



INTERIOR BOARD OF INDIAN APPEALS

Albert W. Hern and Michael Hern v. Northwest Regional Director,
Bureau of Indian Affairs

48 IBIA 141 (12/05/2008)



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

ALBERT W. HERN and MICHAEL)	Order Affirming Decision
HERN,)	
Appellants,)	
)	
v.)	Docket No. IBIA 07-41-A
)	
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 5, 2008

Albert W. and Michael Hern (the HERNs or Appellants) appealed to the Board of Indian Appeals (Board) from a September 29, 2006, decision (Decision) of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), addressing the HERNs' applications for fee patents for their interests, held for them in trust by the United States, in lands within the boundaries of the Confederated Tribes of the Colville Reservation (Tribe; Reservation). In considering a decision of the Superintendent, Colville Agency, BIA (Superintendent), the Regional Director applied a provision of the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. § 2216(f), and declared that the Superintendent must obtain an appraisal of the value of the interests in land held in trust for the HERNs, and that the Tribe must then be given the opportunity to buy those interests from the HERNs at the appraised fair market value, or, if the Tribe declines to do so, the Superintendent must issue a fee patent to the HERNs. We affirm the decision as a proper application of AIPRA.

Background

Michael Hern owns an undivided 2/18 interest in the Colville "John Kaufmann" Allotment No. 101-1230 (Allotment), and his brother Albert owns an undivided 7/18 interest in the same Allotment. The Allotment is located in section 23, T. 28 N., R. 32 E., Willamette Meridian, in Ferry County, southwest of Keller, Washington, within the boundaries of the Colville Indian Reservation; it consists of 155.77 acres more or less. The HERNs' interests are held in trust for them by the United States. The southwest corner of the Allotment abuts Lake Roosevelt, an impoundment created by the Grand Coulee Dam.

The remaining interests in the Allotment are owned in fee by three persons unrelated to this appeal.

On March 24, 2004, the HERNs each submitted an Application for Patent in Fee or the Sale of Indian Land, seeking a patent in fee for their respective interests in the Allotment. *See* 25 C.F.R. § 152.4 (applications for fee patents). Each application asserted an intended use of the land for agriculture and recreation.

On receipt of the applications, the Superintendent sent a letter to each of the brothers explaining that he would notify the Tribe of a right of first purchase, and also requesting individual letters of reference attesting to the brothers' competency. These instructions were issued pursuant to regulations governing the removal of land from trust status at 25 C.F.R. §§ 152.2, 152.5, 152.9. The HERNs complied with the request by submitting references.

On June 21, 2005, the Tribe's Natural Resource Committee determined that the removal of the land from trust status would adversely affect the best interests of the Tribe. The Committee declared the tract to be a "Key Tract" of land desired for retention by the Tribe according to its land use policies. On October 12, 2005, the Real Property Officer, Colville Agency, BIA, sent a letter to the HERNs requesting that the brothers consider selling the property to the Tribe. The HERNs declined the request. By Emergency Resolution 2005-575, the Colville Tribe's Business Council declared the Allotment a Key Tract and opposed the conveyance of the land in fee to the HERNs.

On December 1, 2005, the Superintendent issued a decision to the HERNs determining to withhold the applications for patents in fee, pursuant to 25 C.F.R. § 152.2. That regulation states:

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 had a reasonable opportunity to acquire the land from the applicant.

The rule permits the applicant a right of appeal pursuant to 25 C.F.R. Part 2. *Id.*

The HERNs appealed this decision, and the Regional Director vacated it by decision dated February 10, 2006. The Regional Director explained that the Superintendent did not

“explain how certain facts about the tract lead to the conclusion of an adverse effect,” and therefore stated that he “cannot determine if the evidence supports the decision.”

On August 22, 2006, the Superintendent issued a second decision. This time, the Superintendent explained that retention of the lands in trust status was consistent with a 2001 Plan for Integrated Resource Management, 2000-2014 (PIRM), which establishes resource management directives and decisionmaking for the Tribe’s lands. The Superintendent also explained that the action was consistent with the Tribe’s 1976 Land Use Policy (LUP), and the Colville Business Council’s Resolution No. 1997-137, which set forth criteria for selecting possible purchases of land for the Tribe, including lands contiguous to water.¹

The HERNs again appealed to the Regional Director. On September 26, 2006, the Regional Director issued his decision. In his analysis, he cited the PIRM, the LUP, and Resolution 1997-137, to agree with the Superintendent that removal of the land from trust status would adversely affect the best interests of the Tribe because the Allotment is contiguous to Lake Roosevelt. Decision at 5. He also cited 25 C.F.R. § 152.2, which provides authority to withhold action on an application for fee conveyance of trust land if such a finding is made. Nonetheless, he noted that AIPRA was amended in 2004, but the regulations had not been amended to conform to AIPRA’s provision. He explained that a provision of this statute, 25 U.S.C. § 2216(f), applied, and affords an opportunity to the Tribe, before the Secretary approves an application to terminate trust status, to acquire the interest in the parcel by paying fair market value. Noting that the record “does not indicate if an appraisal has been requested and/or obtained at this time, [or] if the Tribe is prepared to acquire” the land by paying fair market value, the Regional Director issued the following decision:

It is my decision that the Superintendent notify the Tribe of their opportunity to acquire the undivided interests in Allotment 101-1230 and keep the undivided interests in trust status. An appraisal needs to be requested and obtained and *the Tribe must be prepared to pay the fair market value for the undivided interests. If the Tribe is not able to pay the fair market value, then the Superintendent must approve the fee patent applications* and complete the process accordingly.

Decision at 5-6 (emphasis added).

¹ The PIRM, the LUP, and Resolution 1997-137 are included in the record before us.

The HERNs appealed this decision to this Board. In their Notice of Appeal, they raise six arguments challenging the “decision to withhold the application for patent in fee.”

(1) They question why BIA would withhold approval of a fee patent for a parcel that is already “approximately half in fee status” and argue that they wish to protect the rights of their heirs. Notice of Appeal at 1. (2) They argue that BIA has interfered with tenants and a lease on the property. *Id.* (3) They maintain that the Tribe interfered with leasing of the parcel. *Id.* (4) They complain as to the process by which trust estates are transferred to heirs as life estates, and assert that BIA “seizes land without payment.” *Id.* at 2. (5) They claim that the Colville Business Council has allowed others to obtain fee patents for land held in trust. *Id.* Finally, (6) they deny that the land is a “Key Tract” for access to Lake Roosevelt because they claim the Allotment has insignificant access to water.

No other pleadings or brief were submitted.

Discussion

Decisions issued concerning whether or not to approve the issuance of fee patents for trust or restricted lands under 25 C.F.R. § 152.5(a) are committed to BIA’s discretion. *Oglala Sioux Tribe v. Commissioner of Indian Affairs*, 7 IBIA 188, 206 (1979), *aff’d*, 540 F. Supp. 503 (D.S.D. 1982), *aff’d*, 708 F.2d 326 (8th Cir. 1983). The Board’s role in reviewing BIA discretionary decisions is limited. The Board does not substitute its judgment for BIA’s, but instead reviews the BIA decision to ensure that all legal prerequisites to the exercise of discretion are followed. *Pawnee v. Acting Anadarko Area Director*, 32 IBIA 273, 274 (1998); *see generally* Cohen’s Handbook of Federal Indian Law § 16.03[4][b] at 1050-51 (2005 ed.).

We cannot find that the Regional Director abused his discretion here. In fact, the Regional Director reviewed the record and correctly applied AIPRA to the undisputed facts. In relevant part, 25 U.S.C. § 2216(f)(1)² states:

² Section 2216 was enacted in 2000 as part of AIPRA, and subsection 2216(f) was amended in October 2004. It is this latter version of section 2216(f) that we apply here, as it was in effect at the time of BIA’s decision. *See Quantum Entertainment, Limited v. Acting Southwest Regional Director*, 44 IBIA 178, 192-93 (2007), *appeal pending*, No. 1:07-CV-01295 (D.D.C. July 20, 2007) (statute in effect at time of agency’s decision is applied unless application alters legal consequences of conduct performed before the effective date of amendment).

. . . [B]efore the Secretary approves an application to terminate the trust status or remove the restrictions on alienation from a parcel of, or interest in, trust or restricted land, the Indian tribe with jurisdiction over the parcel *shall* have the opportunity –

. . .
(B) in a case in which there is no purchase price offered, to acquire the interest in the parcel by paying the fair market value of the interest.

(Emphasis added.) The Regional Director simply applied this statutory authority and we thus find that all legal prerequisites to the exercise of Secretarial discretion have been met. He directed the Superintendent to appraise the property and allow the Tribe to purchase the land at fair market value; if the Tribe declined the opportunity, he directed the Superintendent to issue a fee patent as the Herns requested. We find little discretion in the statute, and no abuse of that discretion by the Secretary.

Appellants persist in challenging the application of 25 C.F.R. § 152.2, which allows the Regional Director to withhold a decision on an application until the Tribe is given an opportunity to purchase the land. In his decision, the Regional Director applied the plain language of AIPRA and not the regulation. To the extent Appellants object to the Tribe's right of first refusal to purchase the land, or claim that it is an unlawful "seizure," their objection is to a Federal statute and the Board consistently has held that it lacks authority to declare a statute unconstitutional. *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 247 (2005). The Regional Director was obligated to and correctly did follow the law. Moreover, the Regional Director assured the Herns that, should the Tribe decline to purchase the land, the Superintendent must issue a fee patent to the brothers.

Appellants' assertions on appeal do not alter this outcome. It is clear that Appellants have objections to the way in which their land interests have been managed by BIA and by tribal authorities. In particular, they object to the manner in which their land was or was not leased, and complain that BIA interfered with the lease and tenants of the property. *See* Notice of Appeal at paragraphs 2 and 3. While these assertions may form the foundation for Appellants' decision to seek a fee patent, they do not constitute a reason to find the Regional Director's decision to be in error.

Once they applied for land to be conveyed to them in fee and out of trust status, AIPRA effectively required BIA to give the Tribe a right of first refusal to purchase the Herns' interests at fair market value. And if the land is transferred in fee to the Herns, it likely will be subject to State and local taxes, a right of condemnation, and local regulation.

Should the HERNs wish not to sell their interests to the Tribe under AIPRA, or should they wish not to be subject to State and local restrictions, they may withdraw their applications. A fee patent cannot be issued to the HERNs, however, unless the Tribe elects not to purchase their interests.

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 Board affirms the Regional Director's September 2006, decision.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.