



INTERIOR BOARD OF INDIAN APPEALS

Norma Smith v. Acting Anadarko Area Director, Bureau of Indian Affairs

34 IBIA 283 (03/22/2000)



United States Department of the Interior

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

NORMA SMITH,
Appellant

v.

ACTING ANADARKO AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Affirming Decision
:
:
:
: Docket No. IBIA 99-65-A
:
:
: March 22, 2000

This is an appeal from a March 26, 1999, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), assuming management and control of Cheyenne-Arapaho Allotment 2111 after a period during which Appellant Norma Smith had asserted "owner's use" rights over the allotment. For the reasons discussed below, the Board affirms the Area Director's decision.

Appellant holds a 94% interest in Allotment 2111. The remaining 6% is held by June Black (3%) and seven of Black's children and grandchildren (interests totalling 3%). The allotment was subject to a lease which expired on December 31, 1993. At least one bid for a new lease was received by the Concho Agency, BIA, but was rejected with a notation that Appellant "said she was going to lease this tract itself."

Appellant evidently entered into a lease with Doyle Pollock. Neither she nor Pollock submitted the lease to BIA for approval. It appears that the Agency was aware of the lease, however, because, on June 20, 1994, the Superintendent wrote to Pollock, asking him to submit the lease. Pollock did not respond. It does not appear that the Agency made any further attempt to obtain the lease.

Black complained to the Agency that the minority landowners had not received any lease payments from the Pollock lease. On April 20, 1995, the Superintendent wrote to Appellant, requesting verification that the minority owners had received their share of the rentals. On November 21, 1997, the Superintendent again wrote to Appellant, this time referring to Appellant's "personal use" of the allotment and stating: "Agency records show that you have not made a payment to compensate your co-owners since * * * 1/11/1994. 1/ We are requesting

1/ The record includes a copy of a May 31, 1994, check for \$60, made out to Black and signed by Carol Anne Pollock. Presumably, the copy was furnished to BIA by Appellant, but it is not clear when BIA received it. A notation on the copy states that the payment was intended for 1994 and 1995 rental on Allotment 2111.

that you remit a payment for 1995, 1996, 1997, including late payment interest as soon as possible."

On December 17, 1997, the Superintendent reported to Black that the Agency had tried several times to contact Appellant but had not been successful. She furnished Black with some documentation concerning the matter and suggested that Black consider pursuing an action against Appellant in tribal court.

On August 4, 1998, Black wrote to the Area Director, requesting assistance in the matter. On September 9, 1998, the Area Director advised both Black and Appellant that a demand for payment would be made to Appellant and that a failure to pay would result in referral of the matter to the U.S. Attorney. The Area Director also advised them that Appellant would be given notice of BIA's intent to resume management of Allotment 2111.

On September 11, 1998, Appellant submitted a check for \$300, the amount BIA determined was due to cover rentals due to Black for the period 1996-1999 and rentals due to the other minority owners for the period 1994-1999. ^{2/} BIA then disbursed the funds to the minority owners.

On September 21, 1998, the Superintendent wrote to Appellant, stating that, "in light of the difficulty, length of time and lack of response in getting this matter resolved," Appellant was being given formal notice of BIA's intent to assume management and control of Allotment 2111. Appellant appealed the Superintendent's letter to the Area Director.

The Area Director affirmed the Superintendent's decision on March 26, 1999. In a lengthy decision, he discussed "owner's use" in general and in the context of this case. He concluded:

The point of the Superintendent's decision is that the BIA recognized the right of a co-owner to make use of her own land, but at the same time the co-owner in possession of the land should be responsible to pay the other co-owners fair market rent for their rightful share. In the event the co-owner in possession refused to pay fair market rent, execute a lease, or come to terms with the co-owners, then an ouster occurred and the United States is obliged as a matter of trust responsibility to take action to recover the rental value on behalf of the ousted co-owners and to take measures to insure compliance to law and regulations.

Area Director's Mar. 26, 1999, Decision at 7.

^{2/} This figure was evidently based on the amount Appellant had earlier paid to Black for 1994 and 1995, i.e., \$30 per year.

In her notice of appeal to the Board, Appellant stated:

My reason for appealing this decision is because I own [the] majority share of Allotment No. 2111 and I or a member of my family is there all the time to see what goes on. I want to be and should be the one who controls and manages Allotment No. 2111 with respect to the other shareholders receiving their share of any lease payment through BIA.

She also stated that she wished to purchase the minority interests in Allotment 2111.

Appellant did not file a brief. Thus, her only argument is the one expressed in the statement just quoted.

In his answer brief, the Area Director argues:

In leasing individually owned trust property, the BIA's responsibility is to all of the co-owners. Theresa Jerry Moses v. Acting Portland Area Director, 24 IBIA 233, 238 (1993). The BIA's trust responsibility goes to all owners no matter how large or small their ownership interest. The BIA is charged with preventing one co-owner from ousting the others, assuring that Indian lands are leased at a fair price, and that each co-owner receives his proportionate income from the property. Appellant Smith's leasing of the property by unapproved lease to Pollock has hindered the BIA in the exercise of its trust responsibility.

Area Director's Brief at 4-5.

The only reference to "owner's use" in BIA's leasing regulations appears in 25 C.F.R. § 162.2(a), which 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. [3/]

3/ This regulation is based on 25 U.S.C. § 380, which provides:

"Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located * * * (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe."

The American Indian Agricultural Resources Management Act, enacted in 1993, expanded the scope of "owner's use" rights, with respect to lands used for agricultural purposes, by permitting their exercise by landowners who acquired their interests by purchase, as well as by those who acquired their interests by inheritance or devise. 25 U.S.C. § 3715(c)(1). ^{4/} See Emm v. Phoenix Area Director, 30 IBIA 72 (1996).

None of these statutory or regulatory provisions offer much guidance for situations where an allotment is in fractionated ownership and one co-owner invokes "owner's use" of all or part of the allotment. Clearly, however, before BIA agrees to such an arrangement, it should, at a minimum, require that adequate provisions be made for payment to the other co-owners. ^{5/}

In this case, Appellant did not use the land herself but instead allowed the land to be farmed by Pollock. Although no written lease was ever produced in this matter, BIA's investigations led the Area Director to conclude that there was an agreement between Appellant and Pollock under which Pollock was purportedly given exclusive farming and grazing rights. See Area Director's Mar. 26, 1999, Decision at 6-7.

Appellant has not refuted the Area Director's conclusion. There is little doubt that an agreement in the nature of a lease existed, although it was never approved by BIA. Thus, what happened here seems not to have been a true exercise of "owner's use" rights but an attempt

^{4/} 25 U.S.C. § 3715(c)(1) provides:

"Nothing in this section shall be construed as limiting or altering the authority or right of an individual allottee or Indian tribe in the legal or beneficial use of his, her, or its own land or to enter into an agricultural lease of the surface interest of his, her, or its allotment or land under any other provision of law."

^{5/} In an Aug. 20, 1998, memorandum to the Superintendent, the Area Director noted the lack of regulatory guidance and offered some recommendations for dealing with "owner's use" issues for lands in fractionated ownership. The memorandum states in part:

"[T]he person claiming owner's use should be held liable for all fair annual rental payments to the remaining owners and for all other damages. The owner asserting owner's use should deposit the rental with the BIA for distribution to the remaining owners.

"When allowing owner's use on fractionated property, the Agency should have a well-defined and established policy concerning that use. This policy should consider obtaining a written agreement signed by all owners permitting one owner's use. In no instances should an owner be permitted to conduct activities which commit waste. A sublease of the owner's use rights should not be allowed. It is recommended that the applicant sign an affidavit wherein she states under oath that she will use the land herself. No subleasing or assignment of the owner's use rights should be permitted. If it is subleased or assigned, the owner's use should automatically terminate."

Area Director's Aug. 20, 1998, Memorandum at 1-2.

to circumvent the leasing regulations. As the Board has held on several occasions, an unapproved lease of trust or restricted property is void and grants no right to any party. Brooks v. Muskogee Area Director, 25 IBIA 31, 34 (1993), and cases cited therein.

Appellant evidently has no interest in farming the allotment herself but wants control over the choice of a lessee. There may be ways of accommodating her wish while ensuring that BIA's leasing regulations are followed and that Appellant's co-owners receive fair rentals for their shares. Appellant may wish to consult with Agency and Area Office staff in this regard.

Appellant has not shown that BIA erred in reassuming control over Allotment 2111.

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 Area Director's March 26, 1999, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge