



## INTERIOR BOARD OF INDIAN APPEALS

Wesley Barber v. Western Regional Director, Bureau of Indian Affairs

42 IBIA 264 (03/30/2006)



# 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

WESLEY BARBER, Appellant,	:	Order Affirming Decision
	:	
	:	
v.	:	
	:	Docket No. IBIA 04-117-A
WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	
	:	March 30, 2006

Wesley Barber (Appellant) appeals from a May 20, 2004 decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), denying Appellant’s request that BIA approve two gift deed applications for the transfer to Appellant of an interest in Sacramento Public Domain Allotment No. 6, also identified as the “Sac-6” allotment. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director’s decision.

### Factual Background

This case is factually complex, but the facts pertinent to resolving the issues are undisputed and fairly straightforward. Sylvia Andrews, a member of the Washoe Tribe, owned an interest in the Sac-6 allotment. Amy Barber, Appellant’s mother, lived on the allotment until her death, with apparent consent of the owner, though she owned no interest in the allotment. Appellant has lived on the allotment his entire life. After Sylvia Andrews died, her interest in the Sac-6 allotment passed to her children, Deirdre Jones Flood and Mark Kevin Jones (Flood and Jones).

In 1998, Flood and Jones, individually and in their capacity as administrators of the estate of Sylvia Andrews, brought a quiet title action against Appellant and his mother in the Superior Court of the State of California in relation to certain real property owned in fee (not the Sac-6 allotment). The Barbers filed a cross-complaint. Ultimately, the case was resolved through a settlement agreement entered in a judgment by the California court in February 2001, approximately two weeks after Amy Barber’s death. The settlement agreement required, inter alia, that Flood and Jones transfer their inherited fractional interests in the Sac-6 allotment to Appellant.

On June 27, 2002, apparently in response to threats of contempt for failure to comply with the settlement agreement, Flood and Jones each executed BIA form applications to “gift” convey their interests in the Sac-6 allotment to Appellant. <sup>1/</sup> The applications recited the reason for the conveyance as “Judgment was entered in Case No. 1602, Alpine County Superior Court, requiring the gift/exchange of certain lands.” <sup>2/</sup> Flood and Jones also executed a form waiving a formal appraisal of the property and stating that the conveyance was “a gift conveyance, with no consideration being paid.” Appellant then submitted the applications to the Superintendent for approval. The Superintendent forwarded the applications to the Western Regional Office.

The Regional Director took no action on the Flood and Jones gift deed applications. In a letter dated August 29, 2002, counsel for Appellant demanded that the BIA realty officer take action on the applications. In another letter dated October 7, 2002, counsel for Appellant requested that BIA approve the applications.

In a decision issued on May 20, 2004, the Regional Director denied Appellant’s request to approve the applications. The Regional Director based his decision on his conclusion that the gift conveyance process had not been properly followed because the landowners did not “voluntarily” execute any gift deed applications as required by 25 C.F.R. section 152.25(d). The Regional Director further based his decision on his conclusion that even if section 152.25(d) had been satisfied, BIA could not approve the conveyances because 25 C.F.R. section 151.7(e) requires co-owner consent, which was absent.

Appellant’s timely notice of appeal from the Regional Director’s decision was received by the Board on June 25, 2004. Both Appellant and BIA submitted briefs.

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<sup>1/</sup> On December 13, 2001, Appellant sent letters to Flood and Jones stating that each “must request a BIA transfer of the fractional interest” in the Sac-6 allotment “under the term of the settlement we arrived at through state court.” On January 28, 2002, Appellant sent new letters to Flood and Jones demanding that they “comply with the terms of the Settlement Agreement/Court Order.” On February 26, 2002, the California Superior Court issued an order requiring Flood and Jones to appear in court to show cause as to why they should not be found in contempt.

<sup>2/</sup> The settlement agreement also required that Flood and Jones pay Appellant \$20,000, and that Appellant transfer to them his and Amy Barber’s interest in another property.

## Discussion

BIA's decision to approve or deny an application to gift convey trust or restricted land is one committed to the discretion of BIA. See Downs v. Acting Muskogee Area Director, 29 IBIA 94, 97 (1996). The Board's role in reviewing such a decision is to determine whether BIA gave "proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's." Smith v. Acting Eastern Oklahoma Regional Director, 38 IBIA 182, 184 (2002) (quoting Downs, 29 IBIA at 97).

The regulations governing the disposal of trust or restricted lands establish standards for BIA's approval of a gift conveyance. Under 25 C.F.R. section 152.23, BIA may approve an application to gift convey trust or restricted land "if, after careful examination of the circumstances \* \* \* the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners or as under conditions set out in § 152.25(d)." Section 152.25(d), which describes specific conditions under which BIA may approve certain conveyances, states in its entirety:

With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

Because the regulation provides that Indian landowners "may" convey trust or restricted land under certain circumstances, any such conveyance must be entirely voluntary, both in executing the application and in submitting it (or having it submitted) to BIA for approval. An Indian landowner may change his or her mind and revoke his or her consent prior to the actual conveyance. Thus, BIA must refrain from approving a gift deed where there is any doubt as to the donor's intent. See Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220, 228 (1994).

Whereas section 152.25(d) applies both to conveyances for no consideration and to conveyances for less than fair market value, 25 C.F.R. section 151.7 applies to conveyances that are sales. Section 151.7 provides that lands can be acquired in trust only with the approval of the Secretary, and only if one of the following conditions exists:

- (a) The buyer already owns a fractional interest in the same parcel of land; or
- (b) The interest being acquired by the buyer is in fee status; or
- (c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or
- (d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or
- (e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

Appellant claims that the Regional Director's denial of the Flood and Jones gift deed applications was an abuse of discretion because his decision was improperly influenced and improperly premised on several incorrect factual assumptions or findings. Specifically, Appellant argues that the Regional Director was improperly influenced by the Superintendent, who apparently owns an interest in the Sac-6 allotment. Notice of Appeal at 3. Appellant further argues that the Regional Director incorrectly assumed that the applications and "Agreement to Gift Convey" were involuntary because they were the result of a state court judgment; Appellant asserts that the state court judgment simply memorialized a voluntary settlement agreement between Flood and Jones and Appellant. *Id.* at 10. Appellant also argues that the Regional Director incorrectly stated that in his decision that BIA did "not have any gift applications to consider" when, in fact, Appellant had submitted both applications to BIA. *Id.* at 7.

Next, Appellant argues that the Regional Director committed legal error in concluding that section 151.7 applies to the proposed conveyances. Appellant asserts that only 25 C.F.R. Part 152 applies, and that the factors in section 152.25(d) warranting approval of a gift conveyance are satisfied. Appellant argues that, as required under section 152.25(d), a "special relationship" and "special circumstances" exist between Flood and Jones and Appellant because: (1) they are first cousins, (2) Appellant and his mother have lived on the property for decades and have constructed improvements that would be forfeited if the conveyance is not approved; and (3) Flood and Jones received substantial consideration (economic benefit) from the state court settlement agreement. Notice of Appeal at 12-14.

The Regional Director argues on appeal that application of section 151.7 to the conveyance was "pivotal" to his decision. Appellee's Response Brief at 5. The Regional Director asserts that because the co-owner consent required by section 151.7(e) was not satisfied, "the Secretary could not approve the proposed transfer, notwithstanding her discretion." *Id.* at 9.

We first address Appellant's argument that the Regional Director's decision was improperly influenced because the Superintendent owns an interest in the allotment at issue in this case. The Board concludes that Appellant has not met his burden to show that any such improper influence occurred. Even assuming that the Superintendent was at one time involving himself in matters related to the Sac-6 allotment when he should have recused himself because of his ownership of an interest in the allotment, Appellants have submitted no evidence to demonstrate that the Superintendent improperly participated in or influenced the Regional Director's decision. Absent such evidence, we cannot conclude that Appellant's argument has any merit.

We next turn to Appellant's allegations that the Regional Director's decision was premised upon improper assumptions or unsupported factual findings. The Board agrees with Appellant that the Regional Director made several overly broad or incorrect assumptions, as well as incorrect or misleading statements in his May 20, 2004 decision. First, the Regional Director stated that BIA did "not have any gift applications to consider nor will we require Flood and Jones to fill out applications." Regional Director's Decision at 2. Materials submitted by Appellant, however, show that he submitted the applications to the Superintendent, whose correspondence states that he, in turn, forwarded the applications to the Regional Office. On appeal, BIA does not deny Appellant's assertion that he submitted the applications to BIA or contend that the Regional Office never received them. In light of these facts, the Regional Director's statement appears misleading, at best, and the absence of the applications from BIA's administrative record is troubling.

We also agree with Appellant that a voluntary settlement in state court litigation does not, as the Regional Director concluded, automatically mean that a proposed conveyance, executed in compliance with the settlement agreement, is involuntary. Although the Regional Director is correct that the state court judgment "has no force and effect" against the United States, Regional Director's Decision at 2, this is a distinct issue from whether Flood and Jones voluntarily executed the gift deed conveyances. Nevertheless, we conclude that in this case, because the applications recite that the state court "judgment" required the conveyances, and because Flood and Jones appear to have executed the applications under threat of contempt, as well as months after the settlement agreement was entered by the court, the Regional Director would have been justified in questioning the voluntary nature of the applications and requiring additional evidence from the landowners showing that they knowingly and voluntarily intended to gift convey their allotment interests to Appellant before considering the applications further. See Estate of Celestine, 26 IBIA at 226 (before approving a gift deed application, BIA must be "careful to make an independent evaluation of [the applicant's] true wishes and his understanding").

When the Board finds that BIA's exercise of discretion may have been based on improper assumptions or unsupported factual findings, the proper remedy is generally for the Board to vacate the decision and remand the matter for reconsideration. We decline to do so in this case, however, because we conclude that, for the reasons described below, the Flood and Jones applications were flawed as attempted gift conveyances. Under the facts of this case, the Regional Director had no discretion to consider approving the applications. Notwithstanding the deficiencies in the Regional Director's decision and questions about whether the applications were executed voluntarily, the Board therefore affirms his decision denying Appellant's request to approve the conveyances.

The flawed character of the gift deed applications rests upon our finding that the proposed conveyances were not gifts. Instead, we find that there was consideration and therefore the conveyances were actually sales. A gift must be both voluntary and without consideration. See Melsheimer v. Assistant Secretary for Indian Affairs, 11 IBIA 155, 161 (1983). Where "any consideration" exists, a transaction is a sale. Id. In that situation, 25 C.F.R. section 151.7 applies and at least one of the criteria in that regulation must be satisfied in order for BIA approve the transaction. <sup>3/</sup> Here, Appellant apparently wants the conveyances at issue to be treated as gifts, for no consideration. But the applications themselves indicate that there was consideration by describing the state court judgment as "requiring the gift/exchange of certain lands." (Emphasis added.) And although the waiver of formal appraisal signed by Flood and Jones represents that the conveyances were to be for "no consideration," this is flatly contradicted by Appellant's argument that the conveyances should be approved because Flood and Jones have "gained substantial benefit" from Appellant's release of claims in the state court judgment, "given in consideration for Jones' conveyance of the SAC-6 allotment interest." Notice of Appeal at 14. Therefore, even assuming that Flood and Jones voluntarily executed the applications, the evidence in the record is sufficient to establish that there was consideration for the proposed "gift" conveyances, and that the transactions were actually proposed sales.

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<sup>3/</sup> We note that even if a transaction is properly deemed a partial "gift" under section 152.25(d) because it is for "less than fair market value," we would still conclude that because there is some consideration, the transaction is also properly characterized as a sale, and section 151.7 also applies. The policies embodied in 25 C.F.R. section 151.3 with respect to trust acquisitions are not dependent on whether consideration is for appraised fair market value or below fair market value. We therefore find no basis to conclude, as suggested by Appellant, that section 151.7 applies only to sales at or above fair market value. Notice of Appeal at 12 n.7.

Because we conclude that the proposed conveyances were actually proposed sales, one of the factors listed in section 151.7 must exist in order for BIA to properly approve the transaction. We reject Appellant's argument that 25 C.F.R. Part 151 applies only to "initial acquisitions of land into trust" and not to trust-to-trust acquisitions, which is the situation in this case. Appellant's Reply Brief at 6. The language in 25 C.F.R. section 151.3 clearly establishes that the regulations in Part 151 apply not only to initial acquisitions of land into trust, but also to transfers of land already held in trust. The regulation provides: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary." (Emphasis added.) See also Kenneth Gullickson v. Aberdeen Area Director, 24 IBIA 247, 249 (1993) (applying section 151.7 to a trust-to-trust acquisition).

We further conclude that none of the factors listed in section 151.7 is satisfied: Appellant does not already own a fractional interest in the Sac-6 allotment; the interest being acquired is not in fee status; Appellant has not offered to purchase the remaining undivided trust interests in the allotment at not less than fair market value; there is not a specific law that grants to Appellant the right to purchase an undivided interest in the allotment without offering to purchase all such interests; and the majority co-owners of the Sac-6 allotment have not consented in writing to Appellant's acquisition of the allotment interests. 4/

Because none of the factors is satisfied, the Regional Director lacked discretion to approve the conveyances. There is therefore no reason for the Board to consider Appellant's argument that a "special relationship" and "special circumstances," within the meaning of 25 C.F.R. section 152.25(d), exist that warrant approval of the conveyances, or to remand the matter for further consideration. Accordingly, for the reasons stated within this opinion, the Board affirms the Regional Director's decision denying Appellant's request to approve the conveyances.

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4/ In a December 19, 2002 letter to the Regional realty officer, one of the allotment owners explained that the majority landowners of the Sac-6 allotment were opposed to the conveyances.

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, and on the grounds described in this opinion, the Board affirms the Regional Director's May 20, 2004 decision.

I concur:

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// original signed  
Amy B. Sosin  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge