



INTERIOR BOARD OF INDIAN APPEALS

Joe Brooks v. Muskogee Area Director, Bureau of Indian Affairs

25 IBIA 31 (11/12/1993)

Reconsideration denied:  
25 IBIA 96



# United States Department of the Interior

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

JOE BROOKS

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-23-A

Decided November 12, 1993

Appeal from a decision declining to approve a lease of restricted land.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Leases and Permits: Secretarial Approval

Under 25 C.F.R. 162.2(a)(4), the Bureau of Indian Affairs has discretion in determining whether to approve a proposed lease of trust or restricted property when the owners have not agreed to a lease.

APPEARANCES: James R. Winnie, Esq., Oklahoma City, Oklahoma, for appellant; Charles R. Babst, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Joe Brooks seeks review of an October 6, 1992, decision of the Muskogee Area Director, Bureau of Indian Affairs (BIA; Area Director), not to approve a 5-year lease of restricted land for retail tobacco sales and a trading post (smokeshop). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

### Background

For part of the following discussion of the background of this case, the Board relies on a March 2, 1993, affidavit submitted by appellant.

Appellant states that on March 4, 1986, he entered into a 3-year lease of part of Cherokee Allotment 31124 with the Indian owners. He indicates that although one of the owners did not consent to the lease, he took possession of the property, established a smokeshop, and paid rentals, including to the nonconsenting owner. Appellant does not state that this lease was approved by BIA as is required by 25 U.S.C. § 415

(1988) and 25 CFR 162.5(a). 1/ There is no evidence in the record that the lease was approved.

When the 1986 lease expired, appellant states that he entered into negotiations for a new 3-year lease. A lease was apparently executed, without the consent of the same owner, and was backdated to March 4, 1989. Appellant states that he continued to operate his smokeshop during this entire period. Again, appellant does not indicate that the lease was approved by BIA, and there is no evidence in the record that it was approved.

On July 1, 1991, appellant and some of the owners of Allotment 31124 executed a proposed 5-year lease of the allotment. Appellant states that this proposed lease was executed because of the objections of the owner who had not consented to the previous leases and because of "the requirement of the Cherokee Nation for a B.I.A. approved lease in connection with its issuance of tax licenses" (Affidavit at 2). Although no copies of these tax licenses appear in the materials before the Board, there is no dispute that the Cherokee Nation (Nation) issued appellant some form of temporary license pending the outcome of the leasing process. 2/

On November 7, 1991, and May 27, 1992, the Nation wrote the nonconsenting owner, asking for her reasons for not consenting. There is no evidence that a response was received to either letter. On August 26, 1992, another owner, who had previously signed the lease, wrote the Nation and rescinded her approval unless certain specified conditions, including higher rentals, were met. This owner also indicated that she preferred not to use the property for a smokeshop.

Appellant informed the Nation on August 25, 1992, that he believed his proposed lease should have been approved under 25 CFR 162.2(a)(4), 3/ and

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1/ 25 U.S.C. § 415 provides in pertinent part that "[a]ny restricted Indian lands \* \* \* may be leased by the Indian owners, with the approval of the Secretary of the Interior, for \* \* \* business purposes."

25 C.F.R. 162.3 provides that "[a]ll leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval."

2/ The Nation has contracted realty functions from BIA pursuant to a P.L. 93-638 contract and/or a self-governance compact. The Nation has regulatory authority over restricted lands originally allotted to Cherokee Indians in Oklahoma. The Area Director has final authority to approve a lease of restricted Cherokee land.

It is not clear whether the temporary licenses were strictly tax licenses or whether there was also some form of temporary authorization to operate the smokeshop.

3/ Section 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."

that he intended to appeal the Nation's inaction pursuant to 25 CFR 2.8. <sup>4/</sup> The Nation responded on September 1, 1992, stating that it believed it had acted reasonably in this matter. On September 2, 1992, the Nation submitted the lease package and appellant's letter to the Area Director.

By letter dated October 6, 1992, the Area Director returned the proposed lease unapproved. He stated:

[T]he discretionary words "may grant" [in 25 CFR 162.2(a)(4)] clearly indicate the purpose of this section is not meant to force heirs or devisees into negotiations. Rather, it 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 they have not entered into a lease within the aforementioned 90-day period. This conclusion was supported by the [Board] decision in Peace Pipe Inc. v. Acting Muskogee Area Director, 22 IBIA 1, dated April 2, 1992. <sup>5/</sup>

Even if it was to be determined that the 90-day period has been exceeded, in past practice [BIA] has been reluctant to grant leases on behalf of adult Indian landowners who are otherwise qualified to negotiate leases under 25 CFR 162.3, and who may still be engaged in negotiations. In this case, it appears that certain heirs may still be engaged in lease negotiations. In addition, the file does not indicate that the trust resource is in jeopardy and in need of an expeditious lease for protection or to generate income. Further, the usual and preferred [BIA] method of leasing for business purposes on Indian lands has been through negotiation and consent of all the owners.

Under the foregoing circumstances, we are unable to justify granting a lease on behalf of the unsigned adult owners or to even consider the lease for approval with less than the consent of all the restricted Indian landowners. Therefore, the proposed lease is returned unapproved. [Emphasis in original.]

Appellant appealed this decision to the Board. Briefs were filed by appellant and the Area Director.

#### Discussion and Conclusions

Appellant first argues that the Area Director improperly concluded that appellant had failed or refused to negotiate further during the 90-day negotiation period. This argument appears to be based, at least in part, on the

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<sup>4/</sup> Section 2.8 establishes procedures under which "a person or persons whose interests are adversely affected" can make a BIA official's inaction the subject of an appeal.

<sup>5/</sup> Aff'd, Pipes, Inc. v. United States, No. 92-C-373-B (N.D. Okla. Dec. 4, 1992).

Area Director's citation of the Board's decision in Peace Pipes. Appellant contends that he was affirmatively deprived of the right to submit evidence showing his attempts to reach agreement with the nonconsenting owner. In support of this argument, appellant submitted the March 2, 1993, affidavit, mentioned supra, which sets forth further factual background, and also requests an evidentiary hearing.

The Board reads the Area Director's reference to Peace Pipe as being directed to the discretionary nature of 25 CFR 162.2(a)(4) (discussed further, infra), not to the negotiation process. It finds nothing in the Area Director's decision suggesting that he concluded appellant had failed or refused to negotiate, or that he based his decision on any defect in the negotiation process. Appellant's request for an evidentiary hearing to submit further evidence of the negotiation process is denied as not being relevant to the decision.

Appellant next contends that the Area Director's decision is arbitrary, capricious, contrary to law and regulation, and violates appellant's Fifth Amendment right not to be deprived of property without due process of law.

Appellant's Fifth Amendment argument initially lacked focus. He attempted to clarify the argument at pages 3-4 of his reply brief:

The Fifth Amendment right asserted by Appellant is his expectation that the Area Director would perform his duties prescribed by law. The violation arises from the Area Director's arbitrary, capricious and unlawful actions, including his attempt to prevent the presentation of evidence of continued negotiation with the unapproving landowner so as to make the facts in this matter conform with those in Peace Pipe \* \* \*. The action, which can only be described as egregious, was he and his subordinates refusal to accept or consider further evidence. Again, the attitude is "Don't confuse me with facts." [Emphasis in original.]

The portion of the Fifth Amendment cited by appellant protects property interests. The Board fails to discern any property interest which appellant has under the facts of this case. The Board has held that an unapproved lease of trust or restricted property is void and grants no rights to any party. See, e.g., Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 179 (1993); Citation Oil & Gas, Ltd. v. Acting Billings Area Director, 21 IBIA 75, 83 (1991); Bulletproofing Inc. v. Acting Phoenix Area Director, 20 IBIA 179, 181 (1991); Smith v. Acting Billings Area Director, 17 IBIA 231, 235 (1989). Therefore, appellant acquired no property interest through the unapproved lease.

Even if appellant had any property interest under the two prior unapproved leases, that interest did not extend past the expiration of the leases, and appellant had no right to a new lease. Cf. Porcupine Grazing Association v. Acting Billings Area Director, 24 IBIA 243, 244 (1993).

Appellant's temporary licenses from the Nation were, by his own admission, contingent on approval of the proposed lease by BIA (Affidavit at 3). A temporary license does not grant rights in excess of its explicit terms.

Any "expectation" appellant might have had under the circumstances of this case is not a property interest. Furthermore, based upon the discussion in this decision, the Board concludes that the interest appellant cited in his reply brief as having been violated was based upon appellant's erroneous interpretation of the Area Director's decision.

Therefore, the Board rejects appellant's Fifth Amendment argument.

Appellant appears to base his contention that the decision was arbitrary and capricious on his belief that the Area Director was required to approve the proposed lease under 25 CFR 162.2(a)(4). Appellant argues at page 5 of his opening brief: "The lease had been appraised and the rentals are at the high end of the appraisal. The only authority of the Area Director, under the regulations is to order execution."

As the Board has repeatedly stated, the approval of a lease of trust or restricted property is within BIA's discretion. See, e.g., Moses v. Acting Portland Area Director, 24 IBIA 233, 237 (1993), and cases cited therein. Here, the Area Director exercised his discretion by declining to approve the lease. The question before the Board is whether the Area Director acted arbitrarily or capriciously in declining to approve the lease. In deciding this question, the Board does not substitute its judgment for that of BIA, but rather examines BIA's decision to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Moses, 24 IBIA at 237; Rathkamp v. Billings Area Director, 21 IBIA 144, 148 (1992).

[1] Contrary to appellant's contention, 25 CFR 162.2(a)(4) is permissive, not mandatory. It does not require BIA to step into the negotiation process and either force the owners to reach agreement, or to approve whatever lease may have been proposed if the owners cannot, or do not, all consent. Rather, it allows BIA to approve a lease when the owners do not agree.

Appellant has raised only two objections to the Area Director's decision: the Area Director improperly determined that appellant had not met the negotiation requirements of 25 CFR 162.2(a)(4), and the Area Director was required to approve the lease under that section. Because the Board rejects both of these arguments, it concludes that appellant has failed to show that the decision not to approve the lease was arbitrary or capricious.

The parties also discuss the question of whether the owner who rescinded her approval of the lease had the right to do so, given that she had accepted rental payments. The Board has specifically held that an Indian landowner can rescind consent to a proposed lease up until the lease is actually approved by BIA. See Rathkamp v. Billings Area Director, 21 IBIA 144, 149 (1992); Moccasin v. Acting Billings Area Director, 19 IBIA 184, 188 (1991). Therefore, the Area Director committed no error by considering the withdrawal of consent.

Furthermore, in this case, appellant was in fact using the property by operating a smokeshop on the allotment prior to BIA approval of the proposed lease. It thus appears that rentals paid were for appellant's actual use of the property.

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 October 6, 1992, decision of the Muskogee Area Director is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge