IN THE CIVIL COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION
PABLO, MONTANA

No. APCV-073-93

TERRY PITTS and
CRYSTAL PITTS,

Plaintiffs/Appellees

v.

VIRGIL EARLING and
FLORENCE EARLING

Defendants/Appellants

Appeal from the Trial Court
of the Confederated Salish and Kootenai Tribes.
No. CV-073-93--Wm. Joseph Moran, Trial Judge

Argued October 21, 1994
Decided December 5, 1994

Before GAUTHIER, HALL, and PEREGOY, Civil Appellate Judges

OPINION OF THE COURT

PEREGOY, Chair, Civil Appellate Panel.

This litigation arises out of a failed land sale between two enrolled members of the Confederated Salish and Kootenai Tribes. A portion of the land at issue is held in trust for the seller by the United States. The buyer contended an enforceable contract existed and that the seller breached by increasing the selling price after the initial price was negotiated. The seller contended no enforceable agreement ever existed. The buyer sued for specific performance. After a bench trial, the court ordered the seller to convey title to the buyer upon payment of a

sum certain, and to execute the necessary documents to satisfy trust land conveyance requirements of the Bureau of Indian Affairs. The seller appealed. The ultimate issue, raised *sua sponte* by this Court, is whether a contract for the sale of undivided Indian trust and fee land is enforceable absent prior approval by the Secretary of the Interior. We hold it is not and reverse the trial court's judgment.

Because this issue involves the selection, interpretation, and application of legal precepts, we employ the fullest scope of review. In plenary fashion we examine the decision of the trial court for error, and its legal determinations are not shielded by any presumption of correctness.

I. BACKGROUND

Terry Pitts, plaintiff/respondent, and Florence Earling, defendant/appellant, are enrolled members of the Confederated Salish and Kootenai Tribes. Earling is heir to two Indian allotments collectively known as the Magpie property, which consists of approximately 283 acres located within the exterior boundaries of the Flathead Indian Reservation. She owns 15/16 of the Magpie property in fee simple. The remaining 1/16 is held in trust for her by the United States, as an undivided portion of the whole. The trust title instruments are "Deed[s] to Restricted Indian Land" which provide in relevant part that the land is subject to the Act of March 1, 1907 (34 Stat. 1015-1018) and the Act of May 14, 1948 (62 Stat. 236).

In 1989 the value of the Magpie property was appraised at $99,000. The same year Terry Pitts offered to purchase the 283 acre parcel for $60,000 "tax free." Florence Earling rejected the offer.

In 1992, the parties orally agreed to a purchase price of $65,000. The terms of the buy-sell agreement were not reduced to writing. While the precise terms of the contract were

disputed, the trial court found Earling and her husband agreed to sell the land for $65,000, which represented the amount they intended to receive after any capital gains taxes due were paid. The trial court also found that Pitts intended to pay only $65,000, without regard to taxes.

On May 9, 1991, Pitts voluntarily sent Earling a cashier's check for $10,000. The check contained an express notation that the remittance was for partial payment of the Magpie property. Mrs. Earling returned a signed, notarized receipt, prepared by Pitts, acknowledging receipt as "Partial Payment of 65,000 for alloted [sic] land # 2274 & 2275." Florence Earling endorsed the check and deposited the $10,000 in her bank account.

In September 1992, after several delays spanning eighteen months, a current appraisal of the Magpie property was approved by the Bureau of Indian Affairs. The 283 acre parcel of undivided trust and fee land was appraised at $115,000.

Based on the BIA approved appraisal, Earling believed her land had appreciated in value and that she was entitled to more money. She attempted to return the $10,000 and renegotiate the sale price. Pitts did not agree. Alleging breach of contract, he and his wife sued for specific performance.

The trial court granted judgment in favor of buyer Pitts. It concluded under Montana contract law that the object of the contract, the sale of land, was lawful. It further concluded the contract was enforceable and that it was supported by writings sufficient to satisfy the statute of frauds. The court also ruled the tax-free status of the purchase price was a collateral matter rather than an essential element of the contract. The court further concluded the consideration consisted of the seller's promise to convey title to the buyers in exchange for the buyers remitting the purchase price of $65,000 to the sellers. Ruling for buyer Pitts, the court ordered seller

Earling to convey title to Pitts upon payment of $55,000, and to execute documents necessary to satisfy conveyance requirements of the Bureau of Indian Affairs regarding the trust portion of the undivided property.

On appeal, Earling initially argued the trial court erred in ruling the parties had an enforceable contract for the sale of real estate, and that the parties' failure to agree on the tax-free status of the purchase price was a collateral matter rather than an essential contract element. Pre-hearing appellate briefs were predicated on these issues.

During oral argument, the Court *sua sponte* questioned what law governs this dispute. Specifically, the Court announced its determination that federal Indian law controls the outcome, not Montana contract law. Thereafter, the parties filed unsolicited briefs addressing certain federal law issues which we have considered.

II. DISCUSSION

It is well settled that Indian lands are governed solely by federal law and where legal title to such land is held in trust by the United States, any attempted conveyance or alienation must conform to the requirements of federal law. Alienation of restricted Indian lands can only be effectuated pursuant to congressional authorization and according to the rules and regulations prescribed by the Secretary of the Interior. Black Hills Institute v. Dept. of Justice, 812 F.Supp. 1015, 1019 (D.S.D. 1993), *affirmed* 12 F.3d 737 (8th Cir. 1993).

A. The Trust Interest Question

It is undisputed that an undivided 1/16 interest of the Magpie property is held in trust for Florence Earling by the United States. The trust patent was issued subject to the Act of March 1, 1907 (34 Stat. 1015-1018) and the Act of May 14, 1948 (62 Stat. 236). The 1907

statute expressly authorizes Indian allotments under the General Allotment Act of 1887, codified at 25 U.S.C. § 348 which provides in relevant part:

> ...if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the [twenty-five year trust period], such conveyance or contract shall be absolutely null and void...[1]

Pitts contends the twenty-five year trust period set forth in the 1887 Allotment Act, as well as an unspecified 1951 extension thereof, expired long before he contracted with Earling to purchase the Magpie property in 1991. He argues that only contracts entered into during the trust period are voidable, and since the contract at issue was not entered into during the trust period, it cannot be voided. We disagree. As Earling correctly asserts, Congress, pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. § 462), extended the trust periods placed on all Indian lands for an indefinite time. Congress has not directed otherwise. Further, the trial judge correctly found, and it has been undisputed throughout this litigation that an undivided 1/16 interest of the Magpie property is held in trust for Florence Earling by the United States. The contract at issue is voidable under controlling law.

Pitts next contends BIA approval of the appraisal of the Magpie property constituted secretarial approval of the land sale or contract at issue. He cites no evidence or legal authority to support this creative proposition and we discern none. The plain language of the controlling regulations belies this assertion.

Governing regulations prescribed by the Bureau of Indian Affairs set forth a clear,

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[1] See also 25 CFR § 152.22(a) which, in relevant part, provides "Trust or restricted Indian lands, except inherited lands of the Five Civilized Tribes, or any interest therein, may not be conveyed without the approval of the Secretary."

sequential process to be followed before trust lands can be lawfully conveyed. See 25 CFR §§ 152.22-25. First, an individual desiring to sell or convey trust land is required ("shall") to file an application on a form approved by the Secretary. See 25 CFR § 152.23.[2] The Secretary is vested with discretionary authority ("may") to approve the application, but only after a "careful examination of the circumstances" indicates "the transaction appears to be clearly justified in light of the long-term best interests of the owner." Id. One of these circumstances is the appraisal, which is required ("shall") to be completed before ("prior to") making or approving a sale or other transfer of trust land. 25 CFR § 152.24. This regulatory scheme plainly indicates the approval of a sale and an appraisal of land are two separate processes or steps, not one and the same as Pitts contends.[3]

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[2] The Act of May 14, 1948 (62 Stat. 236), which also controls the trust patents at issue, is codified at 25 U.S.C. § 483 and authorizes the Secretary of the Interior:

> ...in his discretion, and upon application of the Indian owners, to issue patents if fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians...

[3] The BIA also treats application/approval and appraisal as separate steps under its form "Authorization to Accept Bid or Offer on Indian Land". Pursuant to separate "whereas" paragraphs, this form contemplates first that the Indian landowner has made proper application to the BIA for a trust land sale, and second that an appraisal has been made. The purpose of this form is to determine if the Indian landowner desires to go forward with a sale for which the owner has made proper application, if the owner agrees with or accepts the appraisal. If so, the owner signs the form, and the sale is thereafter approved (or disapproved) by the superintendent of the BIA. These last two steps appear to be the third and fourth steps in the trust land sale approval process. Completion of this four-step process, including the secretary's exercise of the trustee's fiduciary duty to assure the sale is in the long-term best interests of the Indian landowner, entails much more than a "mere ministerial act" of issuing a deed after an appraisal is done, as Pitts urges. In essence, it is this form which the trial court ordered Earling to sign as part of its specific performance judgment. However, as testified by Virgil Dupuis, Division of Lands Manager for the Confederated Salish and Kootenai Tribes, the landowner only signs

The policy underlying the rule requiring the Indian landowner to make application to the BIA before a trust land sale is made or approved is to put the federal trustee on notice so it can properly exercise its fiduciary responsibility and ultimately assure that any transaction is in the long-range best interest of the Indian owner. Likewise, the policy underlying the rule requiring an appraisal before a trust sale is made or approved is to assure that the Indian owner receives at least fair market value for the land, and is not overreached. To construe approval of an appraisal as approval of a sale would stand these remedial regulations on end, and eviscerate the Secretary's fiduciary duty and discretionary authority to assure that trust land transactions are in the long-range best interests of the Indian owner. This is particularly so where, as here, the land owner negotiated a sale price before a valid appraisal was made and the trustee never had the opportunity to approve (or disapprove) the sale before it was made.

In the instant case, the record lacks any evidence, and Pitts does not contend, that Earling ever filed the required BIA application pursuant to 25 CFR § 152.23 to sell or convey her trust interest in the Magpie property, i.e., that she sought the mandatory approval of the legal owner--trustee prior to contracting to sell the trust land. Further, the plain language of neither 25 CFR § 152.23 nor § 152.24 indicates BIA approval of an appraisal constitutes BIA approval of a sale. Nor do the Magpie appraisal documents contain any language remotely suggesting they constitute BIA approval of the sale. In any event, the 1992 appraisal indicating the fair market value was made after the land was purportedly sold, not "prior to", as required by the regulations. Most

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this form if he or she accepts the appraisal and wants to continue with the sale. Clearly, Earling did not want to continue with the sale after the appraisal was made. As discussed below, since the first two steps in this process were not completed as required by law, this Court will not order Earling to sign the "Authorization to Accept Bid or Offer on Indian Land".

importantly, there is no evidence indicating the BIA gave its prior consent and approval of the sale. In short, the governing regulations require both an application for sale and an appraisal, and BIA approval thereof prior to effectuating a lawful sale. Neither requirement was met in this case. Therefore, the attempted sale of the trust land contravened the requirements of controlling federal law.

As recently recognized by the Eighth Circuit, the foregoing statutes and regulations establish a scheme by which beneficial owners of restricted Indian land (such as Florence Earling) may alienate part or all of their interest before their trust instruments expire. See Black Hills Institute, *supra*, 12 F.3d at 741 (1993). Here, the only way Florence Earling may alienate an interest in her trust land is by securing the **prior** approval of the Secretary. See Id. An attempted sale of an interest in Indian trust land in violation of this requirement is void and does not (and cannot) transfer title.[4] Black Hills Institute, *supra*, 12 F.3d at 741 (1993), *citing* Mottaz v. United States, 753 F.2d 71, 74 (8th cir. 1985), *reversed on other grounds*, 476 U.S. 834 (1986).

In Black Hills Institute, plaintiff Black Hills paid Williams, an Indian, $5,000 for a certain interest in land held in trust for him by the United States. Black Hills alleged the transaction transferred the interest in the trust land to it. Williams had not applied to the Secretary of the Interior for prior approval of the transaction, nor had the Secretary ever approved it. Black Hills Institute, 12 F.3d at 737. The Eighth Circuit held the attempted sale

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[4] Further, Congress has made it a criminal offense "to induce any Indian to execute any contract, deed, mortgage or other instrument purporting to convey any trust land or any interest therein held by the United States in trust for such Indian." 25 U.S.C. § 202; see also 25 CFR § 152.22(a), adding that "offering any such [contract, deed, mortgage or other] instrument for record, is prohibited and criminal penalties may be incurred."

to Black Hills void because Williams had not sought the prior approval of the Secretary pursuant to 25 U.S.C. § 483 and 25 CFR Part 152. See also, Red Mountain Realty, Inc. v. Frost, 659 P.2d 48, 50 (Colo. App. 1982) (listing agreement in connection with sale of restricted Indian land held null and void under 25 U.S.C. § 348 for failure to secure prior consent and approval of the Secretary of the Interior); Bowling v. United States, 233 U.S. 528 (1914) (authority of United States to enforce restraint against alienation of Indian land cannot be impaired by any action without its consent); Dillon v. Antler Land Company, 341 F.Supp 734 (D. Mont. 1972), *affirmed* 507 F.2d 940 (9th Cir. 1974) (Crow Indian's contract to convey trust land was void where contract was executed before issuance of patent); Bacher v. Patencio, 232 F.Supp. 939 (S.D. Cal. 1964), affirmed 368 F.2d 1010 (9th Cir. 1966) (specific performance for breach of contract will not be ordered where Indian sold property for fair consideration during trust period, and ultimately decided he did not want to sell property); Bailey v. Banister, 200 F.2d 683 (10th Cir. 1952) (plaintiff acquired no legal right to demand delivery of deed to restricted Indian land where sale was not completed and Secretary of the Interior had not approved sale); United States v. Brown, 8 F.2d 564 (8th Cir. 1925) (conveyance void and good faith motives of purchaser of restricted Indian land irrelevant where consent and approval of Secretary of the Interior was not obtained); United States v. Walters, 17 F.2d 116 (D. Minn. 1926) (conveyance of restricted Indian land by one Indian to another Indian before expiration of trust period is null and void, and seller need not return consideration); Haymond v. Scheer, 543 P.2d 541 (Okla. 1975) (restricted Indian land may be transferred only under the rules and regulations prescribed by the Secretary of the Interior).

Sage v. Hampe, 235 U.S. 99 (1914) also involved application of 25 U.S.C. § 348. In

that case, Hampe sued to recover damages for breach of contract and to convey to him certain other land of greater value. Sage argued the land at issue did not belong to him and was subject to the restriction of 25 U.S.C. § 348 that any conveyance or contract touching the land was null and void. The Supreme Court ruled for Sage, holding that "the universality of the invalidating language of the statute ('any contract')" was broad enough to include the contract at issue, even though it did not have the direct effect of causing a conveyance in violation of public law and policy. The Supreme Court stated:

> ...A contract that on its face requires an illegal act, either of the contractor or of a third-person, no more imposes a liability for damages for non-performance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. And more broadly it has long been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made grounds of a successful suit. It appears to us that this is a contract of that class. It called for an act that could not be done at the time and it tended to lead defendant to induce the Indian owner to attempt what the law for his own good forbade. Such contracts if upheld might be made by parties nearly connected with the Indian and strongly tend by indirection to induce him to deprive himself of rights that the law seeks to protect.
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> It is true that later statutes in force when the contract was made allowed a conveyance with the approval of the Secretary of the Interior...The purpose of the law still is to protect the Indian interest and a contract that tends to bring improper influence upon the Secretary of the Interior and to induce attempts to mislead him as to what the welfare of the Indian requires are as contrary to the policy of the law as others that have been condemned by the courts. (Citations omitted). Id. at 104-05.

Sage stands for the principle that 25 U.S.C. § 348 is not limited to contracts which have the direct effect of alienating restricted Indian lands. "Rather, it is broad enough to cover those contracts which have as their ultimate objective, the conveyance of the land contrary to law and public policy." See Red Mountain Realty, 659 P.2d at 50 (1982).

During oral argument, counsel for Pitts conceded Earling had not made application to the

BIA for approval of the Magpie trust land sale. Notwithstanding, counsel alleged Earling had promised, as part of the disputed contract, to make proper application to the BIA for approval. In seeking to uphold the trial court's specific performance judgment, counsel argued the Court should order Earling to make such application, and let the BIA exercise its discretion and decide. In effect, this is an assertion that the disputed contract is really a contract to enter into a sale of the Magpie property, rather than a contract purporting to sell it outright. In Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967), the Ninth Circuit applied the Sage principle and rejected this precise argument. In Lawrence, the plaintiffs sued for specific performance of an oral contract to enter into a long-term lease of Indian trust land. They argued the contract should be enforced without prior approval by the Secretary of the Interior, since the contract they sought to enforce was merely a contract to enter into a lease. Plaintiffs reasoned the Indian landowner would not be overreached because the lease would be subject to the eventual approval of the Secretary, and that the Indian should be forced to perform so that it might be determined if the Secretary would approve the lease. Relying on Sage v. Hampe, the Ninth Circuit rejected this argument and ruled the contract was void and not specifically enforceable:

> ...The answer to this contention is that Congress used the words "any contract" [in 25 U.S.C. § 348], and a contract to enter into a lease is embraced within the words "any contract" and is therefore void. Lawrence at 990.

In this case, Pitts claims he had an enforceable contract with Earling to purchase the Magpie property. However, Earling never made application to the Secretary for prior approval of the disputed transaction, nor did the Secretary ever approve it. The regulations also require that an appraisal be completed before a sale is made or approved. Here, the appraisal was done after the purported sale was made. Because the sale was not approved by the Secretary in

conformance with governing federal regulations, Pitts is not entitled to specific performance. The Secretary's approval must be obtained before a contract can be considered enforceable. In light of the foregoing, the contract at issue cannot be enforced because its ultimate objective is the conveyance of restricted Indian land contrary to controlling law and public policy. Accordingly, we hold that failure to secure secretarial approval prior to the attempted sale rendered the contract at issue null and void and unenforceable.

B. The Fee Interest Question

Pitts contends in any event he is entitled to a specific performance decree ordering Earling to convey the 15/16 fee portion of the Magpie property to him. Because the contract at issue includes a portion of trust land undivided from the fee and the $65,000 sale price was for the entire parcel, we do not agree. We find the reasoning of the Oklahoma Supreme Court to be persuasive authority for the holding in this case. In Mann v. Brady, 196 P. 347, 348 (Okla. 1921), Brady, a Creek Indian, entered into a listing agreement with Brady, a real estate agent, for the sale of his allotment. Like the instant case, a portion of the allotment was subject to congressional restrictions on alienation. The governing statute prohibited contracts for the sale of allotted land and rendered them null and void. Mann sued when Brady refused to pay the commission specified in the listing agreement. Finding the object of the contract was the sale of the entire acreage, including both the restricted and unrestricted portions, and that federal law prohibited the sale of the restricted portion, the court held the object of the contract and the contemplated sale were unlawful. It further ruled the contract was not severable and that Brady could not make a valid contract for the sale of the entire allotment where a portion was restricted. Id. at 352-54. We hold accordingly in the instant case.

The Court's ruling is squarely supported by Montana contract law. Under MCA 28-2-603, an entire contract is void where it is limited to a single object and such object is unlawful, whether in whole or in part. Here, the single object was for a sale of a parcel of land, as the trial judge correctly concluded. The attempted sale of the undivided trust interest was unlawful because it did not have the required prior approval of the Secretary. Since part of the object of the contract was unlawful, the entire contract is void and unenforceable under MCA 28-2-603. See also MCA 28-2-803 ("...If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void.").

C. The $10,000 Partial Payment

We must now address the final disposition of the $10,000 payment Pitts made to Earling as earnest money for the failed purchase of the Magpie property. This matter is also appropriately decided under federal Indian law.

The Supreme Court and lower federal courts have addressed the proper disposition of consideration paid in situations involving the unlawful conveyance of restricted Indian lands. See e.g., Heckman v. United States, 224 U.S. 413 (1912); United States v. Walters, 17 F.2d 116 (D.C. Minn. 1926). The general rule is consideration need not be returned where a conveyance of restricted Indian land has been made in violation of federal law. See Heckman at 446-47; Walters at 117. The Supreme Court long ago explained the underlying policy reasons in Heckman:

> It is said the allottees have received the consideration and should be made parties in order that equitable restoration may be enforced. Where, however conveyance has been made in violation of restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very

> incompetence and thriftlessness which were the occasion of the measures for his protection would render them to no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. Id. at 446-47.

However, the Heckman Court also indicated there may be instances where the consideration could be returned without compromising the policy prohibiting alienation of Indian lands. The Court stated:

> ...It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary. Id. at 447.

In the instant case, the attempted sale of the Magpie trust land violated federal law and policy. However, there has been no unlawful conveyance of restricted Indian land. Plainly, title to the Magpie trust land remains in trust held by the United States on behalf of Florence Earling, and possession of the property is not an issue. Accordingly, Heckman policy considerations will not be defeated by a return of the $10,000 to Pitts. Therefore, as a matter of equity and justice, we require Earling to return the $10,000 payment to Pitts, with interest commencing on the date Earling deposited the payment in her checking account.

III. CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court and hold that the contract for the sale of the Magpie property entered into between Pitts and Earling is null and void and unenforceable for failure to secure the approval of the Secretary of the Interior prior

to the attempted sale. We further direct Earling to return the $10,000 down payment to Pitts, together with interest commencing on the date Earling deposited the payment in her checking account, i.e., on or about May 9, 1991.

REVERSED AND REMANDED

Robert M. Peregoy, Chair
Civil Appellate Panel