INTERIOR BOARD OF INDIAN APPEALS

David Thompson v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

54 IBIA 125 (10/31/2011)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

DAVID THOMPSON, Appellant,	)	Order Affirming Decision in Part, Vacating in Part, and Remanding
v.	)	
ACTING SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Docket No. IBIA 10-012
	)	October 31, 2011

Appellant David Thompson appealed to the Board of Indian Appeals (Board) from a decision dated September 15, 2009, in which the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirmed an earlier decision of the Acting Superintendent of BIA's Anadarko Agency (Superintendent) which found Appellant in trespass on Wichita Allotment No. 398 (Allotment 398) and assessed back rent against Appellant with interest.[1] We affirm that portion of the Regional Director's decision that affirms the Superintendent's decision to hold Appellant liable for rent to his co-owners, but we vacate and remand that portion of her decision that assesses Appellant $6,823.75 in back rent and interest because we find that the record is insufficient to support this amount. The back rent includes rent for the house Appellant claims to own and in which Appellant resided. The Regional Director did not explain, nor does the record support, a conclusion by BIA that the house is held in trust by BIA as part of Allotment 398, and thus could be included in BIA's assessment of back rent. In addition, the appraisal upon which BIA relied uses a 12 percent compounded rate of return that is substantially higher than that relied upon by BIA for residential leases elsewhere in the country. *See Hawkey v. Acting Northwest Regional Director*, 52 IBIA 86, 87 (2010). No explanation or justification is found in the record for this rate of return.

---

[1] Wichita Allotment No. 398, which consists of 160 acres, is described as the NW¼ of Section 33, Township 8 North, Range 10 West in Caddo County, Oklahoma.

Background

Appellant owns a 1/12 interest in Allotment 398. He represents that in 2005 he bought out an existing agricultural lease on Allotment 398 for the balance of that year,[2] and moved into a vacant house that he claims sits on 1½ acres of the allotment. Appellant did not obtain a homesite lease nor has he paid any rent, although he claimed to have the consent of several co-owners to reside on the land. He also claimed that he expended over $25,000 of his personal funds to rehabilitate the house, which he explained was moved to Allotment 398 from Anadarko by his family and which he claimed his family "inherited" from his grandfather, Lee Zadoka. *See* Letter to BIA from Appellant, Oct. 15, 2007, at unnumbered 1 (Administrative Record (AR) Tab 4).

On September 27, 2007, the Superintendent notified Appellant that it appeared that he was in trespass on Allotment 398. According to the letter, BIA had "received a report" that Appellant was residing on the allotment,[3] and the Superintendent gave Appellant 10 days to show that he was authorized to reside on the allotment.

Meanwhile, BIA contacted at least one of the other owners of Allotment 398, Vanessa Vance, concerning Appellant's use of the allotment. According to Vance, she received a call from Steve Sulloway at BIA in October 2007, in which he suggested that 1¼ acres would be set aside as a homesite for Appellant.[4] Vance demanded that Appellant

---

[2] According to the Regional Director, Allotment 398 was the subject of a lease that expired at the end of 2006. A March 2008 letter from BIA to one of the co-owners of Allotment 398 identifies the lease as Lease No. 48274; in her September 15, 2009, decision, the Regional Director refers to Lease No. 804-04238902 executed in favor of Leldon Birch for the period January 1, 2002 through December 31, 2006. The parties do not address whether Appellant attempted to obtain BIA approval of the assignment of the agricultural lease from Birch to him nor is it clear what happened to the agricultural lease in 2006.

[3] The record is devoid of any documentation prior to the Superintendent's 2007 letter. Thus, there is no documentation of any "report" received by BIA. Notwithstanding, Appellant confirms that in August 2005 he met with the Superintendent and 2 co-owners "to discuss the trespass issue." Letter to BIA from Appellant, Oct. 15, 2007, at unnumbered 1 (AR Tab 4). Therefore, BIA was aware that Appellant was residing on Allotment 398 at that time.

[4] Vance also asserts that Sulloway told her that Appellant "had discussed this [matter] with Mr. George Beatty and that the 'file' was missing. He also admitted that this supposedly took place over two years ago." Letter to BIA from Vance, Oct. 4, 2007, at 1 (AR Tab 3).

"be immediately evicted from the property, [and] assessed rent, damages and fines for his actions [because he did not have a lease]." Letter to BIA from Vance, Oct. 4, 2007, at 1 (AR Tab 3).

Appellant responded to the Superintendent's letter, and provided details concerning numerous contacts he made with BIA in 2005 and 2006 to get both a residential lease and an agricultural lease in place. He explained that after he met with the Superintendent in August 2005, he made 5 additional attempts to obtain a homesite lease through BIA. He claims his last contact with BIA concerning a homesite lease was in March 2006 when he was told by George Beatty that BIA had determined that no homesite lease was needed because "the house was owned by my family." *See* Letter to BIA from Appellant, Oct. 15, 2007, at unnumbered 2 (AR Tab 4).[5] Appellant also detailed three additional attempts by him to obtain an agricultural lease on Allotment 398. He stated that Steve Wallace at BIA told him in March 2006 that he would send him the agricultural lease documents after the property was reappraised for a grazing lease.[6] Neither Appellant nor BIA states whether there was any further contact during the next 18 months.

Thereafter, on November 13, 2007, the Superintendent issued a finding of trespass. The Superintendent acknowledged that Appellant appeared to have engaged in discussions with the Agency concerning a residential lease as well as an agricultural lease, but concluded that since Appellant never obtained either lease, he was "in trespass and will be assessed damages for trespass until paid or until an Agency lease is approved." Superintendent's Nov. 13, 2007, decision (AR Tab 5). The Superintendent explained that trespass damages would be assessed upon BIA's receipt of an appraisal, which BIA requested on December 14, 2007.

On July 15, 2008, the Superintendent assessed $6,823.75 against Appellant as past due rent plus interest. This amount was based upon an appraisal dated April 29, 2008, that

---

[5] According to Appellant's diary, copies of which were provided by Appellant, Beatty "said OK to not draw up lease contract (on House) after I said I would not pay to live in my own property." Attach. to Stmt. of Reasons to Reg. Dir., Sept. 25, 2008, at unnumbered 4 (AR Tab 19).

[6] Appellant states that he asked what the proposed amount for the agricultural lease would be and was told — prior to the appraisal — that it would be $1,374 per year. Appellant stated that this amount was 30 percent higher than the rent paid by the previous lessee.

appraised the market rent of a 2.122-acre homesite on Allotment 398,[7] "including improvements." Appraisal cover letter, Apr. 29, 2008 (AR Tab 15).[8] The record contains only the cover letter for the appraisal and the fourth and last pages of the 16-page appraisal report. AR Tab 15. According to these excerpts, the property first was inspected for appraisal purposes in November 2005.[9] The last page of the appraisal summarizes the appraiser's opinions. The appraiser determined that the rental value was $206 per month or $2,470 per year[10] based on a "Cost Approach/Rate of Return" method. In explaining the use of the Cost Approach/Rate of Return method, the appraiser acknowledged that it "is typically a less desirable approach when appraising older properties." Appraisal at 16 (AR Tab 15). The appraiser then applied a 12 percent compounded rate of return to arrive at back rent plus interest of $7,443 for 31 months (from August 31, 2005, through March 31, 2008).[11] The Superintendent determined that, as an owner of a 1/12 interest in the property, Appellant would be entitled to 1/12 of the $7,443 in calculated back rent and interest. Therefore, she reduced the amount assessed against Appellant by 1/12 and determined that Appellant should pay $6,823.75.[12]

Appellant appealed to the Regional Director, and raised six arguments: (1) BIA informed Appellant that he did not need a lease to live in the house and renovate it; (2) Appellant denied that he has occupied the property since August 31, 2005; (3) the property occupied by Appellant was not rented to anyone else nor had BIA put the property

---

[7] There is no indication in the record how BIA arrived at 2.122 acres for the surveyed homesite and appraisal rather than 1¼ or 1½ acres suggested by Vance (Letter to BIA from Vance, Oct. 4, 2007, at 1) (AR Tab 3) and Appellant's Opening Brief at 2, respectively.

[8] The improvements apparently included a one story, 685 sq. ft. home.

[9] Nothing in the record informs us of the type of appraisal sought by BIA in 2005 or whether an appraisal was completed at that time.

[10] The annual rental amount of $2,470 is mathematically incorrect. The actual annual amount — at $206 per month — would be $2,472.

[11] Presumably, the missing body of the appraisal explains how the appraiser applied the Cost Approach/Rate of Return method and how the appraiser determined that a 12 percent compounded rate of return was appropriate.

[12] This amount, too, is not entirely correct. Appellant's one-twelfth share of $7,443 is $620.25 ($7,443 ÷ 12). Therefore, reducing $7,443 by Appellant's share of $620.25 equals $6,822.75.

up for rent; (4) Appellant bought out the agricultural lease and the property has not been rented since; (5) the appraised rent is incorrect and no basis is set forth for the appraised amount; and (6) BIA failed its trust responsibility for failing to lease the house, which resulted in the house falling into disrepair and necessitating repairs by Appellant. The Regional Director affirmed the Superintendent's decision. The Regional Director rejected Appellant's arguments and explained that Appellant was required to have a lease pursuant to 25 C.F.R. § 162.104(b)[13] where there is no consent from the co-owners for Appellant to reside on the land without a lease; that Appellant previously had been provided with a copy of the regulations and was told by BIA that he must have a lease; that Appellant's statement that he had not lived on the property since August 31, 2005, was refuted by his later statement, in November 2007, that he intends to "continue" to live on Allotment 398; that the assessed amount of $6,823.75 was based upon an appraisal performed by the Office of Appraisal Services within the Office of the Special Trustee for American Indians; and the owners are responsible for keeping the house in repair, not BIA. The Regional Director did not address Appellant's contention that he had bought out the agricultural lease.

This appeal followed.

Discussion

We are unable to conclude that the Regional Director's assessment of back rent and interest is supported by the record and therefore vacate that portion of the Regional Director's decision that demands Appellant to pay $6,823.75. The appraisal on which BIA relies includes rental for Appellant's home, but the Regional Director does not explain, nor does the record support, how he determined that the home properly is included in an appraisal of "trust interests" for purposes of assessing back rent for trespass on trust property under 25 C.F.R. pt. 162. If BIA can support its finding that the house is part of the trust property for which BIA is responsible for leasing under Part 162, the record should include BIA's analysis of this issue and evidence supporting its determination. In addition, we cannot determine how the appraiser arrived at a 12 percent rate of return nor is there any analysis or explanation of why BIA applied a 12 percent rate of return as part of determining the residential rental value of Appellant's homesite vis-a-vis a 6 percent rate of return utilized by BIA in Washington state as part of its formula for determining residential rental values during the same time period.

---

[13] Section 162.104(b) provides, "An Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given the[ir consent] to take or continue in possession without a lease."

We review the Regional Director's decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Hawkey*, 52 IBIA at 89-90. It is Appellant's burden to show error in the Regional Director's decision, *id*. at 90, but the Board may also act *sua sponte* to correct manifest error or injustice in appropriate circumstances, *see Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 83 (2010). However, we will not substitute our judgment in place of BIA's in matters of discretionary decision making. *Id*. at 80.

Appellant challenges the Regional Director's decision on several grounds: He was originally told in 2005 that he could rent the entire allotment for $1,374 per year; he should only be responsible for paying for a small fraction of Allotment 398 consistent with his residential use because he did not use the entire allotment; he should pay only for his rental use of the house and the rent should be offset by the improvements he made to the house; he is not liable for the entire amount of rent assessed because his co-owners have not been denied access to or use of Allotment 398; and he should not be assessed rent precisely because his co-owners have utilized the property and he has not been in sole possession of the allotment.

We first dispose of Appellant's arguments concerning the amount of land for which he is assessed rent. Appellant argues that BIA is charging him rent for the entire 160 acres instead of just the area on which the house sits. Appellant errs. The appraisal on which the assessed rent is based, was for a 2.122-acre homesite on Allotment 398. The limited pages of the appraisal that are before the Board make no mention of the remaining acreage of the allotment. We thus conclude that BIA seeks only to recoup rent from Appellant for the land actually utilized by him.

Next, although Appellant argues that none of his co-owners were denied the use of the house, this fact is not determinative of whether Appellant is required to pay rent. It is his personal, long-term occupancy or "possession" of the land — which he does not dispute — that gives rise to Appellant's obligation to pay rent to his co-owners. *See* 25 C.F.R. § 162.104(b). Appellant's possession of the property need not be exclusive. But, because he owns an interest in the land, BIA did not err in granting Appellant an offset equivalent to his 1/12 ownership interest.

Turning to Appellant's challenges to the amount of back rent, he claims that BIA told him in 2006 that the rent might be set at $1,374 for an agricultural lease covering the entire allotment of 160 acres. Therefore, Appellant claims that annual rent of $2,470 for a homesite lease covering 2.122 acres is excessive. This argument was not raised before the Regional Director, for which reason we need not consider it on appeal. *Weinberger v. Rocky*

Mountain Regional Director, 46 IBIA 167, 173 (2008).[14] Appellant also did not, in his appeal to the Regional Director, seek an offset for the upgrades Appellant claims were made to the house. Therefore, we also decline to consider this argument on appeal.

But, we are troubled by the amount of back rent assessed by BIA and *sua sponte* raise the following issues. First, although the Board was not provided with a complete copy of the appraisal,[15] it is evident from the pages that were provided that the appraisal included the home and is not limited to the land surface.[16] The requirements for a lease in 25 C.F.R. pt. 162 do not apply to non-trust interests in property. And nothing in the record before the Board supports a determination that the home is trust property. In fact, the Regional Director failed to address Appellant's assertions that his family "inherited" the house and that the house is "owned by" his family. Letter to BIA from Appellant Oct. 15, 2007, at unnumbered 1, 2 (AR Tab 4).

In *Smartlowit v. Northwest Regional Director*, 50 IBIA 98 (2009), the Board vacated and remanded BIA's assessment of rent due because it included the rental value of a home on the allotment, and there was no showing that, or consideration of whether, the home itself was held in trust. We held that prior to requiring a lease for the house and seeking rent for past use of the house, it was necessary for BIA to determine whether the house was part of the trust land to which BIA's leasing regulations apply. 50 IBIA at 108-09. This issue is not new: In 1997, the Board observed that "there have been and continue to be questions concerning the status of particular houses built on trust property." *Olson v. Portland Area Director*, 31 IBIA 44, 51 (1997). And in *Smartlowit*, we observed that the

---

[14] We note, however, that different uses of the land may well command different rental values.

[15] We do not know whether the inclusion of only two pages of the appraisal was deliberate or inadvertent. The entire appraisal report should have been in the record before the Board.

[16] In the cover letter that accompanied the appraisal, the subject of the appraisal is described as "[Allotment] 0398 – Punley – Market Rent as of August 31, 2005 for the surface rights, *including improvements*, of a parcel of land . . . containing 2.122 acres, more or less." Appraisal Cover Letter, Apr. 29, 2008 (emphasis added) (AR Tab 15). Page 4 of the appraisal describes the structural improvement as a "[o]ne story frame home containing approximately 685 square feet." AR Tab 15. And on page 16 of the appraisal, the Cost Approach is described as "a less desirable approach when appraising *older properties*," which can only refer to the house as opposed to the bare land. *Id*. (emphasis added).

American Indian Probate Reform Act, 25 U.S.C. §§ 2206(a)[second](2)[17] and (h)(1)(B), includes rules of devise and descent for permanent improvements located on trust assets even though they may not be held in trust and without affecting their non-trust status. 50 IBIA at 108. As we concluded in *Smartlowit*, BIA simply cannot assume that a house located on trust land is trust property and, thus, simply cannot presume the authority to assess or collect rent for the house along with the land.

Second, we note that the 12 percent rate of return utilized by the appraiser, upon which BIA relied, is substantially higher than the rate of return utilized during the same time period by BIA's Northwest Region for residential leases in that area. *See Hawkey*, 52 IBIA at 87 (6 percent rate of return for residential lease on the Tulalip Reservation in Washington in 2005). Because the Board was not provided with a complete copy of the appraisal, we do not know how the appraiser came to select a 12 percent rate of return. While rates of return may well be regional, the appraiser or BIA must identify the source of the rate of return and if it is substantially different from other rates of return utilized by BIA, the Regional Director must explain her decision to rely upon the chosen rate of return.

Given our discussion above, we affirm the Regional Director's decision to hold Appellant liable for back rent and interest. But we vacate the decision as to the amount of back rent and interest assessed against Appellant, and remand. On remand, the Regional Director shall determine whether the house properly is considered trust property, and therefore subject to the leasing regulations at 25 C.F.R. pt. 162. If, in assessing back rent, the Regional Director chooses to rely on an appraisal that utilizes a rate of return that is different from that utilized by BIA for residential rental properties elsewhere in the country, she must explain and support her reasons for doing so.

Therefore, pursuant to the authority delegated to the Board by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's September 15, 2009, decision to hold Appellant liable for back rent and interest, but we vacate that portion of the decision that assesses Appellant back rent in the amount of $6,823.75, and we remand this matter to the Regional Director for a new assessment in accordance with our decision.

I concur:

// original signed	// original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge

[17] As originally enacted by Congress, § 2206(a) contained 2 subparagraphs that were both enumerated "(2)."