



INTERIOR BOARD OF INDIAN APPEALS

Peace Pipe, Inc. v. Acting Muskogee Area Director, Bureau of Indian Affairs

22 IBIA 1 (04/02/1992)

Judicial review of this case:

Affirmed, *Pipes, Inc. v. United States*, No. 92-C-373-B, 1992 WL 684917 (N.D. Okla. Nov. 4, 1992)

Related Board case:

19 IBIA 114



United States Department of the Interior

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

PEACE PIPE, INC.

v.

ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-110-A

Decided April 2, 1992

Appeal from a determination that a lease of Indian land was null and void.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally

An appeal pending before the Bureau of Indian Affairs may be summarily dismissed only when the reasons for the appeal cannot be determined from the appeal documents taken as a whole and only after the appellant has been given an opportunity to amend his/her appeal documents.

2. Bureau of Indian Affairs: Administrative Appeals: Generally

When it is necessary to approximate the date on which an answer is due in an appeal pending before the Bureau of Indian Affairs, the Bureau deciding official should not issue a decision until a reasonable time has passed after the date an answer might be expected.

3. Indians: Lands: Individual Trust and Restricted Land: Generally--
Indians: Leases and Permits: Secretarial Approval

Under 25 CFR 162.2(a)(4), the Bureau of Indian Affairs may grant leases of individually owned trust or restricted land when the heirs or devisees have not been able to agree upon a lease during the 3-month period immediately following the date on which a lease may be entered into.

APPEARANCES: John G. Ghostbear, Esq., Tulsa, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Peace Pipe, Inc., seeks review of a June 4, 1991, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declaring lease No. G08-1221 between appellant and some of the heirs of Sam Tagg, Cherokee 18506, null and void. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Sam Tagg died in 1952, owning a lot in Claremore, Rogers County, Oklahoma, in restricted fee status. On January 9, 1987, prior to determination of Tagg's heirs, appellant entered into a lease of the property with Venoia Thompson Wright who, appellant states, claimed to have authority to lease the property as executrix of Tagg's estate and/or trustee of the "Sam Tagg Trust." The lease, which stated that it was for a 3-year term, was not approved by BIA.

In January 1989, appellant began negotiations with Wright for a new lease. Sam Tagg's heirs were determined on June 27, 1989, in the District Court of Rogers County, Oklahoma, No. C-87-449. 1/ In November 1989, appellant began to contact at least some of the other heirs directly. It obtained the signatures of Henry Tagg and Callie Horton, who together hold two-thirds of the interests in the property. The remaining four heirs did not sign the lease. The Superintendent, Tahlequah Agency, BIA, approved the lease on January 11, 1990. He apparently did not inform the non-consenting heirs that he had approved the lease or that they had the right to appeal the approval. 2/

In December 1990, Wright attempted to appeal the Superintendent's approval to the Board. The Board dismissed her appeal for lack of jurisdiction, holding that the Superintendent's action must first be appealed to the Area Director. Wright v. Tahlequah Agency Superintendent, 19 IBIA 114 (1990). In a footnote, the Board observed that, under 25 CFR 2.7, the time for filing a notice of appeal does not begin to run until interested parties are properly advised of their appeal rights.

1/ As shown on the lease at issue in this appeal, the heirs and their respective interests are: Henry Tagg, 1/3; Callie Horton, 1/3; Edith Thompson Jackson, 1/12; Eunice Thompson Hawes, 1/12; Henry Thompson, 1/12; and Venoia Wright, 1/12.

2/ Appellant wrote to the non-consenting heirs on Jan. 18, 1990, advising them that the Superintendent had approved the lease and requesting them to sign it.

On January 16, 1991, Eunice Thompson Hawes wrote to the Area Director, seeking appeal information and also requesting to have the property partitioned. The Area Director responded on March 4, 1991; in separate letters, he described procedures for partition and procedures for appealing the Superintendent's lease approval.

On March 25, 1991, Hawes filed notices of appeal with the Superintendent and the Area Director. ^{3/} In a decision dated June 4, 1991, the Area Director stated:

Title 25, Code of Federal Regulations (CFR) Subpart 162.2(a), provides in part as follows:

“(a) The Secretary may grant leases on individually owned land on behalf of: . . . (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees;” (Underlining supplied.)

The discretionary words “may grant” clearly indicate the purpose of this section is not meant to force heirs or devisees into negotiations. Rather, this section gives the Secretary the authority to grant leases only if the heirs or devisees have been unable to agree on a lease and not on the mere fact that the heirs or devisees have not entered into a lease within the 90-day period.

Failure to respond to the January 8, 1990, letter from Mr. John Ghostbear, Attorney, apparently written on behalf of [appellant], and the January 18, 1990, letter from [appellant] cannot be interpreted as inability on the part of the owners to negotiate a lease, nor does it indicate disagreement, per se.

The record is void of any evidence to indicate the owners were actually unable to agree to a lease. At most, disagreement can only be inferred by the non-response of the unconsenting owners

^{3/} The two notices were slightly different. Both were labelled "Notice of Appeal," and both stated that they had been served on several parties, including appellant.

25 CFR 2.9(a) requires that a notice of appeal be filed in the office of the official whose decision is being appealed, with a copy to the official who will decide the appeal.

to the January 8 and January 18 letters referenced in the preceding paragraph. Under the foregoing circumstances, the Superintendent was without authority to award a lease on the premises on behalf of the adult owners who qualified to negotiate leases under 25 CFR 162.2.

Pursuant to delegated authority, the January 11, 1990, decision of the Tahlequah Agency Superintendent is vacated and this matter is remanded to the Self Governance Specialist, successor to the Tahlequah Agency Superintendent, for further consideration consistent with this decision. [Emphasis in original.]

(Area Director's June 4, 1991, Decision).

Appellant's appeal from this decision was received by the Board on July 1, 1991. Only appellant filed a brief.

Discussion and Conclusions

Appellant argues: (1) Hawes' appeal was improperly perfected, (2) lease approval was proper as to the interests of Henry Tagg and Callie Horton, and the remaining interests should be considered unleased; (3) the non-consenting heirs are estopped from alleging that they did not approve the lease because they have accepted lease payments, and (4) there was disagreement among the heirs concerning the proposed lease.

[1] Appellant contends that the Area Director should have dismissed Hawes' appeal because she did not file a statement of reasons. Under 25 CFR 2.17(b), an appeal may be summarily dismissed "[i]f after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents." It is apparent from this provision that summary dismissals are disfavored. Summary dismissal is inappropriate if an appellant's reason for appealing may be deduced from the documents filed, even if those documents do not include a formal statement of reasons. ^{4/} The Area Director determined that Hawes' notices of appeal adequately communicated her reasons for

^{4/} This provision of section 2.17 was discussed in the preamble to the Federal Register publication of 25 CFR Part 2, 54 FR 6478, 6479 (Feb. 10, 1989):

“Two commenters recommended revisions concerning the provision in proposed § 2.17 that permitted summary dismissal for failure to file a statement of reasons. In response to these comments, this section has been revised to allow summary dismissal only where the reasons for the appeal cannot be determined from the appeal documents taken as a whole and only after the appellant has been given an opportunity to amend his/her appeal documents.”

appealing the Superintendent's approval. Therefore he appropriately considered her appeal on the merits, rather than dismissing it summarily.

Apparently, because Hawes did not file a formal statement of reasons, appellant did not file a formal answer. Appellant now contends that because it did not have an opportunity to file an answer, the Area Director was lacking crucial information when he decided the appeal, *i.e.*, information which would have shown that there was disagreement among the heirs concerning appellant's proposed lease.

Hawes' notices of appeal state that they were served on appellant, and appellant does not dispute that it received the notices. Under 25 CFR 2.10, Hawes was entitled to file her statement of reasons with her notice of appeal or separately. If filed separately, her statement of reasons was due 30 days after she filed her notice of appeal. 25 CFR 2.10(b), (c). Since Hawes did not explicitly indicate that she intended her notice of appeal to include her statement of reasons, appellant had no way of knowing that Hawes did not intend to file a separate statement of reasons until after the 30-day period for filing a statement of reasons had passed.^{5/}

Under 25 CFR 2.11, appellant's answer was due 30 days after its receipt of Hawes' statement of reasons. Under the circumstances, it was not possible to calculate the exact date appellant's answer was due. It was, however, possible to approximate the date, based on the briefing times provided in the regulations, with allowances for time in the mail. Appellant's answer should have been filed around the end of May.

On May 30, 1991, appellant's attorney wrote to the Realty Officer of the Cherokee Nation, stating:

[W]e have not received any Statement of Reasons which should be filed pursuant to 25 CFR 2.1, et seq. * * * Since Ms. Hawes has failed to file a statement of reasons as required under the regulations, Peace Pipe takes the position that Ms. Hawes' appeal should be dismissed.

If for any reason you disagree with this, please notify the undersigned immediately. In that regard, if you have determined that the notice of appeal constituted a statement of reasons under

^{5/} 25 CFR 2.10(d)(1) provides that "[t]he statement of reasons whether filed with the notice of appeal or filed separately should: (1) Be clearly labeled 'STATEMENT OF REASONS.'" Therefore, Hawes should have labelled her notice of appeal so as to make clear that she intended it to include her statement of reasons. Even though she failed to properly label her filing, however, summary dismissal for this reason would not have been appropriate. *See* 54 FR at 6479 (discussion of section 2.10).

the regulations, we need to know that in some official capacity since, as you know, under the regulations we have thirty (30) days after receipt of the statement of reasons within which to file our answer [25 CFR 2.11(c)]. [Bracketed material in original.]

Since this letter expressed a position on the appeal, *i.e.*, that Hawes' appeal should be dismissed, the Area Director might have considered it to be appellant's answer and thus concluded that the appeal was ripe for decision. 6/ It appears possible, however, that the letter had not reached the Area Director when he signed his decision. The record copy of appellant's letter shows that it was telefaxed by the Cherokee Nation and received, presumably at the Area Office, at 1:54 p.m. on June 4, 1991, the day the Area Director's decision was issued. The decision does not refer to the letter. 7/

[2] If the Area Director was not aware of the letter when he issued his decision, he could well be deemed to have issued his decision prematurely, *i.e.*, without allowing adequate time for receipt of appellant's answer. Because of the need to approximate the date appellant's answer was due, it cannot be stated with certainty that appellant's answer should have been received at the Area Office by June 4. When the filing date for an answer must be approximated, an Area Director should not issue a decision in the appeal until a reasonable time has passed after an answer might be expected.

Under the circumstances of this case, however, the Board finds that, if the Area Director erred, his error may be cured in these proceedings. Although the Board could remand this case to the Area Director for consideration of appellant's arguments, such a procedure would simply serve to delay resolution of the matter. The Board therefore concludes that it should consider appellant's arguments on the merits at this time, even though it normally does not consider arguments made for the first time on appeal. 8/

6/ 25 CFR 2.11(b) provides: "An answer shall state the party's position or response to the appeal in any manner the party deems appropriate."

Appellant's May 30 letter was not filed with the Area Director, as required by 25 CFR 2.11(d), and apparently not served on Hawes or the other parties to the appeal, as required by 25 CFR 2.12(a). Even though the document was not properly filed, appellant is not in a position to complain if the Area Director chose to consider it, inasmuch as the improper filing was the fault of appellant.

7/ The record copy of the decision shows that it was prepared on May 31, 1991. It is, of course, possible that the decision letter, although prepared ahead of time, was not actually signed until after the Area Director had reviewed appellant's letter.

8/ The Board has stated on a number of occasions that it is not required to consider arguments and evidence raised for the first time on appeal. *E.g.*

Appellant contends that there was disagreement among the Tagg heirs, extending over a 12-month period preceding approval of the lease. It submits documents which purportedly show this disagreement. The Board has reviewed these documents and finds that they do not support appellant's contention. The documents do not reflect involvement by any of the heirs except Wright until late November 1989. ^{9/}

[3] 25 CFR 162.2(a) provides: "The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees." This section contemplates that a 3-month period will be allowed for heirs to attempt to reach agreement on a lease before a Superintendent is authorized to grant a lease on behalf of non-consenting heirs.

Inasmuch as there is no evidence in the record here that the Tagg heirs, except for Wright, were even aware of lease negotiations until late November 1989, less than 2 months before the lease was approved, it is not possible to conclude that the heirs were unable to agree on a lease over a 3-month period. The Board affirms the Area Director's conclusion that the lease was improperly approved because the Superintendent was not authorized to execute the lease on behalf of the non-consenting heirs.

Appellant argues that, even if the Superintendent's approval was not proper as to the interests of the non-consenting heirs, it was proper as to the interests of Henry Tagg and Callie Horton, who signed the lease. The interests of the non-consenting heirs, appellant contends, should be considered unleased and their shares of the rental payments placed in escrow. Appellant cites no authority whatsoever for this theory, and the Board is aware of none. Appellant's contention is rejected.

Appellant also argues that the non-consenting heirs are estopped from denying that they approved the lease because they have accepted rental payments. In support of this argument, appellant cites Oklahoma law, under which, appellant argues, a person who accepts benefits under a real estate contract or conveyance is estopped from denying the validity of the document.

fn. 8 (continued)

Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990). However, since it is possible that appellant was improperly deprived of its opportunity to present arguments before the Area Director, the Board will make an exception to its usual rule in this case.

^{9/} Appellant submits its Nov. 21, 1989, letter to Henry Tagg. The letter indicates that it is the first contact appellant ever made with Tagg and that, prior to this time, appellant had dealt only with Wright.

Leasing of trust or restricted Indian land is governed by Federal law, not state law. As a matter of Federal Indian law, a lease which has not been properly approved by BIA is invalid. See, e.g., Bulletproofing, Inc. v. Acting Phoenix Area Director, 20 IBIA 179 (1991). The fact that the non-consenting heirs may have accepted rental payments is of no relevance to the validity of appellant's lease. Because it has not been properly approved, the lease is invalid.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Muskogee Area Director's June 4, 1991, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge