INTERIOR BOARD OF INDIAN APPEALS

Theresa Jerry Moses, et al. v. Acting Portland Area Director,
Bureau of Indian Affairs

24 IBIA 233 (09/29/1993)

Related Board cases:

4 IBIA 255

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9 IBIA 158

14 IBIA 153

United States Department of the Interior

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

THERESA JERRY MOSES, ET AL. 1/
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-17-A Decided September 29, 1993

Appeal from the granting of a business lease.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Leases and Permits: Generally

   Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Leases and Permits: Generally

   In leasing individually owned trust or restricted property, the Bureau of Indian Affairs is responsible to all of the landowners, not to a group of co-owners. Furthermore, the Bureau's responsibility is not to the Tribe or to tribal members in general.

1/ The individual appellants are Theresa Jerry Moses; Mary L. Ross (Jerry); Pete Jerry; Hoppy Jerry; Donna L. Starr; Agatha Starr; Allen Moses; Harold Moses; Loretta L. Moses; Norma Lee Moses Eyle; Sharon Moses LaClair; Connie Courville; Clifford Jerry; Alfred Starr, Sr.; Curtis L. Jerry; Helen E. Ross (Starr); Mardee Rodrigues; Sallie Moses; Leah M. Moses; Earl Moses, Sr.; Aletha R. Moses; Joan Moses; Julie Moses; Stanley Moses; Merle P. Barr; Lorraine Moses; Lawrence Jerry; Gerald Moses; Agnes Moses; Donald C. Jerry; Ramona Elkins; Irene Barr; Sarah Y. Moses; Bonnie Moses; Lonnie Moses; Mona Moses; Thelma N. Moses; Johnny Sam Moses; Curtis S. Jerry; Ronald M. Jerry, Jr.; Rose M. Jerry; Lawrence L. Jerry; Lawrence Jerry, Jr.; and Carl Moses, Sr.

The administrative record contains an Oct. 29, 1992, title status report for Allotment #7. Not all of the individuals identifying themselves as appellants are listed on that report as holding interests in the allotment. For purposes of this decision, the Board does not consider it essential that the various appellants be required to show that they actually hold

APPEARANCES: Harold Chesnin, Esq. , Seattle, Washington, for appellants; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Robert L. Otsea, Jr., Esq., Auburn, Washington, for the Muckleshoot Indian Tribe; and Samuel J. Stiltner, Esq., Seattle, Washington, for Property Improvement Corporation, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants seek review of a September 17, 1992, decision of the Acting Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), granting a business lease covering approximately 20 acres of Muckleshoot Allotment #7 to Property Improvement Corporation, Inc. (PIC). For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to the Area Director for further consideration.

Background

The Board has long familiarity with Muckleshoot Allotment #7. The original 25-year lease covering this allotment began on June 15, 1964, with Robert B. Wooding, d.b.a. Associated Investors, as lessee. Although the lease covered 90 acres, only about 20 acres was developed as the Forest Villa Mobile Home Park (park). A 1971 Departmental decision concerning a rental rate adjustment was appealed to Federal district court. The case was remanded to the Department, and the Secretary of the Interior ordered the Office of Hearings and Appeals to hold an evidentiary hearing concerning the rental rate adjustment. See IA-2252; Wooding v. Morton, No. 77-72C3 (W.D. Wash. Aug. 13, 1973); on remand, Wooding v. Commissioner of Indian Affairs, 4 IBIA 255 (1975), recon. denied, 5 IBIA 9 (1976), aff'd Wooding v. Kleppe, No. C-76-86T (W.D. Wash. Nov. 4, 1976). The same parties appeared before the Board again in Wooding v. Portland Area Director, 9 IBIA 158 (1982), and Forest Villa Joint Venture v. Assistant Secretary for Indian Affairs, 14 IBIA 153 (1986). Each time, the subject of the appeal was a rental rate adjustment.

When the Wooding lease expired in June 1989, the estates of several persons holding interests in Allotment #7 had not been probated. In order to keep the allotment productive, the Superintendent, Puget Sound Agency, BIA (Superintendent), granted a 2-year lease to PIC (2-year lease) on behalf of the heirs. See 25 CFR 162.2(a)(3) and 162.8(e).

The record shows there are serious problem with the park. No one disputes that the park was originally poorly designed and engineered, and was constructed with substandard materials. It appears, inter alia, that major problems in the water and sewer systems present imminent health and safety hazards, fire protection and emergency access are inadequate, the roads need

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fn. 1 (continued)
an interest in the allotment. The first named appellant, Theresa Jerry Moses, is listed on the title status report. She could, therefore, maintain this appeal individually.

extensive repair, and there is no underground storm system or method of controlling water runoff quantity or quality. Extensive and expensive repairs are necessary to make the park competitive, and perhaps even to meet health, safety, and environmental requirements.

On March 14, 1991, the Superintendent informed all persons owning an interest in Allotment #7, 2/ that PIC had expressed interest in a 25-year lease; indicated the general terms of the proposed lease, including the proposed rentals; and sought either consent to the proposed lease or a statement of the terms which each co-owner would accept. The Superintendent stated that if the co-owners could not agree on a lease, he would grant one on their behalf.

Although the Muckleshoot Indian Tribe (Tribe) does not own an interest in Allotment #7, on April 8, 1991, the Tribal Council passed a resolution "declar[ing] the Tribal Council's opposition to the BIA-proposed 25 year lease to [PIC] for the [park] and * * * intent to prepare a tribally-determined alternative for the management & operation of the park." The resolution stated that the Tribal Council was undertaking this action "on behalf of several heirs and devisees of the subject property, and in consideration of the Tribal Council's fiduciary responsibility to ensure the rights and interests of its constituents are protected." Inter alia, the resolution "[r]equest[ed] and demand[ed] that the Superintendent * * * and/or any official or agent of the [BIA] terminate all actions with respect to the proposed lease for the subject property until such time as a Tribally-determined option for the park [could] be developed." 3/

The Superintendent responded to the resolution on April 18, 1991, explaining that the co-owners had been given the opportunity to approve the lease or negotiate a lease on their own. The letter stated that, in the best interest of the co-owners, the negotiation process should not extend beyond the expiration of the 2-year lease.

Some co-owners, representing approximately one-third of the ownership interests, sent a joint letter to BIA, on tribal stationery, opposing PIC's proposed lease on the grounds that they did not want another 25-year lease, believed PIC would be making more money than the co-owners, and believed that alternate uses of the property might generate more income. By letter dated May 10, 1991, Pete Jerry requested additional information concerning the proposed lease. The Superintendent provided the requested information.

2/ According to the title status report, the allotment is highly fractionated, with at least 62 co-owners. The size of interests owned ranges from 0.0625 to 0.0017361111. As of early 1991, there were apparently only 54 co-owners.

3/ The record indicates that, in 1991, Pete Jerry was the Vice-Chairman of the Tribe. Jerry stated that he owned an interest in Allotment #7. Although the name "Pete" Jerry does not appear on the BIA title status report, for purposes of this decision the Board assumes that Jerry owns an interest in the allotment.

On May 20, 1991, PIC submitted a proposed lease and a copy of a May 13, 1991, evaluation of the park by an independent professional engineer.

On June 5, 1991, the Superintendent wrote to the co-owners, reminding them that the 2-year lease was about to expire, and providing them with the information given to Pete Jerry and received from PIC. The Superintendent noted that although some of the co-owners and the Tribe had expressed opposition to the proposed lease, no alternative proposal had been submitted.

The 2-year lease expired on or about June 16, 1991. Because the Superintendent had not received an alternative proposal for a lease or other use of the property, he held PIC over as lessee.

On June 21, 1991, BIA requested an appraisal of the property. The appraisal concluded that the fair market value of the property was $2,100,000, and that, by applying a 10 percent rate of return to the fair market value, the estimated fair annual rental was $210,000. It further noted that although the property had the potential to generate a gross income of $352,500 per year ($235 monthly rent per space times 125 spaces times 12 months), there was a 21 percent vacancy rate. The appraisal thus allowed 35 percent for operating expenses, including vacancies, in determining that the property had the present potential to generate approximately $229,125 annually of net operating income. Thus, the appraisal concluded that the property could presently be expected to provide an annual rent of $210,000 to the co-owners, with $19,125 as potential profit to the lessee. The appraisal stated that it "assume[d] all maintenance and repairs [would] be performed by the lessee" (Appraisal at 1).

By letter dated November 10, 1991, the Superintendent notified the Tribe that he intended to grant the lease to PIC if the Tribe did not provide information implementing the April 8, 1991, resolution. The Tribe telefaxed a response on November 27, 1991. The response consisted of a non-substantive transmittal letter and 3 pages of a proposed lease of the property to the Tribe for a mobile home park. The proposed lease jumps from Section 7, Additional Rent, on page 2, to Section 43, Force Majeure, on page 3. 4/

The Superintendent responded to the Tribe's proposal on December 3, 1991, noting that the proposal did not address the major improvements needed in the park, and was missing many required provisions, including those required by 25 CFR Part 162, as well as provisions relating to rent; yearly financial statements; liens against the property; payment of taxes, licenses, fees, utility bills, fire and damage insurance, and public liability insurance; and a capital improvement program and budget.

4/ Because it appeared that the copy of the Tribe's proposed lease in the administrative record was incomplete, the Board requested a complete copy from the Puget Sound Agency. It was informed that the 3-page lease in the record was all that the Agency had received, and that the Agency had contacted the Tribe when the proposal was received in order to determine if the copy was incomplete, and was told that the 3 pages were the entire proposal.

The Superintendent indicated that, because he could not delay taking action any longer, he was prepared to grant a lease to PIC if, by close of business December 6, 1991, he did not receive a more complete proposal and a tribal resolution authorizing the Tribe to lease the property. The Superintendent closed the letter by giving the Tribe information concerning its right to appeal his decision to the Area Director.

The Superintendent ultimately approved a lease to PIC on December 6, 1991 (PIC lease).

The Tribe and some of the co-owners appealed to the Area Director, who affirmed the Superintendent's decision on September 17, 1992. Appellants appealed this decision to the Board. The Tribe filed a motion to intervene, "because the issue of when and whether the [BIA] can issue long term business leases on trust land over the objections of a large number of allottees of that land is a matter of great importance to the Tribe and its members." Application at page 1. The Tribe did not indicate that it was a disappointed lessee. After considering the motion and the generalized interest which the Tribe stated it wished to represent, the Board granted the Tribe amicus curiae status under 43 CFR 4.313. 5/ Briefs were filed by appellants, the Tribe, the Area Director, and PIC.

Discussion and Conclusions

[1] In Rathkamp v. Billings Area Director, 21 IBIA 144, 148 (1992), the Board noted

> that the awarding of a lease of trust or restricted property is generally a discretionary decision. See Metzger v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 314, 319 n.5 (1985); Wray v. Deputy Assistant Secretary--Affairs (Operations), 12 IBIA 146, 154 n.4, 91 I.D. 43, 48 n.4 (1984). In reviewing BIA's discretionary decisionmaking, it is not the Board's role to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

See also Clausen v. Portland Area Director, 19 IBIA 56, 60 (1990); HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222, 226 (1990). This standard of review will be applied in the present appeal.

Appellants and the Tribe contend that the granting of the PIC lease violated several regulations in 25 CFR Part 162. The Board has carefully

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5/ Section 4.313(a) provides:

"Any interested person or Indian tribe desiring to intervene* * * or to appear as amicus curiae * * * in an appeal before the Board shall apply in writing to the Board stating the grounds for the action sought. Permission to intervene, * * * [or] to appear, * * * may be granted for purposes and subject to limitations established by the Board. This section shall be liberally construed.

considered all of the arguments, and concludes that although it could issue a detailed, legalistic decision regarding each of the arguments raised, such a decision would not benefit anyone. This is a classic case in which the parties should be talking with one another. Their goals are essentially the same: to manage the property in the most productive way possible. It is apparent, however, that, if they ever were, the parties are no longer communicating with each other.

Probably all co-owners were, with good reason, displeased with the previous lessee and his performance, and especially with the low rents they received. At least some co-owners apparently believe that BIA has not done an adequate job of protecting their interests and maximizing income from the allotment. However, appellants and the Tribe appear to believe that what they want is paramount, and must be accepted regardless of what the other co-owners may want; and BIA appears to have become frustrated with the whole process of leasing this allotment. While each of these reactions may be understandable, they are not in the best interest of all the co-owners.

[2] In leasing individually owned trust or restricted property, BIA's responsibility is to all the co-owners, not to a group of them. See, e.g., Rathkamp, 21 IBIA at 149; Kimmet v. Billings Area Director, 19 IBIA 72, 78 n. 6 (1990); Smith v. Acting Billings Area Director, 17 IBIA 231, 236 (1989). Furthermore, its responsibility is not to the Tribe or to tribal members in general. In this case, it appears that both appellants and the Tribe believed that BIA could not take any further action relating to leasing the land as soon as they expressed interest in a “Tribally determined” option for the property, apparently because they were the largest group of co-owners. This is not true. BIA had a responsibility to all of the co-owners, including both those who disagreed with the position taken by appellants and those who had not expressed an opinion. These co-owners, although fewer in number than appellants, owned approximately two-thirds of the total interests in Allotment #7.

Here, BIA attempted to discharge its responsibilities to the co-owners by presenting them with PIC's proposed lease. Based on the evidence in the record, it is understandable that BIA would favor continuing to use this portion of the allotment as a mobile home park: the park was a known commodity, a large amount of money and effort had already been invested in the park's development, there was a need for this land use in the area, the park could reasonably be expected within a short period of time to generate sufficient funds to pay for the necessary improvements, and after the improvements were completed the park would generate income for the co-owners. A change in land use would probably result in no income from the property for a significant period of time, would not generate revenues for the development of the new land use, and might be highly speculative. Furthermore, there is no evidence that any co-owner had indicated to BIA a desire to change the land use, even though the co-owners were aware of the expiration of both the Wooding lease and the 2-year lease. Under these circumstances, BIA reasonably exercised its discretionary authority by attempting to lease the allotment as a mobile home park. It was also reasonable for BIA to consider PIC's offer, because PIC had managed the property for 2 years and was knowledgeable about its problems and willing to undertake the task of improving and reconstructing it.

However, BIA failed to provide complete information to the co-owners about PIC's proposed lease. BIA's March 14, 1991, letter to the co-owners provided extremely little information about PIC's proposal. Indeed, it could not have, because at that time, PIC had not provided BIA with the details of its proposal. Those details were not presented until June 5, 1991, when PIC sent BIA an actual proposed lease. In addition, the appraisal was not available to BIA until July 10, 1991, and may not have been provided to the co-owners at all. Thus, when BIA informed the co-owners that they had until the expiration of the 2-year lease to either agree with the proposed PIC lease or negotiate their own lease, the co-owners did not have sufficient information upon which they could base a reasoned decision. Cf. Henderson v. Portland Area Director, 16 IBIA 169 (1988) (holding that when BIA undertook to convey information about competing lease offers to the co-owners, it was required to ensure that the information conveyed was correct).

This is not to suggest that appellants and the Tribe had totally clean hands in this matter. Except for Pete Jerry's inquiries, there is no evidence that appellants made any effort to gather additional information or to negotiate a lease, instead contending that because they objected to the PIC proposal (although they did not know its terms), BIA was required to negotiate a lease on their behalf with the Tribe. In effect, appellants wanted it both ways: they wanted the freedom to negotiate with the party of their choice, but also wanted BIA to do all the work for them. This is not the intent of the leasing regulations in 25 CFR Part 162, which authorize co-owners to negotiate their own lease. In addition, although appellants contend that a determination should be made as to whether the mobile home park is the best use of the allotment, no co-owner suggested any other use.

The Tribe also procrastinated for almost eight months before finally submitting its proposed lease after receiving an ultimatum from BIA. The proposal was obviously incomplete, but when BIA made inquiries about it with the Tribe, no one was willing or able to explain it. 6/ Based on the Tribe's proposed lease, it appears that the “Tribally determined” option for the allotment was to lease it to the Tribe for the same purpose, but with a shorter term. However, the proposed lease was not accompanied by any indication that the Tribe has experience in leasing and managing individually owned allotted land. The leasing and management of land are business activities, not governmental functions.

When the Tribe submitted its proposed lease, BIA gave it an unrealistically short time in which to amend and supplement the proposal. BIA may very well have thought that unless it took action immediately, nothing would happen, and PIC would merely be held over indefinitely to manage the park

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6/ It is possible that the Tribe intended its 3-page submission to indicate those places in which a lease with it would differ from the lease proposed by PIC. If this is the case, the Tribe's proposed lease is internally inconsistent. For example, the term of the lease would be 5 years, but the Tribe would be liable for paying rent to the co-owners for 25 years.

while it continued to deteriorate, perhaps to the point of threatening public health and safety and of destroying the allotment's income-generating ability to the detriment of the co-owners. Failure to take action under such circumstances might well have subjected BIA to charges of violating its trust responsibility to manage trust property.

Based on its review of the arguments of the parties and the administrative record, and on the above discussion, the Board concludes that BIA did not properly fulfill the legal prerequisites to the exercise of its discretion under 25 CFR 162.2(a)(4). BIA failed to provide the co-owners with information concerning PIC's proposed lease to enable them to make a decision as to whether to accept it. Accordingly, the Board vacates the Area Director's September 17, 1992, decision, and remands this matter to BIA for further consideration. On remand, BIA should fully inform the co-owners of PIC's proposal and explain the appraisal, about which there appears to be a great deal of confusion, as well as considering whether an alternative use of the allotment might be more economically beneficial. BIA is not required, however, to negotiate a lease with the Tribe merely because some co-owners desire such a lease. Any such negotiations are the responsibility of those co-owners. If a lease is negotiated with the Tribe, BIA's trust responsibility is to determine the positions of the co-owners on that lease.

This decision does not require that all co-owners must agree before a lease can be approved. Furthermore, it expresses no opinion regarding the merits of the proposed leases with PIC and the Tribe, except as explicitly discussed. BIA retains its full authority under 25 CFR 162.2(a)(4) to grant a lease should the co-owners still be unable to agree.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 17, 1992, decision of the Acting Portland Area Director is vacated, and this matter is remanded to him for further consideration in accordance with this decision.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge