GEORGIANA KAUTZ
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-91-A Decided April 18, 1991

Appeal from a denial of a fee-to-trust land acquisition.

Vacated and remanded.

1. Indians: Lands: Trust Acquisitions--Regulations: Generally

A change in regulations governing the acquisition of lands in trust status should not be applied retroactively to a matter pending before the Bureau of Indian Affairs when the person affected detrimentally relied upon the policy and procedures that were in place at the time the trust acquisition was approved.

APPEARANCES: Georgiana Kautz, pro se; Colleen Kelley, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Georgiana Kautz seeks review of a March 20, 1990, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), denying appellant's request for a fee-to-trust acquisition of real property she owned. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to the Area Director for further action in accordance with this opinion.

Background

On February 24, 1977, appellant and her husband, both of whom are enrolled members of the Nisqually Indian Community, applied to the Western Washington Agency, BIA, 1/ for a fee-to-trust conversion of real property she owned. The real property is located in the SW¼ NE¼, sec. 17, T. 18 N., R. 1 E., Willamette Meridian, Thurston County, Washington, and consists of 4.05 acres, more or less. The parcel is approximately 1 mile from the boundary of the Nisqually Reservation.

1/ The Nisqually Indian Community is now under the jurisdiction of the Puget Sound Agency.

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Appellant stated that she and her husband purchased the property in 1972 under a BIA program "which encouraged Indian families to move away from the reservation and enter the outside job market. We received a loan from the Bureau for purchase of the land and my husband received vocational training in welding" (Feb. 24, 1977, Letter at 1). Although appellant acknowledged that it was BIA policy not to acquire land located off the reservation in trust status, she indicated several reasons why an exception should be made in her case, including the fact that her property was located adjacent to another parcel that had been held in trust since the 1920's.

Appellant's request was referred to the Portland Area Office (Area Office). By memorandum dated March 15, 1977, the Acting Assistant Portland Area Director (Economic Development) informed the agency Superintendent that:

> In this case we have decided to make an exception to our policy prohibiting off-reservation fee to trust transactions. You may proceed with processing this case and if clear title is provided we will accept title in trust.
>
> We are making this exception to our policy because there is adjoining land which has been in trust for many years. Also because available trust land for housing purposes on the Nisqually Reservation is in very short supply.

The Superintendent conveyed this information to appellant in a letter dated March 21, 1977, which stated:

> Your request for fee to trust action on land that you own outside the Nisqually Reservation boundaries has been reviewed by the Portland Area office. They have issued instructions that they agree to your request due to the circumstances involved.
>
> Please submit a Preliminary Commitment for Title Insurance, showing owners of record.
>
> No doubt you are aware that in fee to trust acquisitions, there can be no encumbrance or liens against the property.
>
> Once the Preliminary Title report is received, a draft deed will be prepared. As you are both the owners of this land, the deed will cite from each of you to the United States of America in Trust for you, each an undivided 1/2 interest. The title report and draft deed will be sent to our Portland office for preliminary review and they will issue instructions on what needs to be done to clear title.
>
> Once the Preliminary instructions are received, you will be informed on what you would need to do to clear title, the deed would be sent to you for signing with instructions that the deed should be recorded in the County records and you would then be required to secure a Final Title Policy on U. S. Form 1963. Both

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> the deed and Final Title Policy must then be returned to this office and we would then submit both documents to the Area Director for final approval.
>
> A copy of this letter is being sent to the Tribe for their information.

Appellant's letters to BIA indicate that shortly after she received the Superintendent's letter, her husband suffered an on-the-job injury which left him permanently disabled. Because appellant's husband was no longer able to earn income as a welder, the family was unable to pay off their mortgage until 1985. At that time, appellant approached BIA about completing the fee-to-trust acquisition of her property.

By letter dated April 11, 1985, the Superintendent informed appellant:

> Even though you started this action in 1977, and we advised you at that time that the Area Office had advised that you could proceed with your fee to trust case, there have been land acquisition regulations that have been implemented. Under the current land acquisition regulations there is no provision for placing land into trust status for individual Indians when the land is not located within an Indian reservation or adjacent thereto, and we need to request a waiver of regulations.
>
> All off-reservation fee to trust requests must be sent to Washington D.C. for review by the central office as this is the office that would grant the waiver. According to instructions we have received from the Director, Office of Trust Responsibilities, in the Central Office, we must be more keenly aware of factors to be considered under [25 CFR 151.10], when reviewing requests from individuals in requesting waivers for conversion of off-reservation fee land to trust status.

Appellant responded in a May 21, 1985, letter, repeating the background of her purchase of property off the reservation, and providing information requested by the Superintendent. She noted, however, at page 2:

> I am now pleased to be able to report to the Bureau that our homesite has been paid off in full, and we are now prepared to complete the fee-to-trust conversion to which the Bureau had agreed to in writing in 1977. Even though there have been land acquisitions regulations implemented by the Bureau since that time, we clearly view our request as having been reviewed and decided upon by the Bureau prior to the new regulations being in effect.

Despite favorable recommendations by both the Superintendent and the Area Director, by memorandum dated March 24, 1986, the Deputy Assistant Secretary - Indian Affairs (Operations), after discussing the purpose behind the promulgation of regulations governing trust acquisitions, denied the requested waiver. Appellant was informed of this decision in

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an April 14, 1986, letter from the Superintendent. The Superintendent also indicated that the Area Director had stated that he would request Central Office reconsideration of the matter if additional information showing a compelling need or unusual circumstances could be provided.

Supported by a 1988 resolution of the Nisqually Indian Community, appellant again applied for a fee-to-trust acquisition on November 10, 1988. The Superintendent proceeded to consider the application, and by memorandum dated November 6, 1989, recommended approval of the acquisition to the Area Director. The Superintendent noted that Thurston County opposed the acquisition.

By memorandum dated March 20, 1990, the Area Director informed the Superintendent that the acquisition would not be approved. The memorandum noted that 25 CFR 151.3(b)(1) provides for trust acquisitions of land located within the exterior boundaries of a reservation or adjacent to an existing reservation. The Superintendent conveyed this decision to appellant by letter dated April 3, 1990.

The Board received appellant's notice of appeal and statement in support of her appeal on May 7, 1990. Appellant did not file an additional opening brief. Although counsel for the Area Director entered her appearance, she did not file a brief. 2/

Discussion and Conclusions

Acquisition of land in trust for Indian tribes and individuals is authorized by the Indian Reorganization Act, 25 U.S.C. § 465 (1988) (IRA), which provides in pertinent part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * * * * *
>
> Title to any lands or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

2/ The Board notes that Thurston County was inadvertently omitted from the distribution list in this appeal. Because of the disposition of this matter and the length of time the appeal has already been pending, the decision is being issued. Thurston County may file a petition for reconsideration with supporting reasons under 43 CFR 4.315 should it disagree with this decision.

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Regulations governing trust acquisitions were not promulgated until 1980. See 45 FR 62036 (Sept. 18, 1980). Prior to that time, decisions on such acquisitions were committed to the discretion of the deciding official with some guidance from the Washington, D.C., BIA office. One policy established in the area of trust acquisitions discouraged the acquisition of lands located off the reservation. This policy could, however, be relatively easily altered by the deciding official when it was deemed appropriate.

The 1980 regulations formalized the prior policy not to acquire off-reservation lands in 25 CFR 151.3(b):

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status (1) when the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or, (2) when the land is already in trust or restricted status.

Because this policy was contained in regulations, deviation from it required a formal waiver under 25 CFR 1.2, which provides:

> Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

Authority to waive the regulations was not delegated to Area Directors.

In determining exactly what was decided in this matter in 1977, the Area Office's March 15, 1977, memorandum to the Superintendent is of paramount importance. The operative words in that memorandum are: "if clear title is provided we will accept title in trust." The only obstacle to clear title that has been raised by anyone at any point in this matter was an outstanding mortgage. The Area Director did not establish a time limitation for providing clear title. The Board holds that BIA approved the fee-to-trust acquisition of appellant's property in 1977. The only remaining task was for BIA to perform the ministerial action of taking title in trust once appellant had shown that the mortgage had been paid and that she held clear title.

The question raised by this appeal, therefore, is whether this particular trust acquisition was governed by the procedures in effect in 1977, when the Area Director approved the fee-to-trust conversion, or whether, because the matter was still pending in 1985, after the promulgation of regulations, the stricter procedures established in those regulations should be applied.

[1] As discussed in United States v. An Article of Drug Neo-Terramycin Soluble Powder Concentrate, 540 F. Supp. 363, 373 (N.D. Tex. 1982):

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> [N]o rule of law forbids an agency from changing its regulations [or promulgating new regulations]. Kelly v. United States Dept. of Interior, 339 F.Supp. 1095, 1100 (E.D.Cal. 1972). Agencies need sufficient latitude to adjust their rules to reflect actual experience and may even reverse their thinking if necessary. Id. While these changes may not be done arbitrarily, a change in regulations that results in a loss of pre-existing benefits does not in itself show that the agency acted arbitrarily. Id.; General Telephone Co. of Southwest v. United States, 449 F.2d 846, 863 (5th Cir. 1971). Where a rule has retroactive effects, it may still be sustained despite such retroactivity if it is reasonable. Id.; Public Service Co. of Colorado v. Andrus, 433 F.Supp. 144, 154 (D.Col. 1977).

However,

> [g]enerally speaking, an agency may be prevented from applying a new policy [retroactively] for one of two reasons (in addition to the standard constraints that apply to any agency decision). First, a departure from prior policy cannot stand when the agency fails to explain the reason for the change. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C.Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971). Second, under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy. See RKO General v. FCC, 670 F.2d 215, 223 (D.C.Cir. 1981), cert. denied, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 442 (1982).

New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987), cert. denied, ___ U.S.___, 109 S. Ct. 1942 (1989). See also Boston Edison Co. v. FPC, 557 F.2d 845, 847 (D.C. Cir. 1977). Conversely, "it may be appropriate to apply the amended version of a regulation to a pending matter where it benefits the affected party to do so." James E. Strong, 45 IBLA 386, 388 (1980).

In the present case, the promulgation of regulations did not substantially alter the policy under which off-reservation land was generally not acquired in trust, but significantly restricted the procedures for waiving that policy. Appellant and her family relied upon the Area Director's 1977 decision stating that he would accept the land in trust, and proceeded to pay off their mortgage with what appears to be remarkable dispatch. Furthermore, the new regulatory procedures did not benefit appellant in any way. Appellant's detrimental reliance on the procedures in place at the time of the initial decision is precisely the type of situation envisioned in considering whether a change in regulations can or should be applied retroactively to a matter pending before the agency at the time of the change.

The Board concludes that the Area Director decided in 1977 to acquire appellant's land in trust status, subject only to the condition that she show clear title. Because of the time needed for appellant to pay off the

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mortgage, the matter was still pending when new regulations governing trust acquisitions were promulgated. That change in regulatory procedure should not have been applied here because appellant relied to her detriment on the procedures in effect when the Area Director decided to acquire the land in trust. Accordingly, because appellant alleges that she has now met the condition established in the Area Director's 1977 memorandum and can show clear title, BIA should proceed to address this matter in accordance with the 1977 decision to acquire this land in trust status. 3/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 20, 1990, decision of the Portland Area Director is vacated and this matter is remanded to him for further action in accordance with this opinion.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

3/ Considering the history of problems the Portland Area Office has had with trust acquisitions, it is understandable why, out of an abundance of caution, the Area Director decided to reconfirm the 1977 decision under the new regulations. See, e.g., City of Tacoma, Washington v. Andrus, 457 F. Supp. 342 (D.D.C. 1978).

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