



INTERIOR BOARD OF INDIAN APPEALS

Frank Poafpybitty, et al. v. Acting Anadarko Area Director,  
Bureau of Indian Affairs

27 IBIA 29 (11/16/1994)



# United States Department of the Interior

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

FRANK POAFPYBITTY ET AL.

v.

ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-87-A

Decided November 16, 1994

Appeal from a decision declining to cancel a lease of Indian land.

Affirmed.

1. Indians: Leases and Permits: Generally

In order to meet their particular needs, the parties to a lease of Indian land may agree to lease provisions different than those contained in a standard Bureau of Indian Affairs lease form. Where these special provisions are approved by the Bureau and are not in conflict with governing regulations, they are binding on the parties and the Bureau.

APPEARANCES: Rick Moore, Esq., Chickasha, Oklahoma for appellants.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Frank Poafpybitty, Bruce Poafpybitty, Rose Yokesuite, Carl Poafpybitty, Louise Poafpybitty Wade, William Poafpybitty, and Pearly Atavich <sup>1/</sup> own interests in Comanche Allotment 795. They seek review of a February 17, 1994, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to cancel a lease of a portion of the allotment. For the reasons discussed below, the Board affirms the Area Director's decision.

### Background

On June 13, 1967, Isaac Poafpybitty, Comanche Allottee 795, executed a lease of a 1.7-acre portion of his allotment to Rural Water District No. 2, Comanche County, Oklahoma (water district). The lease was approved by

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<sup>1/</sup> Pearly Atavich is evidently the same person as Pearl Yokesuite, who is shown in the administrative record as an owner of Comanche Allotment 795.

the Area Director and became effective on November 1, 1967. On April 30, 1969, pursuant to paragraph 12 of the lease, the water district executed an assignment of the lease to the Farmers Home Administration for the purpose of securing financing to construct improvements. The Area Director approved the assignment on June 17, 1969.

Paragraph 1 of the lease provides that the water district is to use the tract for “the installation of a water well, pump house, pipelines, and the right to withdraw and use a maximum of 125 gallons per minute of water.” Paragraph 2 establishes the term of the lease at 25 years and provides for a 20-year renewal term.

Royalty rates for the entire term of the lease, including the renewal term, are established in paragraph 3. Rates for the initial term are: 10 cents per 1,000 gallons for the first 5 years of the lease, 11 cents for the next 10 years, and 12 cents for the final 10 years. Rates for the renewal term are: 13 cents per 1,000 gallons for the first 10 years, 14 cents for the next 5 years, and 15 cents for the final 5 years.

Isaac Poafpybitty died on February 7, 1976. His heirs were his nieces and nephews. As of the date of the Area Director's decision, 25 individuals held interests in Comanche Allotment 795. 2/

In 1984, William Poafpybitty, one of the appellants here, began efforts to have the lease cancelled or renegotiated. At that time, he was represented by an attorney with Oklahoma Indian Legal Services (OILS). He abandoned his efforts in 1986, evidently because the heirs were unable to agree on the matter.

In February 1993, an OILS legal intern wrote to the Anadarko Agency, BIA, inquiring about the lease. This inquiry was apparently made on behalf of William Poafpybitty. 3/ As far as the record shows, the Agency did not respond to the inquiry. On July 28, 1993, appellants' present counsel wrote to the Superintendent, Anadarko Agency, BIA, citing 25 C.F.R. 2.8 and requesting that BIA take certain actions. 4/ Counsel's letter stated:

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2/ In addition to appellants, the individual owners are: Mary Poafpybitty, Virgil Poafpybitty, Edward Quannemwermy, Maudine Kennedy, Geanelle Mowatt, Luella Yokesuite Hunter, Donnie Yokesuite, Sandra Yokesuite, Lillian Yokesuite Simmons, Winifred Yokesuite Sovo, Carlton Kopaddy, Brenda Washington Asheington, Sammy Kopaddy, Geraldine Parker Weryava, Phyllis Weryava, Dana Weryavah, Jo Neda Weryavah, and Bert Weryavah.

One interest has escheated to the tribe.

3/ The legal intern's letter identifies the client only as “Mr. Poafpybitty.”

4/ 25 C.F.R. 2.8 provides:

“(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

It is the desire of the heirs to cancel the lease. Moreover, demand is made for a complete accounting of all water used by the [water district]. Particularly, you are directed to obtain copies of all amounts charged by the [water district] for water consumed by customers. In the past the [water district] has not been forthcoming concerning its water usage. Also the [water district] has poisoned the stream with herbicides and other toxins. The wildlife is dead and all the vegetation is adversely affected.

The Board of Directors of [the water district] refused the request for an accounting made by [the OILS attorney] who previously represented my clients.  
\* \* \*

Also, it appears that 25 C.F.R. [Part] 131 [now Part 162] limits leases of this type to five years. Moreover, the heirs are not receiving a fair market value for their water.

\* \* \* \* \*

My clients expect the agency to obtain all back amounts due, a lease cancellation and a full accounting of all amounts of water consumed. Also, obtain payment for damages to the riparian wildlife and flora. Again, in relation to amounts consumed, please obtain the complete internal accounting of the [water district].

(Counsel's July 28, 1993, Letter at 1-2).

In a decision dated November 16, 1993, the Superintendent addressed the assertions made by appellants but concluded that there was not sufficient cause to cancel the lease. Appellants appealed to the Area Director. On February 17, 1994, the Area Director affirmed the Superintendent's decision, stating in part:

The lease file maintained by the Agency includes records of payments made on the contract by the water district. It also contains meter readings and other supporting documentation showing the amount of water produced. The record reflects that payments and statements were made in a timely manner. There is no evidence

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fn. 4 (continued)

“(1) Request in writing that the official take the action originally asked of him/her;  
\* \* \* \* \*

“(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request.”

in the record to indicate that the owners have been underpaid. \* \* \* Even though the lease makes provision for the Secretary or his authorized agent to examine the district's accounts, that has not been done. However, in a telephone conversation with water district personnel they say that their attorney advised [appellant's counsel] in writing that he or any of the owners were welcome to go to the district's office anytime during working hours to personally inspect the records, but they never received a reply from [appellant's counsel] and none of the owners took advantage of the opportunity to inspect the records.

Prior to its approval this contract underwent extensive review taking over a year to reach the approval stage. The review thoroughly considered the amount of water to be taken in relation to its capacity, sale rate, minimum rental, number of users expected, area to be used and improvements to be placed thereon. In reconciliation with regulations and financing requirements, it was determined that the initial beginning rate of 10 cents was consistent with or perhaps in excess of comparables to be found, and that the provisions for periodic escalation through its term could be expected to provide an adequate and fair rate of return.

When a few of [Isaac] Poafpybitty's heirs started questioning the rental provisions of the lease, research was made through inquiries with other rural water districts in Oklahoma. It was the consensus of those contacted that at the time of the negotiations in 1967 the rate of this lease (10 cents) was above the norm and that the escalating rates in the lease are consistent with or exceed rates paid by other districts. There are no set guidelines concerning rates paid for water but they are negotiated between the Lessee and Lessor. Because [of] the purpose of water districts and their designation as non-profit organizations, their contracts appear to be based primarily upon actual amount of cost involved in making the product available for use to the general public.

\* \* \* \* \*

Agency personnel make regular inspections of this area. However, as a result of a few of the heirs' demands for payment for riparian damage to flora and fauna at the well site due to pollution, an unscheduled special inspection was made in December 1993 to determine if the allegations were founded. Agency personnel could find no evidence of pollution and reported that the leased premises were being well maintained.

(Area Director's Feb. 17, 1994, Decision at 2-3).

Appellants appealed this decision to the Board, filing a statement of reasons with their notice of appeal. The Board issued a notice of docketing in which it advised the parties of their right to file briefs and informed

appellants that they bore the burden of showing error in the Area Director's decision. No further filings were made by any party.

Discussion and Conclusions

Appellants' arguments on appeal are set out in their statement of reasons, which states in its entirety:

STATEMENT OF REASONS

- 1) Failure to cancel lease.
- 2) Failure to properly account for water used pursuant to lease.
- 3) Underpayment of heirs pursuant to lease agreement.
- 4) Breach of fiduciary duty of United States to optimize beneficiaries interest.
- 5) Lease period in excess of that allowed by 25 C.F.R. [Part 162].
- 6) Failure to obtain payment for riparian damage to flora and fauna at well site due to pollution.
- 7) Lessee has used amounts of water in excess of that in Lease Agreement.
- 8) Lessors not receiving fair market value for water.
- 9) Violation of 25 U.S.C. Section 415 in the following:
  - a) Beneficiaries did not consent to renewal.
  - b) Secretary did not adequately consider market value of resource prior to renewing lease.
  - c) Secretary has failed to promulgate rules and regulations pertaining to renewal of water lease.
  - d) Lease granted exceeds minimum duration, commensurate with purpose of lease, that will allow for highest economic return to owners consistent with prudent management and conservation practices as required by 25 C.F.R. Section 162.8 and 25 U.S.C. Section 415.
  - e) Secretary did not perform and Lease did not provide for periodic review of at [sic] not less than five-year intervals to consider the equities involved in violation of 25 C.F.R. Section 162.8 and 25 U.S.C. Section 415.

f) Secretarial review did not give consideration to the economic conditions at the time of the review in violation of 25 C.F.R. Section 162.8 and 25 U.S.C. Section 415.

g) Secretary failed to apply the correct canon of construction to matters involving Indian beneficiaries, i.e., any rule or law must be construed in a way which best benefits Indian beneficiary.

h) Secretary violated 25 C.F.R. Section 162.5(e) by providing Lessee a preference right to future lease or renewal.

Appellants' ability to show error in the Area Director's decision is somewhat impaired by their "laundry list" style of argument which omits any support for either their factual assertions or their allegations of legal error. It is evident from the record that appellants similarly failed to support their allegations before BIA. Thus, with respect to factual issues, the Board has absolutely no basis upon which to question the Area Director's decision, let alone to conclude that the decision was in error. Appellants have clearly failed to carry their burden of proof in this regard.

Appellants make a number of allegations of legal error. The Board will address these allegations.

In paragraphs 5) and 9)d) of their statement of reasons, appellants contend that the term of their lease is in excess of that allowed under 25 U.S.C. § 415 (1988) and 25 C.F.R. Part 162. Both the statute and the regulations permit business leases of 25 years duration, with one renewal period of 25 years. Appellants' lease falls within that limitation. As to whether the lease is "limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, 25 C.F.R. 162.8, the Board notes that the water district was required to construct facilities upon the leased land. Where extensive construction is required in order to carry out the purposes of a lease, a lengthy term is justified for economic reasons. Appellants fail to show that the term of the lease was not justified.

In paragraph 9)h), appellants contend that BIA violated 25 C.F.R. 162.5(e) by providing the water district with a preference right to a future lease or renewal. 25 C.F.R. 162.5(e) provides: "No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part" (Emphasis added). 25 C.F.R. 162.8(a) provides that business leases "may include provisions authorizing a renewal or extension for one additional term of not to exceed 25 years." The renewal provision in appellants' lease is consistent with this provision and, thus, also with 25 C.F.R. 162.5(e). Appellants fail to identify any provision of their lease which grants the water district a preference right to a future lease, and the Board finds no such provision in the lease.

In paragraph 9)a) , appellants contend that a violation of 25 U.S.C. § 415 (1988) has occurred because the beneficiaries did not consent to the renewal. Isaac Poafpybitty consented to the renewal when he executed the lease. There is no requirement that his heirs also give their consent.

In paragraph 9)c), appellants contend that BIA has failed to promulgate regulations concerning renewal of water leases. Contrary to appellants' contention, BIA has promulgated regulations concerning lease renewals in 25 C.F.R. Part 162, BIA's general leasing regulations. See, e.g., 25 C.F.R. 162.8(a).

In paragraphs 9)b), e), and f), appellants contend, in essence, that BIA erred in failing to require the parties to include the standard BIA rental review provision in their lease and/or in failing to conduct rental reviews at 5 -year intervals.

25 C.F.R. 162.8 provides:

Except for those leases authorized by § 162.5(b)(1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements.

The standard BIA business lease form includes a rental adjustment provision based on this requirement. <sup>5/</sup>

[1] The Board has held, however, that the parties to a lease of Indian land may agree to terms which are different from those included in a standard BIA lease form and that, once approved by BIA, the parties' agreement is binding upon BIA and the parties, as long as it does not conflict with governing regulations. See, e.g., Nevaco, Inc. v. Acting Phoenix Area Director, 24 IBIA 157 (1993) (Lease provided for cure period longer than that established in 25 C.F.R. 162.14). Thus the Board recognizes the right of the parties to design lease provisions which will meet their particular requirements, as long as the protective purposes of the leasing regulations are achieved.

In this case, the parties agreed to a methodology for adjusting the lease rental which was different than the periodic review called for in 25 C.F.R. 162.8. It is apparent, however, that the parties and BIA understood

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<sup>5/</sup> See, e.g., the standard lease paragraph quoted in Pinoleville Indian Community v. Acting Sacramento Area Director, 26 IBIA 292, 294 (1994).

and intended that the rental adjustment provision in the lease would accomplish the purpose of the rental review provision in 25 C.F.R. 162.8, i.e., to ensure that the owner(s) would continue to receive fair rental throughout the term of the lease. 6/

Appellants make only the most general allegation, unsupported by any evidence whatsoever, that they are not receiving fair rental value at this time. They make no allegation at all concerning what would be a more germane question, i.e., whether BIA knew or should have known at the time the lease was executed that the adjustment provision in the lease would not provide fair rental value throughout the lease term. Appellants have not shown error in BIA's approval of the lease without a requirement for rental reviews at 5-year intervals.

Appellants have also failed to show that BIA breached its fiduciary duty toward them (paragraph 4)) or that it failed to apply the correct canon of statutory construction (paragraph 9g)).

Appellants have not carried their burden of proving error in the Area Director's decision. 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 February 17, 1994, decision is affirmed.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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6/ The record shows that, during the lengthy negotiation period, BIA originally insisted that the standard rental review provision be included in the lease but ultimately concluded that a flat-rate adjustment would serve the purpose.