



INTERIOR BOARD OF INDIAN APPEALS

City of Lincoln City, Oregon v. Portland Area Director, Bureau of Indian Affairs

33 IBIA 102 (01/14/1999)

Judicial review of this decision:

Affirmed, *City of Lincoln City v. United States Department of Interior*,
229 F. Supp. 2d 1109 (D.Ore., 2001*), stipulated dismissal,
No. 01-35616 (9th Cir. Mar. 21, 2002)

*The District Court's decision was issued on April 17, 2001; the West Reporter incorrectly identifies the year as 2002.



United States Department of the Interior

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

CITY OF LINCOLN CITY, OREGON

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-92-A

Decided January 14, 1999

Appeal from the approval of a fee-to-trust land acquisition for the Confederated Tribes of Siletz Indians of Oregon.

Affirmed.

I. Indians: Lands: Trust Acquisitions

In analyzing a request for trust acquisition under 25 C.F.R. § 151.10(c), the Bureau of Indian Affairs must take into consideration all facts known to the Bureau, or which should be known to the Bureau, which relate to the purpose for which the property proposed for trust acquisition is to be used. The Bureau's consideration of these facts must be reflected in the decision to grant or deny the request for trust acquisition.

APPEARANCES: Christopher P. Thomas, Esq., Portland, Oregon, for the City of Lincoln City; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Craig J. Dorsay, Esq., Geoffrey A. Strommer, Esq., and Craig A. Jacobson, Esq., Portland, Oregon, and Marsha Kostura Schmidt, Esq., Washington, D.C., for the Confederated Tribes of Siletz Indians.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant City of Lincoln City, Oregon, seeks review of a January 7, 1997, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), approving a fee-to-trust land acquisition for the Confederated Tribes of Siletz Indians (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

By Tribal Resolution dated August 5, 1995, which was transmitted to the Superintendent, Siletz Agency, BIA (Superintendent), on August 19, 1995, the Tribe requested that the United States take into trust for it approximately 37 acres of land which it owned in fee in Lincoln City, Oregon. The property was described as consisting of several parcels, designated the “Lakeside Village” site, located in sec. 2, T. 7 S., R. 11 W., Willamette Meridian, Lincoln County, Oregon. When the Tribe purchased the property, it was the subject of a development plan which had been approved by local authorities, including Appellant. In requesting that the property be taken into trust, the Tribe stated its intention to proceed with the approved development plan.

The Superintendent reviewed the fee-to-trust request under the land acquisition regulations in 25 C.F.R. Part 151; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335 (1994); 1/ and the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1455-1465. On October 18, 1996, he recommended that the acquisition be approved. The Area Director reviewed and concurred with the Superintendent’s recommendation on January 7, 1997. The Superintendent’s 23-page memorandum recommending approval of the trust acquisition, as signed by the Area Director, constitutes the decision under review. Briefs were filed on appeal by Appellant, the Area Director, and the Tribe.

Standard of Review and Burden of Proof

On September 12, 1997, the Board issued a decision in Village of Ruidoso, New Mexico v. Albuquerque Area Director, 31 IBIA 143 (Ruidoso I). The Board referred that appeal to the Assistant Secretary - Indian Affairs for clarification of the standard of review the Assistant Secretary intended the Board to use in trust acquisition cases. In its decision, the Board noted that the final determination of whether or not to acquire land in trust status is committed to BIA’s discretion; that the Board’s authority to review BIA discretionary decisions is limited; that the Board had previously reviewed trust acquisition decisions in accordance with its limited review authority over discretionary decisions; and that the Assistant Secretary’s filings in Ruidoso I raised questions about what standard of review she intended the Board to use in the future. The Board stated that it would stay all trust acquisition appeals before it until it received clarification from the Assistant Secretary. In accordance with that statement, the Board stayed its consideration of this appeal on September 23, 1997.

The Assistant Secretary’s response in Ruidoso I requested that the Board review trust acquisition appeals under the standard set out in McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997). In Ruidoso I, 31 IBIA at 154, and in a second decision issued on April 14,

1/ All further citations to the United States Code are to the 1994 edition.

1998, Ruidoso II, 32 IBIA 130, 131, the Board concluded that the McAlpine standard was similar to the standard of review which it first fully articulated in City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). As stated in Eagle Butte, decisions 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." 17 IBIA at 196; 96 I.D. at 330.

On April 17, 1998, the Board lifted the stay in this case. It provided the parties with copies of Ruidoso II, and gave them an opportunity to submit statements concerning any effect they believed the decision in Ruidoso II might have on this appeal. Only the Area Director believed that Ruidoso II necessitated any modification of the arguments previously presented. He stated that a discussion in his Answer Brief relating to the scope of the Board's review authority could be disregarded.

The Board agrees with the Area Director's assessment of the application of Ruidoso II to his discussion of the standard of review in trust acquisition appeals.

In this case, however, Appellant has challenged both legal conclusions reached by the Area Director and his exercise of discretion. The Board is not restricted in its authority to review BIA legal determinations. It therefore divides Appellant's objections according to whether they challenge the Area Director's legal determinations or his exercise of discretion.

In regard to BIA's legal determinations, Appellant bears the burden of proving that the Area Director's decision was in error or not supported by substantial evidence. *See, e.g., Ewing v. Acting Billings Area Director*, 29 IBIA 264, 266 (1996). In regard to BIA's exercise of discretion, Appellant bears the burden of proving that the Area Director did not properly exercise his discretion. *See, e.g., Soper v. Acting Anadarko Area Director*, 29 IBIA 182 (1996). In reviewing objections challenging the exercise of discretion, the Board will apply the McAlpine/Eagle Butte standard of review.

Discussion and Conclusions

Appellant's Opening Brief consists of a list of documents upon which it relies, including six documents from the administrative record, its Notice of Appeal to the Board, and two new documents that were attached to the Brief. Although Appellant made no arguments in its Opening Brief, its Notice of Appeal contained 22 numbered paragraphs setting forth its objections to the Area Director's decision. The Board follows the Area Director's lead in referring to the numbered paragraphs in Appellant's Notice of Appeal for a statement of its arguments on appeal.

The Board first addresses Appellant's objections which challenge the Area Director's decision on legal grounds.

Appellant contends that the trust acquisition is unconstitutional. It argues in Paragraph 19 that the acquisition violates Article IV, section 3, of the United States Constitution, and the Act of February 14, 1859, 11 Stat. 383, admitting Oregon into the Union; in Paragraph 20 that the acquisition violates Article IV, section 4, of the United States Constitution; and in Paragraph 21 that 25 U.S.C. § 465 is unconstitutional for the reasons set forth in South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1996). ^{2/} As discussed below, 25 U.S.C. § 465 is the primary statute under which this trust acquisition was approved. The Board interprets Paragraphs 19, 20, and 21 as attacking the constitutionality of section 465.

As it has stated on a number of occasions, the Board lacks authority to declare an act of Congress unconstitutional. See Ruidoso II, 32 IBIA at 133, and cases cited therein. Accordingly, the Board lacks jurisdiction to address Appellant's contentions in Paragraphs 19, 20, and 21 of its Notice of Appeal that 25 U.S.C. § 465 is unconstitutional.

Several of Appellant's objections are based on its contention that BIA could not adequately consider this trust acquisition request unless the Tribe entered into a legally binding agreement that it would not deviate from the previously approved plan for the development of the property, and that it would not change the use of the tract in the future. Appellant argues at pages 2-3 of its Reply Brief:

If a tribe proposes a fee-to-trust transfer with little specificity as to use, the tribe must bear a heavy burden in guiding the proposed transfer through the evaluation process under 25 CFR Part 151, under [NEPA], and under the [CZMA]. Each of these evaluation processes requires justification of the proposed transfer in relation to specific criteria. If there is little specificity as to how the tribe will use the land, the evaluation process requires the consideration, in relation to the applicable criteria, of virtually all of the reasonably likely future uses of the land by the tribe. This is a large task, although in appropriate circumstances it is not an insurmountable task. The benefit to a tribe from this approach is that if a fee-to-trust transfer is approved, the tribe has many options as to how to use the land in the future.

On the other hand, if a tribe proposes a fee-to-trust transfer for a specific use, this greatly diminishes the difficulty of justifying the proposed transfer. This

^{2/} South Dakota was vacated and remanded by the Supreme Court. 117 S.Ct. 286 (1996). Although Appellant acknowledges that the case was remanded, it does not mention that the court of appeals' decision was vacated.

is because, if the transfer is for a specific use, the evaluation process requires consideration, in relation to the applicable criteria, of only the specifically proposed use of the land. The central point of [this] appeal, however, is that such a limited consideration is legally appropriate only if the tribe's use of the land will be legally limited to the use on which the evaluation was based. Thus the "down side" to a tribe from this approach is that if a fee-to-trust transfer is approved, the tribe does not have an option as to how to use the land in the future.

In this particular case, the [Tribe] asked the [BIA] to review the Tribe's proposed fee-to-trust transfer of the Lakeside Village site on the basis of a specific, detailed proposed use of the land. The central point of [this] appeal is that, given the manner in which the [Tribe] chose to present the proposed fee-to-trust transfer, an approval of the transfer can be valid only if the Tribe is legally obligated to develop the Lakeside Village site in a manner consistent with the use as proposed by the Tribe.

* * * * *

In line with its central point, [Appellant] has requested that the Department of [the] Interior, if it wishes to approve the proposed fee-to-trust transfer based on consideration of a specific development, make the transfer subject to a reverter of title to the Tribe in the event the Tribe does not develop the Lakeside Village site in a manner that is consistent with the proposed development that was the basis for the approval. Alternatively, [Appellant] has requested that the Department make any transfer subject to some other equivalent condition that would allow enforcement of the use that was the basis for the approval.

The Tribe contends that this argument constitutes an attack on its sovereignty by attempting to subject trust land to state and local laws and regulations; that no trust acquisition review would ever be completed if BIA had to examine all potential uses for the property, for the unlimited future; and that there is no statutory authorization for a reversion of the trust patent to fee status.

Appellant cites no legal authority for its proposal that the Department impose restrictions upon future uses of the property. Instead, it argues only that 25 U.S.C. § 465 does not prohibit the imposition of restrictions and that review under NEPA and CZMA "can have validity only if there is an assurance that development will be in accord with specific use." Reply Brief at 4.

The acquisition of land in trust for the Tribe is governed by 25 U.S.C. § 711a(a), which is part of the Siletz Restoration Act (25 U.S.C. §§ 711-711f), and 25 U.S.C. § 465. 25 C.F.R. § 151.10(c) requires BIA to consider the use for which a tribe wishes to acquire land in trust.

Nothing in the Restoration Act, 25 U.S.C. § 465, or 25 C.F.R. Part 151 authorizes the Department to impose restrictions on the Tribe's future use of land which is taken into trust.

The Board finds that Appellant has failed to provide support for its legal argument that BIA has authority to restrict a fee-to-trust land acquisition.

Appellant also argues that, absent the imposition of restrictions on the Tribe's use of the land, BIA is required to examine every possible use that could be made of the property. Appellant cites no authority for this position.

[1] In Ruidoso II, the Board held that

[i]n order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property.

32 IBIA at 139.

The Board thus requires that BIA base its decision on both the information provided by the tribe as to its proposed use of the land and any other information which BIA knows, or should know, which has some bearing on the present or future use of the land. At least under the circumstances of this case, the Board declines to impose any additional restrictions on BIA's consideration of the "use" criterion in 25 C.F.R. § 151.10(c).

The Board finds that BIA considered the proposed use of the land articulated by the Tribe and that Appellant has failed to show that BIA knew, or should have known, that the Tribe intends to use this tract for any purpose other than the one which it articulated.

Therefore, the Board rejects the objections Appellant raises in Paragraphs 1, 9, 14, and 15 of its Notice of Appeal.

In Paragraph 2 of its Notice of Appeal Appellant contends that the Area Director erred by basing his decision in part on a business plan submitted by the Tribe because BIA's withholding of portions of the plan deprived it of the opportunity to review the entire plan. The Area Director states that two pages of the plan were withheld under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, because those pages "contain[ed] very sensitive detailed projections of revenues and income as well as projections of profits and margins based upon the projected revenues and expenses." Area Director's Answer Brief at 5. BIA's decision to withhold these two pages was upheld by the Departmental FOIA Appeals Officer on August 14, 1996, almost 5 months before the Area Director issued his decision.

Appellant's right to appeal from the Department's FOIA decision was clearly set out by the FOIA Appeals Officer. Appellant has not argued that it timely appealed the Department's FOIA decision. The Board declines to hold that the Area Director erred in relying on the Tribe's business plan when Appellant failed to pursue its right to seek judicial review of the Department's decision under the FOIA not to disclose two pages of that document.

In Paragraph 12 Appellant contends that an amendment to the Oregon Constitution which became effective on January 1, 1997, prohibits shifting property tax burdens from one group of taxpayers to another. It contends that this amendment applies to the present case because the Tribe has not completed negotiations for in lieu payments to local governmental entities.

Appellant does not provide a copy, or even a quotation, of this constitutional amendment. It also does not attempt to show how the amendment applies to this case. The Board concludes that Appellant has failed to carry its burden of showing that the Area Director's decision was in error under this State Constitutional amendment, and therefore rejects the objection raised in Paragraph 12 of Appellant's Notice of Appeal.

In Paragraph 16 Appellant asserts that it is unaware of any requirement that new determinations under NEPA must be prepared if the Tribe changes the use of the land. As both the Area Director and the Tribe note, if the Tribe were to use the land in any way which necessitated action by BIA, and which differed significantly from the proposed use, new determinations under NEPA would be required.

In Paragraph 22 Appellant contends that the Area Director erred in approving the trust acquisition prior to the completion of the CZMA review process. That review process involves consideration of BIA's Federal Consistency Determination by the Oregon Department of Land Conservation and Development (DLCD), with a right of appeal to the Oregon Land Conservation and Development Commission (LCDC). The Area Director notes that, although the DLCD had not completed its review of the Consistency Determination when the Superintendent recommended approval of the trust acquisition request, it had done so before he issued his decision. The Area Director contends that, on March 27, 1997, the LCDC affirmed the DLCD's decision to agree with the Consistency Determination. Appellant sought review of this decision in State court; the matter was removed to Federal court; and, on August 26, 1998, the matter was remanded to State court after a determination that Appellant's complaint arose solely under Oregon law and did not challenge the BIA Consistency Determination. The information before the Board indicates that judicial review of the CZMA review process is ongoing.

The Board finds that, if a State court determines that the LCDC erred, BIA may need to review its position. However, it declines to hold that the Area Director erred in issuing his decision prior to the completion of the entire administrative and judicial review process.

The Board now turns to Appellant's objections which challenge the Area Director's exercise of discretion in his consideration of the criteria in 25 C.F.R. § 151.10.

As in Ruidoso II, the Area Director's decision here includes a discussion of each of the criteria in 25 C.F.R. § 151.10, with the exception of criterion (d), which applies only to trust acquisitions for individuals. The decision also addresses the concerns raised during the review process by several entities, including Appellant. Under the standard of review applicable here, the Board does not undertake to re-analyze or re-weigh this acquisition request under the criteria in section 151.10. Rather, the Board's task is to determine whether BIA's decision was based on a consideration of the relevant factors.

On appeal, Appellant raises many of the same objections which it raised during the BIA review process. Those objections were specifically addressed in the Area Director's decision. Appellant's Notice of Appeal presents no new arguments. The Board finds that the Area Director fully considered these objections and that his analysis is reasonable. It therefore rejects the objections raised in Paragraphs 3, 4, 5, 6, 8, 11, 13, and 17.

The objections raised in at least Paragraphs 7, 10, and 18 were also fully considered in the Area Director's decision and/or the Federal Consistency Determination prepared under the CZMA. As presented in Appellant's Notice of Appeal, these paragraphs include objections concerning the Tribe's failure to guarantee the future use of the property. Thus, it appears that these objections challenge both the Area Director's interpretation of his authority to take land into trust and his exercise of discretion. For the reasons discussed above, the Board rejects the objections raised in Paragraphs 7, 10, and 18.

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 Portland Area Director's January 7, 1997, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge