



INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota and Mellette County, South Dakota
v. Aberdeen Area Director, Bureau of Indian Affairs

35 IBIA 16 (04/14/2000)



United States Department of the Interior

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

STATE OF SOUTH DAKOTA
and
MELLETT COUNTY, SOUTH DAKOTA
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 99-3-A, 99-6-A

Decided April 14, 2000

Appeals from a decision to take land in trust for the Rosebud Sioux Tribe.

Affirmed as modified.

1. Indians: Lands: Trust Acquisitions--Indians: Reservations:
Definition

For purposes of trust acquisitions under 25 C.F.R. Part 151, the definition of "Indian reservation" in 25 C.F.R. § 151.2(f) controls "unless another definition is required by the act of Congress authorizing a particular trust acquisition."

2. Indians: Lands: Trust Acquisitions

Even where a trust acquisition is "mandated by legislation," and thus no notice of a trust acquisition request is required to be given to state and local governments under 25 C.F.R. § 151.10, the Bureau of Indian Affairs must still provide interested parties with notice of a decision on the acquisition request in accordance with 25 C.F.R. § 2.7.

APPEARANCES: John P. Guhin, Esq., Pierre, South Dakota, for the State of South Dakota; Michael "Mick" Strain, Esq., White River, South Dakota, for Mellette County, South Dakota; Priscilla A. Wilfahrt, Esq., Field Solicitor, U.S. Department of the Interior, Fort Snelling, Minnesota, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The State of South Dakota and Mellette County, South Dakota seek review of a notice of intent to take land in trust for the Rosebud Sioux Tribe (Tribe) published by the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), on August 26, 1998. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

Background

By Resolution No. 98-48, dated February 13, 1998, the Tribe requested that BIA take approximately 3,400 acres of land in Mellette County, South Dakota, into trust for the Tribe. The resolution stated that the land had been acquired under the provisions of the Act of Dec. 11, 1963, Pub. L. No. 88-196, 77 Stat. 349 (Isolated Tracts Act; the Act), in that it was located within the Tribe's approved land consolidation area and had been purchased with the proceeds of mortgages of isolated tracts in Tripp, Gregory, and Lyman Counties, South Dakota, which had been certified as isolated by BIA. ^{1/}

^{1/} The Isolated Tracts Act provides:

"[N]otwithstanding any other provision of law, upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to exchange or to sell, by public or by negotiated sale, the tribal interests in isolated tracts of land located in Tripp, Gregory, and Lyman Counties, South Dakota, and held by the United States in trust for the tribe: Provided, (1) That the Secretary of the Interior certifies that the tract is isolated in that it is so located or situated that it would be to the economic advantage of the tribe to sell or exchange the tract; * * * (3) that any proceeds from the sale of land under this Act are used exclusively for the purchase of land on the reservation within land consolidation areas approved by the Secretary of the Interior; (4) that title to any land acquired for the tribe under this Act by purchase or exchange shall be taken in the name of the United States in trust for the tribe; * * *.

"Sec. 2. Upon request of the Rosebud Sioux Tribe, South Dakota, acting through its governing body, the Secretary of the Interior is authorized to mortgage tribal interests in isolated tracts of land, in lieu of selling or exchanging them, and the proceeds of the loan secured by the mortgage must be used exclusively for the acquisition of land on the reservation within land consolidation areas approved by the Secretary of the Interior, title to the land acquired being taken in the name of the United States in trust for the tribe."

On July 19, 1964, the Tribe designated Todd and Mellette Counties as its land consolidation area for purposes of the Act. The Assistant Area Director approved the land consolidation area on Mar. 22, 1965.

See Todd County, South Dakota v. Aberdeen Area Director, 33 IBIA 110 (1999), for a discussion of the Act and its history.

Upon review of the Tribe's request, the Area Director concluded that the trust acquisition was "mandated by legislation" and that no notice of the request was required to be given to state and local governments under 25 C.F.R. § 151.10. Therefore, following completion of a Hazardous Substances Determination (see 25 C.F.R. § 151.10(h)) and satisfaction of the title requirements of 25 C.F.R. § 151.13, the Area Director published notice of her intent to take the land into trust. The notice appeared in the Todd County (South Dakota) Tribune and stated:

The Area Director of the Aberdeen Area of the Bureau of Indian Affairs, United States Department of the Interior, has made a final agency determination that the United States will acquire the SW 1/4 Sec.16, S 1/2 Sec. 17, Lots 1, 2, 3, 4; E 1/2 NW 1/4, E 1/2 SW 1/4, SE 1/4 Sec. 18, Lots 1, 2, 3, 4; E 1/2 NW 1/4, E 1/2 SW 1/4, NE 1/4, SE 1/4 Sec. 19, NW 1/4 Sec. 20, Lots 1, 2, 3, 4; E 1/2 NW 1/4, E 1/2 SW 1/4, E 1/2 Sec. 30, Lots 1, 2; E 1/2 NW 1/4, Sec. 31, All in T. 43 N. R. 26 W.; N 1/2, SE 1/4 Sec. 13, E 1/2 Sec. 25, All in T. 43 N. R. 27 W., All in 6th P. M., Mellette County, South Dakota which is located within an approved land consolidation area on the Rosebud Sioux Reservation, in the name of the United States for the benefit of the Rosebud Sioux Tribe. Title to the land acquired is being taken in trust for the tribe pursuant to Public Law 88-196, 77 Stat. 349, as amended, Public Law 91-115, 83 Stat. 190. The United States shall acquire title no sooner than thirty days after this notice is published. This notice is published in accordance with Title 25 Code of Federal Regulations section 151.12 (b) (1997).

Appeals from this notice were filed by the State of South Dakota (Docket No. IBIA 99-3-A) and Mellette County, South Dakota (Docket No. IBIA 99-6-A). The appeals have been consolidated.

Discussion and Conclusions

25 C.F.R. § 151.10 provides:

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

Appellants contend that they should have been given notice and an opportunity to comment under this provision because trust acquisitions under the Isolated Tracts Act are

not "mandated by legislation." In Todd County, *supra*, the Board rejected a similar contention, holding that BIA need not consider the criteria in 25 C.F.R. § 151.10 with respect to a trust acquisition under the Isolated Tracts Act, because such acquisitions were mandated by legislation.

Nothing in Appellants' arguments persuades the Board that Todd County was wrongly decided.

Appellants also argue that the lands in dispute are not within the Rosebud Sioux Reservation. Here, Appellants raise an issue that was not present in Todd County. There was no question in Todd County that the lands in dispute were within the boundaries of the reservation.

In her answer brief, the Area Director notes that Mellette County was held in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), to have been detached from the reservation by the Act of May 30, 1910, 36 Stat. 448. She contends however, that the lands are within the reservation as "Indian reservation" is defined in 25 C.F.R. § 151.2(f). ^{2/} Appellants disagree with the Area Director on this point, devoting a large part of their reply brief to a discussion of the definition of "Indian reservation" in subsec. 151.2(f).

[1] The definition of "Indian reservation" in 25 C.F.R. § 151.2(f) is clearly relevant to trust acquisition decisions. It plays a major role, for instance, in determining which trust acquisition requests are considered under sec. 151.10 (on-reservation acquisitions) and which must be considered under the more stringent criteria in sec. 151.11 (off-reservation acquisitions). The definition in subsec. 151.2(f), however, specifically excepts from its scope those instances where the statute authorizing the acquisition requires a different definition.

As this exception recognizes, the meaning of the term "Indian reservation" or "reservation," for purposes of a specific statute, must first be sought in the statute itself. In this case, the inquiry is a critical one because the Isolated Tracts Act authorizes trust acquisitions only of land "on the reservation." Thus, the trust acquisition of the lands at issue here is "mandated by legislation" only if the lands are "on the reservation" for purposes of the Isolated Tracts Act

^{2/} 25 C.F.R. § 151.2(f) provides:

"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."

Since Rosebud Sioux Tribe was decided in 1977, it has been clear that the present-day reservation is limited to Todd County although, "[w]hen established, the Rosebud Indian Reservation contained somewhat over 3.2 million acres, and covered all or a portion of what later became five counties in South Dakota: Gregory, Tripp, Lyman, Mellette, and Todd." 430 U.S. at 586. The Supreme Court held that a series of statutes enacted in 1904, 1907, and 1910 removed all lands in Gregory, Tripp, Lyman, and Mellette Counties from the reservation.

Prior to Rosebud Sioux Tribe, the Tribe took the position that the reservation boundaries remained as originally established. Others, however, i.e., "the settlers, their descendants, the State of South Dakota and the federal courts," had, from the time the 1904, 1907, and 1910 acts were passed, treated the four affected counties as outside the reservation. 430 U.S. at 585.

The bill which became the Isolated Tracts Act, i.e., H.R. 2467, 88th Cong., 1st Sess., was introduced by Rep. E.Y. Berry on January 24, 1963. 3/ On April 2, 1963, the President of the Rosebud Sioux Tribal Council testified on the bill before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs. He stated:

The boundaries of the Rosebud Reservation cover all of four counties (Todd, Mellette, Tripp and Gregory) and part of one county (Lyman).

The Tribe is the owner of 100% interest, about 225,301 acres of trust land.
* * * Of this 225,301 acres about 211,711 acres are in Todd and Mellette counties.
The remainder is spread in the other three counties * * *.

* * * * *

What the Tribe wants to accomplish is to end up with solid tribal holdings of 100% ownership mainly in Todd and Mellette counties. * * *

* * * * *

3/ An identical bill was introduced in the Senate by Sen. McGovern. S. 711, 88th Cong., 1st Sess.

Todd and Mellette counties are the Tribe's consolidation areas. We do not want to sell any tribal land in those two counties. Accordingly, we ask that the bill be amended to cover only Tripp, Gregory and Lyman counties.

Statement of Cato Valandra, President, Rosebud Sioux Tribal Council, 1-3. 4/

In his testimony, Valandra explicitly stated the Tribe's position as to the boundaries of the Rosebud Reservation. Although the Tribe's view on this point was in conflict with the contemporaneous non-Indian understanding, as that understanding was later described in Rosebud Sioux Tribe, Congress evidently accepted the Tribe's position for purposes of the Isolated Tracts Act.

This acceptance becomes apparent when the title of the Act is considered in conjunction with its text. The Act is titled: "AN ACT to authorize the sale and exchange of isolated tracts of tribal land on the Rosebud Sioux Reservation, South Dakota." (Emphasis added.) The text makes clear that the only sales and exchanges authorized by the Act are those of "isolated tracts of land located in Tripp, Gregory, and Lyman Counties, South Dakota") three counties which, under the general understanding described in Rosebud Sioux Tribe, were no longer considered to be on the reservation. Yet, the statutory language indicates that, for purposes of the statute, the three counties were deemed to be on the reservation.

Despite this language, a colloquy on the House floor suggests that Rep. Berry, the House sponsor of the bill, was aware of, and probably shared, the general understanding described in Rosebud Sioux Tribe:

Mr. GROSS: * * * I should like to ask some member of the committee whether an Indian has priority in the purchase of this land?

Mr. BERRY: * * * [T]here is no provision * * * for the prior [sic] treatment of an Indian, because it is off the Indian reservation. It is in an area ranging from 25 to 75 miles from the Indian reservation.

109 Cong. Rec. 8935 (1963).

4/ A typewritten copy of this statement was submitted by the Area Director as part of a supplemental administration record. The copy shows that it was obtained from the University of South Dakota, I.D. Weeks Library, Special Collections.

Appellants made no objection to the Area Director's submission of a supplemental record. Accordingly, the supplemental record is accepted.

Rep. Berry referred to the lands authorized for sale (those located in Gregory, Tripp, and Lyman Counties) as off the reservation while, as noted above, the Act placed them on the reservation. Thus, Rep. Berry's brief statement on the House floor appears to be at odds with the statutory language. It is clearly conceivable, however, that he intended the term "reservation" to have a more expansive meaning in the Isolated Tracts Act than it had for jurisdictional or other purposes. Particularly in light of the purpose of the Isolated Tracts Act, as discussed further below, Rep. Berry's statement is not persuasive evidence that he intended the term "reservation," as used in the Act, to exclude Mellette County.

President Valandra's statement informed Congress that the Tribe considered Todd and Mellette Counties to be its land consolidation area. Had Congress considered Mellette County to be inappropriate for land acquisitions under the Act, it could easily have amended the bill to limit the area for land acquisitions. However, it took no action in response to Valandra's statement on this point. By contrast, it did act upon Valandra's request to limit the area in which lands could be sold under the Act. ^{5/}

Congress was aware that Mellette County was one of the two counties in which most of the Tribe's landholdings were located. It was also aware that the Tribe wished to further consolidate its landholdings in Todd and Mellette Counties. Thus, to have precluded trust acquisitions in Mellette County under the Act)) the necessary result of defining the reservation to exclude Mellette County)) would have partially frustrated the Tribe's intent and, to that extent, the purpose of the legislation as well.

Further, there is no reason to suppose that Congress would have considered Mellette County to be outside the reservation for purposes of the Act when it considered Gregory, Tripp, and Lyman Counties to be within the reservation. The four counties shared a similar history, see Rosebud Sioux Tribe, 430 U.S. at 590-615, so no distinction would likely have been made on that basis. Moreover, of the four counties, Mellette County was the only one with significant tribal landholdings. Finally, Mellette County, unlike Gregory and Lyman Counties, directly adjoined Todd County and thus was geographically closer to the undisputed part of the reservation.

The Board concludes that Congress intended in the Isolated Tracts Act to authorize trust acquisitions within Mellette County and that it considered the county to be "on the

^{5/} See S. Rep. No. 674, 88th Cong., 1st Sess. 2 (1963): "At the request of the Rosebud Tribal Council, the bill was amended to limit the sale or exchange of tracts to the three counties listed. The tribal council was fearful that without this amendment, sales or exchanges might reduce the holdings in the two counties containing the principal tribal acreage."

Accord H.R. Rep. No. 296, 88th Cong., 1st Sess. 2 (1963).

reservation" for purposes of the requirement that the acquisitions be "on the reservation within land consolidation areas approved by the Secretary of the Interior."

Appellants have failed to show that the lands at issue here may not be taken into trust under the Isolated Tracts Act. Accordingly, the Board concludes that this trust acquisition is properly made under the Act and that it is therefore "mandated by legislation." Thus, the Board affirms the Area Director's decision to the extent it assumed that no notice was required to be given to state and local governments under sec. 151.10.

[2] The fact that the Area Director was not required to give notice of a trust acquisition request under sec. 151.10, however, did not relieve her of her obligation to give notice of her decision on the request under 25 C.F.R. § 2.7. 6/ Sec. 2.7 requires that notice of a decision be given to all interested parties known to the decision maker.

Appellants are interested parties here and were known to the Area Director. Thus, they should have been given notice under sec. 2.7. They were, at a minimum, entitled to challenge the Area Director's legal conclusion that this particular trust acquisition was mandated by legislation.

The Area Director's published notice indicates that she was attempting to implement 25 C.F.R. § 151.12(b). 7/ That provision, however, does not come into play until administrative remedies have been exhausted. Because the Area Director's decision was subject to

6/ 25 C.F.R. § 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

7/ 25 C.F.R. § 151.12(b) provides:

"Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published."

