



INTERIOR BOARD OF INDIAN APPEALS

Todd County, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs

33 IBIA 110 (01/19/1999)



United States Department of the Interior

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

TODD COUNTY, SOUTH DAKOTA

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-106-A

Decided January 19, 1999

Appeal from a decision to take land in trust for the Rosebud Sioux Tribe.

Affirmed.

1. Indians: Lands: Trust Acquisitions

Trust acquisitions made for the Rosebud Sioux Tribe under the Act of Dec. 11, 1963, Pub. L. No. 88-196, 77 Stat. 349, are "mandated by legislation" within the meaning of 25 C.F.R. § 151.10. Thus, consideration of the criteria listed in that section is not required.

APPEARANCES: Alvin Pahlke, Esq., Winner, South Dakota, for Appellant; Marcia M. Kimball, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Todd County, South Dakota, seeks review of a January 28, 1997, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), to take 13,163.24 acres of land in trust for the Rosebud Sioux Tribe (Tribe). For the reasons discussed below, the Board affirms the Area Director's decision.

Background

In 1963, Congress enacted a statute authorizing the sale, exchange or mortgage of isolated tracts of trust land belonging to the Tribe and located in Tripp, Gregory, and Lyman Counties, South Dakota. Act of Dec. 11, 1963, Pub. L. No. 88-196, 77 Stat. 349 (Isolated Tracts Act). The statute provides:

[N]otwithstanding any other provision of law, upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to exchange or to sell, by public or by negotiated sale, the

tribal interests in isolated tracts of land located in Tripp, Gregory, and Lyman Counties, South Dakota, and held by the United States in trust for the tribe: Provided, (1) That the Secretary of the Interior certifies that the tract is isolated in that it is so located or situated that it would be to the economic advantage of the tribe to sell or exchange the tract; (2) that the amount of exchange value received by the tribe is not less than the fair market value of the tribal trust land and is accepted by the tribe; (3) that any proceeds from the sale of land under this Act are used exclusively for the purchase of land on the reservation within land consolidation areas approved by the Secretary of the Interior; (4) that title to any land acquired for the tribe under this Act by purchase or exchange shall be taken in the name of the United States in trust for the tribe; (5) that if the lands in an exchange are not of equal value the difference in value may be paid in money; and (6) that if an enrolled member of the Rosebud Sioux Tribe acquires the tribal trust land, title may be taken in the name of the United States in trust.

Sec. 2. Upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to mortgage tribal interests in isolated tracts of land, in lieu of selling or exchanging them, and the proceeds of the loan secured by the mortgage must be used exclusively for the acquisition of land on the reservation within land consolidation areas approved by the Secretary of the Interior, title to the land acquired being taken in the name of the United States in trust for the tribe. 1/

By Resolution No. 6436, dated July 19, 1964, the Tribe designated Todd and Mellette Counties as its land consolidation area for purposes of the Isolated Tracts Act. On March 22, 1965, the land consolidation area designated by the Tribe was approved by the Assistant Area Director, acting under authority delegated by the Secretary of the Interior.

1/ The need for this legislation was discussed in S. Rep. No. 673, 88th Cong., 1st Sess. (1963), at 2:

"The Rosebud Sioux Tribe owns numerous isolated tracts of land in Tripp, Gregory, and Lyman Counties which are of little use to the tribe and which cannot be effectively consolidated into tribal holdings. Some of the tracts would be of value to nearby landowners, but neither the Secretary nor the tribe has authority to sell them. This bill will provide authority to permit the sale or exchange of these tracts so that the tribe can consolidate its holdings and thus develop greater economic benefit to its membership. Proceeds from the sale of these tracts may be used only for the purchase of additional acreage within land consolidation areas. The new land will be held in trust for the tribe."

Section 2, authorizing mortgages, was added at the recommendation of the Department of the Interior.

The 1963 statute was amended in 1969. Act of Nov. 10, 1969, Pub. L. No. 91-115, 83 Stat. 190. The amendment concerns foreclosure of mortgages and is not relevant to the issues in this appeal.

On November 20, 1995, the Tribe entered into an agreement to purchase the Mustang Meadows Ranch, consisting of 18,761.6 acres of fee land, all within Todd County, South Dakota, on the Rosebud Sioux Reservation. The Tribe then identified a number of tracts of tribal land in Tripp, Gregory, and Lyman Counties and, by Resolution No. 95-239, dated December 14, 1995, requested BIA

to certify the tracts * * * as "Isolated Tracts" for the purpose of and within the meaning of the Isolated Tracts Act and authorize and approve a mortgage on such tracts with the proceeds of the loan secured by the mortgage to be used exclusively for the acquisition of the Mustang Meadows Ranch.

On February 28, 1996, after BIA staff had reviewed the status of the tracts listed by the Tribe, the Area Director certified 54 tracts as isolated tracts under the Isolated Tracts Act. On March 26, 1996, the Area Director approved mortgages of the tracts.

By Resolution No. 96-72, dated March 13, 1996, the Tribe requested that BIA take 13,163.24 acres of the Mustang Meadows Ranch in trust under the Isolated Tracts Act. This portion of the ranch had been appraised in February 1996 at an amount slightly less than the amount for which the isolated tracts had been mortgaged, thus bringing it within the terms of the Isolated Tracts Act.

In June and July 1996, the Superintendent, Rosebud Agency, BIA, informed Appellant and the State of South Dakota of the Tribe's trust acquisition request and invited comments.

By letter of August 8, 1996, Appellant responded to the Superintendent's notice, providing certain information and objecting to the trust acquisition. Appellant contended:

a) [BIA] is not complying with the [Isolated Tracts Act] for the reason that it allowed the [Tribe] to mortgage the land in question, located in Tripp County, South Dakota, in spite of the fact that the statute specifically requires the mortgage to be accomplished by the "Secretary of the Interior." See 77 Stat. 349, Section 2.

b) The [Tribe] has not complied with 25 CFR 151.10(b), because it has failed to even assert that it has a "need" to put the 13,163.24 acres into Trust. It merely states a desire to do so, and makes no attempt to demonstrate any "need." Furthermore, because the Tribe already owns the land, it cannot rely merely on a desire or even a "need" for more land, but must prove a "need" that the land be put into Trust.

c) [Appellant] objects to the transfer of the 13,163.24 acres of land into non-taxable trust status for the reason that to do so would violate controlling law.

Appellant's Aug. 8, 1996, Letter at 2-3.

On October 1, 1996, the Superintendent approved the Tribe's trust acquisition request. In a letter to Appellant, he discussed his reasons for rejecting Appellant's objections. He also analyzed the acquisition request under the factors in 25 C.F.R. § 151.10. He sent a similar letter to the State, although the State had elected not to submit comments on the trust acquisition request.

Both Appellant and the State appealed the Superintendent's decision to the Area Director. The State subsequently withdrew its appeal.

On January 28, 1997, the Area Director affirmed the Superintendent's decision.

Appellant appealed the Area Director's decision to the Board. Briefs were filed by Appellant and the Area Director. The appeal was stayed on September 23, 1997, pending a final decision in Village of Ruidoso, New Mexico v. Albuquerque Area Director. See 31 IBIA 143 (1997). Following the issuance of a final decision in Ruidoso, 32 IBIA 130 (1998), the parties were given an opportunity to submit statements concerning any effect they believed the decision in Ruidoso had on this appeal. Only Appellant filed a statement.

After the time for filing briefs and statements had expired, the Tribe submitted, without comment, documents concerning the legislative history of the Isolated Tracts Act. Of these documents, the Board considers only the published documents, which would have been available to the Board through its own research and of which the Board therefore takes official notice.

Discussion and Conclusions

As it did before the Superintendent and the Area Director, Appellant contends that this trust acquisition is not authorized under the Isolated Tracts Act because the isolated tracts were mortgaged by the Tribe and not the Secretary. Appellant contends that the Secretary's approval of the mortgages does not constitute mortgaging under the statute.

Appellant does not cite any authority in support of its constrained construction of the mortgaging provision in the Isolated Tracts Act. Nor does it put forth any reason to suppose that Congress would have had such a narrow construction in mind. The critical requirement of the mortgaging provision is that both the Tribe and the Secretary act in order to mortgage tribal land. Clearly, both acted in this case. Thus, the purpose of the statutory requirement has been satisfied.

If there were any doubt in the matter, those doubts would be resolved by reference to the well-established rule of statutory construction under which "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." County of Yakima v. Confederated Bands and Tribes of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), quoting from Montana v. Blackfoot Tribe, 471 U.S. 759, 766 (1985). The Board finds

that the Area Director's construction of the statute is the better one and agrees with him that, "[b]y approving the mortgage, the Secretary mortgaged the interests of the [Tribe] to comply with Section 2 of the [Isolated Tracts Act]." Area Director's Jan. 28, 1997, Decision at 1.

Appellant has not shown that this trust acquisition violates the Isolated Tracts Act.

Before proceeding to Appellant's next contention)) that BIA failed to analyze the acquisition adequately under the criteria in 25 C.F.R. § 151.10, the Board first addresses an argument made by the Area Director.

The Area Director contends that this "trust acquisition is a mandatory trust acquisition and therefore, the consideration of the criteria in 25 C.F.R. § 151.10 was not required and any analysis of the factors listed in 25 C.F.R. § 151.10 conducted by the BIA was above and beyond the requirements contained in the regulations." Area Director's Answer Brief at 2. If the Area Director is correct, Appellant's arguments concerning the criteria in section 151.10 are irrelevant.

25 C.F.R. § 151.10 provides:

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation.
* * * The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated: [2/]

[Criteria omitted].

The Area Director equates the language of the Isolated Tracts Act with that of the Coquille Restoration Act, 25 U.S.C. § 715c(a), which the Board construed as ministerial in Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 27 IBIA 48 (1994) ("The Secretary shall accept any real property in Coos and Curry Counties not to exceed one thousand acres for the benefit of the [Coquille] Tribe if conveyed or otherwise

2/ The language concerning mandated trust acquisitions was added to sec. 151.10 in 1995. The preamble to the final revised rule states:

"Comment: It was also suggested that the proposed rules be revised to accept [sic] legislatively-mandated acquisitions from compliance with 25 CFR 151.10 and the proposed 151.11. An alternatively [sic] suggested that they be revised to specify that certain provisions would apply even when a complete evaluation of the acquisition would be precluded by legislation.

"Response: The introductory paragraph to both 25 CFR 151.10 and the new 25 CFR 151.11 exempts such legally mandated acquisitions."
60 Fed. Reg. 32874-75 (June 23, 1995).

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"). The Area Director contends: "Likewise, the Isolated Tracts Act contains such mandatory language and directs that the proceeds of a loan secured by the mortgage of isolated tracts 'must' be used to acquire trust land within the consolidation area. If those requirements are met, the Secretary's role is ministerial." Area Director's Brief at 7.

Appellant interprets the Isolated Tracts Act differently. In its view, "the proviso of a transfer of certain land into trust is a condition precedent of a valid sale or exchange of land under [section 1 of] the Act, and not a mandated subsequent action" and, with respect to section 2, "the transfer of land into trust status is a condition precedent to a valid mortgage." Appellant's Reply Brief at 5-6. Further explaining its position, Appellant contends:

The word "shall" in Proviso (4) of Section 1 does not mandate the transfer of land into trust as a consequence upon a sale or exchange. Rather, the word "shall" is intended to show that taking such land into trust status is a mandatory qualification to making a valid sale or exchange of certain property under this Act.

Id.

The Board finds Appellant's "condition precedent" construction of the Isolated Tracts Act unpersuasive. Had Congress intended to make the validity of sales, exchanges, or mortgages of isolated tracts dependent upon a decision by the Secretary as to whether or not to take other land into trust, it presumably would have so stated, particularly given the havoc that could result from such a scheme. It is easily conceivable, for instance, that the Tribe might sell an isolated tract at an opportune time and not find suitable replacement land available for purchase until much later. Under Appellant's theory, the Secretary could refuse to take the replacement land into trust, thus rendering the sale of the original tract invalid, no matter how long ago it occurred. Even in a case such as the present one, where the mortgage of isolated tracts and the Tribe's purchase of new land occurred close together in time, the scheme Appellant advocates would permit the invalidation of both a mortgage given in good faith and the Tribe's good faith purchase of land. Nothing in the Isolated Tracts Act or its legislative history suggests that Congress intended to permit such drastic consequences.

The Board rejects Appellant's "condition precedent" construction of the Isolated Tracts Act.

Appellant also contends that the Isolated Tracts Act is not comparable to the Coquille Restoration Act. It argues that the Secretary has control over the outcome of the transactions authorized by the Isolated Tracts Act because he has the authority to approve sales, exchanges, or mortgages of isolated tracts, knowing that those approvals will result in the trust acquisition of other land. Thus, Appellant reasons, the statute is not mandatory with respect to this trust acquisition because it gives the Secretary decision-making authority. Id. at 10.

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 Isolated Tracts Act is less clear in this regard. It does, as Appellant contends, give the Secretary "control," at least over some aspects of the transactions authorized.

By authorizing, but not requiring, the Secretary to exchange, sell, or mortgage tribal tracts, Congress undoubtedly intended to authorize the Secretary to exercise his judgment on the question whether the particular tracts selected by the Tribe for disposition ought to be exchanged, sold, or mortgaged. Similarly, Congress undoubtedly intended that the Secretary exercise judgment in certifying the "isolated" status of the selected tracts, because judgment would clearly be required in making the necessary determinations. But the judgment called for in both of these instances concerns disposition of the Tribe's isolated tracts, rather than the choice of replacement land to be placed in trust.

In one instance, the statute gives the Secretary authority to exercise judgment on a point related to the choice of replacement land. It requires that the Secretary approve the Tribe's land consolidation areas, thus vesting the Secretary with authority to judge the suitability of the areas selected by the Tribe. However, the statute gives the Secretary no explicit role in selecting replacement lands per se or in determining the suitability of replacement lands selected by the Tribe. Thus, the language of the statute suggests that, once the Secretary has approved the Tribe's land consolidation areas, as he did in 1965, and once the requirements concerning isolated tracts have been satisfied with regard to any particular disposition, the Secretary has no further opportunity to exercise judgment.

The legislative history of the Isolated Tracts Act is not extensive and does not deal specifically with the issue here. It does, however, explain a distinction made in the statute between trust acquisitions for the Tribe and trust acquisitions for individual members of the Tribe. Acquisitions for individuals are addressed in proviso (6) of section 1, which provides "that if an enrolled member of the [Tribe] acquires the tribal land, title may be taken in the name of the United States in trust."

The legislative history shows that the original bill had provided, in the case of acquisitions by tribal members, that title "shall" be taken in the name of the United States in trust. The Assistant Secretary of the Interior recommended that "shall" be changed to "may." He explained:

The taking of title in trust for lands acquired by individual Indians is permitted, but not required, under section 5 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). We believe that the discretionary authority of the Secretary to determine whether title acquired for an individual Indian is to be taken in trust should be continued on the Rosebud Reservation as it is elsewhere.

S. Rep. No. 673, supra, at 3.

The change was made, as recommended by the Assistant Secretary. The significance of this provision, as enacted, to the issue in this appeal is that, in clearly differentiating the terms of trust acquisitions for individuals from those for the Tribe, it underscores the apparent understanding of the Assistant Secretary, and presumably of Congress as well, that the Department would not exercise any discretion when it made trust acquisitions for the Tribe under the statute.

Had Congress intended the Secretary to exercise discretion with respect to trust acquisitions for the Tribe under the Isolated Tracts Act, it could have followed the example of an earlier statute applicable to lands belonging to individual Indians. That statute, enacted in 1931, is codified at 25 U.S.C. § 409a. It provides:

Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

This provision shows that Congress knew how to make the trust acquisition of replacement land discretionary with the Secretary. The Isolated Tracts Act conspicuously lacks a comparable provision vesting discretion in the Secretary.

The premise of Appellant's argument is that the Secretary ought to employ the discretion given to him in connection with disposition of isolated tracts to assert discretionary authority over the trust acquisition of new tribal lands. Under this theory, the Secretary would apparently have to withhold his approval of the disposition of isolated tracts until such time as the Tribe found new land which met with the Secretary's approval. It is apparent that this argument suffers infirmities similar to those suffered by Appellant's "condition precedent" argument discussed above. The scheme is simply unworkable.

Further, the purpose for which Appellant would have the Secretary exercise his supposed discretion here is far removed from the purpose for which the Secretary is given discretion concerning the disposition of the isolated tracts. Appellant clearly hopes that the Secretary would exercise discretion to protect Appellant's interests, or at least to take them into consideration. However, Appellant's interests here (primarily protection of its tax base) do not come into play when the Tribe seeks to dispose of isolated tracts.

The isolated tracts are part of the Tribe's existing land base. Because the Secretary's trust responsibility for tribal land was well established in Federal law by 1963, when the Isolated Tracts Act was enacted, there is no doubt that Congress intended the Secretary's role with respect to the isolated tracts to be in furtherance of that trust responsibility. Thus, it is evident that the discretion the Secretary may exercise in this regard concerns the protection of the isolated tracts)) protection against, for instance, improvident alienation by the Tribe. The protective purpose of this discretionary authority of the Secretary has no relevance to the purpose for which Appellant seeks to invoke it.

There is simply no indication that Congress intended in the Isolated Tracts Act to vest the Secretary with discretion beyond the discretion to approve the disposition of isolated tracts and the discretion to approve the Tribe's land consolidation areas. The Board concludes that trust acquisitions made for the Tribe under the Isolated Tracts Act are mandated by legislation. 3/

As stated above, Appellant has failed to show that this trust acquisition violates the Isolated Tracts Act.

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 Area Director's January 28, 1997, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

3/ A number of statutes similar to the Isolated Tracts Act have been enacted for the benefit of other tribes. E.g., Act of Aug. 11, 1964, Pub. L. No. 88-418, 78 Stat. 390 (Cheyenne River Sioux Tribe); Act of June 10, 1968, Pub. L. No. 90-335, 82 Stat. 174, as amended, 25 U.S.C. § 487 (Spokane Tribe); Act of Sept 28, 1968, Pub. L. No. 90-534, 82 Stat. 884, 25 U.S.C. § 610-610(e) (Swinomish Tribe); Act of June 14, 1972, Pub. L. 92-312, 86 Stat. 216 (Southern Ute Tribe).

Each of these statutes would require analysis of its specific provisions to determine whether it is "mandatory" legislation under 25 C.F.R. § 151.10.