



## INTERIOR BOARD OF INDIAN APPEALS

Cheyenne & Arapaho Tribes of Western Oklahoma  
v. Deputy Assistant Secretary - Indian Affairs (Operations),  
Reading & Bates Petroleum Co. and Woods Petroleum Corp.

12 IBIA 241 (05/18/1984)

Also published at 91 Interior Decisions 229

Reconsidering:  
11 IBIA 54

Judicial review of this case:

Reversed, *Cheyenne and Arapaho Tribes of Oklahoma v. United States*,  
Civ. No. 84-1765-A (W.D. Okla.)  
Affirmed, 966 F.2d 583 (10th Cir. 1992)  
Certiorari denied, 507 U.S. 1003 (Mar. 29, 1993)



# United States Department of the Interior

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

CHEYENNE AND ARAPAHO TRIBES OF WESTERN OKLAHOMA

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS),  
READING & BATES PETROLEUM CO., AND WOODS PETROLEUM CORP.  
(ON RECONSIDERATION)

IBIA 82-37-A

Decided May 18, 1984

Petition for reconsideration of Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., and Woods Petroleum Corp., 11 IBIA 54, 90 I.D. 61 (1983), filed by appellant tribes.

Board's previous decision affirmed as modified.

1. Administrative Procedure: Administrative Record--Administrative Procedure: Administrative Review

When new procedural requirements are imposed during the pendency of an appeal which render the administrative record previously prepared by the Bureau of Indian Affairs insufficient for full administrative review, the Board of Indian Appeals will give the Bureau an opportunity to supplement the record and to demonstrate, if possible, that all substantive requirements were met.

2. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

APPEARANCES: Yvonne T. Knight, Esq., Native American Rights Fund, Boulder, Colorado, for appellants; Kent L. Jones, Esq., Tulsa, Oklahoma, for appellee companies. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have filed a petition for review of the February 10, 1983, decision of the Board of Indian Appeals (Board) in Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., and Woods Petroleum Corp., 11 IBIA 54, 90 I.D. 61 (1983). For the reasons discussed below, the Board affirms that decision as modified in this opinion.

Background

The background of this case is fully set forth in the Board's original decision, 11 IBIA at 55-57, 90 I.D. at 61-62. That discussion is hereby incorporated by reference.

In summary, Reading & Bates Petroleum Company and Woods Petroleum Corporation (companies) entered into 5-year oil and gas leases in 1976 with appellants. The leases covered restricted Indian lands in Custer County, Oklahoma, owned by appellants. In July 1980, the companies received pooling orders covering these leases from the Oklahoma Corporation Commission (Commission). When the oldest of the leases was nearing its expiration date, the

companies requested the Bureau of Indian Affairs (BIA) to approve a communitization agreement. The agreement would put into effect the pooling order received from the State agency. Over appellants' objections that the agreement was not sufficiently lucrative, the companies, on May 5, 1981, presented the proposed agreement to the Geological Survey for approval, pursuant to Departmental regulations. The Geological Survey recommended approval of the agreement the same day. The agreement was subsequently approved by the Concho Agency, BIA, on May 6, 1981; by the Anadarko Area Office on May 8, 1981; 1/ and by the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary) on February 9, 1982. The Board affirmed approval on February 10, 1983.

Appellants sought reconsideration of the Board's decision. Initial briefs on whether reconsideration should be granted were filed by appellants and the companies. By order dated September 2, 1983, the Board granted reconsideration and requested additional information from BIA on the factors that were considered before the communitization agreement was approved. An additional briefing period followed BIA's response.

#### Discussion and Conclusions

The issue before the Board in this reconsideration is whether BIA improperly approved the present communitization agreement without considering

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1/ Appellants argue that the speed with which the agreement was approved proves that it was not fully and carefully considered. The record, however, shows that the proposed agreement had been under discussion for a considerable time before it was actually submitted to the Department.

the economic impact of approval on the tribe. <sup>2/</sup> The BIA's right and obligation to consider the economic best interests of an Indian lessor before approving communitization agreements was addressed by the Tenth Circuit Court of Appeals in Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982). In Kenai, a BIA decision not to approve a communitization agreement that it believed was not in the Indians' best economic interest was challenged on the grounds that this was not a permissible reason for disapproval. The court upheld BIA, holding that its fiduciary obligation as trustee included the responsibility to determine whether such agreements were in the Indians' best economic interest. Kenai, *supra* at 387.

Following the decision in Kenai, the Department published guidelines for assisting BIA area directors in considering proposed communitization agreements and in ensuring adequate documentation of their analysis of all relevant factors. Memorandum of April 23, 1982 (Guidelines), adopted in 47 FR 26920 (June 22, 1982). In general, the guidelines require BIA to demonstrate that the agreement is “based on logical engineering and economic facts” (Guidelines, § 2). Section 2(a), which relates to the analysis of economic effects, states: “The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.”

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<sup>2/</sup> The companies initially opposed the petition for reconsideration on the grounds that it was not timely filed. The Board addressed this argument in its Sept. 2, 1983, order granting reconsideration. The return receipt card for appellants' copy of the Board's decision and the postmark on their petition for reconsideration show that the petition was timely under 43 CFR 4.315 and 4.310(a).

The posture of this case, therefore, is that the decision in question was made by BIA in accordance with the requirements in effect at the time. During the pendency of an appeal of that decision, the requirements were elaborated and made stricter. Although a record had been developed in the initial decisionmaking process, it was not sufficient to permit full review of the decisionmaking process as contemplated under the new requirements.

This situation is very similar to that before the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), in which statutory and regulatory changes were made during the lengthy process of deciding on the location for a Federal-aid highway. New regulations, promulgated after the location decision was made, required the Secretary of Transportation to make "formal findings" when he approved the use of parklands for highway construction. The adequacy of the administrative record was challenged on the grounds that this regulation required the Secretary to hold hearings on the proposed location, which he had not done.

The Court agreed that it should apply the new regulation because it was "the law in effect at the time of [its] decision," 401 U.S. at 419, but refused to remand the case to the agency for a hearing to develop formal findings. The Court distinguished Thorpe v. Housing Authority, 393 U.S. 268 (1969), cited by appellants as requiring remand to the deciding agency, on the grounds that in Overton Park there had been a change in circumstances and an administrative record was available, although that record might not present a sufficient basis for full review of the agency decision. <sup>3/</sup> The Court stated:

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<sup>3/</sup> In Thorpe, the housing authority had refused to give a tenant any reason for the eviction.

But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

401 U.S. at 420. The Court discouraged probing the mental processes of deciding officials if the information necessary for review could be obtained in another way, recognizing that any such explanation would "to some extent, be a 'post hoc rationalization' [which] must be viewed critically." Id. The procedure of requiring supplementation of the record was, however, sanctioned. 4/

Similarly, in Camp v. Pitts, 411 U.S. 138, 142-43 (1973), the Court remanded a decision of the Comptroller of the Currency for further explanation, stating:

If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

The Court further noted that a reason for the agency action had been given at the time of the decision and that further elaboration must support that original reason.

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4/ In his concurrence in Overton Park, Mr. Justice Blackmun noted that the new requirements "cut across former methods and \* \* \* imposed new standards and conditions upon a situation that already was largely developed. This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after" the new requirements were announced. 401 U.S. at 423 (Blackmun, J., concurring).

[1] In accordance with these precedents, when the Board determined that reconsideration of this appeal was appropriate and found that the administrative record provided some indication that the economic effects of approval of the proposed communitization agreement had been considered, but that the record was insufficient for full review of that issue, it requested additional information from BIA. This supplementation was provided on October 25, 1983. <sup>5/</sup>

In order to comply with the present guidelines, the administrative record as supplemented must show that BIA determined that the "long term economic effects of the [communitization] agreement [were] in the best interest of" appellants (Guidelines, § 2). The original record shows that BIA expended considerable effort in 1981 to revise its standard communitization

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<sup>5/</sup> The Board takes official notice that the Deputy Assistant Secretary has followed a similar procedure on at least one occasion. A Nov. 9, 1983, letter to the Board from the Deputy Assistant Secretary in Rose v. Anadarko Area Director, Docket No. IBIA 83-45-A, dismissed because of Secretarial assumption of jurisdiction, 12 IBIA 130 (1984), stated:

"This is in response to an order of the Board, dated October 19, 1983, requesting the Bureau to submit a report on the status of an administrative appeal to the Deputy Assistant Secretary-- Indian Affairs (Operations) seeking review of a February 11, 1982 decision by the Anadarko Area Director, BIA, which approved a communitization agreement involving the Appellants' property.

"By way of background, on May 2, 1983, I remanded this matter to the Anadarko Area Director and directed him to prepare and submit an analysis showing whether approval or disapproval of the unit agreement was in the best economic interest of the Indian allottees. This action was taken because of the holding in Kenai Oil and Gas v. Dept. of the Interior, [671] F.2d 383 (10th Cir., February 17, 1982), which appears to require that such an analysis should be made before a communitization agreement is approved."

In Rose, as in the present case, the Area Director had approved the communitization agreement before the Tenth Circuit issued its decision in Kenai. The Deputy Assistant Secretary remanded Rose for supplementation of the administrative record on May 2, 1983. In Cheyenne and Arapaho, the decision of the Deputy Assistant Secretary upholding the Area Director's initial decision without further elaboration had been issued on Feb. 9, 1982, before the new guidelines were published in the Federal Register on June 22, 1982.

agreement form in order to provide more favorable terms for Indian lessors. Among other things, the revised form was designed to provide in general what BIA believed to be the most favorable economic terms for Indian lessors. The agreement here was submitted using the revised form.

The BIA's supplementation further shows that the long term economic effects of the proposed agreement were considered. The BIA states that it was primarily concerned with the possibility that if communitization was not approved, the Commission would de-space the Indian allotments from its pooling order. The BIA believed that de-spacing would substantially hinder the issuance of new leases on the tracts when the existing leases expired because of production from the remaining portions of the pooled area and probable litigation or other controversy concerning the tracts. The BIA states:

The assertions of the appeal are that new leases might have been negotiated if the agreements had not been signed. There is also a possibility that the three (3) leases that would have expired, absent the communitization approvals, could not have been leased again.

A consideration given by the Area Office which was not contemplated in the appeal was the authority of the Oklahoma Corporation Commission to de-space lands from spacing units established by them. De-spacing essentially allows an operator, in an area spaced by the Commission, to produce and not distribute revenues to de-spaced interest owners in the spaced area. [6/] [Emphasis in original.]

The Acting Anadarko Area Director (Acting Area Director) further elaborates on the potential effect of disapproval of communitization agreements:

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6/ Memorandum from Program Officer, Division of Energy & Mineral Resources, Golden, Colorado, to Solicitor's Office, May 5, 1983 (May memorandum), at 4. The memorandum then describes the effect of such de-spacing upon another Oklahoma Indian tract.

Experience with other Indian mineral ownerships wishing to be removed from CAs [communitization agreements] until another bonus might be obtained, result in cases where the oil companies have petitioned the State Corporation Commission to remove the tracts from the spacing unit, or by total abandonment by the oil companies of development of the Section. There are instances where an oil company and/or investor within the spacing area is willing to proceed with development and carry an unleased Indian tract, providing it is very small. Most, however, are reluctant to carry an unleased tract of any size because of the costs involved drilling the spacing pattern, whether voluntarily or involuntarily, it is not likely that an oil company would be interested in drilling the second well, when it has been determined that the common source of supply may be drained by one well. [Z/]

Furthermore,

If proper reservoir spacing were not followed, the reservoir would be developed under the simple rule of capture. This has a long-term result of lower ultimate recovery of oil and/or gas (to the detriment of all interests). There may be times when spacing is not in the best interests of a particular individual in the short-term; but, the determination to communitize must be based upon the long-term overall conditions of the reservoir. [8/]

In contrasting the short term versus long term economic effects of approval of this communitization agreement, the Acting Area Director notes:

Approval or disapproval of CAs has always been the subject of a thorough review. Most objections or concerns posed by Indian mineral owners were prompted by the short-lived astronomical bonuses received for leases within the Anadarko Basin, and the hope that they might avail themselves of such a bonus. In general, objection to communitization, per se, is not the prevailing concern, but rather, that where the end of the primary term is in sight, that expiration thereof may occur, and a new lease

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Z/ Memorandum from Acting Area Director, Anadarko Area Office, BIA, to Solicitor's Office, Oct. 3, 1983 (October memorandum), at 4.

8/ October memorandum at 2-3.

may result in another (and substantially large) bonus. Therefore, the official having the responsibility of approving proposed CAs must weigh all factors in reaching a decision which will benefit the Indian mineral ownership. The purpose of communitization is not to extend lease terms, but to achieve orderly development and to encourage timely development. [9/]

After analyzing potential economic effects of approval, BIA concludes:

We are of the opinion that a uniform policy of refusing to approve communitization agreements in logically spaced areas solely for the reasons that the mineral owners might receive additional revenues will eventually diminish the sale of Indian land leases and will not be in the best long term interests of the Indians. [10/] [Emphasis in original.]

Appellants contend that this analysis is legally incorrect because a state has no jurisdiction over the communitization of Indian tracts. Samedan Oil Corp. v. Cotton Petroleum Corp., 466 F. Supp. 521, 526 (W.D. Okla. 1978). The BIA's submissions agree that states have no jurisdiction over Indian tracts. See, e.g., October memorandum at 2: "Since the State Commission cannot pool Indian Lands into an established spacing unit, joinder of the Indian tract(s) is achieved by a CA approved by the Secretary under terms of the lease."

Appellants attempt to take this legal principle further by apparently alleging that because the State does not have authority to join Indian tracts, it also does not have authority to de-space such tracts. The question here is not the possible effect of a state order attempting to de-space Indian

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9/ October memorandum at 4.

10/ May memorandum at 4.

tracts from a pooling order put into effect by the Secretary through approval of a communitization agreement. Rather, the question is whether a state has the authority to de-space tracts when the Secretary has refused to approve communitization. De-spacing under such circumstances is the ultimate recognition by the state that it does not have the authority to force the inclusion of Indian tracts in a pooling order without Secretarial approval. Because none of the cases cited by appellants requires a different conclusion, the Board finds that BIA's assertion that failure to approve a communitization agreement might result in the de-spacing of an Indian tract is not without foundation.

[2] Through its supplementation of the record, BIA has shown that it considered the long term economic best interests of appellants in approving the communitization agreement at issue. Although appellants disagree with BIA's analysis and with particular provisions of the agreement, and believe that a more immediately lucrative agreement might have been reached, it was within BIA's discretion to approve an agreement as long as it considered the relevant factors, including the Indian lessor's long term economic best interests. The Board has jurisdiction only to determine whether BIA considered the relevant factors in approving the communitization agreement. Because BIA has shown that it did consider appellants' long term economic best interests, the only factor contested by appellants, the Board has no further jurisdiction in this case and cannot second-guess BIA's exercise of discretion to approve the communitization agreement. 11/

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11/ Cf. Overton Park, supra at 416: "The court is not empowered to substitute its judgment for that of the agency."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's February 10, 1983, decision is affirmed as modified in this opinion.

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//original signed  
Jerry Muskrat  
Administrative Judge

We concur:

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//original signed  
Bernard V. Parrette  
Chief Administrative Judge

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//original signed  
Anne Poindexter Lewis  
Administrative Judge