



INTERIOR BOARD OF INDIAN APPEALS

Estate of Temens (Timens) Vivian Gardafee

5 IBIA 113 (05/27/1976)

Also published at 83 Interior Decisions 216

Judicial review of this case:

Dismissed, *Confederated Tribes & Bands of the Yakima Indian Nation v. Kleppe*,  
No. C-76-200 (E.D. Wash. Sept. 19, 1978)



# United States Department of the Interior

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

## ESTATE OF TEMENS (TIMENS) VIVIAN GARDAFEE

IBIA 76-15

Decided May 27, 1976

Appeal from final order determining fair market value of certain allotted lands on the Yakima Reservation.

Reversed and Remanded.

1. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:  
Yakima Tribes: Generally

Absent controlling guidelines in the statute concerning valuation date (fair market value), it is more equitable to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase same, i.e., January 25, 1974.

APPEARANCES: Hovis, Cockrill and Roy, by Pat Cockrill, Esq., for appellant; H. W. Felsted, Esq., for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The above-entitled matter comes before this Board on appeal from the final order of Administrative Law Judge Robert C. Snashall, issued August 25, 1975, after a hearing upon petition and demand for valuation hearing brought by Ervin Ray, a non-eligible heir, under the provisions of the Yakima Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607 (1970)), pursuant to 43 CFR 4.305.

Temens Vivian Gardafee died intestate on December 11, 1971, leaving certain heirs at law and trust properties on the Yakima Reservation. Interests in said trust properties were subject to divestiture by Yakima Tribal purchase pursuant to 25 U.S.C. § 607 (1970). The Tribe elected to purchase said trust properties described in attachments to Supplemental Order of Distribution dated January 25, 1974, and referred to as tract Nos. 124-3283 (Temens Vivian Gardafee) and 124-2173 (Jason Sam). The Tribe entered into a written stipulation concerning the value of that particular portion of the estate purchased under the exercise of option designated as Allotment No. 124-2173 (Jason Sam); consequently that tract is not at issue here.

The land designated Allotment 124-3283 (Temens Vivian Gardafee) consisting of 80 acres was appraised by the Bureau of Indian Affairs on or about March 9, 1973, at a fair market value

of \$11,500 as of December 11, 1971, date of death of Temens (Timens) Vivian Gardafee.

As previously stated, a Supplemental Order of Distribution was entered by the Judge on January 25, 1974, evidencing the Tribe's election to purchase tract no. 124-3283, and \$11,500 was deposited in the estate account as the estimated just compensation (fair market value). The Order further vested all rights, title and interest in the Tribe as of the date of the Order, January 25, 1974.

Ervin Ray, the surviving spouse and non-eligible heir, petitioned for a valuation hearing contending in substance that the property in question was under valued. A hearing was set for February 11, 1975, and subsequently continued to April 6, 1975, to afford the petitioner an opportunity to obtain counsel. Due to the untimely death of Judge Richard Montgomery, the matter was further continued to July 25, 1975. On July 25, 1975, the aforementioned petitioner appeared with counsel. Neither the Tribe nor its counsel appeared. Counsel for the Tribe steadfastly maintained that its failure to appear was due to the mistaken belief it had been granted a continuance to a future date.

Hearing was held, testimony taken and exhibits offered. A Final Order was entered on August 25, 1975, wherein it was determined that the fair market value at the time of taking was \$800

per acre, or \$64,000 for the 80 acres in question. The Judge further concluded that interest at the rate of eight (8) percent per annum should be paid on \$52,500 remaining outstanding from the 25th of January 1974 until the deficiency is deposited into the estate IIM account.

The Tribe, through counsel, appealed contending among other things, that:

1) The regulations adopted by the Department were unconstitutional because they have a retroactive effect.

2) The Judge erred in failing to determine in his Final Order the appropriate time of taking for purposes of 25 U.S.C. 607 (1970).

3) The Judge erred in concluding that the 80-acre allotment was worth \$64,000 based on a valuation of \$800 per acre in the absence of competent and material evidence sufficient to meet the petitioner's burden of proof.

Counsel for the Tribe argues that the proper valuation date for determining the fair market value to be paid by the Yakima Tribe for its purchase of all desired interests should be the date of death of Temens Gardafee. We cannot agree. We believe that the proper valuation date for determining the fair market value to be paid by the Yakima Tribe for its purchase of all desired interests to be

January 25, 1974, the date the Supplemental Order of Distribution was entered by Judge Snashall evidencing the Tribe's election to purchase subject property and the Tribe's deposit of \$11,500 in the estate account as estimated just compensation (fair market value).

[1] Consequently, absent controlling guidelines in the statute concerning the selection of a valuation date, the Board finds that it would be more equitable in this case to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase, i.e., January 25, 1974.

Although we are of the opinion that conformance with the regulations adopted by the Department is not a prerequisite, in the interest of an orderly and equitable disposition of this matter, the course the Board adopts coincides with certain of the procedures set forth in 43 CFR 4.310 et seq. Department regulations prescribing the manner by which fair market value shall be determined in Yakima Tribal purchases initiated pursuant to the Act of December 31, 1970, supra, did not become effective until September 30, 1974. Because of our determination that the proper valuation date in this case is January 25, 1974, we conclude that regulations implemented after that date which are tailored to a newly-adopted valuation scheme should be followed only to the extent practicable. See Estates of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles and Caroline J. Charles (Brendale), 5 IBIA 96, 83 I.D. 209 (1976).

Based upon the record as presently constituted we are unable to arrive at a fair market value for tract No. 124-3283 (Temens Vivian Gardafee) at the time of taking (January 25, 1974).

The record includes an appraisal report and summary dated March 9, 1973, from the Bureau of Indian Affairs, Branch of Real Estate Appraisal, wherein it is determined in 1973 that the fair market value of this property at the time of death of Temens Vivian Gardafee, December 11, 1971, was \$11,500. The record further contains two letter appraisals submitted by Ervin Ray, one dated May 2, 1974, signed by Mark W. Maughan and R. S. Lawrence, the other dated June 19, 1975, signed by Robert S. Lawrence. The May 2, 1974, appraisal after an on-site inspection on April 26, 1974, values tract No. 124-3283 at \$400 per acre. The June 19, 1975, appraisal after an on-site inspection on May 16, 1975, values the same tract at \$800 per acre. At the hearing, Mr. Lawrence testified that he made his appraisal to reflect the fair market value of the property in question on May 16, 1975. Upon being advised that any determination would have to reflect the fair market value as of February 11, 1975, Mr. Lawrence testified that the fair market value on February 11, 1975, was \$800 per acre or \$64,000 for the 80-acre tract.

We further note that only 59 of the 80 acres were being utilized by the lessee prior to expiration of the lease, 2 acres are

in a county road right-of-way, and about 19 acres are undeveloped lands suitable for development for irrigation receiving irrigation water from a deep well. None of the foregoing items was considered in Mr. Lawrence's appraisal. Mr. Lawrence, moreover, made no comparison of the property in question to other properties in the immediate vicinity. Finally, we are of the opinion that prior to the beginning of the hearing in July 1975, Judge Snashall should have requested and received from the Bureau of Indian Affairs, an appraisal report with a summary thereof, made on the basis of the fair market value as of the date of inspection of the property.

We would consequently remand the case for a hearing de novo for the purpose of determining the fair market value of tract No. 124-3283 as of January 25, 1974, with all interested parties having the opportunity to participate.

Preliminary to the hearing, the Judge should issue an Order to the Superintendent, Bureau of Indian Affairs, for an appraisal of the decedent's interest and the filing of an appraisal report with a summary thereof on the basis of the fair market value as of the date of the inspection of the property and also to reflect the fair market value as of January 25, 1974. A copy of the new summary shall be mailed by the Judge to the Tribe and affected heirs with opportunity for all interested parties to examine and copy at their own expense the full appraisal report. In addition, all members

of the Branch of Real Estate Appraisal involved in the appraisal should be available for examination and/or cross-examination.

At the hearing, each party, i.e., Ervin Ray and Yakima Tribe, attacking the valuation of the interest shown by the appraisal report shall have the burden of proving his own position.

Further, it shall be ordered that within 20 days after receipt of the Judge's decision, in the event that an appeal is not taken, the Tribe must file with the Superintendent of the Yakima Indian Agency, a specific list of all interests it elects to take from surviving spouse, Ervin Ray. It shall be conclusively presumed that the Tribe has released all claims to any interest not listed. Should the Tribe decide that it does not want part or all of the surviving spouse's interest, the Superintendent must be informed of such rejection within 20 days of receipt of the decision. In such event, the Tribe will be allowed full reimbursement for all monies deposited toward the purchase of the interest in question included in the estate account.

Within 1 year from the date of filing the formal election to take with the Superintendent, the Tribe shall pay into the estate account any balance determined by the Judge to be due, plus interest on the unpaid balance at a rate of 8 percent from the date of the filing of the formal election. The payment deadline may be extended for no more than two 6-month periods.

Judge Snashall shall retain jurisdiction of this matter for a period of 2 years to oversee the necessary transactions and to rule on any extension requests. Upon payment by the Tribe of the full market value for its elected interest, Judge Snashall, after certification of said fact by the Superintendent, shall make a finding that the required fair market value has been paid and he shall issue a decision that the United States holds the title to such interest in trust for the Tribe.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Final Order issued August 25, 1975, and REMAND the matter to the Administrative Law Judge for hearing de novo pursuant to the dictates referred to supra, to determine the fair market value of tract No. 124-3283 (Temens Vivian Gardafee) as of January 25, 1974.

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Mitchell J. Sabagh  
Administrative Judge

We concur:

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//original signed  
Wm. Philip Horton  
Board Member

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Alexander H. Wilson  
Administrative Judge