INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota and Bennett County, South Dakota v.
Acting Great Plains Regional Director, Bureau of Indian Affairs

39 IBIA 301 (04/08/2004)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

STATE OF SOUTH DAKOTA, and BENNETT COUNTY, SOUTH DAKOTA, Appellants	:	Order Affirming Decision
v.	:	Docket No. IBIA 03-24-A
ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	April 8, 2004

Appellants State of South Dakota (State) and Bennett County, South Dakota (County) seek review of a September 18, 2002, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to acquire a 10-acre tract of land in Bennett County, South Dakota in trust for Rex L. Herman (Applicant), a member of the Oglala Sioux Tribe. For the reasons below, the Board of Indian Appeals (Board) affirms that decision.

On March 17, 1998, the Applicant requested the Superintendent, Pine Ridge Agency, BIA (Superintendent), to take 10 acres of land in trust in Bennett County, South Dakota. The Applicant stated that due to his health and age, he wanted the 10-acre property to be placed back into trust status. According to information on the application, the land has been in the family for three generations, dating back to an original allotment, and is surrounded within 560 acres owned at that time by the Applicant and his children. The record does not indicate when a fee patent was issued for the 10 acres. The application indicates that the Applicant in 1998 was 65 years old, a widower, with a $10,000 annual income from social security, and with a highest educational level of 9th grade. The Applicant stated that for estate purposes, he wanted the land placed in trust to pass to his children, who are also enrolled members of the Oglala Sioux Tribe.

BIA sent letters on April 20, 1998, to Appellants notifying them of the trust application and requesting their comments on the amount of taxes currently levied on the property, any special assessments, and any governmental services currently provided to the property.

On April 29, 1998, the State filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for a copy of the trust application and any other documents that BIA intended to consider in making its decision.

The County responded to BIA's April 20, 1998, solicitation of comments on May 15, 1998. The County stated that it opposed the acquisition because (1) the property taxes were $350 to $375, (2) it provided police and fire protection to the property, (3) the County needed the property tax to help retire bonds issued to construct a nursing home, (4) taking the land in trust would confuse State and County law enforcement and fire protection efforts, (5) it did not believe the factors of 25 C.F.R. § 151.10 had been met, and (6) it believed the Applicant was competent to handle his own affairs.

On May 18, 1998, the State advised BIA that it had not yet received a response to its FOIA request; asserted that BIA was without authority to proceed with the trust application; and stated that if BIA did proceed, the State objected.

On May 19, 1998, BIA provided the State with a redacted copy of the trust application, and advised that certain personal information about the Applicant was being withheld under 5 U.S.C. § 552(b)(6) to protect his privacy interests. BIA advised the State that it had 20 workdays to appeal the FOIA decision to the Department of the Interior (Departmental) FOIA office. The State did not appeal BIA's FOIA decision.

On July 15, 1998, the Superintendent advised Appellants of his approval of the trust application, and advised them of their appeal rights. Although not stating why, the Superintendent reconsidered his July 15, 1998, decision and again approved the trust application on September 21, 2000.

The State filed a notice of appeal with the Regional Director on October 18, 2000. It argued that the land should not be taken in trust because land may not be acquired for an individual outside of the reservation boundary, the trust acquisition process was procedurally unfair because BIA held no evidentiary hearing and did not provide a copy of the full trust application, and the requirements of 25 C.F.R. § 151.10 were not met.

On September 18, 2002, the Regional Director affirmed the Superintendent's September 21, 2000, decision. He addressed each of the State's arguments, finding that the proposed trust acquisition was located "on reservation" as the term "Indian Reservation" is defined in the regulations because it was in an area that had been diminished or disestablished by judicial decision; that the Superintendent had followed proper administrative procedures in handling the application and in advising the State of its FOIA appeal rights; and that each of the factors under 25 C.F.R. § 151.10 was met. On October 15, 2002, Appellants appealed the Regional Director's decision to the Board.

The standard of review and burden of proof on appeal in trust acquisition cases is well established:

> [D]ecisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. Rather, the Board reviews such decisions 'to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations.' [City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196, 96 I.D. 328, 330 (1989)].
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> [W]hen an appellant challenges BIA's exercise of discretion, it 'bears the burden of proving that the [Regional] Director did not properly exercise his discretion.' Id. However, when an appellant challenges legal determinations that BIA may have made in connection with a trust acquisition decision, it 'bears the burden of proving that the [Regional] Director's decision was in error or not supported by substantial evidence.' Id. See also County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 170 (2002); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-9 (1999).

State of South Dakota and Moody County, South Dakota v. Acting Great Plains Regional Director (State of South Dakota), 39 IBIA 283, 287 (2004); See City of Isabel, South Dakota v. Great Plains Regional Director, 38 IBIA 263, 264 (2002); State of Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Regional Director, 38 IBIA 42, 45 (2002).

Appellants challenge the Regional Director's decision on legal grounds, as well as challenging the Regional Director's exercise of discretion. Among Appellants' legal challenges are three threshold procedural issues, which the Board addresses first.

Appellants argue that their due process rights were violated because BIA had no administrative evidentiary hearing on the trust application, and they request such a hearing before the Board on whether the Superintendent should have approved the trust application. Appellants contend that in order for BIA to make a decision based on a "full record," there must necessarily be a proceeding in which discovery, hearing, and cross-examination are allowed. Otherwise, Appellants argue, they cannot possibly know what information is relied upon by BIA for making its decision.

The Board has held that "[t]here is no requirement in 25 U.S.C. § 465 or 25 C.F.R. Part 151 that an evidentiary hearing be conducted for trust acquisition applications." State of Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 158 (2001). Appellants were afforded an opportunity to submit comments and information for BIA's administrative record for the decision. Appellants have cited no authority that requires BIA to hold administrative evidentiary hearings on trust acquisition applications. Thus, the Board concludes that Appellants' due process rights were not violated and denies their request for an evidentiary hearing.

Appellants next argue that the Regional Director's decision is procedurally flawed because they were initially deprived of information necessary for them to fully evaluate and comment on the trust application.

In the May 19, 1998, FOIA decision, the Superintendent advised the State that certain personal information about the Applicant was being withheld under 5 U.S.C. § 552(b)(6) to protect his privacy interests, and that the State had 20 workdays to appeal the decision to the Departmental FOIA office. The Superintendent's letter specifically stated that the State had not "enunciated[] any public interest that would be served in disclosing the data which would outweigh the privacy interest of the subject individual." Superintendent's May 19, 1998, Letter at 1. The State's brief in this appeal acknowledges that the State did not appeal BIA's FOIA determination.

Appeals from FOIA decisions are subject to the appeal process in 43 C.F.R. § 2.18, and the Board is not a part of that process. Simpson v. Southern Plains Regional Director, 38 IBIA 127 (2002). The Board has previously declined to hold that BIA committed error in relying on withheld information where the appellant had unsuccessfully challenged the withholding. City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 107-08 (1999), aff'd, City of Lincoln City v. U.S. Department of the Interior, Civil No. 99-330-AS (D. Ore. 2001) (City of Lincoln City).

Appellants urge the Board to reconsider its decision in City of Lincoln City, but have given the Board no valid reason to do so. The State failed to appeal the FOIA decision withholding the Applicant's personal and financial information. Furthermore, Appellants acknowledge that the Regional Director subsequently included some if not all of the withheld information in his decision, and they have now had an opportunity to challenge that decision, and the sufficiency of the information relied upon. The Board concludes that the Regional Director did not err in considering the Applicant's information that was withheld under FOIA. 1/

1/ Appellants also request the Board to establish new administrative procedures for the release of trust application information without having to go through FOIA. The Board has no authority to promulgate BIA regulations or procedures.

Appellants allege that the Regional Director's decision is fatally flawed because he failed to give notice to the local school district. Appellants raise this issue for the first time on appeal to the Board.

The Board has a well-established rule that it does not consider issues raised for the first time on appeal. County of Mille Lacs, 37 IBIA at 174. Therefore, it declines to do so here. 2/

The Board now turns to Appellants' substantive legal challenges to the Regional Director's decision. Appellants argue that 25 U.S.C. § 465 is unconstitutional. In support of their argument, they cite South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996). Appellants concede that the Board has previously held that it lacks authority to declare an act of Congress unconstitutional, see Town of Charlestown, Rhode Island v. Eastern Area Director, 35 IBIA 93, 97 (2000), aff'd, Carcieri v. Norton, C.A. No. 00-375 ML (D.R.I. 2003), but nevertheless urge the Board to reconsider its prior decisions.

The Board has repeatedly held that it lacks authority to declare an act of Congress unconstitutional. State of South Dakota, 39 IBIA at 288-89, and cases cited there. Appellants have cited no legitimate reason for the Board to reconsider its prior decisions, and the Board continues to hold that it lacks authority to declare an act of Congress unconstitutional.

Appellants argue that 25 C.F.R. Part 151 does not permit this acquisition because the Applicant's proposed trust acquisition is located outside of the Pine Ridge Reservation boundaries. See 25 C.F.R. § 151.3(b). 3/

The Regional Director found that the proposed acquisition fell within "Indian reservation" boundaries pursuant to 25 C.F.R. § 151.2(f), which provides that:

2/ The Board noted in County of Mille Lacs as dicta, that the appellant there had not established that school districts were "local governments having regulatory jurisdiction over the land to be acquired" simply because they regulated truancy and had the authority to impose taxes. County of Mille Lacs, 37 IBIA at 174. In any event, the Board notes here that the local school district – which was served with Appellants' brief and thus clearly had notice of this appeal – has not sought to intervene.

3/ Section 151.3(b) of 25 C.F.R. provides in pertinent part that:

"[L]and may be acquired for an individual Indian in trust status:

"(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto * * * ."

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary [of the Interior].
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> In his decision, the Regional Director stated that:
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> We found a court case decision, United States ex rel. Cook v. Parkinson, 525 F.2d 120, 121-22 (8th Cir. 1975), cert. denied, 430 U.S. 980 (1977), which diminished the Pine Ridge Reservation. In this decision, the Pine Ridge Reservation was diminished by declaring that Bennett County was no longer part of the Pine Ridge Reservation. Based on our Federal Regulations, for purposes of fee to trust acquisitions, [BIA] can consider Bennett County as a part of the former reservation and therefore Bennett County meets the definition of Indian reservation [in 25 C.F.R. 151.2(f)]. The subject land is considered as part of an on-reservation fee to trust acquisition and the Superintendent of the Pine Ridge Agency has the authority to make the decision to bring this land into trust status. (Emphasis omitted).

Regional Director's Sept. 18, 2002, Decision at 2.

The parties do not dispute that the Pine Ridge Reservation was judicially diminished and that Bennett County was removed from the reservation. See United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 980 (1977). However, Appellants devote considerable time arguing that for diminished reservations, the definition of "Indian reservation" in 25 C.F.R. § 151.2(f) creates two alternatives that are mutually exclusive. According to Appellants, for purposes of trust land acquisition, an "Indian reservation" as defined by section 151.2(f), in the context of a diminished reservation such as the Oglala Sioux Reservation, must consist of either the reservation lands remaining within the intact Reservation boundary or the lands constituting the former reservation area – but not both. In Appellants' words: "A tribe can have an existing 'reservation' or a tribe can assert that the area which constitutes its 'former reservation' constitutes a 'reservation' – it cannot do both." Appellants' Opening Brief at 7-8.

The Board rejects Appellants' proferred interpretation of section 151.2(f). The "except that" clause in section 151.2(f) is intended to include *additional* land areas with the definition of "Indian reservation" for the trust land acquisition regulations – not to *exclude* land areas still within intact reservation boundaries. The disjunctive "or," on which Appellants place all their

emphasis, is contained within the "except that" clause, and merely distinguishes between the State of Oklahoma and all other areas of the United States in which there may be disestablished or diminished reservation boundaries. The disjunctive "or" does not create alternate and mutually exclusive definitions of "Indian reservation" within section 151.2(f) itself. Indeed, if section 151.2(f) were read as creating mutually exclusive categories, the "except that" clause would actually lead to the implausible result that for tribes with diminished reservations, the *only* area falling within the definition of "Indian reservation" would be the *former* reservation area, and not the area within the remaining and still intact reservation boundaries. Even Appellants seek to avoid this result, by contending that tribes with diminished reservations must make some kind of an "election" for which area is to be treated as on-reservation – either the area within existing reservation boundaries or the area within the former reservation area, but not both. The regulations provide no requirement or procedures for such an election, nor does the Board consider such an interpretation of section 151.2(f) to be reasonable.

The Board next addresses Appellants' arguments in regard to the Regional Director's discretionary decision to take the proposed acquisition in trust. The Board has previously explained that in reviewing the criteria set forth in 25 C.F.R. § 151.10, no single factor is determinative of the outcome. Rather, BIA's decision should be reasonable in light of its overall analysis of the factors. Town of Charlestown, Rhode Island v. Eastern Area Director, 18 IBIA 67, 72 (1989) .

To meet its burden of proof, an appellant must show with specificity how BIA erred in exercising its discretion. See State of South Dakota, 39 IBIA at 291, and cases cited there.

Appellants argue that the Regional Director's analysis of the Applicant's need for additional land was in error because the Superintendent did not consider that the Applicant gift deeded all of his trust property to his children. According to Appellants, the Applicant thus voluntarily placed himself in a position to need land taken in trust for him. Appellants also argue that the Applicant had no need for the land to be taken into trust for estate planning purposes.

The Regional Director found that bringing this land into trust would allow the Applicant to use the estate planning assistance of the Pine Ridge Agency. The Regional Director also noted the Applicant's age, income, education level and potential for health problems. The Regional Director specifically noted that "[a]s [the Applicant] gets more elderly, the need for assistance in managing his affairs will only increase." Regional Director's Sept. 18, 2002, Decision at 3. The Regional Director acknowledged that the Applicant had owned an interest in approximately 587.5 acres of trust land, and that he had gift deeded all of those interests to his other family members. The Regional Director agreed with the Superintendent that the Applicant had established a need to have the property in trust status.

Appellants have failed to carry their burden to prove that the Regional Director did not properly consider the Applicant's need to have the 10-acre parcel taken into trust. Appellants contend that because the Applicant gift deeded his existing trust property to his children, he could not then claim a "need" to have trust property. Appellants misunderstand the "need for trust status" that BIA found here. The Regional Director concluded that the Applicant had established a need, based on his age, health, and income, to have this particular 10-acre parcel taken into trust in order to protect his homesite and to enable the BIA to provide estate planning assistance for the property as trust property. Cf. 25 C.F.R. § 15.3(a) (BIA only probates trust property). Whether or not the applicant also owned – or no longer owned – other trust lands, these considerations reflected factors specific to this 10-acre parcel. Accordingly, the Board concludes that the Regional Director properly considered the Applicant's need for placing this land in trust.

Appellants next argue that the Regional Director erred in only considering the impact of the proposed trust acquisition, but not the cumulative effect of the County's loss of tax revenue attributable to all tribal and individual Indian trust lands. The Board has previously discussed and rejected this argument. See State of South Dakota, 39 IBIA at 294-95, and cases cited there. Thus, the Board concludes that the Regional Director did not err by not considering the cumulative effect of the removal of all trust lands in the County from its tax rolls.

Appellants next argue that the Regional Director erroneously assumed that the school district would automatically be entitled to additional funding if the land is taken into trust.

In his decision, the Regional Director quoted from the Superintendent's decision, which stated that, "[t]he local school district receives federal entitlement for those Indian families with school age children living on trust land in the County." Regional Director's Sept. 18, 2002, Decision at 4. Appellants do not contend that the statement is inaccurate, and no where does the Regional Director's analysis or decision suggest that the Regional Director believed that school age children were presently living on the property. Appellants have not met their burden of proof to demonstrate that the Regional Director assumed that there would be an automatic increase in impact aid once the property was taken into trust.

Appellants exhaustively argue that if this trust application is approved, jurisdictional conflicts will arise in the provision of police, fire, road, and other governmental services to the property. They allege that the Tribe or BIA will only be able to provide police protection if this tract is converted to "Indian country," and that the Regional Director did not adequately discuss jurisdictional problems.

With respect to police and fire protection, the Regional Director accepted the Superintendent's conclusion that once the parcel is taken into trust, BIA or the Tribe will accept responsibility for such services, and the County and State will be relieved of that responsibility.

The Regional Director also considered other jurisdictional issues associated with this trust acquisition, and found:

> [BIA] currently administer[s] 248,825.88 acres of trust land in Bennett County. The Superintendent is stating that an additional 10 acres of land is not going to raise further jurisdictional problems than already currently exist on the 248,825.88 acres of trust land within the boundaries of Bennett County. The jurisdictional issues will remain the same and must be litigated. This trust acquisition will not increase any existing jurisdictional issues in Bennett County. It is not unusual for different entities to have their own interpretation of who maintains what jurisdiction in a trust/fee checker boarded area of land such as Bennett County.

Regional Director's Sept. 18, 2002, Decision at 5.

As the Board concluded in State of South Dakota, 39 IBIA at 298-99, it was not unreasonable for the Regional Director to presume that BIA or the Tribe would assume jurisdictional responsibility on the 10-acre parcel once it is placed in trust. Nor have Appellants shown that BIA and the Tribe have been precluded from providing services on some or all of the existing 248,825 acres of trust land within the County. The regulations do not require the Regional Director to fully resolve all jurisdictional issues prior to approving a trust acquisition, but only to consider "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10(f); see also State of South Dakota, 39 IBIA at 299-300 (Regional Director is not required to resolve all possible jurisdictional conflicts prior to acquisition, only to consider them and reach a reasonably-supported decision). Even if the State retains law enforcement jurisdiction over this 10-acre parcel, Appellants have not demonstrated that such a situation would affect the Regional Director's analysis that this acquisition will not in any meaningful way raise further jurisdictional problems. Here, the Regional Director considered the jurisdictional problems and reasonably concluded that the 10-acre trust acquisition would not increase or change the nature of existing jurisdictional issues in any meaningful respect. Appellants have failed to prove that the Regional Director did not give proper consideration to this factor, or that the legal jurisdictional status of the property as trust property must necessarily be resolved before BIA can properly exercise its discretion whether to accept it in trust.

Appellants have failed to carry their burden to show that the Regional Director did not give proper consideration to all legal prerequisites or otherwise failed to properly exercise his discretion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Regional Director's September 18, 2002, decision is affirmed. 4/

// original signed
Kathleen R. Supernaw
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

4/ Any arguments not specifically addressed were considered and rejected.