



INTERIOR BOARD OF INDIAN APPEALS

Robert B. Wooding v. Commissioner of Indian Affairs

4 IBIA 255 (12/22/1975)

Reconsideration denied:

5 IBIA 9

Judicial review of this case:

Affirmed, *Wooding v. Kleppe*, No. C-76-86T (W.D. Wash. Nov. 4, 1976)

Dismissed for failure to prosecute (June 6, 1977)

Related Departmental case:

IA-2252

Reconsideration denied, IA-2252

Remanded, *Wooding v. Morton*, No. 77-72C3
(W.D. Wash. Aug. 13, 1973)

Related Board cases:

9 IBIA 158

14 IBIA 153

24 IBIA 233



United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF ROBERT B. WOODING, ET AL.

v.

COMMISSIONER, BUREAU OF INDIAN AFFAIRS

IBIA 75-54-A

Decided December 22, 1975

Appeal from the decision of the Commissioner, Bureau of Indian Affairs, affirming a rental adjustment order approved by the Area Director, Portland, Oregon.

Recommended decision of the Administrative Law Judge reversing the Commissioner's action, Modified.

APPEARANCES: Wallace B. Hager, Esq., for appellant; Office of the Regional Solicitor, Portland, Oregon, by James R. Kuhn, Jr., Esq.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Background

On March 5, 1975, Administrative Law Judge John R. Rampton, Jr., issued a recommended decision in this administrative appeal which involves the 1969 adjustment of annual rental under Lease No. 4388, Muckleshoot Indian Reservation. Lease No. 4388, dated June 15, 1964, was for a term of 25 years and by its terms the rental was subject to adjustment at intervals of not less than 5 years. ^{1/}

The above lease involves approximately 90 acres of trust land located near Auburn, Washington. The land constitutes allotment

^{1/} Item seven of the lease provides:

"7. RENTAL ADJUSTMENT -- The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR 131. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements."

No. 7, Muckleshoot Indian Reservation, assigned to Jerry Dominic and his heirs. The beneficial owners of the allotment leased the above property in 1964 at a time of expanding commercial and industrial development to Robert B. Wooding, d/b/a Associated Investors, for an annual rental of \$1,500. The lease was approved by the Secretary and executed pursuant to 25 U.S.C. §§ 380, 403(b) 403(c) (1970); 25 U.S.C.A. § 415 (Supp. 1973). Robert Wooding made an authorized assignment of the lease to Auburn Enterprises, Inc., in 1966. The lessees have used approximately one-fifth of the leased premises (17 acres) for trailer park development; the remainder has apparently been left undeveloped.

In 1970, following unsuccessful negotiations between the Indian lessors and the lessees to agree on an acceptable upward adjustment of the rental charged since 1964, the Bureau of Indian Affairs instructed the lessees that the matter would be resolved by requiring the lessees to pay the fair rental value for the leased premises as determined from an appraisal retroactive to June 15, 1969. The Superintendent of the Western Washington Agency, BIA, then determined that the fair annual rental should be set at \$16,800 as of June 15, 1969. This figure was taken from an appraisal of fair annual rental for Lease No. 4388, dated December 22, 1967, prepared by Otto Kassner, a qualified appraiser employed by the BIA, which the Superintendent deemed reliable for application in 1969.

Because the lessees refused to pay the increased rental and to post a rental bond, the Superintendent canceled the lease on December 10, 1970. Lessees appealed the Superintendent's decision to the Area Director, BIA. That office affirmed the cancellation and appeal was made to the Commissioner of Indian Affairs. The Area Director's action was upheld by decision of the Acting Deputy Commissioner on December 10, 1972. A final decision for the Department of the Interior was then rendered by the Assistant Secretary who also affirmed the rental adjustment.

In response to the above administrative rulings, *inter alia*, the lessees filed an action in the United States District Court, Western District of Washington, seeking a declaratory judgment and review of the Secretary's decision. In a Memorandum and Order dated August 13, 1973 (unpublished), United States District Court Judge William P. Copple remanded the controversy to the Secretary of the Interior for further proceedings.

On October 25, 1973, in accordance with Judge Copple's instructions, the Secretary directed that the Office of Hearings and Appeals provide a full hearing to determine a reasonable adjustment in rental for Lease No. 4388 for the period beginning June 15, 1969. Prior to the hearing, which was conducted July 23, 1974, the Secretary enlarged the appellate authority of the Board of Indian Appeals, Office of Hearings and Appeals, enabling the Board

to decide for the Secretary appeals taken from administrative decisions of BIA officers. 2/ Accordingly, the July 1974 hearing in this dispute resulted in a recommended decision to the Board for whatever final disposition it deems appropriate.

It is the recommendation of the Administrative Law Judge that the annual rental for Lease No. 4388, as of June 15, 1969, be fixed at \$4,138. For the reasons set forth in this opinion, the Board concludes that the recommended figure does not represent a fair annual rental for the period in question and that the Indian lessors are entitled to an annual rental of \$9,668 as of June 15, 1969.

Summary of the Recommended Decision

The requirement on remand was that the BIA produce evidence at a hearing which would lend "substantial and reasoned support to the Secretary's figures" as it did not appear from the administrative record reviewed by Judge Copple that an increase of some 1000 percent in rental (\$1,500 in 1964 to \$16,800 in 1969) seemed "justified on an appraisal showing a rise in land sale values of only 20 to 25 percent per year over five years." 3/

The evidence produced by the BIA at the July 1974 hearing was of two types. Primary emphasis was given to validation of the formal appraisal of fair annual rental prepared by Otto Kassner in 1967 which, as previously noted, determined the fair rental value of the lease to be \$16,800 per year. This appraisal was part of the record on appeal examined by Judge Copple. Secondly, the BIA undertook to show that Lease No. 4388 was entered into at less than fair rental value in 1964 and that an adjustment was contemplated after at least 5 years which would offset the disparity incurred by the Indian lessors. 4/

2/ This authority was delegated on December 14, 1973, by amendment of 211 Department Manual 13.7. Applicable regulations are now found in 43 CFR 4.350 et seq.

3/ Memorandum and Order, August 13, 1973, Wooding v. Morton, U.S.D.C., W.D. Wash., Civil No. 77-72C3, at p. 5.

4/ The regulations provide two bases upon which a Superintendent of the BIA may approve a lease of Indian Trust land. They are:

Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental. (25 CFR 131.5(b).)

Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners. (25 CFR 131.5(b)(3).)

Administrative Law Judge Rampton concluded from the evidence presented that the 1967 appraisal adopted by the BIA was not fair and objective for several reasons. Foremost, it was found that purported comparable sales of property situated near the land in question lacked sufficient elements in common with Lease No. 4388 to permit reliable value comparisons. In addition, the proposed findings of fact establish that the appraiser 1) did not consider rental values for properties in the area but rather values for fee estates, 2) erroneously assumed that sewer and water services were available to portions of the leased property and 3) based his value of the land on residential uses which were not realistic. ^{5/} From a purely mathematical approach, Judge Rampton also observed that an appraised rental of \$16,800 fails to square with other evidence of the BIA that an actual fair rental in 1964 would have been "\$4,500" ^{6/} which, compounded annually by an acknowledged increase in land value of between 20 to 25 percent per year, produces a sum considerably below the \$16,800 mark (Recommended Decision, p. 13).

The Board does not disagree with the conclusion reached by the Administrative Law Judge that the 1967 appraisal fails to warrant an adjustment of rental to \$16,800 as of 1969. Neither, however, does the rental proposed in the recommended decision, \$4,138, appear supported by the evidence. Judge Rampton derived his proposed rental by multiplying the 1964 rental, \$1,500, by 275.8 percent--representing the degree of increased value for the land over a 5-year period. ^{7/} Since, as Judge Rampton notes, "the evidence is clear that the annual rental of \$1,500 for the 1964-1969 period was not a fair annual rental for the land" (Recommended Decision, p. 8), the Board can find no just reason for applying a fixed rate of appreciation to that sum in calculating fair rental for 1969.

^{5/} Since the lessees did not introduce any independent appraisals at the hearing, the proposed findings referred to were adduced by the Administrative Law Judge from cross-examination of the BIA's witnesses.

^{6/} More precisely, the evidence presented by the Bureau establishes that the fair rental in 1964 would have been at least \$4,550. See BIA Exhibit No. 9 (1973 Appraisal of Richard Swanson, Area Chief Appraiser, retroactive to June 15, 1964), and testimony of Mr. Swanson at pages 101-103 of the hearing transcript.

^{7/} Judge Rampton found that land values in the area had increased 20-25 percent per year from 1964-1969 "for an average of 22.5 percent per year * * *." He states at p. 16 of the recommended decision: "Uncompounded, the total increase would be 112.5 percent. More properly though, the total increase should be computed on a compounded basis, *i.e.*, by geometric progression. When this is done, the percentage increase for five years is 275.8 percent."

There is no indication in the federal court's remand that the Secretary was to be bound by the initial \$1,500 rental, as distinguished from the overall leasing agreement, in arriving at an appropriate rental adjustment authorized by federal regulations and Item 7 of the lease. If, as contended by the lessees, the Department of the Interior is precluded from looking behind the \$1,500 rental established in 1964, an administrative hearing would have been of little value and, in fact, the federal court could have simply instructed the Secretary that an adjusted rental was to be based on the \$1,500 figure multiplied by the rate of increase in land value experienced from 1964-1969.

The course charted by the Board in this appeal is not inconsistent with the principle stated by the federal court at page 5 of its Memorandum and Order in Wooding v. Morton, supra, where it is stated:

The right granted in the lease to reevaluate the rent does not support action that amounts to complete renegotiation at five-year intervals; rather it allows only incremental adjustments to protect the beneficial owners. If the rule were otherwise, the valuable 25-year term of the lessee would be illusory, and he would hold a mere option to negotiate a renewal at these intervals.

The standard prescribed by Judge Copple in the above excerpt is that an adjustment in rental cannot be approved by the Secretary where such action would constitute creation of a new lease. As set forth below, the evidence in this case reveals that adherence to the \$1,500 rental after 1969 as the exclusive basis for future adjustments was not contemplated when the lease was entered.

The testimony of Bureau officials who were directly involved in the execution of Lease No. 4388 in 1964, John Vaninetti and Harlow Nasewytewa, leaves no doubt that the initial rental of \$1,500 was understood to be below the fair annual rental for the premises in 1964 and, accordingly, was not considered binding on the lessors after 5 years. At pages 8-9 of the Recommended Decision, the Administrative Law Judge states:

* * * Mr. Nasewytewa testified that he knew the \$1,500 per year was below the "economic rent" but that "the rent would be adjusted five years hence and bring it up to economic rent." (Tr. 141, 142, 149.) John Vaninetti testified that his reason for recommending the approval of Lease No. 4388 was that it was for the best interest of the Indian landowners as well as the lessee. He stated: "When I say to the best interest of the lessee, it gave him a chance to get in and

develop it, have an income, and then probably at the end of the five year period, at the adjustment period, then he was able to pay a rent based on the appraisal. As far as the landowner is concerned, they had land that was undeveloped. It was being used for lower use before that. He had a chance to use it, get more money than he ever got before, and put it to use." (Tr. 158.) * * *

The Administrative Law Judge concludes at page 9:

The lease under consideration was approved without an appraisal because it was the opinion of those officials of the BIA that an annual rental at less than the present fair value would be in the best interest of the landowners and that there would be an adjustment upwards at the end of five years.

Conclusion

The Board has carefully reviewed the testimony of all witnesses who appeared at the July 1974 hearing and examined the briefs and exhibits. From this review and in light of the proposed findings and conclusions of the Administrative Law Judge previously cited, we find the evidence is convincing and uncontroverted in the following respects: 1) the initial rental for Lease No. 4388, \$1,500 was below the fair rental value for the land, 2) the fair rental value for the leased premises in 1964 would have been no less than \$4,550, 3) Departmental approval was given to the 1964 leasing agreement in contemplation of adjusting the rental to meet fair market value after at least 5 years, and 4) from 1964-1969 the rental value of Lease No. 4388 had increased an average of 22.5 percent per year.

The above findings provide a basis for formulating a fair rental solution to this case. Specifically, the Board concludes that the fair annual rental for the lease in 1964 should be multiplied by 112.5 percent to arrive at a rental adjustment fair to all parties. This formula results in a rental of \$9,668.

Various considerations are responsible for the Board's decision to increase the 1964 fair rental by 112.5 percent as opposed to the compounded factor of 275.8 percent recommended by the Administrative Law Judge. First, it is nowhere agreed by the parties that a 275.8 percent increase is a fair way of translating a 22.5 percent increase which admittedly reoccurred for 5 years. In fact the opposite was stated by the BIA's Area Chief Appraiser when he testified that land values in the area, gauged by dollar sales, had increased by approximately 90 percent from 1964-1969 (Tr. 108). Read as a whole, therefore, we interpret the evidence presented as

meaning that the lease in question roughly doubled in value from 1964-1969.

In addition, subscribing to the recommended formula that land values leaped by 275.8 percent from 1964-1969 is inconsistent with evidence that by 1969 a slump in area economic conditions began to develop. Finally, although the lease in question leaves much to be desired from a drafting standpoint, it is believed that the formula followed in this decision remains as faithful as possible to the terms of the written lease and the understanding of the parties without unjust enrichment to either side.

Rental Adjustment as of June 15, 1975

The third 5-year period for lease No. 4388 commenced June 15, 1974. Judge Copple stated in his remand:

While the considerations must be separate in each instance, nothing herein bars the Secretary from establishing the amount of adjustment, if any, for the third five-year period commencing June 15, 1974, in the new proceeding here ordered.

Memorandum and Order, Wooding v. Morton, *supra*, p. 5.

The procedure chosen by the Secretary upon remand was to limit the July 1974 hearing to the single issue of determining rental for the period 1969-1974, even though a separate appeal had ensued from a May 30, 1974 decision of the Portland Area Director, BIA, establishing the rental for Lease No. 4388, as of June 15, 1974, at \$14,800 per year. On January 17, 1975, the Commissioner withdrew the issuance of the 1974 adjustment on rental, reserving the right to issue a new order of adjustment at a later date.

Now that a final decision is entered with respect to the rental required from the lessees from June 15, 1969, to at least June 15, 1974, the way is cleared for a further adjustment to become effective during the third 5-year period of the lease. No hearing will be ordered by the Board to consider this question since it is a matter within the authority of Bureau officials to decide.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), IT IS DECIDED AND ADJUDGED that the rental for Lease No. 4388, Muckleshoot Indian Reservation, be and the same is hereby adjusted to \$9,668 per year as of June 15, 1969.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Alexander H. Wilson
Administrative Judge

I concur:

//original signed
Mitchell J. Sabagh
Administrative Judge