



INTERIOR BOARD OF INDIAN APPEALS

Kelly Oil Co. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

15 IBIA 5 (10/08/1986)

Related Board case:
15 IBIA 249



United States Department of the Interior

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

KELLY OIL CO.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 86-6-A

Decided October 8, 1986

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) increasing the rent on lease No. 1-0454 for a portion of Yakima Allotment Nos. 1136 and T-1136.

Dismissed in part; referred in part for evidentiary hearing and recommended decision.

1. Administrative Procedure: Hearings--Indians: Leases and Permits:
Rental Rates

When the administrative record does not contain the necessary factual basis for a determination of whether a rental adjustment was based on substantial evidence, the matter will be referred for an evidentiary hearing and recommended decision.

APPEARANCES: S.D. Blevins, Kelly Oil Company, for appellant.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Kelly Oil Company seeks review of a September 19, 1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) affirming a rental increase on lease No. 1-0454 for a portion of Yakima Allotment Nos. 1136 and T-1136. For the reasons discussed below, this appeal is dismissed in part and referred in part to the Hearings Division for an evidentiary hearing and recommended decision by an Administrative Law Judge.

Background

The lease at issue is a business lease covering 1.53 acres, a portion of Yakima Allotment Nos. 1136 and T-1136. It was entered into on December 4, 1978, for a period of 10 years, beginning March 1, 1979, and ending February 28, 1989. The initial annual rental was \$3,600. The lease provides that improvements on the property belong to the lessee. The leased property is used for a service station and is located directly west of the city limits of Wapato, Washington, on West Wapato Road, and close to U.S. Highway 97. It is within the Yakima Indian Reservation, Yakima County, Washington.

The only provision of the lease at issue in the present appeal is the provision concerning rental adjustment. Provision No. 7 of the lease states:

The rental provisions in all leases which are granted for a term of more than five (5) years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR 131. ^{1/} Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

On October 7, 1983, the Yakima Agency Superintendent, Bureau of Indian Affairs (Superintendent; BIA), notified appellant that its annual rental for 1984 and following years would be increased from \$3,600 to \$6,000, a 66-2/3 percent increase. The increase was supported by an October 3, 1983, BIA appraiser's report in which the value of the leased property was calculated by comparison to adjusted sales values of six commercial properties (comparables) ^{2/} in Yakima County which had been sold between 1979 and 1983. After adjustments, the BIA appraiser found the mean value of the properties sold to be \$1.06 per square foot and the median value to be \$0.91 per square foot. Using a value of \$0.90 per square foot, the appraiser calculated the value of the leased property at \$60,000. He then applied a 10 percent rate of return ^{3/} to the estimated value of \$60,000 to conclude that \$6,000 was a fair annual rental.

As an alternate method of arriving at an annual rental, the appraiser calculated an amount based upon estimated gallons of gasoline pumped, at 1-1/2 cents per gallon, for a total of \$6,300 annual rental. The appraisal report states that the land value calculation was given the most weight and indicates that the appraiser considered the cents-per-gallon approach less reliable. The report concludes by recommending that the rent be adjusted to \$6,000. This recommendation was adopted by the Superintendent.

On appeal to the Portland Area Director, BIA (Area Director), appellant stated that it disagreed with the valuation of the property but offered no alternative valuation. Instead, it suggested that its lease be amended to delete 29,000 square feet. Appellant also objected to the 1-1/2 cents per-gallon calculation but, again, suggested no alternative rate. Appellant

^{1/} Part 131 was redesignated Part 162 without substantial change by notice published at 47 FR 13327 (Mar. 30, 1982).

^{2/} Five of the properties were zoned for commercial use. The sixth was zoned for general agricultural use, a classification which apparently encompassed semi-commercial and industrial uses related to agriculture.

^{3/} The report states that 10 percent was determined to be a reasonable rate of return through analysis of competitive investment alternatives, real estate rental-to-value relationships, and mortgage lending rates.

stated that by comparison to the rental rates for five other service stations which it leased, the rental for the property at issue should be between \$210 and \$250 per month (\$2,520-\$3,000 per year). Appellant also argued that the rental increase was inconsistent with the general economic climate.

In a decision dated November 6, 1984, the Area Director affirmed the rental increase. The Area Director noted that the lease modification suggested by appellant, *i.e.*, the deletion of 29,000 square feet from the lease, was beyond the scope of the appeal. He rejected appellant's comparison of the leased property to appellant's five other leased service stations on the primary grounds that the five stations were in substantially inferior locations.

In response to appellant's arguments about the general economic climate, the Area Director stated that, in his view, changes in land values were the best indicators of changes in economic conditions, and that studies conducted by his office showed an increase in value of 67 percent for prime agricultural land in the area between 1979 and 1983, an increase which coincidentally supported the result reached in the rental adjustment appraisal.

On appeal to appellee, appellant argued that assessment information from the Yakima County Assessor's office concerning five properties adjacent to the leased property was relevant and that it showed an average increase in value of only 18 percent between 1980 and 1984. Appellant also submitted traffic count data and argued that the traffic counts relevant to the leased property had decreased significantly following opening of a freeway. It argued further that decreased real estate sales and high unemployment figures for the area were indicators of the economic climate which should be taken into account in setting the rental rate. Finally, it objected to the valuation of the comparables by the BIA appraiser, stating that their average sales price was \$0.58 or \$0.40 per square foot, and alleging that four of the six properties, which were now bypassed by the new freeway, had diminished in value.

Appellee's decision dated September 19, 1985, affirmed the rental increase. Appellee considered appellant's data from the Yakima County Assessor's Office to be possibly indicative of a trend in property values but not necessarily indicative of fair market values. Appellee noted, however, that the properties analyzed by appellant were residential and agricultural, rather than commercial properties analogous to the leased property. Appellee then analyzed assessor's office data concerning twelve commercial properties in the area and concluded that between 1981 and 1985 the average increase in assessed valuation was 209 percent for land, 64 percent for improvements, and 102 percent for land and improvements combined.

With respect to traffic count, appellee acknowledged a decrease in traffic at one location 6 miles from the leased property but cited data showing an increase in traffic at another location 3 miles from the leased property.

In response to appellant's allegations concerning declining real estate sales and high unemployment as indicators of economic conditions, appellee stated that the best indicator of change in economic conditions relevant to real estate is the change in land values.

Appellee also rejected appellant's objections to the BIA appraiser's valuation of the comparables, explaining that adjustments to the actual sales prices had been made where necessary to compensate for differences between the leased property and the comparables. Further, appellee discussed the alternate method for calculating rental employed by the BIA appraiser, *i.e.*, the calculation based on gasoline sales. ^{4/} Appellee listed appellant's actual sales by month from October 1981 to July 1984 and calculated a rental based on 1-1/2 cents per gallon. The total for 1983 was \$8,655.50. Appellee concluded that the appropriate annual rental rate ranged from \$6,000 to \$8,655.50 and that \$6,000 was a fair annual rental. Appellee therefore affirmed the new rental rate of \$6,000.

Appellant's notice of appeal was received by the Board on October 22, 1985, and the administrative record was received on March 3, 1986. Neither appellant nor appellee filed briefs.

Discussion and Conclusions

In its notice of appeal, appellant argues (1) it was inappropriate for BIA to rely on assessed values rather than actual sales prices, (2) traffic volume had not increased or decreased; (3) BIA's use and valuation of the comparables was erroneous, and (4) the cents-per-gallon rate used by BIA was inappropriate.

The Board has previously discussed its role in reviewing rental adjustments, most recently in Bien Mur Indian Market Center v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 231, 235 (1986). There, quoting from its earlier decision in Fort Berthold Land & Livestock Ass'n v. Aberdeen Area Director, 8 IBIA 230, 246-47, 88 I.D. 315, 324 (1981), the Board stated:

In our review of that determination [of an adjusted rental rate], the Board's requirement is to overturn the decision only if it is found to be unreasonable. It is possible that we could set a different rate from the evidence adduced as could anyone

^{4/} Appellee evidently considered this methodology more valid than the original BIA appraiser did. Appellee's decision states at page 6:

“[T]he estimated annual rental is based on actual sales of gasoline. This approach is more consistent in that it reflects the actual economic conditions of the area and at the same time projects a true annual rental rate for the property in question, whereas the comparative sales analysis approach determines the market value of the land and analyzes the real estate market.”

else. However, as long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for this body to substitute its judgment for the agency's.

In Fort Berthold, the Board also stated that "the burden of proof in this appeal is on appellant to show that the Bureau's action [in adjusting a rental rate] is unreasonable." 8 IBIA at 241. Thus, the Board's task is to determine whether appellee's decision to increase appellant's rental is reasonable, that is, whether it is supported in law and by substantial evidence, or whether appellant has shown, to the contrary, that appellee's decision is unreasonable.

Although appellant alleges that BIA improperly relied on assessed values of properties in adjusting its rental, the record shows that this was not the case. Rather, it is apparent that it was appellant who asserted that certain assessed values, *i.e.*, the assessed values of five noncommercial properties, were relevant to the rental adjustment. Appellee responded by analyzing the assessed values of twelve commercial properties, noting that they were more closely analogous to the leased property. There is no evidence, however, that BIA relied on assessed values in setting the new rental rate. Therefore, appellant's first claim is dismissed.

There is also no evidence that BIA relied on traffic count data in adjusting the rental. Appellee's discussion of this point was merely responsive to appellant's assertion of a decrease in traffic which, in appellant's view, warranted a lower rental rate. Appellant now concedes that overall traffic volume relevant to the leased property has neither increased nor decreased appreciably. Therefore, appellant's second claim is dismissed.

Appellant's next argument concerns the BIA appraiser's choice of comparables and his method of evaluating them. It argues that the sales information is too limited to allow a valid analysis and that two of the properties are not comparable because they are located on the new freeway. Further, it asserts that one of the properties was never really sold because the purchaser backed out of the sale. ^{5/} Appellant also objects to the appraiser's adjustments to the sales prices, arguing that only the actual sales prices are relevant.

The record fails to disclose why BIA chose the particular method of appraisal employed here, *i.e.*, comparison to adjusted sales prices of fee simple properties. The first page of BIA's October 3, 1983, appraisal report states: "This rental is being reviewed considering the increment of change in economic conditions as measured by analysis and comparison with current rentals of similar properties." After quoting this statement, appellee's September 19, 1985, decision, at page 5, paragraph D, continues: "With

^{5/} The BIA report states that the purchaser of this property (No. 7983) sold the property back to the seller for \$5,000 less than he paid for it because he needed the money.

regard to real estate, the Bureau feels that this method of determining the change in economic conditions is the most applicable concerning the situation at hand." At two other places (page 4, paragraph B; page 5, paragraph E), appellee's decision states that change in land values is the best indicator of change in economic conditions relevant to real estate. 6/ Nothing in the record explains why neither of the two methods described as most relevant was used. The Board has no reason to doubt that the rental rate adjustment was made in accordance with an accepted appraisal methodology. However, having identified two other methodologies as most appropriate in the circumstances, BIA should explain its decision to use a different one. 7/

Moreover, the Board cannot tell from the record whether the BIA appraiser's valuation of the comparables is reasonable because the adjustments to the sales prices, which are in some cases substantial, are not adequately explained. A summary analysis table shows that the comparables were compared to the leased property with respect to size, location and utilities. Plus, minus, and zero signs symbolize the comparables' relation to the leased property. A net adjustment figure is given for each comparable. However, the report does not explain what weight was assigned to each factor or how the particular adjustment figure was reached. Therefore, the Board cannot conclude that the rental rate, insofar as it is based on these adjusted values, is supported by substantial evidence.

Appellant's last challenge to the rental adjustment concerns the alternate method for calculating rental employed by BIA, *i.e.*, the cents-per-gallon calculation. BIA used a rate of 1-1/2 cents per gallon. The BIA appraisal report states: "Indicators in the market place show a rate of 1-1/2 cents

6/ The Board has upheld as reasonable the method of adjusting rental rates by reference to the increase in fee simple land values in the vicinity of the leased property. Wooding v. Area Director, Portland Area Office, 9 IBIA 158 (1982).

7/ It is possible that the record is incomplete. Appellant's appeal to the Board refers at page 2 to the Oct. 3, 1983, appraisal report: "[P]age 5 (Valuation). 'Since no actual rentals of property like the subject were available.'" The record copy of the appraisal report, which has unnumbered pages, does not have a heading "Valuation" or a sentence beginning, "Since no actual rentals of property like the subject were available." The Board requested BIA to furnish another, complete copy of the report. That copy also lacks these references.

8/ The actual sales prices and adjusted values per square foot are as follows:

<u>Property</u>	<u>Sales Price</u>	<u>Adjusted Value</u>
8135	.24	.59
8205	.20	.60
7982	1.38	.79
8084	.29	1.03
8125	.46	1.06
7983	1.20	1.22

per gallon is reasonable." This statement is repeated at page 5 of appellee's decision. Appellant states that this rate would be reasonable for rentals of land and improvements but that since it leases only land, its rate should be only three-fourths of a cent per gallon. Nothing in the record describes further the "indicators in the marketplace" upon which BIA relied or shows whether the 1-1/2 cents rate was based upon rentals of land and improvements or of land only. Therefore, the Board cannot conclude that the rental rate, insofar as it is based on the cents-per-gallon calculation, is supported by substantial evidence.

[1] The Board is unable to determine from the record whether the rental adjustment is reasonable because of the incomplete evidence supporting BIA's choice of appraisal methodology, the calculations based on sales of fee simple properties, and the calculations based on cents-per-gallon. Therefore, the Board finds it necessary to refer these three issues for an evidentiary hearing before an Administrative Law Judge.

Moreover, although appellant has not raised the issue, the Board questions whether the cents-per-gallon methodology is an appropriate one for a lease in which the rental is set at a flat rate rather than a percentage of income produced. Appellant presumably bargained for a rental rate not based upon income produced, thereby subjecting himself to the rental adjustment requirement of 25 CFR 162.8. ^{9/} A rental rate based upon cents-per-gallon appears to be closely akin to a rate based upon a percentage of income. It is quite possible, of course, that the number of gallons of gasoline pumped is reflective of the "economic conditions at the time [of rental adjustment] as appellee's decision states, supra n.4, and that therefore the cents-per-gallon methodology is properly within the scope of the rental adjustment provision of the lease and 25 CFR 162.8. Because appellant did not challenge the cents-per-gallons methodology per se, and because, as noted above, the burden is on appellant to show that BIA's action is unreasonable, the Board, under other circumstances, might not address this issue. However, inasmuch as the three issues mentioned above must be referred for an evidentiary hearing, the Board also refers the question whether the cents-per-gallon methodology is an appropriate one upon which to base a rental rate for this lease.

Accordingly, this case is referred to the Hearings Division of this Office for an evidentiary hearing and recommended decision by an Administrative Law Judge (Departmental). The Administrative Law Judge shall consider whether there is substantial evidence supporting BIA's choice of the sales price comparison and cents-per-gallon appraisal methodologies, its valuation of the comparables, and its use of 1-1/2-cents as the appropriate cents-per-gallon rate. The hearing shall be conducted in full compliance with the administrative due process standards generally applicable to other hearings

^{9/} Leases in which the consideration is based primarily on percentages of income produced by the land are not subject to the rental adjustment provision in 25 CFR 162.8.

conducted by Administrative Law Judges (Departmental). The present administrative record may be considered as part of the evidentiary record in the hearing. In view of the length of time this appeal has been pending in the Department, the Administrative Law Judge is requested to consider this matter on an expedited basis.

Pending completion of the hearing and the issuance of the recommended decision, further procedures will be established by the Administrative Law Judge assigned to this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed in part and referred in part to the Hearings Division for assignment to an Administrative Law Judge (Departmental), who shall conduct a hearing and recommend a decision to the Board. As provided in 43 CFR 4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of the recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision.

//original signed

Anita Vogt
Acting Chief Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Administrative Judge