



INTERIOR BOARD OF INDIAN APPEALS

Hazel Hawk Visser v. Portland Area Director, Bureau of Indian Affairs

7 IBIA 22 (02/17/1978)



# 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 HAZEL HAWK VISSER

v.

AREA DIRECTOR, PORTLAND AREA OFFICE,  
BUREAU OF INDIAN AFFAIRS

IBIA 77-56-A

Decided February 17, 1978

Appeal from Area Director's decision effecting sale of allotted land to the Yakima Tribe.

Affirmed.

1. Indian Lands: Allotments: Alienation

Pursuant to the Act of July 28, 1955, 69 Stat. 392, as amended, (25 U.S.C. § 608), and 25 CFR 121.17 *et seq.*, an Indian owner of trust land who consents to sell her interest to the Yakima Tribe is legally entitled to the fair market value therefor.

2. Indian Lands: Tribal Rights in Allotted Lands

The action of the Land Committee of the Yakima Tribe in voting to acquire allotted land at the fair market value as determined by the Bureau of Indian Affairs after an appraisal constituted an offer to purchase and not an acceptance of an offer.

3. Bureau of Indian Affairs: Administrative Appeals: Generally--  
Indian Lands: Allotments: Alienation

The party challenging the terms or conditions of a sale of Indian land bears the burden of proving the violation or misconduct alleged.

4. Indian Lands: Allotments: Alienation

The individual Indian seller has not upheld her burden of disproving the validity of the March 1976 appraisal as the basis for sale of her land in October 1976, nor has she demonstrated through the proposed testimony of witnesses or other possible evidence, any necessity for ordering a hearing on this question.

5. Indian Lands: Allotments: Alienation

Where the subject appraisal was based on the land's "highest and best use" and 5 of the 80 acres were considered by the BIA appraiser as contributing no value in such a market, the appellant erroneously construed the appraisal as a determination that 5 acres of her land were without value for any purpose.

6. Indian Lands: Allotments: Alienation

Under the circumstances of this case, no prejudicial error occurred as a result of the BIA appraiser's failure to estimate the worth, or lack thereof, of an old abandoned structure on appellant's land.

APPEARANCES: Francis B. Mathews, Esq., Eureka, California, for appellant; Vincent Little, Area Director, Portland Area Office, Bureau of Indian Affairs, appellee, pro se.

OPINION BY ADMINISTRATIVE JUDGE HORTON

Hazel Hawk Visser, appellant, seeks reversal of action by the Bureau of Indian Affairs which resulted in her one-half interest in 80 acres of land located on the Yakima Indian Reservation being acquired by the Yakima Tribe for what she alleges to be below fair market value by at least \$24,000. From an adverse decision of the Area Director, Portland Area Office, dated January 18, 1977, appellant sought review by the Commissioner of Indian Affairs (now Assistant Secretary for Indian Affairs). By memorandum dated August 4,

1977, the Commissioner referred this administrative appeal to the Board for decision pursuant to 25 CFR 2.19. 1/

### Background

The administrative record discloses the following relevant facts and sequence of events:

Hazel Hawk Visser, appellant, and her sister, Ione H. Knox, were co-owners by inheritance of 80 acres of trust land in Yakima County, Washington, legally described as follows: S 1/2 NE 1/4 sec. 31, T. 11 N., R. 19 E., Willamette meridian, Washington. This land was originally allotted to Paul Leschi, deceased Allottee No. 2159, Yakima Reservation.

In 1970 appellant and her sister, neither of whom is a Yakima Indian, submitted applications to the Bureau of Indian Affairs to sell their interest in the above property to the Yakima Tribe. A provision in each application, executed on BIA Form No. 5-105, authorizes the sale of the land "provided it is not inconsistent with the present fair market value as indicated by the appraisal \* \* \*."

The first appraisal of the property occurred on September 27, 1974. 2/ For this date the BIA appraised the fair market value of the 80 acres in question at \$50,000.

On June 13, 1975, appellant and Mrs. Knox signed consent forms prepared by the BIA in which they requested the Secretary of the Interior to sell their interest in Allotment No. 2159 to the Yakima Tribe "provided the consideration involved is not inconsistent with the present fair market value of \$50,000 as indicated by the appraisal \* \* \*."

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1/ This regulation provides in pertinent part as follows:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

2/ The September 27, 1974 appraisal report is not found in the administrative appeal file but references to the report's findings are commonly referred to by appellant and BIA in various records and pleadings.

On January 9, 1976, the Land Committee of the Yakima Tribe voted to purchase Allotment No. 2159 subject to a reappraisal of the land.

The BIA reappraised the subject property as of March 2, 1976, in an appraisal report approved by the Area Chief Appraiser on April 12, 1976. The fair market value established in this report, hereafter referred to as the March 1976 appraisal, was \$88,000.

The next action by the Yakima Land Committee occurred on August 11, 1976, at which time the committee voted to purchase the 80 acres in question at the appraised value of \$88,000.

By memorandum dated October 14, 1976, the Superintendent of the Yakima Agency recommended to the Portland Area Director, BIA, that he approve the sale of the subject property to the Yakima Tribe for the consideration of \$88,000 to the Indian owners.

On October 26, 1976, the Area Director executed a deed conveying the 80 acres to the Yakima Tribe for the sum of \$88,000 as recommended by the Superintendent.

On November 5, 1976, proceeds from the sale were deposited by the BIA into the Individual Indian money accounts (IIM accounts) of appellant and her sister.

By letter dated November 30, 1976, appellant advised the Yakima Agency that she considered the latest appraisal of the subject property to be below fair market value. This comment, among others contained in the foregoing letter, suggest that appellant was not aware that her interest in Allotment No. 2159 had already been sold to the tribe.

The Superintendent responded to appellant's letter of November 30, 1976, by correspondence dated December 14, 1976. <sup>3/</sup> The Superintendent's letter explained details of the completed sale as follows:

The sale of Allotment No. 2159 to the Tribe was approved by the Acting Assistant Area Director on October 26, 1976, and the money was transferred to your account on November 5, 1976.

We are attaching a copy of your's and your sister's Consent to Sale of this tract for \$50,000.00 along with a

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<sup>3/</sup> The Superintendent's written response reflects that he and the appellant had previously discussed her letter of November 30, 1976.

copy of the latest appraisal report. It is the policy of this office to regard a consent as valid if it is being sold for a price above the amount approved by the seller. The sale was sold at the appraised price of \$88,000.00. We checked with the appraisal office, were informed that there has been no measurable change in market value of farm lands in this area since appraisal of March 2, 1976.

#### Issue on Appeal

Appellant alleges that the actions of the Yakima Superintendent and Portland Area Director in effecting the sale of her land to the Yakima Tribe were unlawful and deprived her of fair market value for her property. Having affirmed their own actions under the preliminary administrative appeal procedures, the matter is now before the Board on referral from the former office of the Commissioner of Indian Affairs, as noted previously.

#### Discussion

The Secretary of the Interior is authorized, in his discretion, to purchase for the Yakima Tribe any lands within the Yakima Indian Reservation or within the area ceded to the United States by the treaty of June 9, 1855. Act of July 28, 1955 (69 Stat. 392), 25 U.S.C. § 608(a)(1), as amended by the Act of August 31, 1964 (78 Stat. 747), 25 U.S.C. § 608 (a)(1) (1970).

The terms and conditions of any purchase of individually owned trust land by the Secretary for the Yakima Tribe--"including the price at which any land is so purchased"--shall be mutually agreed upon by the Secretary, the Yakima Tribe, and the individual Indian or Indians concerned. 25 U.S.C. § 608(d) (1970).

Departmental regulations concerning the sale or conveyance of trust lands are codified at 25 CFR 121.17 et seq. As relate to the appeal at hand, these regulations provide as follows:

121.17

[P]ursuant to \* \* \*authorizing acts, trust or restricted lands acquired by allotment, devise, inheritance, purchase, exchange, or gift may be sold, exchanged, and conveyed by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner.  
[Emphasis supplied.]

121.23

Applications for the sale \* \* \* of trust or restricted land shall be filed in the form approved by the Secretary

with the agency having immediate jurisdiction over the land. Applications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners \* \* \*.

121.25(a)

Indian owners may, with the approval of the Secretary, negotiate a sale of and sell trust or restricted land for not less than the appraised market value \* \* \* (2) when the sale is to the tribe \* \* \*.

From the factual summary provided and the foregoing synopsis of applicable legal requirements, these conclusions can be drawn. First, appellant expressly desired that her interest in Allotment No. 2159 be conveyed to the Yakima Tribe. Second, in consideration for her interest, appellant was entitled to be compensated in accordance with the fair market value of the property. Third, appellant fully intended that the Secretary of the Interior would undertake to ascertain the fair market value of the subject property. And fourth, once the tribe agreed to purchase the land at its fair market value, the Secretary was authorized and committed to selling the property for appellant to the tribe.

[1] Notwithstanding that appellant entrusted the Secretary of the Interior through his agents in the BIA to appraise and sell her land to the Yakima Tribe, we hold that she is entitled to appeal any departmental action which she believes has deprived her of fair market value for her land. Appellant's Consent to Sale, therefore, did not transform BIA officers into "landowners with free choice in dealing with this land"; 4/ rather, the terms of the consent, the statute and the regulations vest appellant with a legally enforceable right to fair market value. 5/

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4/ Coomes v. Adkinson, 414 F. Supp. 975, 992 (D.S.D. 1976).

5/ The Act of July 28, 1955, as amended, supra, does not guarantee "fair market value" to sellers of land to the Yakima Tribe. It does specify that the purchase price of trust land sold by Indians to the tribe shall be mutually agreed upon by the Secretary, the tribe and the individual Indian or Indians concerned. In the case at hand the price agreed upon was the fair market value of the property. Further, as an "other authorizing act" for the sale of trust land (25 CFR 121.17), the implementing regulations of the Department require the Indian seller to be compensated by "not less than the appraised fair market value" (25 CFR 121.25(a)).

The final question is whether the purchase price obtained by appellant 6/ was based on fair market value. Alleging that it was not, appellant argues the following: (1) the fair market value of the property in March 1976 (\$88,000) could not have represented fair market value as of the time of sale, and (2) the March 1976 appraisal was below fair market value by at least \$24,000.

The date of sale is variously referred to in this case as either August 11, 1976, when the Yakima Tribe, through its Land Committee, voted to acquire appellant's property for \$88,000, or October 26, 1976, when the BIA executed a deed formally conveying the subject property in trust to the tribe.

[2] Neither the Department's regulations nor the BIA's manual of operations define the time of sale in either these or related transactions. As in traditional property law, however, an examination of the ordinary incidents of a sale of property will resolve this question where the matter is unclear. Here, the following circumstances, *inter alia*, require a finding that sale of the property was not completed until at least October 26, 1976: (1) the deed was executed by the Area Director for the Secretary on October 26, 1976 (it was filed with the appropriate title office on October 28, 1976); (2) no consideration was received by the individual Indian seller until November 5, 1976; and (3) rental grazing refunds of \$53.14 were calculated for each seller for a period ending October 26, 1976. In accordance with the foregoing, the action of the Land Committee of the Yakima Tribe on August 11, 1976, could only have constituted an offer to purchase. It was not an acceptance of an offer.

The BIA contends that \$38,000 represented the fair market value of the subject property whether the date of sale is regarded as occurring on August 11, 1976, or on October 26, 1976. 7/

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6/ Appellant's sister, who shared equally in the proceeds from the sale, does not join in this appeal. See Letter from Mrs. Ione H. Knox to BIA, dated January 21, 1977.

7/ Accompanying the Area Director's appellate brief is a memorandum prepared by Area Chief Appraiser Walter Stone, dated June 2, 1977, which states as follows:

“Our analysis on sales data on agricultural lands in the Yakima Valley reveals that they occur on an annual cycle. The greatest sale activity is AFTER fall harvest and before spring planting when farmers are not as busy with their crops. During these winter months, price changes, if any, become apparent in the new transactions. Trends are usually not established, and are not clear during the ‘off-season’ (for land sales.)

[3] The party challenging the terms or conditions of a sale of Indian land bears the burden of proving the violation or misconduct alleged. In this case, appellant disputes the validity of the March 1976 appraisal for a sale completed in October 1976 on grounds that the property must have appreciated in value due simply to the lapse in time. Brief in Support of Appeal, filed August 26, 1977, at 2. 8/

However, appellant has made no attempt to respond to BIA's explanation for the alleged stability in the value of her property from the date of the second appraisal until the time of sale.

[4] Based on the administrative record before us, we hold that appellant has not upheld her burden of disproving the validity of the March 1976 appraisal as the basis for sale of her land in October 1976, nor has she demonstrated through the proposed testimony of witnesses, or other possible evidence, 9/ any necessity for ordering a hearing on this question. 10/

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fn. 7 (continue)

"The subject, Yakima Allotment No. 2159, was appraised April 6, 1976 using sales from the immediately past '75-'76 agricultural land 'trading' season and reflected a general \$417.50 per acre upward adjustment from 1975 levels. Any change from April to October 1976 would be difficult to establish. Appraisals made on other similar allotments in October '76 utilized the same data as was used on subject. I do not believe an appreciable (measurable) change occurred between the two dates."

8/ See also, Appellant's Response to Area Director's Brief, filed September 30, 1977, in which appellant's counsel states:

"During the 8 months elapsing between June 13, 1975 when the original sale was consented to at \$50,000 and the reappraisal of April 12, 1976, the property increased 76% in value.

"If it was applying the same percentage to the 6-1/2 months elapsing between April 12, 1976 (the date of the reappraisal), to the date the sale was finally consummated on October 26, 1976, the property would increase 58.6% additionally \* \* \*" (At 1).

It is of course erroneous to suggest that only 8 months elapsed between the original appraisal and the second appraisal. From September 27, 1974, to March 2, 1976, comprises a period of more than 17 months, or two "trading seasons" as described by the Area Chief Appraiser (Fn. 7).

9/ Appellant's brief alleges that "comparable properties have been sold at not less than \$1,400 per acre \* \* \*." It is noted that BIA's March 1976 appraisal considered, among other factors, five 1976 sales of comparable property, two of which were over \$1,400 per acre.

10/ Cf. Coast Indian Community v. United States, 550 F.2d 639, 653 (Ct. Cl. 1977), in which the BIA's appraisal of a right-of-way across

The remaining issue is whether the March 1976 appraisal accurately reflected the property's fair market value as of the time it was appraised.

Appellant claims the appraisal is deficient for two reasons. First, it is alleged that the value of 5 of the 80 acres was excluded in calculating the appraised value. Second, it is alleged that the appraisal failed to attribute any value to a dwelling located on the property.

[5] The subject appraisal was based on the land's "highest and best use" which was found to be for the production of irrigated crops. Five of the 80 acres were considered by the appraiser as contributing no value in such a market. Appellant erroneously interprets the appraisal report as the equivalent of a finding that 5 acres of her land were without value for any purpose. This is obviously not what the appraisal conveys. 11/

[6] Finally, it is correct that the appraisal report omits reference to a dwelling on the property. In the proceedings below, the BIA has explained to appellant that it knew of the structure, an old, abandoned house, but that its presence cannot be considered an asset to the property. While this conclusion should have been drawn in the formal appraisal, failure to do so does not render the evaluation invalid.

Appellant makes no claims which would tend to show that it was prejudicial to omit a separate evaluation of the subject dwelling. In addition, her present regard for the structure contrasts sharply with her opinion of it over 9 years ago. On December 9, 1968, the record shows she wrote the BIA regarding a proposed conveyance of her land and referred to the house as "no longer liveable."

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fn. 10 (continued)

Indian land, for which the Indians are entitled to fair market value by regulation (as in the case at hand) was overturned. The court observed, however:

"Mere evidence of a disparity between the value that the trustee realized in disposing of trust property and the fair market value at the time of that disposition, as later independently appraised, is not sufficient to establish negligence or other breach on the part of the trustee."

11/ Based on information contained in reports of the Yakima Land Committee, it appears that the first appraisal of appellant's land in September 1974 attributed market value to only 76 of the 80 acres. Appellant filed no objection of record to this apparent procedure and in fact endorsed the evaluation in her consent to sale filed on June 13, 1975.

For the foregoing reasons, the Board is not persuaded that the March 1976 appraisal failed to fairly evaluate the market value of appellant's land. Nor, as previously indicated, has the appellant demonstrated that use of the March 1976 valuation by the BIA in October 1976 deprived her of fair market value for her property in a sale of the land to the Yakima Tribe. 12/

Now, therefore, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Area Director, Portland Area Office, Bureau of Indian Affairs, dated January 18, 1977, denying the appeal of Hazel Hawk Visser, is AFFIRMED.

This decision is final for the Department.

Done at Arlington, Virginia.

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//original signed  
Wm. Philip Horton  
Administrative Judge

We concur:

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//original signed  
Alexander H. Wilson  
Chief Administrative Judge

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//original signed  
Mitchell J. Sabagh  
Administrative Judge

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12/ This ruling should not be interpreted as approval of any practice whereby appraisals in need of supplementation are relied upon in a conveyance of trust land. Rather, we have determined here that appellant failed to show that the March 1976 appraisal was invalid by the time of sale.