crow Allottee No. 3519

IBIA 74-9-A

Decided December 20, 1973

Appeal from the decision of the Area Director, Bureau of Indian Affairs, affirming the decision of the Superintendent, Crow Agency, withholding approval of application for a fee patent to lands for which a trust patent has been issued.

Reversed and remanded.

Indian Lands: Patents--Indians: Competency

A Crow Indian's application for a patent in fee to lands for which a trust patent has been issued will be determined on the basis of general statutory provisions in that respect, and a decision to withhold fee patent will be overturned on

appeal where there is an abuse of administrative discretion and where the record supports the conclusion that the applicant is capable of properly managing his or her own affairs.

APPEARANCES: Harold G. Stanton, Esq., of Stanton, Hovland and Torske, for appellant.

OPINION BY MR. SABAGH

On or about April 17, 1973, the appellant, an enrolled Crow Indian, made application for fee patent covering five allotments 1/ for lands she owned on the Crow Reservation in Montana, totaling 2,084.34 acres. 2/ The Superintendent, Crow Agency, notified appellant through counsel that he had sent a letter to the Area Director, Bureau of Indian Affairs, Billings, Montana, on May 17, 1973, recommending withholding of action on appellant's application. The applicant filed a timely appeal with the Area Director. On June 8, 1973, the Acting Area Director issued a letter decision sustaining the Superintendent withholding approval of the application.

1/ Crow allotment Nos. 2057, 2058, 2059, 3518 and 3519.

2/ 485.8 acres were classified as dry cropland. 1,598.54 acres were classified as pasture land.

In his decision of June 8, 1973, the Acting Area Director, gave as his reasons for sustaining the Superintendent the following:

The Crow Tribe has expressed an interest in purchasing all five tracts of Mrs. Kevern's land. Accordingly, we intend to withhold approval of this application at this time in order to allow the Tribe to enter into negotiations with Mrs. Kevern. We will notify the Superintendent and the appropriate tribal officials of this decision in order that they may expedite communication with your client.

In support of the desire of Indians across the Nation to retain their lands in trust status whenever possible, new regulations for 25 CFR 121 have become effective April 24, (sic) 1973, by publication in the Federal Register, Volume 38, No. 78, Page 10080. We draw your attention to the new Part 121.2 entitled "Withholding action on application" which states in pertinent part as follows:

Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have (sic) [had] a reasonable opportunity to acquire the land from the applicant * * *

The balance of the part provides that the applicant may appeal the withholding action under the same appeal procedure currently in use.

The sum total of these considerations is such that we think this is a proper case for the discretion afforded the Secretary of the Interior by the Acts of February 8, 1887 (24 Stat. 390) and May 8, 1906 (34 Stat. 82) for use in such instances, and we concur in the recommendation of the Superintendent that approval be withheld on these applications for now.

Mrs. Kevern appealed the decision of the Acting Area Director to the Secretary of the Interior on or about June 27, 1973, and the matter was referred to this Board pursuant to a special delegation.

Notice of Docketing of the appeal was mailed to the appellant and the Area Director. Appellant was allowed 30 days within which to file an appeal brief and the Area Director was allowed 20 days from the date of receipt of appellant's brief to reply.

The appellant timely filed an appeal brief which was duly served by certified mail, return receipt requested, on the Area Director, Bureau of Indian Affairs, Billings, Montana. No reply was filed by the Area Director, and the time for filing has expired.

The appellant among other things contends that the action of the Bureau of Indian Affairs in withholding approval of the application for a fee patent was an arbitrary and capricious use of discretion.

The law applicable to the case follows. Section 5 of the General Allotment Act, February 8, 1887, 24 Stat. 389, 25 U.S.C.A. § 348, provides in pertinent part that--

* * * [U]pon the approval of allotments * * *, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, * * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * *, in fee, discharged of said trust and free of all charge or incumbrance whatever: Provided, That the President of the United States may in any case in his discretion extend the period. * * * (Emphasis supplied.) * * *

The period in question has been extended by presidential action.

Section 6 of the General Allotment Act, May 8, 1906 (34 Stat. 182), 25 U.S.C.A. 349, as amended, provides in pertinent part:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * * Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * *. (Emphasis supplied.)

See Acting Area Director's decision of June 8, 1973, supra, for the contents of 25 CFR 121.2, effective May 23, 1973, entitled "Withholding action on application."

We are of the opinion that the contents of the General Allotment Act referred to supra, clearly express the legislative intent and the dictates of Congress, i.e., that the United States will cause to be issued to the allottee a patent in fee simple, if before the expiration of the trust period the Indian allottee becomes competent and capable of managing his or her own affairs.

Several cases consider patents as merely evidence of the completed and vested allotment. After compliance with the acts of Congress and agreements relative to the distribution of Indian lands, the allottee's title becomes absolute, and the execution and delivery of patents are thereafter merely ministerial acts, Woods v. Gleason, 43 Okla. 9, 140 P. 418 (1914). A trust patent is simply "a piece of paper or writing, improperly called a patent," designated to show that at the end of 25 years the Indian allottee or his heirs will receive the fee to the land allotted. See United States v. Rickert, 188 U.S. 432, 436 (1903).

It is not probable that the issuance of these fee patents was considered essential in order to give the Indian unrestricted fee

title, but they were issued because it was apparently believed that fee title now existed and that a fee title patent would be more convenient for the Indian and his vendees. A title tantamount to fee by reason of legislation enactment existed in the allottee. United States v. Spaeth, 24 F. Supp. 465 (D.C. Minn 1938).

We agree however that because of the variety of allotment laws, a case under one is not necessarily applicable to another. We conclude under the present circumstances that the Bureau of Indian Affairs was and is clothed with the discretion to determine the competency of the individual Indian to manage his or her own affairs.

There has been no moratorium on the approval of patent applications on the Crow Reservation during the period April 17, 1972, to the present.

The Acting Area Director's position is that Indian allottees who wish to dispose of their interest in Indian land holdings owe some allegiance and duty to assist their tribe in retaining same in tribal ownership. See Acting Area Director's letter decision of June 8, 1973, supra. He consequently did not approve or disapprove the appellant's application until as he said, the Tribe had a reasonable opportunity to acquire the land from the applicant.

In the transmittal of the appeal to the Secretary on July 19, the Area Director used the phrase, "We feel that a generous length of time should be provided for the Tribe to formulate its land purchase * * * ." (Emphasis supplied.)

It is common knowledge in cases such as this in which there is a competent Indian, without debt or family responsibility, that the Bureau of Indian Affairs would approve the application for a fee patent. We take official notice thereof.

We come now to the question of whether the Bureau has the authority to withhold approval of an application for a fee patent until other Indians of the Tribe so affected had a reasonable opportunity to acquire the land from the applicant?

Conceding that an Indian may owe a moral obligation to the Tribe or his brethren, we find no law, statutory or otherwise sustaining the Area Director's position.

We are of the opinion that the language contained in Arenas v. United States though not factually on all fours with the case at bar is nonetheless applicable here. See 8 U.S.S.Ct. Digest 685 (1970).

* * * A departmental change in policy is insufficient to warrant the Secretary of the Interior in refusing to

grant patents of reservation lands * * * to Indian allottees where no absolute discretion in the matter is reserved to the Secretary of the Interior by the Act of Congress authorizing such allotments and the prescribed method of allotment has been complied with. * * *

The Judge in Arenas v. United States, 322 U.S. 419, 432 (1944), said the following:

* * * But courts are not to determine questions of Indian land policy nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. To separate questions of right from questions of policy requires judicial examination of any well pleaded allegation of the complaint and any grounds advanced for refusal of the patent. Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction.

The appellant who is 63 years of age with two years of college education, has conducted her own business affairs for the last 40 years which includes leasing her own land. She has resided off the reservation for the past many years. She now wishes to retire from her employment in Phoenix, Arizona, and move to Yachata, Oregon where she with her husband purchased a new home. They have no children. These facts are not disputed by the Bureau.

From an examination of the statutes and amendments thereto applicable to the Crow Tribe, it appears that certain of its members

were classified as competent in connection with the Crow rolls established under the Act of June 4, 1920 (41 Stat. 751). At any rate, the Bureau had ample opportunity since April 1972 to determine the competency of the appellant. Upon examining the record we find that the Bureau had determined to its own satisfaction at least as far back as the first week in November 1972 that the appellant was competent to manage her own affairs. The Bureau did not choose however, to act on the appellant's application for fee patent until June 8, 1973, when it withheld approval thereof.

We are of the opinion that the Bureau is charged with the responsibility of the management of its trust obligations in the best interest of the Indian beneficiaries. We hold that this fiduciary duty carries with it--if not express--at least an implied requirement of diligence.

It is obvious that the Bureau had ample opportunity from April 1972 to the effective date of the new regulations, supra, entitled "Withholding action on application" to either approve or disapprove appellant's application.

Assuming arguendo that the individual Indian owed the Tribe a certain moral duty, i.e., giving them a reasonable opportunity to

acquire the land, does not the Tribe owe the appellant a corresponding duty? We think it does.

From April 1972 to the present, the record is void of evidence of any effort on the part of the Tribe to approach or to negotiate with the appellant. We find that the Tribe was aware of the appellant's intentions at least as far back as October 1972. We further find in keeping with the intent of the Bureau that the Tribe has had a reasonable opportunity to negotiate with the appellant since October 1972 but instead chose to remain silent to the detriment of the appellant. The decision shall not act as a bar against any effort at negotiation for purchase which the tribe wishes to initiate prior to the actual delivery of the patent.

We find that the appellant was competent to manage her own business affairs and as such her application for fee patent should have been approved. The Tribe had reasonable opportunity from October 1972 to negotiate with the applicant but instead chose not to. We further find that the failure of the Bureau to approve the application and to obtain the issuance of a fee patent was an arbitrary and undue exercise of authority.

NOW, THEREFORE, by virtue of the special authority delegated to the Board of Indian Appeals by the Secretary of the Interior, we

