



INTERIOR BOARD OF INDIAN APPEALS

Christine A. May; and Washoe County, Nevada v. Acting Phoenix Area Director,
Bureau of Indian Affairs

33 IBIA 125 (01/28/1999)



United States Department of the Interior

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

CHRISTINE A. MAY
and
WASHOE COUNTY, NEVADA

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-151-A, 97-161-A

Decided January 28, 1999

Appeal from a decision to take a 1.1-acre tract of land in trust for the Reno-Sparks Indian Colony.

Affirmed.

1. Indians: Lands: Trust Acquisitions

When an Indian tribe requests trust acquisition of land that is not contiguous to the Tribe's reservation, the Bureau of Indian Affairs must apply the criteria in 25 C.F.R. § 151.11 as well as those in 25 C.F.R. § 151.10.

APPEARANCES: Christine A. May, pro se; Russell S. Nash, Jr., Esq., Reno, Nevada, for Washoe County, Nevada; Janet L. Wong, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director; Patrick L. Smith, Esq., Missoula, Montana, for the Reno-Sparks Indian Colony.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Christine A. May (May) and Washoe County, Nevada (County) seek review of a June 18, 1997, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), approving the trust acquisition of a 1.1 acre tract of land in Washoe County, Nevada, for the Reno-Sparks Indian Colony (Tribe). Appellants were informed of the decision by letters dated June 25, 1997. For the reasons discussed below, the Board affirms the Area Director's decision.

In 1993, the Tribe purchased 4.9 acres of land in Washoe County, Nevada, near the community of Verdi and about 15 miles from the Tribe's reservation. The property is close to the California-Nevada border, immediately off U.S. Highway 80, and adjacent to a commercial establishment known as Gold Ranch, which includes a casino, truck stop, and restaurant. Because of the location of the property, the Tribe considered it to be well suited for a new tribal

smoke shop, and possibly a recreational vehicle park. During 1994, representatives of the Tribe began a series of meetings with the Verdi Citizen Advisory Board and with various officials of the County for the purpose of discussing the Tribe's plans for the property. Throughout 1994 and into 1995, the Tribe continued to communicate with the County, discussing, *inter alia*, the possibility of a land exchange between the Tribe and the County. The Tribe agreed to, and did, submit its development plans to the County's Department of Development Review and the County's Design Review Committee for comment. Because of objections from local residents, the Tribe abandoned plans for a recreational vehicle park and decided to proceed only with its smoke shop project, which it planned to restrict to a 1.1-acre portion of the 4.9-acre tract (the 1.1 acres closest to the existing commercial development at Gold Ranch). ^{1/}

In light of this change in plans, the Tribe also decided to limit its trust acquisition request to the 1.1 acres planned for the smoke shop. Therefore, its formal request, which it submitted to the Superintendent, Western Nevada Agency, BIA, on July 19, 1995, covered only 1.1 acres. The County and the Tribe continued their efforts to effect a land exchange with respect to the remaining 3.8 acres.

The Tribe's trust acquisition request described its intent to develop a smoke shop and explained that it had an agreement with the State of Nevada under which it would be able to

^{1/} Some of the lengthy communications between the Tribe and the County are reflected in a Feb. 28, 1995, letter from the Director, Washoe County Dep't of Development Review, to the Verdi Citizen Advisory Board:

"[T]he tribal representatives have expressed a desire to work with the community so that any commercial venture is one that the Verdi community can look to with pride. The [Tribe's] officials have demonstrated this interest by being aware of the regulations that the county would ask to be considered in any commercial development. I believe that the [Tribe] understands the need to separate commercial development from the residential uses by offering a substantial buffer between the location of the commercial venture and the existing residences. The [Tribe's] officials have indicated a desire to have the buffer retained as open space in perpetuity and have offered some suggestions as to how that can be accomplished. * * *

"[The Tribe's] officials also demonstrated to me that they understand the need to integrate the design and size of the development with the neighborhood. Discussions on sign size and amount have centered around compliance with the current county regulations. Staff has offered to work with the [Tribe] on siting, landscaping and access to the selected site so that adherence with the county's standards could be achieved. The [Tribe's] officials have arranged to visit with staff on these issues. The [Tribe's] representatives have proposed to me a rather modest commercial venture with no appurtenant recreational vehicle park."

collect taxes on cigarettes and other items, provided the sales occurred on trust land. ^{2/} Thus, the Tribe noted, trust status was critical for the Tribe's plans. The Tribe also explained that there was no further opportunity for development on the Tribe's small existing reservation.

Once the Tribe had submitted its formal request to BIA, BIA staff began to participate in the Tribe's discussions with the County concerning a possible land exchange and mitigation of the concerns of Verdi residents. Discussions continued through 1995 and into 1996, during which time the Tribe's trust acquisition application was held in abeyance. By April 1996, it appeared that no suitable County land would be found for exchange, ^{3/} and the Tribe therefore requested that BIA proceed to process its application. On April 16, 1996, the Superintendent transmitted the Tribe's application to the Area Director, together with a number of supporting documents. Communications between the Tribe, BIA, and the County continued through the summer and into the fall.

The issue of the Tribe's trust acquisition proposal was addressed at a November 12, 1996, meeting of the County's Board of County Commissioners. Tribal representatives and the Superintendent attended the meeting. The Tribal Chairman made a presentation to the Commissioners, in which he described the Tribe's plans for the property, responded to objections raised by the Verdi residents, and described the Tribe's efforts to accommodate the residents' concerns.

The Commissioners voted to oppose the trust acquisition. On November 25, 1996, they wrote to the Area Director, stating:

After hearing all public testimony, the Board concluded the following regarding the [Tribe's] application for trust status:

1. The Board believes the impact on the County resulting from the removal of the land from the real property and personal property tax rolls would be minimal.

^{2/} With regard to this agreement, the Tribe states in this appeal:

"The cornerstone to economic self-determination for the [Tribe] in recent years has been a tax agreement between the [Tribe] and the State of Nevada. Under the Agreement, the [Tribe] assesses a tribal sales tax and excise tax on retail sales of cigarettes, rather than the state, so long as the tribal tax is equal to or greater than the State tax, and so long as the underlying land is in trust."

Tribe's Answer Brief at 3.

^{3/} The Tribe states in this appeal that, "in 1998, the [Tribe] exchanged [with the County] a one acre tract closest to the Verdi residences as a buffer zone." Tribe's Answer Brief at 11.

2. The Board has concerns regarding potential conflicts of land use and feels that the only way to address those concerns fairly for the property owner and the public, is to have the project reviewed in accordance with the Washoe County Development Code rules and regulations and is, therefore, opposed to the Bureau granting trust status for the Verdi property.

BIA continued to process the Tribe's trust acquisition application. An Environmental Assessment for the acquisition was prepared at the Agency and, on March 28, 1997, the Superintendent signed a Finding of No Significant Impact.

On June 18, 1997, the Area Director signed a memorandum, addressed to the Phoenix Field Solicitor, in which he analyzed the proposed trust acquisition under the criteria in 25 C.F.R. § 151.10 and stated that he was granting preliminary approval of the Tribe's request. He then requested that the Field Solicitor issue a preliminary title opinion so that BIA could proceed with the acquisition.

On June 19, 1997, the Area Director wrote to the Tribe, stating his intent to take the 1.1 acre tract in trust for the Tribe and citing his June 18, 1997, memorandum.

On June 25, 1997, the Area Director sent identical letters to May, the County, and others, informing them of the decision. Each letter stated:

After our review and evaluation of the Tribe's request in this case, we have concluded that the use of the property for economic development would promote tribal self-sufficiency, and that the acquisition would thus satisfy 25 CFR 151.3(a). We have also determined that the acquisition would be consistent with the applicable guidelines and would be in the best interest of the Tribe. Therefore, by memorandum dated June 18, 1997, this office preliminarily approved the trust acquisition of the 1.1-acre parcel. Enclosed is a copy of a letter dated June 19, 1997, to Mr. Arlan D. Melendez, Chairman of the Reno-Sparks Indian Colony, reflecting our **intent** to take the 1.1-acre parcel in trust.

Area Director's June 25, 1997, Letter at 2. Each letter also advised the recipient of a right to appeal to the Board.

The Board received a notice of appeal from May on July 16, 1997. May's notice of appeal stated general objections to the trust acquisition but did not state how the acquisition would affect her personally and thus did not demonstrate that she had standing to pursue her appeal. By order of July 22, 1997, the Board gave her an opportunity to show standing. Before May filed her response, the County filed its appeal. Because the County clearly had standing, the Board found it unnecessary to determine May's standing immediately. It therefore consolidated the two appeals and gave the parties an opportunity to address May's standing during the briefing period.

The appeal was stayed on September 23, 1997, pending a final decision in Village of Ruidoso, New Mexico v. Albuquerque Area Director. See 31 IBIA 143 (1997). Following the issuance of a final decision in Ruidoso, 32 IBIA 130 (1998), the stay was lifted, and the briefing schedule was reinstated. Briefs were filed by the County, the Area Director, and the Tribe. May did not file a brief.

On December 21, 1998, the Tribe filed a Motion for Imposition of Bond and Expedited Consideration. The motion is now moot and is therefore denied.

Discussion and Conclusions

The County contends that, at a minimum, the Area Director's decision must be vacated and the matter remanded to him because he failed to analyze the proposed acquisition under the criteria in 25 C.F.R. §§ 151.10 and 151.11 and failed to discuss the concerns raised by the County. ^{4/} The County would prefer, however, that the Board overrule the Area Director outright and "rule that as a matter of law, the facts could not support the approval of the [Tribe's] request for trust acquisition of the 1.1 acre Verdi parcel." County's Opening Brief at 9.

^{4/} In its Opening Brief, the County states that, on July 15, 1997, its Board of County Commissioners authorized appeal of the Area Director's decision and specified the following reasons for appeal:

"1. The Board has concerns regarding potential conflicts of land use and feels that the only way to address those concerns fairly for the property owner and neighboring public is to have the project reviewed in accordance with the Washoe County Development Code rules and regulations;

"2. It is the Board's opinion that the proposed commercial development is not compatible with the residential land use designation of Low Density Suburban assigned to the property, nor is it compatible with the surrounding residentially developed neighborhood;

"3. The Board has concerns over the possible negative affects [sic] on the scenic and environmental quality of the surrounding residential area as it relates to design, signage, lighting, noise and traffic;

"4. The Board feels that allowing the proliferation of 'islands' that are not subject to Washoe County's Comprehensive Plan and Development Code defeats the purpose of the County's planning efforts, and does not afford the public the same opportunity for input in the development review process. In addition, approving trust status on non-contiguous property removes the certainty that established land use designations provide to adjacent property owners and prospective land purchasers."
County's Opening Brief at 3-4.

Only the first of these reasons was mentioned in the County's Nov. 25, 1996, submission to BIA. The County clearly has no basis to fault the Area Director for not addressing the remaining objections, which the County never submitted to him.

In fact, however, although he had no opportunity to address the County's new objections per se, the Area Director touched on all these areas of concern in his June 18, 1997, memorandum.

The latter course of action must be rejected summarily. As the Board has stated on many occasions, a BIA decision to take land into trust is a decision based on the exercise of discretion. E.g., City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1998). Although the Board may fully review any legal conclusion reached in an otherwise discretionary BIA decision, id., the County has not identified or challenged any legal conclusion reached by the Area Director. Nor has it stated any legal basis upon which the Area Director's decision might be overturned.

The Board has often described the scope of its review authority with respect to decisions based on the exercise of discretion. See, e.g., Lincoln City, 33 IBIA at 104:

The Board does not substitute its judgment for BIA's in decisions based upon the 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].

As the Board also stated in Lincoln City, an appellant seeking to challenge a discretionary BIA decision bears the burden of proving that BIA did not properly exercise its discretion. Id.

The County correctly notes that neither the Area Director's June 19, 1997, letter nor his June 25, 1997, letter includes any analysis of the criteria in 25 C.F.R. §§ 151.10 and 151.11. However, as the Area Director and the Tribe point out, an analysis under sec. 151.10 was contained in the Area Director's June 18, 1997, memorandum.

Citing Ruidoso, the County argues that analysis of the criteria was required to have been included in the Area Director's decision. It then contends that the June 18, 1997, memorandum was "clearly not a part of the decision." County's Reply Brief at 5. The County evidently construes the June 19, 1997, letter to the Tribe as the Area Director's decision. Although it is conceivable that the Area Director intended the June 19, 1997, letter to constitute his decision, it appears more likely that he intended the June 18, 1997, memorandum to serve that function. The memorandum states at page 22: "[W]e are granting preliminary approval." Further, the June 25, 1997, letter states that, in the June 18, 1997, memorandum, BIA had "preliminarily approved the trust acquisition of the 1.1-acre parcel."

Admittedly, the June 25, 1997, letter is less than crystal clear as to which document was intended to constitute the Area Director's decision. It refers, not only to the June 18, 1997, memorandum, but also to the June 19, 1997, letter to the Tribe. Further, the June 25, 1997, letter enclosed a copy of the June 19, 1997, letter but not a copy of the June 18, 1997, memorandum. On balance, however, the Board finds that the record is sufficiently clear to support a conclusion that the June 18, 1997, memorandum constitutes the Area Director's decision. The Board further finds that, even if the June 19, 1997, letter is considered to be the Area Director's decision, the

June 18, 1997, memorandum, upon which the letter depends, must be deemed to have been incorporated into that decision.

The County states that it was not sent a copy of the June 18, 1997, memorandum and "has no idea what the memorandum contains." County's Reply Brief at 5. Ideally, the Area Director would have enclosed a copy of the memorandum with his June 25, 1997, letter or offered to furnish a copy upon request. While he did not do either of these things, the Area Director did put the County on notice of the June 18, 1997, memorandum and of the fact that, in that memorandum, he had "preliminarily approved the trust acquisition." Thus, the County was on notice that the June 18, 1997, memorandum was a critical document in the trust acquisition process. Not having received a copy of the memorandum, the County could easily have requested one from the Area Director. ^{5/} The Board finds that the County must bear responsibility for its failure to know the contents of the memorandum.

Contrary to the County's allegations, the Area Director analyzed the trust acquisition under all the criteria in 25 C.F.R. § 151.10, with the exception of criterion (d), which applies only to acquisitions for individuals. Further, contrary to the County's allegations, he discussed in some detail the County's expressed concerns about potential conflicts in land use.

With respect to potential conflicts in land use, the County contends that the Area Director erroneously relied on the Tribe's statement that the property was zoned commercial (C-2), when in fact it is zoned Low Density Suburban (LDS). Thus, the County appears to be contending that the Area Director's analysis under 25 C.F.R. § 151.10(f) was based on a mistake of fact.

The Tribe stated in its July 19, 1995, trust acquisition request that the property was zoned C-2. It appears from the record that the zoning was changed from C-2 to LDS, probably in 1992. The record also shows, however, that a five-year "transition program" was put in place on July 1, 1992, under which a property owner could choose to initiate commercial development under the older C-2 zoning. That period ended June 30, 1997. ^{6/} See, e.g., Feb. 28, 1994, Letter to the Tribe from the Director, Washoe County Department of Comprehensive Planning. Further, the record shows that, under the new LDS zoning, the Tribe's proposed smoke shop would be allowable as a convenience store. See July 23, 1996, Letter to BIA from the Director, Washoe County Department of Development Review. It clearly appears that, under either the old or the new

^{5/} Alternatively, the County could have requested a copy of the memorandum, either from the Area Director or the Board, after these appeals were docketed. The County was put on notice that the memorandum was a part of the record for these appeals when it received a copy of the table of contents for the record, as an attachment to the Board's notice of docketing.

^{6/} Thus it was in effect on July 19, 1995, when the Tribe submitted its request and, in fact, was still in effect when the Area Director issued his decision.

zoning, development of the property for smoke shop use would be permissible. ^{7/} Thus, the Tribe's minor misstatement about the applicable zoning would have been of little practical consequence, even had it not been corrected.

In any event, the matter was clarified in the County's July 23, 1996, letter to BIA. The Area Director's decision indicates that he was aware of the change in zoning from C-2 to LDS. See, e.g., June 18, 1997, Memorandum at 13-14. The Board concludes that the Area Director's analysis under subsec. 151.10(f) was not based on a mistake of fact as to the zoning applicable to the Tribe's property.

Appellant has not shown that the Area Director improperly exercised his discretion with respect to any of the criteria in 25 C.F.R. § 151.10.

[1] This acquisition is also subject to 25 C.F.R. § 151.11, concerning off-reservation trust acquisitions. Section 151.11 provides:

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

^{7/} Evidently, commercial development would ordinarily require special County approval under either the old or the new zoning (i.e., site plan approval under C-2 zoning or a special use permit under LDS zoning). As County planning officials recognized, the Tribe would not be required to obtain this special County approval to construct a smoke shop on trust land. See Sept. 24, 1996, Memorandum from the Washoe County Dep't of Development Review to the Washoe County Board of County Commissioners at 2-3. As the planners advised the County Commissioners, however, the Tribe had voluntarily submitted its plans to both the County Dep't of Development Review and the County Design Review Committee for comment. Id. at 3.

(d) Contact with state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

As noted above, the Area Director considered all the criteria in sec. 151.10 with the exception of criterion (d). Therefore, subsec. 151.11(a) has been satisfied.

The Superintendent evidently wrote to the County prior to September 1, 1995, giving the notice required by subsec. 151.11(d). ^{8/} He wrote to the State on October 27, 1995. On August 22, 1996, BIA again gave the County formal notice under subsec. 151.11(d). BIA accepted and considered the comments which the County submitted on November 25, 1996, more than 30 days after August 22, 1996. Clearly, subsec. 151.11(d) has been satisfied.

The record includes a copy of the Tribe's business plan for its proposed smoke shop. The plan addresses, *inter alia*, "the anticipated economic benefits associated with the proposed use." The Area Director discussed the Tribe's business plan in connection with his analysis under subsec. 151.10(c) ("the purpose for which the land will be used"). June 18, 1997, Memorandum at 4. Thus, subsec. 151.11(c) has been satisfied.

With respect to subsec. 151.11(b), the Area Director gave "great[] scrutiny to the tribe's justification of anticipated benefits from the acquisition." He recognized that the Tribe's small reservation would not support further development and that the Tribe was in need of additional land for economic development. In addition, he recognized that the tract purchased by the Tribe was ideally located for the Tribe's planned venture, thus increasing the chances that it would be successful. June 18, 1997, Memorandum at 3-4.

The Area Director also gave "great[] weight to the concerns raised" by the County and County residents. *Id.* at 5-15. Further, he took into consideration the substantial efforts made, especially by the Tribe but also by the Superintendent, to accommodate and respond to the concerns expressed by the County and its residents. *Id.* at 7-8, 12, 15-20. ^{9/}

^{8/} Although the Board does not find the Superintendent's first letter to the County in the record, it does find what appears to be a response to such a notice letter. This is a Sept. 1, 1995, letter from the County Dep't of Development Review which discusses tax impact on the County, as well as the ongoing efforts to locate County land suitable for exchange with the Tribe.

On July 23, 1996, the County Dep't of Development Review advised BIA that its Sept. 1, 1995, letter was not an official County position on the trust acquisition.

^{9/} The record shows that the Tribe has made extraordinary efforts to cooperate with the County and its residents and to conform to the County's standards for development. The Tribe's filings

The Board finds that subsec. 151.11(b) has been satisfied.

The Board concludes that the County has failed to show that the Area Director improperly exercised his discretion with respect to any of the requirements in 25 C.F.R. § 151.11.

Having failed to show that the Area Director improperly exercised his discretion under either 25 C.F.R. § 151.10 or § 151.11, the County has failed to carry its burden of proof in this case.

As noted above, the standing of May to pursue her appeal has not been determined. As also noted above, she did not file a brief. May's only arguments are those she made in her notice of appeal and in the response to the Board's July 22, 1997, order. These consist only of her objections to the trust acquisition. She makes no attempt to show that the Area Director improperly exercised his discretion.

For purposes of this decision, the Board assumes, but does not decide, that May has standing here. It finds, however, that May has failed to carry her burden of proof in this case.

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 Area Director's June 18, 1997, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

fn. 9 (continued)
in this appeal, while evidencing an intent to continue its efforts to cooperate with the County, also reflect frustration that its efforts have so far proved futile.

The Tribe's filings also reflect frustration with what it believes is the County's double standard. For instance, the Tribe makes and supports allegations that the County, while continuing to oppose the Tribe's trust acquisition request, has approved expansion of the adjacent Gold Ranch commercial enterprise (including construction of a new building closer to the residential area), and has also approved development of a massive gaming-entertainment complex about three miles away from the Tribe's property. Tribe's Answer Brief at 12-13; Tribe's Brief in Support of Motion for Imposition of Bond and Expedited Consideration at 4-6.

The County does not deny that it has approved the other projects described by the Tribe.