



INTERIOR BOARD OF INDIAN APPEALS

Wendell Gooday and Savant Resources, LLC.
v. Southern Plains Regional Director, Bureau of Indian Affairs

38 IBIA 166 (10/25/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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WENDELL GOODAY, Appellant	:	Order Affirming Decision
	:	
	:	
SAVANT RESOURCES, LLC, Appellant	:	
	:	
	:	Docket Nos. IBIA 01-111-A
v.	:	IBIA 01-115-A
	:	
SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	October 25, 2002

These are appeals from a March 14, 2001, decision of the Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming the grant of an oil and gas lease for Comanche Allotment 841 to Wagner & Brown, Ltd. (Wagner & Brown). Appellants are Wendell Gooday (Gooday), the present owner of Allotment 841, and Savant Resources, LLC (Savant). For the reasons discussed below, the Board affirms the Regional Director's decision.

Prior to the events giving rise to this appeal, Allotment 841 was owned by Mary Dorcas Gooday (Decedent), who died on December 12, 1994. Decedent's estate remained in probate until June 13, 2000, when the Board issued the final Departmental decision in the matter. The Board there held that Gooday was entitled to receive Allotment 841 in its entirety, albeit by gift deed rather than through inheritance or devise. Estate of Mary Dorcas Gooday, 35 IBIA 79 (2000). ^{1/}

On September 29, 1998, Wagner & Brown sought permission from the Anadarko Agency, BIA, to negotiate oil and gas leases with the owners of Indian lands located in 12

^{1/} Although the probate of Decedent's estate was contentious, the Board's decision has not been appealed to Federal court. It is conceivable, as the Regional Director notes in his answer brief here, that an appeal of the Board's decision might still be taken to Federal court and that the court might accept the appeal as timely. Thus, it is also conceivable that the Board's decision could be overturned.

sections within an exploration area Wagner & Brown was developing in Caddo and Comanche Counties, Oklahoma, including the section in which Allotment 841 is located. ^{2/} Wagner & Brown made a standing offer for the terms of the leases it was proposing. Its offer was referred to the Bureau of Land Management (BLM) for review by a minerals appraiser. On December 11, 1998, an analysis was provided by BLM's Minerals Review Appraiser in Santa Fe, New Mexico. In describing Wagner & Brown's offer, the appraiser stated in part:

Because the target formations are in the 20,000 ft. plus depth zones, the time to drill is given as from 9 to 10 months per hole. Therefore, in order to have time to do a reasonable exploratory drilling program and analyze the results, the requested primary lease term is for 5 years with an option right (not an obligation) to obtain a 5 year extension. "Signing bonus" payments of \$75.00 per net mineral acre will be paid at the beginning of both the primary lease and the extension. Also, and this is an unusual proposal for Indian minerals, an additional "termination payment" of \$75.00 per net mineral acre will be paid if [Wagner & Brown] does not drill a minimum 10,000 ft. deep well. Consequently, the Indian mineral owners will receive at least \$75.00 per acre, and they may receive as much as \$225.00 per acre if they get the Primary bonus, the Extension bonus, and the No 10,000 ft. well payment. A royalty rate of 20% is proposed.

Appraiser's Review Paper and Comments at 1. In the "Comments" section of his paper, the appraiser noted that Wagner & Brown's proposal was "based upon a new twist on the usual interpretation of the local geology," *id.* at 2, and was high risk. He also discussed the history of failed drilling efforts and unsuccessful attempts to lease tracts in the 12 sections. ^{3/} He expressed the opinion that, if the subject tracts were offered in the current market, they would attract some bids for bonus amounts from \$10 to \$50 per acre. In the cover memorandum transmitting his paper, he stated:

I have found [Wagner & Brown's] offer to be one that exceeds the current market as far as value (dollars offered) is concerned. Because I am of the opinion that this offer is an exceptional proposal and totally in the best interests of the Indian mineral owners involved, I recommend it for approval and early initiation.

^{2/} Allotment 841 is described as the N/2 NE/4 and N/2 NW/4, section 26, T. 5 N., R. 12 W., Caddo County, Oklahoma, containing 160 acres.

^{3/} With respect to the section in which Allotment 841 is located, the appraiser stated that a test well drilled in 1993 to a depth of 3,993 feet proved dry and was abandoned. He also stated that no bids were received when tracts in the section were offered for lease in September 1995, April 1996, June 1997, and July 1998.

Pursuant to permission granted by the Agency, Wagner & Brown proceeded to negotiate with the owners of Indian lands in the 12 sections. As indicated above, however, Allotment 841 was then in probate.

On October 6, 1999, Congress enacted legislation affecting mineral leasing of certain Indian lands in Oklahoma. Act of Oct. 6, 1999, Public Law No. 106-67, 113 Stat. 979, 25 U.S.C. § 396 note. The 1999 legislation amended the Act of July 7, 1998, Public Law No. 105-188, 112 Stat. 620, 25 U.S.C. § 396 note.

The 1998 Act, which originally applied only to the Fort Berthold Reservation in North Dakota, provides in subsection 1(a):

(3) EXECUTION OF LEASE OR AGREEMENT BY SECRETARY.—

The Secretary may execute a mineral lease or agreement that affects individually owned Indian land on behalf of an Indian owner if—

(A) that owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined; * * *

* * * * *

(4) PUBLIC AUCTION OR ADVERTISED SALE NOT REQUIRED.—

It shall not be a requirement for the approval or execution of a lease or agreement under this subsection that the lease or agreement be offered for sale through a public auction or advertised sale.

The 1999 amendment made the provisions of the 1998 Act applicable to trust and restricted Indian lands within “a former Indian reservation located in Oklahoma of—(aa) the Comanche Indian Tribe” and certain other Oklahoma tribes.

In October 1999, Wagner & Brown asked the Superintendent, Anadarko Agency, to grant a lease of Allotment 841 under the authority conferred in the 1998 Act as amended on October 6, 1999.

On November 15, 1999, BIA included Allotment 841 in an oil and gas lease advertisement. Documents in the record suggest that the allotment was advertised because of a request made by Appellant Gooday, who was then a presumptive heir. ^{4/} In this appeal, the Regional

^{4/} Gooday’s request was dated July 17, 1998.

Director states that, although Gooday's request was one reason BIA included Allotment 841 in the lease advertisement, BIA also believed that its responsibility to the undetermined heirs of Allotment 841 would be best served by advertising the allotment in order to learn whether there would be any bids that matched Wagner & Brown's offer. Regional Director's Brief at 2.

Savant was the only bidder for Allotment 841. It made a bonus offer of \$35 per acre, which it later increased to \$75 per acre. ^{5/} BIA then asked the BLM appraiser to compare Savant's improved bid to Wagner & Brown's offer. The appraiser concluded that Savant's bid was not as beneficial to the heirs as Wagner & Brown's offer. In a February 18, 2000, memorandum to BIA, he recommended that Wagner & Brown's offer be accepted. On March 20, 2000, an Acting Superintendent signed a document accepting the bonus offered by Wagner & Brown. On March 25, 2000, he granted a lease to Wagner & Brown, citing as authority the 1998 Act as amended on October 6, 1999.

Savant objected to the lease. On August 4, 2000, the Superintendent issued a formal decision explaining the reasons for granting the lease to Wagner & Brown. Her decision was appealed by Gooday and Savant. On March 14, 2001, the Regional Director affirmed the Superintendent's August 4, 2000, decision and the Acting Superintendent's March 25, 2000, grant of a lease to Wagner & Brown. ^{6/}

On appeal to the Board, Gooday makes two principal arguments: (1) the Wagner & Brown lease is void because of BIA's failure to give him notice of actions taken by BIA in connection with the lease, and (2) the Wagner & Brown lease is not in his best interest. Savant makes three principal arguments: (1) BIA failed to comply with the provisions of 25 C.F.R. §§ 212.20 and 212.21; (2) BIA was biased against Savant and violated Savant's right to due process; and (3) BIA did not act in Gooday's best interest when it granted a lease to Wagner & Brown rather than Savant. Gooday and Savant are in accord in their opposition to the Wagner & Brown lease; both ask the Board to declare the lease void. They part company thereafter. Gooday opposes a lease to Savant, whereas Savant asks the Board to order BIA to grant a lease to Savant.

Before addressing Appellants' arguments, the Board briefly summarizes the standard of review and burden of proof applicable here. The BIA decision at issue, *i.e.*, a decision to grant a lease of Indian land, is a decision based on the exercise of discretionary authority. *E.g.*,

^{5/} This was permitted by the advertisement, which provided: "On tracts receiving only one (1) bid, the bidder will be given one (1) opportunity to improve the bid." Lease Advertisement at 1.

^{6/} On Mar. 1, 2001, shortly before the Regional Director issued his decision, counsel for Gooday sent the Regional Director a copy of an Oct. 12, 2000, offer he had received from Upland Exploration, Inc. (Upland), for a lease of Allotment 841.

Brooks v. Muskogee Area Director, 25 IBIA 31, 35 (1993). The Board's role in reviewing BIA discretionary decisions is limited. The Board does not substitute its judgment for BIA's. Rather, it reviews the BIA decision to ensure compliance with all legal prerequisites to the exercise of discretion. E.g., Pawnee v. Acting Anadarko Area Director, 32 IBIA 273, 274 (1998).

Insofar as Appellants challenge BIA's exercise of discretion, they bear the burden of proving that BIA did not properly exercise its discretion. Insofar as they allege legal error, they bear the burden of proving that the Regional Director's decision is in error or is not supported by substantial evidence. E.g., Cox v. Acting Muskogee Area Director, 35 IBIA 43, 46 (2000); City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999).

Gooday argues that he was entitled to notice because he was a determined heir of Decedent prior to the time the lease was granted and that, even if he was not a determined heir, he was entitled to notice as a presumptive heir.

Gooday contends that he became a determined heir of Decedent on March 30, 1999, when Administrative Law Judge Richard L. Reeh issued his initial decision in Decedent's estate. The Board rejects that contention. Judge Reeh's decision was not final on March 30, 1999. Gooday did not become a "determined heir" until the Board issued the final Departmental decision on June 13, 2000. ^{7/} Accordingly, Gooday was not a determined heir at the time the Acting Superintendent granted the lease to Wagner & Brown.

Gooday contends that, even as a presumptive heir, he was an interested party entitled to notice under an October 25, 1999, memorandum signed by the Acting Regional Director and/or under 25 C.F.R. § 2.7.

The Acting Regional Director's October 25, 1999, memorandum provided guidance concerning the 1999 amendment to the 1998 Act. With respect to the notice to be provided to landowners prior to BIA's approval of a lease, the memorandum stated: "**Notice** - The agency shall notify all adult competent parties (inclusive of guardians) holding a trust/restricted interest in the property to be leased at their last known address. * * * Parties should have at least thirty (30) calendar days to respond."

Gooday did not hold a trust/restricted interest in Allotment 841 at any time prior to grant of the lease to Wagner & Brown. Thus, he did not fall within the category of persons entitled to notice under the Acting Regional Director's memorandum.

^{7/} As noted above, Gooday was determined to be entitled to receive Allotment 841 by gift deed, rather than by inheritance or devise. Therefore, he is technically not an "heir." However, his right to receive the property was determined at the conclusion of the probate proceedings. Thus, for purposes of the issue here, he is the equivalent of a person who, as of June 13, 2000, was Decedent's determined heir.

C.F.R. § 2.7(a) provides: “The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.” Gooday appears to be contending that this provision concerns the same kind of pre-decisional notice described in the Regional Director’s October 25, 1999, memorandum. However, it is clear from the wording of 25 C.F.R. § 2.7(a) that the notice described there is the notice to be given at the time a decision is issued.

The Acting Superintendent made a decision on March 20, 2000, when he signed a document accepting Wagner & Brown’s bonus offer, and a related decision on March 25, 2000, when he granted the lease to Wagner & Brown. Gooday may be contending that he was entitled to notice of these decisions under 25 C.F.R. § 2.7(a), although his argument on this point is not entirely clear.

It does not appear that Gooday was given notice of the actions taken on March 20, 2000, or March 25, 2000, at the time those actions were taken. However, failure to give him notice at that time, even assuming he was then entitled to notice under 25 C.F.R. § 2.7(a), 8/ would not render the Wagner & Brown lease void, as Gooday contends. This is made clear in 25 C.F.R. § 2.7(b), which provides: “Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.”

Gooday was given notice of the Superintendent’s August 4, 2000, decision reaffirming the Wagner & Brown lease. By that time, he had been determined to have ownership rights in Allotment 841 and was clearly entitled to notice. As a result of the notice he received, Gooday had the opportunity to, and did, challenge the lease. Therefore, even assuming BIA erred in not giving Gooday notice on March 20, 2000, or March 25, 2000, the error was cured when the Superintendent gave him notice of her August 4, 2000, decision.

Gooday was given the notice required by 25 C.F.R. § 2.7(a). He has not shown that he was entitled to notice under any other provision of law, regulation, or administrative guidelines. Thus, he has failed to show that the Wagner & Brown lease is void for lack of notice to him.

Gooday next contends that the Wagner & Brown lease is not in his best interest. In support of this contention, he asserts that the Regional Director ignored an offer to lease made

8/ In addition to arguing that he was entitled to notice as a determined or presumptive heir, Gooday appears to be arguing that he was an interested party entitled to notice under 25 C.F.R. § 2.7(a) because BIA advertised Allotment 841 at his request. For the reasons discussed in the text, it is not necessary to determine whether Gooday was entitled to receive notice on Mar. 20, 2000, or Mar. 25, 2000.

by Upland which, he contends, offered better terms than those contained in the Wagner & Brown lease.

As indicated in footnote 6 above, Upland wrote to counsel for Gooday on October 12, 2000. Upland's letter stated in its entirety:

Upland Exploration, Inc. is currently interested in acquiring an oil and gas mineral lease from Wendell Gooday and or any heirs associated with [Allotment 841]. The terms of said lease would be a 1/5 royalty (20%), a lease bonus of \$200 per net mineral acre, and a five-year standard BIA lease. Please consider this an offer to lease your client or clients mineral rights under said tract.

If you have any concerns or question [sic] please do not hesitate to contact me.

Gooday's counsel did not submit this letter to BIA until March 1, 2001, nearly five months after it was written, nearly two months after the completion of briefing before the Regional Director, and shortly before the Regional Director was required to issue his decision under the deadline established in 25 C.F.R. § 2.19(a). The Board finds it disingenuous for Gooday's counsel to accuse the Regional Director of ignoring the letter when counsel withheld it from BIA for nearly five months and then made an extremely untimely submission in the context of the ongoing proceedings.

In their answer briefs in this appeal, both the Regional Director and Wagner & Brown questioned the seriousness of the Upland offer, given the manner in which it was presented. Gooday has not responded to those challenges, although he had the opportunity to do so in his reply brief. Nor has he offered any explanation for his attorney's failure to submit the Upland letter earlier.

Gooday has failed to show that BIA should have considered the Upland letter. He has also failed to show that any serious potential lessee would offer lease terms superior to those of the Wagner & Brown lease.

Gooday also contends that the 1998 BLM appraisal is inadequate because it addressed a large area of 12 sections, rather than Allotment 841 exclusively; because it lacked leasing and production history concerning the tracts surrounding Allotment 841; and because it failed to mention an abandoned well on Allotment 841. The Board finds Gooday's objections to be without merit. Although the appraisal covered 12 sections, it included a section-by-section drilling history and a section-by-section leasing history. As stated in footnote 3 above, the appraiser noted the failure of any of the tracts in section 26, T. 5 N., R. 12 W. (the section in which Allotment 841 is located) to attract bids in recent years. He also mentioned the abandoned well in that section.

Gooday has failed to show that the BLM appraisal was inadequate.

As indicated above, the BLM appraiser found the Wagner & Brown lease to be in the best interest of the heirs of Allotment 841. Gooday has not shown otherwise.

The Board finds that Gooday has failed to show that BIA did not properly exercise its discretion in granting the lease to Wagner & Brown. It further finds that Gooday has failed to show that the Regional Director's decision was legally erroneous or that it was not based on substantial evidence.

Savant contends that BIA failed to comply with the provisions of 25 C.F.R. §§ 212.20 and 212.21 when it granted a lease to Wagner & Brown. Savant also complains that the Wagner & Brown lease is not the standard lease required by the November 15, 1999, advertisement and that Savant was never notified that its bid had been rejected. Savant contends that, in view of these failures, the Board should void the Wagner & Brown lease and order BIA to grant a lease to Savant.

In essence, Savant's argument is that, because it was the only bidder and followed the rules set out in the advertisement, it was entitled to be awarded a lease. That is simply not so. As required by 25 C.F.R. § 212.20(b)(2), the lease advertisement stated: "The Superintendent reserves the right to reject any and all bids." Lease Advertisement at 1. ^{9/} Savant was therefore on notice that its bid was subject to rejection despite the absence of any other bids and despite Savant's having followed the rules governing the lease sale. Nothing in the applicable statutes or regulations precluded BIA from rejecting Savant's bid and entering into a negotiated lease with Wagner & Brown.

Savant contends that, because the advertisement required that a successful bidder prepare its lease on a standard form, the Wagner & Brown lease was also required to be prepared on a standard form. However, nothing in the applicable statutes or regulations requires that a negotiated lease, such as the Wagner & Brown lease, be prepared on a standard form.

Savant contends that it was never formally notified that its bid had been rejected and that it was rebuffed by BIA when it attempted to obtain information about the matter. Savant submits copies of BIA vouchers for refunds of Savant's bid deposits (one for its original bid and one for its improved bid) for Allotment 841. Both vouchers state in a "Remarks" notation:

^{9/} 25 C.F.R. § 212.20(b)(2) provides: "The advertisement shall provide that the Secretary reserves the right to reject any or all bids."

“Rejected bid.” Savant alleges that it did not receive the vouchers at the time they were prepared. ^{10/} It does not allege, however, that it did not receive the refunds.

Even if BIA failed to promptly notify Savant that its bid had been rejected, as Savant alleges, that failure would not constitute grounds for voiding the Wagner & Brown lease.

Savant has not shown that any violation of 25 C.F.R. §§ 212.20 or 212.21 occurred in this case.

Next, Savant argues that BIA was biased against Savant and violated Savant’s right to due process. In this regard, Savant alleges that BIA engaged in secret communications with Wagner & Brown and tailored the bidding process to Savant’s detriment. Savant also alleges bias on the part of the BLM appraiser. Further, Savant alleges that its right to due process was violated when BIA declined to release certain documents under the Freedom of Information Act (FOIA).

Undoubtedly BIA and Wagner & Brown communicated with each other in connection with the lease negotiations. There is no evidence, however, that any of these communications were improper. There is also no evidence that BIA improperly tailored the bidding process. Savant’s complaints in this regard stem from the fact that it submitted a bid under the terms of the advertisement whereas Wagner & Brown negotiated a lease. There is no requirement, however, that lease negotiations track the formal procedures of a lease sale, nor any requirement that negotiations be public. Savant has not shown that BIA communicated improperly with Wagner & Brown or that it tailored the bidding process.

Savant argues that the BLM appraiser’s February 18, 2000, memorandum shows that he “did not want Savant competing with Wagner & Brown for a lease covering [Allotment] 841” and that he was guilty of “inherent bias against Savant and favoritism towards Wagner & Brown.” Savant Opening Brief at 37. The February 18, 2000, memorandum makes it clear that the appraiser considered Wagner & Brown’s offer superior to Savant’s bid. Even so, he recommended that Savant’s bid be accepted if Wagner & Brown’s offer was no longer available. Upon review of the February 18, 2000, memorandum, the Board finds no evidence that the appraiser’s opinion was based on anything other than his professional expertise.

Savant’s FOIA argument is not properly before the Board. Appeals from FOIA decisions are governed by 43 C.F.R. § 2.18. The Board is not part of the FOIA appeal process and has no authority to decide FOIA appeal issues. E.g., Iowa v. Great Plains Regional Director, 38 IBIA 42, 48 (2002).

^{10/} The vouchers were addressed to Savant’s agent. Copies of the vouchers were furnished directly to Savant with the Superintendent’s Aug. 4, 2000, decision.

Savant next argues that a lease to Savant would be in Gooday's best interest and that, by granting a lease to Wagner & Brown rather than Savant, BIA has violated its fiduciary duty to Gooday.

In Clausen v. Portland Area Director, 19 IBIA 56 (1990), the Board considered an argument made by Clausen that "BIA breached its fiduciary duty by failing to award the lease to him because his lease offer was in the best interest of the Indian owners." Id. at 60. Clausen was a non-Indian who owned a fractional fee interest in the allotment which he sought to lease. The Board found that, as a non-Indian, he was "not a beneficiary of the Federal trust responsibility" and therefore "lack[ed] standing to raise an alleged violation of that trust responsibility." Id.

Savant has no more, and arguably even less, claim to standing on this issue than did Clausen. The Board finds that Savant lacks standing to raise the issue of breach of fiduciary duty to Gooday.

The Board finds that Savant has failed to show that BIA did not properly exercise its discretion in approving the lease to Wagner & Brown. It further finds that Savant has failed to show that the Regional Director's decision was legally erroneous or that it was not based on substantial evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's March 14, 2001, decision is affirmed. 11/

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge

11/ All arguments made by Appellants but not discussed in this decision have been considered and rejected.