AVOYELLES PARISH, LOUISIANA, POLICE JURY
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-124-A Decided October 27, 1999

Appeal from a decision to take two tracts of land into trust for the Tunica-Biloxi Tribe of Louisiana.

Vacated and remanded.

1. Indians: Lands: Trust Acquisitions

A local government which has furnished inaccurate or incomplete tax information to the Bureau of Indian Affairs in response to notice from the Bureau under 25 C.F.R. § 151.11(d) cannot complain that the Bureau relied upon that information in analyzing a trust acquisition request under 25 C.F.R. § 151.10.

2. Indians: Lands: Trust Acquisitions

Under 25 C.F.R. § 151.11(d), the Bureau of Indian Affairs is required to give notice of a proposed trust acquisition to "the state and local governments having regulatory jurisdiction over the land to be acquired" and to allow for responses. With respect to a local government, this notice should be sent to an official or governing body which exercises regulatory authority on behalf of the local government, even in a case where property tax information is separately sought from tax officials of the local government. Where the Bureau is uncertain whether a city or county exercises regulatory jurisdiction, notice should be sent to both.

APPEARANCES: Charles A. Riddle, III, Esq., Marksville, Louisiana, for Appellant; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director.

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OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Avoyelles Parish, Louisiana, Police Jury 1/ seeks review of a July 15, 1998, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), to take two tracts of land in Avoyelles Parish, Louisiana, into trust for the Tunica-Biloxi Tribe of Louisiana (Tribe). For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further proceedings.

Background

In August 1997, the Tribe submitted an application for the trust acquisition of certain land, including a .39-acre tract and a .918-acre tract in Avoyelles Parish, Louisiana, the two tracts at issue in this appeal.

Following consideration of the Tribe's request, the Area Director wrote to the Tribe on July 15, 1998, stating:

> This letter is to inform you of the intent of the Secretary of the Interior to accept the properties known as "Burger King" [the .918-acre tract] and "Family Fun Center" [the .39-acre tract] located on Tract 3, Section 66, Township 2 North, Range 4 East, Louisiana Meridian, Avoyelles Parish, State of Louisiana into trust for the use and benefit of the Tunica-Biloxi Tribe of Indians of Louisiana.
>
> After consideration of the requirements [in 25 C.F.R. §§ 151.10-151.12], it has been determined to be in the best interest of the Tribe that the subject properties be accepted into trust.
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> * * * * * * *
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> The properties are adjacent to the Tribe's current trust lands and were acquired for the express purpose of expanding the land base to provide space for the Tribe's economic development projects.

1/ A parish police jury in Louisiana corresponds to a county board of commissioners in other states. See http://www.lpgov.org/facts.htm#Forms.

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> The application was reviewed in accordance with the regulation cited at 25 C.F.R. 151.10.

Area Director's July 15, 1998, Decision at 1-2. Copies of this letter were sent to the Governor of Louisiana, the Mayor of the City of Marksville, Louisiana, and the Assessor of Avoyelles Parish.

The decision letter was evidently accompanied by a copy of an undated memorandum from the Area Realty Officer to the Area Director, which evaluated the proposed trust acquisitions under the criteria in 25 C.F.R. § 151.10. 2/

Discussion and Conclusions

Decisions of BIA officials as to whether to acquire land in trust are discretionary. The Board does not substitute its judgment for BIA's but reviews the BIA decision to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of discretion. An appellant challenging a BIA discretionary decision bears the burden of proving that the Area Director did not properly exercise his discretion. E.g., Town of Ignacio, 34 IBIA at 38-39, and cases cited therein.

Appellant raises seven objections to the trust acquisitions. First, it argues that the trust acquisitions would have an adverse economic impact on Avoyelles Parish because they would

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2/ The Area Director's letter did not refer to the Realty Officer's memorandum or state that the memorandum was enclosed. Thus, it cannot be determined from the decision itself whether the memorandum was sent to interested parties. However, in response to a Board order directing Appellant to furnish a copy of the decision it sought to appeal, Appellant submitted a copy of the Realty Officer's memorandum as well as a copy of the Area Director's July 15, 1998, letter. Thus it is clear that Appellant received a copy of the Realty Officer's memorandum at some point and has therefore had an opportunity to review the analysis on which the Area Director's decision was based and to address that analysis in this appeal.

Had it not been clear that Appellant received a copy of the Realty Officer's memorandum, the Board would be required to remand this case under Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37 (1999). In that case, the Board stated:

"[I]t is important that BIA furnish its analysis to interested parties at the time it issues notice of its trust acquisition decision. In order to encourage BIA to do so in the future, barring extraordinary circumstances * * *, the Board will henceforth either vacate an Area Director's trust acquisition decision or require additional proceedings before the Board if it becomes apparent that BIA did not furnish the appellant with a copy of its analysis and the appellant has not subsequently obtained a copy."
34 IBIA at 42.

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remove land from the tax rolls. Appellant contends that the Tribe's statement that the tax impact of the acquisitions would be minimal (a statement made in the Tribe's 1997 trust acquisition request) 3/ was based upon the fact that Appellant was not then assessing taxes on the property because it mistakenly believed that land owned in fee by the Tribe (as are these tracts) was not taxable. Appellant states that the Parish learned that the land was taxable on January 31, 1997, when the Area Director so informed it in a letter to the Parish's Chief Deputy Assessor. Appellant further states that, under Louisiana law, the Parish could not begin assessing taxes until 1998.

Appellant is apparently arguing that the Area Director's decision was based on a mistake of fact as to the amount of property tax revenue that would be lost to the Parish.

In connection with his consideration of the Tribe's trust acquisition request, the Area Director wrote to the Parish Assessor on August 21, 1997, requesting, inter alia, information as to the amount of property taxes levied on the properties. The Assessor supplied information on September 2, 1997, showing that the .39-acre tract was assessed at $0, the .918-acre tract was assessed at $0, and the improvements on the .918-acre tract were assessed at $21,880 and taxed in the amount of $1,430.73.

[1] To the extent that the Parish Assessor supplied incorrect or incomplete information in response to the Area Director's request for information, Appellant cannot now complain. As Appellant concedes, the Parish was made aware on January 31, 1997, that fee land owned by the Tribe was taxable. Yet, eight months later, its Assessor submitted tax data which did not take this information into account. Even though State law precluded assessment of taxes until the following year, the Parish Assessor could have explained that in his response and perhaps could have provided an estimate of what the taxes would be. He did not do so.

Appellant now states that, for 1998, taxes in the amount of $18,980.58 are owed on the improvements on the .39-acre tract and taxes in the amount of $3,919.91 are owed on the improvements on the .918-acre tract. 4/

Appellant concedes, however, that the improvements on the .39-acre tract were not returned to the tax rolls until August 17, 1998, a month after the Area Director's decision was

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3/ Although not mentioned by Appellant, the Realty Officer's memorandum also stated that the impact of the acquisitions on ad valorem taxes would be minimal.

4/ Appellant does not submit any information concerning 1998 assessments on the land itself. The 1997 assessment information in the administrative record indicates that, at least in 1997, separate assessments were made for land and improvements.

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issued. 5/ Appellant necessarily concedes, therefore, that, as of the date of the Area Director's decision, the assessment information before him concerning the .39-acre tract was accurate.

Appellant does not state when (i.e., before or after the Area Director's decision) the taxes on the improvements on the .918-acre tract were increased. If they were increased before July 15, 1998, the taxes attributable to that tract were $2,489.18 higher than the Area Director believed they were, and thus the Area Director's decision may have been based upon incorrect information. Appellant has not alleged, however, that the taxes on the .918-acre tract were increased prior to July 15, 1998. Nor has it alleged that the Assessor advised BIA of a tax increase.

Appellant has not shown, in the case of either tract, that the assessment information before the Area Director on July 15, 1998, was inaccurate.

More importantly, with respect to its burden of proof in this appeal, Appellant has not shown that the Area Director improperly exercised his discretion in relying upon the tax information furnished to BIA by the Parish Assessor.

Appellant next contends that the Tribe does not need any more land because it is financially secure. The Realty Officer's memorandum stated that the Tribe's 140-acre reservation was fully utilized and thus the Tribe needed new land in order to gain space for further economic development. Appellant does not dispute the Realty Officer's statement that the reservation was fully utilized.

Appellant clearly disagrees with the Area Director as to whether the Tribe needs additional land. Nothing in 25 C.F.R. § 151.10(b), 6/ however, suggests that the only legitimate need for additional land is one which stems from financial difficulties. A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed.

Appellant has not shown that the Area Director improperly exercised his discretion in assessing the Tribe's need for land.

Next, Appellant contends that the Tribe owes 1998 property taxes on the two tracts which it seeks to have taken into trust. As Appellant states, unpaid taxes may affect the acquisition of title under 25 C.F.R. § 151.13. The Area Director confirms that "whatever amount

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5/ Appellant also concedes that this was done for purposes of filing the present appeal.

6/ Under 25 C.F.R. § 151.10(b), BIA is required to consider "[t]he need of the individual Indian or the tribe for additional land."

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is owed by the Tribe in property taxes must be satisfied before the land in taken into trust." Area Director's Brief at 3. However, as 25 C.F.R. § 151.13 makes clear, the requirement to furnish satisfactory title evidence does not arise until after a decision is made as to whether or not the land should be taken into trust. 7/ The factors the Area Director was required to consider in making his July 15, 1998, decision are those listed in 25 C.F.R. § 151.10. Whether or not the Tribe is presently current in its property tax payments is not one of those factors.

Appellant has not shown that the Area Director improperly exercised his discretion in not considering whether or not the Tribe was current in its property tax payments.

Next, Appellant contends that there are unresolved issues concerning whether the State of Louisiana can collect sales taxes on the tracts and that, "[r]egardless of the decision in this matter, it should be made clear as to whether the State of Louisiana has the authority to collect sales taxes on the businesses involved." Appellant's Opening Brief at 4. Appellant cites 25 C.F.R. § 151.10(f), which requires BIA to consider "[j]urisdictional problems and conflicts of land use which may arise," and appears to be contending that, under that provision, BIA should have made a legal determination as to whether Louisiana may impose its sales tax on transactions on the land proposed for trust acquisition.

In his response, the Area Director argues that questions concerning state sales taxes require extensive legal analysis and that no such analysis is required under 25 C.F.R. § 151.10. As the Area Director observes, questions concerning sales or transaction taxes are likely to be complicated ones. Although the leading case on the subject, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), was decided by the Supreme Court nearly 20 years ago, the issue is still being litigated, in part because of differences in state tax laws. See, e.g., Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997), cert. denied, 118 S.Ct. 853 (1998).

Neither BIA nor this Board has the authority to make a legal determination as to whether Louisiana may impose its sales tax on transactions on the Tribe's trust lands. 8/ Further, as the Area Director contends, the regulations in 25 C.F.R. Part 151 "do not require an analysis

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7/ 25 C.F.R. § 151.13 provides:
"If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards for the Preparation of Title Evidence in Land Acquisitions by the United States, issued by the U.S. Department of Justice."

8/ In cases where states and tribes are unable to reach agreement on the collection of state sales taxes on Indian lands, the disputes must be resolved in the courts.

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of the taxability of activities conducted on the land after it is taken into trust." Area Director's Brief at 3. However if, as Appellant alleges, there are unresolved sales tax issues regarding the Tribe's trust lands, Appellant may well have identified a "jurisdictional problem" under 25 C.F.R. § 151.10(f). While nothing in Part 151 requires that jurisdictional problems be resolved prior to approval of a trust acquisition, subsec. 151.10(f) requires that BIA take them into consideration before deciding whether or not to approve the acquisition.

Because of a defect in BIA's notice under 25 C.F.R. § 151.11(d), discussed below, Appellant had no opportunity to raise this issue before BIA. Upon remand of this matter to the Area Director, discussed further below, the Area Director shall consider Appellant's allegation of unresolved sales tax issues under 25 C.F.R. § 151.10(f).

In its fifth argument, Appellant raises health and safety issues. It contends:

> Avoyelles Parish has grave concerns because of the previous experiences with other businesses that are in trust status. That is, that the Parish Sanitarian and Fire Marshalls have not been granted any authority to do their jobs in any businesses that are located on trust property. This is a problem that must be resolved. Now the Tribe is making an effort to add a retail food restaurant and a business geared to children that would remove them from the jurisdiction of the state agencies. This is unacceptable to the Parish and the citizens that they are sworn to represent. The health, welfare and safety of the public is an important factor to consider.
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> * * * The regulatory jurisdiction of fire standards, food quality and other health standards are legitimate concerns [which] must be addressed as required in § 151.11(d). If in fact the current businesses in trust are not allowing the fire marshall's office nor health inspectors into their businesses a close look should be made into whether this is legal. Further, the question arises as to whether other businesses should be allowed this status.

Appellant's Opening Brief at 5.

This argument, like the preceding sales tax argument, involves concerns arising under 25 C.F.R. § 151.10(f) which, as discussed above, requires consideration but not necessarily resolution of jurisdictional problems.

Because the issue raised in Appellant's seventh (and final) argument is relevant at this point, the Board proceeds to that argument. 9/ In its seventh argument, Appellant contends

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9/ The Board returns to Appellant's sixth argument below.

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that it did not receive notice of the proposed acquisitions under 25 C.F.R. § 151.11(d). It contends that notice was sent to the City of Marksville even though the Parish, rather than the City, is the local government with regulatory jurisdiction over the property at issue. Appellant further contends that, as the body which exercises the regulatory jurisdiction of the Parish, it should have received notice of the proposed acquisitions.

25 C.F.R. § 151.11(d) provides:

> 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.

The only notice letter included in the record is one addressed to the Assessor of Avoyelles Parish. 10/ As discussed above, it was the Assessor who provided the property tax information upon which the Area Director relied.

25 C.F.R. § 151.11(d) does not specify which officials of a state or local government are to be provided notice. Concerning this subsection, which was added in 1995, the preamble to the final rule stated:

> [A commenter] suggested that the rule specify which state and local offices would be contacted.
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> * * * * * * *
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> * * * [I]t should be noted that (1) the narrower definition of the "notified party" will generally mean city or county officials, but will also recognize the wide variation in the designations and functions of "local governments," * * * (2) the burden of obtaining additional information from state officials, neighboring jurisdictions, or other units of local governments (including special function districts, public authorities, or higher political subdivisions) will rest with the local officials who are directly notified by the BIA.

60 Fed. Reg. 32877 (June 23, 1995).

10/ For purposes of this decision, the Board assumes that notice letters under subsec. 151.11(d) were sent to the City of Marksville, as alleged by Appellant, and to the State of Louisiana.

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This language suggests that BIA may have intended to place the burden on any local official who receives notice of a proposed land acquisition to pass that notice on to other appropriate officials))in this case, to place the burden on the Parish Assessor or on City of Marksville officials to inform Appellant of the notices they received.

If BIA intended to place such a burden on the Parish Assessor in this case, it did not so inform him in its August 21, 1997, notice letter. Nor did BIA's notice letter list the other recipients of the letter. Thus, BIA's failure to notify Appellant directly would not have been obvious to the Assessor, who might reasonably have assumed that BIA had also sent the letter directly to Appellant. 11/

[2] The Area Director concedes in this appeal that BIA erred in failing to send notice to Appellant. The Board agrees that BIA erred in this regard. Particularly in light of the language of 25 C.F.R. § 151.11(d), which requires that notice be given to "local governments having regulatory jurisdiction over the land to be acquired," it is reasonable to expect BIA to send its notice to an official or governing body which exercises regulatory authority on behalf of the local government notified, even though BIA also seeks tax information directly from that local government's tax assessor. It is also reasonable to expect BIA, in a case where it does not know whether regulatory jurisdiction is exercised by a city or a county (or parish), to send notice to both. While there may be circumstances where BIA might reasonably request a local government official to forward the notice to other officials, it is not reasonable for BIA to expect an official to forward a BIA notice when it does not inform the official of that expectation.

While conceding error in failing to notify Appellant, the Area Director contends that BIA's mistake was innocent and that Appellant has had an opportunity to voice its health and safety concerns in this appeal and thus has suffered no harm. The Area Director also contends that Appellant's health and safety concerns are vague and based upon the unwarranted assumption that the Tribe will not provide adequate controls in these areas.

Appellant should have had an opportunity to present its health and safety concerns, as well as its sales tax concerns, to BIA. In turn, BIA should have considered those concerns under 25 C.F.R. § 151.10(f) prior to issuing a decision on the acquisition request. Contrary to the Area Director's contention, the fact that Appellant has had an opportunity to raise its concerns in this appeal does not cure BIA's notice error, because it is BIA, not this Board, which must consider the criteria in 25 C.F.R. § 151.10.

11/ As noted above, no copy of the notice letter to the City of Marksville is included in the record. The Board must assume, therefore, that the same problems exist with respect to the letter to the City.

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Under the standard of review discussed above, "the Board does not undertake to re-analyze or re-weigh [a trust] acquisition request under the criteria in section 151.10." City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 109 (1998). Thus, the Board cannot re-analyze these acquisition requests under 25 C.F.R. § 151.10(f) in order to take into account the concerns raised by Appellant in this appeal. Rather, this matter must be remanded to the Area Director so that BIA may re-weigh the requests in light of Appellant's jurisdictional concerns. 12/

In its sixth argument, Appellant contends that the Tribe was organized as a non-profit corporation in 1974 but is currently earning profits and distributing profits to its members in violation of its charter. Appellant does not explain how this argument is related to the criteria which BIA was required to consider in evaluating the trust acquisition request. Possibly, Appellant is contending that the Area Director should have denied the trust acquisition request because the Tribe intends to use the tracts for business purposes. See 25 C.F.R. § 151.10(c), under which BIA is required to consider "[t]he purposes for which the land will be used."

As the Area Director notes in his brief, the Tribe became a Federally recognized Indian tribe in 1981. See 46 Fed. Reg. 38411 (July 27, 1981). Thus, its powers derive from its status as an Indian tribe, not from its 1974 charter. There is no doubt that Indian tribes have the power to engage in profit-making business activities. Moreover, economic development is specifically mentioned in 25 C.F.R. Part 151 as a purpose for which trust acquisitions can be made. 25 C.F.R. § 151.3(3).

Appellant has not shown that the Area Director improperly exercised his discretion by not considering the limitations in the Tribe's 1974 charter.

The only issues raised by Appellant which require further consideration under 25 C.F.R. § 151.10 are the jurisdictional issues discussed above.

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 July 15, 1998, decision is vacated, and this matter is remanded to him for re-analysis of the acquisition requests under 25 C.F.R.

12/ The Board reaches no conclusion as to the validity of Appellant's concerns.

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§ 151.10(f), taking into account the jurisdictional concerns raised by Appellant in this appeal. The Area Director should include his new analysis in the text of a new decision to be sent to all interested parties.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

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