



INTERIOR BOARD OF INDIAN APPEALS

Yerington Paiute Tribe v. Acting Western Regional Director, Bureau of Indian Affairs

36 IBIA 261 (08/13/2001)



United States Department of the Interior

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

YERINGTON PAIUTE TRIBE, : Order Affirming Decision
Appellant :
 :
v. :
 :
 : Docket No. IBIA 00-81-A
ACTING WESTERN REGIONAL DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : August 13, 2001

This is an appeal from an April 25, 2000, decision of the Acting Western Regional Director, Bureau of Indian Affairs, denying an application for trust acquisition of property located within the City of Yerington, Lyon County, Nevada. 1/ For the reasons discussed below, the Board affirms the Regional Director's decision.

The Tribe purchased the property on July 1, 1985. Shortly thereafter, it applied to the Yerington City Planning Commission for a special use permit under which it would be authorized to operate a Dairy Queen franchise on the property. On September 5, 1985, the Planning Commission approved the permit "with the condition that they will not withdraw the property from tax rolls and they will pay taxes as other business in the community." Planning Commission Minutes, Sept. 5, 1985, at unnumbered 2. On the same day, the Yerington City Council approved the permit "with the stipulation that the property will not be withdrawn to custodial use and that all applicable taxes will be paid." City Council Minutes, Sept. 5, 1985.

In November 1987, the Tribe submitted another application for a special use permit for construction of a Dairy Queen on the property. On February 1, 1988, the Tribal Chairperson wrote to the Chairman of the Planning Commission, stating: "With respect to the [Tribe's] intent to construct a Dairy Queen * * *, the Tribe acknowledges that [the] land is located off reservation lands. Accordingly, the Tribe intends to pay all state and local taxes against said property." The Tribe's November 1997 application bears the following notation

1/ The property is described in Lyon County records as "Parcel 2A of that certain Parcel Map filed for record in the office of the County Recorder, Lyon County, Nevada on July 25, 1985 as Official Record No. 94158." It is not within or contiguous to either of the Tribe's two reservations.

signed by the Secretary of the Planning Commission: "APPROVED FEBRUARY 1, 1988, WITH THE STIPULATIONS AS STATED IN THE MINUTES OF SAID MEETING." 2/

On July 26, 1990, the Tribal Chairperson executed a quitclaim deed for the property, purporting to convey it to the United States in trust for the Tribe. The Tribe filed the deed with the Lyon County Recorder on the following day. On February 12, 1991, the Tribal Chairperson wrote to the County Assessor, stating: "This property has been put into trust status with the Bureau of Indian Affairs. As such it no longer falls under the jurisdiction of county tax rolls. The [Tribe] will no longer pay taxes to Lyon County on this property."

BIA became aware of the Tribe's quitclaim deed and letter to the County Assessor when it received a Congressional inquiry about the matter. On March 28, 1991, the Superintendent, Western Nevada Agency, BIA, informed the Tribe that its quitclaim deed was not effective to put the property into trust and advised the Tribe concerning procedures for seeking trust status.

In May 1992, the Tribe submitted an application for trust acquisition of the property. BIA gave notice of the application to the City of Yerington, which filed an objection. The Superintendent informed the Tribe of the objection, requested a response, and suggested that the Tribe meet with City representatives to discuss the matter. The Tribe did not respond, despite several subsequent requests from the Superintendent. In a January 11, 1994, letter, the Superintendent asked the Tribe if it wished to proceed with the application and stated that, unless the Tribe responded within 15 days, the application file would be closed. The Tribe did not respond until June 28, 1996, when its attorney wrote to the Agency, indicating that the Tribe wished to withdraw the application.

On December 9, 1996, the Tribal Chairperson wrote to the Superintendent, requesting copies of all forms it would need to submit with an application for trust acquisition of the property. The Superintendent responded on December 16, 1996. He described the documents and information the Tribe was required to provide and continued:

2/ It is not clear what meeting was referred to in this notation. The Regional Director construed it as referring to the Sept. 5, 1985 meeting(s). In the absence of any information to the contrary, this appears to be a reasonable construction.

During the course of this appeal, the City submitted an excerpt from the minutes of the July 11, 1985, Planning Commission meeting, apparently the first meeting at which the Tribe's application was discussed. The excerpt shows that the Tribal Chairperson attended the meeting and stated that the Tribe was "more than willing to pay the taxes" and had "no wishes to bring this land into trust." The excerpt also shows that the City Attorney advised the Commission to place conditions on any special use permit issued. He gave that advice, he stated, because he was uncertain as to whether, as a legal matter, the Tribe could be held to a commitment to pay taxes on the property. Planning Committee Minutes, July 11, 1985, at 2.

It does not appear that the July 11, 1985, minutes were before the Regional Director when he issued his decision.

[T]his Agency will consider the [Tribe's] request for Trust Status upon receipt of the information as mentioned above. More importantly, your office must consider the conditions placed upon the special use permit for the Dairy Queen operation by the City of Yerington. We would suggest that your office meet with the City and discuss this issue prior to making application for the trust status.

Superintendent's Dec. 16, 1996, Letter at 4.

By letter of March 9, 1999, the Tribe submitted a formal trust acquisition application. The Agency sought comments from the City of Yerington, Lyon County, and the State of Nevada. The City responded on March 25, 1999, expressing a wish to cooperate with the Tribe but stating that, in light of the special use permit and the conditions under which it was granted, the Tribe should be required to pay taxes on the property "no matter what the trust status is." Lyon County responded on April 15, 1999, opposing trust acquisition on several grounds. The Superintendent informed the Tribe of the City's and County's comments and required that it make an attempt to respond to and resolve the concerns raised. He also recommended that the Tribe "meet with the City and continue to maintain a a positive government to government relationship for current and future issues." Superintendent's Apr. 1, 1999, Letter to Tribe.

In September 1999, the Tribe requested that the Agency forward its application to the Phoenix Area Office (now Western Regional Office) for action. The Superintendent did so on September 23, 1999, recommending that the Tribe's application be denied. He gave several reasons for his recommendation but indicated that his principal concern was that the Tribe had not made an effort to resolve issues relating to the special use permit.

On November 19, 1999, the Tribe responded to the Superintendent's memorandum. Among other things, it stated that it had made several efforts to resolve issues with the City but had been unsuccessful.

On April 25, 2000, the Regional Director issued a decision denying the Tribe's application. In support of his decision, he attached a 20-page memorandum dated April 24, 2000. The memorandum is signed by the Acting Regional Realty Officer and concurred in by the Regional Director. It discusses the history of the matter and analyzes the acquisition under the criteria in 25 C.F.R. § 151.10. ^{3/} It states at page 20 that BIA was not persuaded that the Tribe had made a good faith effort to resolve disagreements with the City, particularly with regard to the special use permit. It then concludes:

We believe that this proposal involves the type of potential land use conflict which should be resolved by agreement, if at all possible. In view of the fact that the

^{3/} The memorandum did not reach the factors in 25 C.F.R. § 151.11.

record reflects that a satisfactory agreement may still be possible, and the fact that the Special Use Permit could be viewed as a prior "agreement" between these parties, we are again recommending that the Tribe continue to pursue negotiations. If those negotiations fail, and the Tribe provides reliable documentation, showing that the City and County have not negotiated in good faith (along with other required documentation, as described above), we will reconsider the application at that time.

Id.

On appeal, the Tribe asks the Board to "reverse the denial of the local agency and take the tribe's downtown property into trust." Tribe's Opening Brief at 15. As a preliminary matter, the Board observes that, under the standard of review applicable here, the Board would not, indeed could not, order BIA to take the Tribe's property into trust. At most, it would remand the matter to the Regional Director for further consideration and then only upon finding some legal insufficiency in his decision. Because the Regional Director's decision is ultimately a discretionary one, the Board does not substitute its judgment for his. See, e.g., Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 36 IBIA 14, 18 (2001), and cases cited therein.

The Board's decision in Rio Arriba also describes the burden of proof imposed upon an appellant who challenges a BIA discretionary decision: Such an appellant bears the burden of proving that BIA did not properly exercise its discretion. Id. The Tribe bears that burden here.

The Tribe recognizes that "[t]he disputed issue is whether the Tribe has attempted to negotiate with the local governments." Tribe's Opening Brief at 6. It contends that it has made several such attempts and that "[t]he local governmental officials refuse to negotiate because they do not want the land in trust status." Id. With respect to documentation of its attempts to negotiate, the Tribe contends in its reply brief that it prepared minutes of meetings it had with the City and County in 1996, 1997, 1998, and 1999, which showed that the City and County would not negotiate. The Tribe also contends that it submitted the minutes to the Regional Director.

There is one document in the record that could be construed as minutes of a meeting between tribal and local officials during 1998. That is a June 15, 1998, memorandum from the Tribe's attorney to the Tribal Chairperson, discussing a meeting attended by tribal, BIA, and local governmental representatives. ^{4/} That memorandum does not support the Tribe's contention that the local governmental officials were unwilling to negotiate. To the contrary, it reflects a willingness on their part to discuss the matter further. The memorandum states at page 3:

^{4/} The memorandum does not give the date on which the meeting was held. Presumably, it was held on June 15, 1998, or shortly before.

The County and City representatives believe that if some plan for continuing to pay taxes plus some retention of local control so that the Tribe could not change the use of the property to one that discharges hazardous materials, for example, then the proposition could be placed on a public agenda. The group believed that a proposal that would eliminate any loss of revenue to the City or County would improve the chances of wide-spread public acceptance of a change in the status of the Dairy Queen property.

The best procedure to follow would be:

1. To summarize the issues discussed in this meeting in writing and circulate this to participants for comment;
2. Prepare a proposal for placing the Dairy Queen property in trust with accommodation to the City and County;
3. Prepare a final proposal that the participants can agree to on a public agenda of the City or County for public comment;
4. Establish a means by which the Tribe, the County, the City and the Districts have a means of communication, either by regular meeting times or communication among themselves so that when important issues arise, the comments, questions, or concerns of the governmental entities can be addressed.

Other than the June 15, 1998, memorandum, the Board finds no other documents in the record that might be construed as minutes of meetings between tribal and local officials during 1996, 1997, 1998, or 1999. The Tribe has not submitted any such documents during the course of this appeal. Nor has it objected to the administrative record, although it was made aware of the contents of the record (and the fact that no such documents were included) through the very detailed table of contents prepared by the Regional Director and furnished to the parties.

The Tribe failed to mention these minutes until it filed its reply brief. Even then, it made only the barest assertions about them. The Tribe's belated and undeveloped contentions concerning the minutes are insufficient to prove their content or to prove that the Tribe submitted them to the Regional Director.

Nothing in the administrative record or in the Tribe's filings with the Board shows any documentation by the Tribe of the unwillingness of the City and County to discuss the matter further with the Tribe. In fact, as noted above, the Tribe's contentions in this regard seem to be directly contradicted by the Tribal attorney's June 15, 1998, memorandum, which is the most recent relevant document in the record.

The Tribe has not shown that the City and County were unwilling to negotiate. Nor has it shown that the Regional Director improperly exercised his discretion by requiring documentation of the Tribe's attempts at negotiation.

The Board finds the other arguments made by the Tribe irrelevant to the issue of whether the Regional Director properly exercised his discretion under 25 C.F.R. Part 151. It further finds that the Tribe has failed to carry its burden of proof in this appeal.

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 Regional Director's April 25, 2000, decision is affirmed. 5/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ The Regional Director's decision does not foreclose resubmission of the Tribe's trust acquisition application. If the Tribe believes that the minutes it mentioned in its reply brief constitute "reliable documentation, showing that the City and County have not negotiated in good faith," it should include them with any resubmission of its application.