



INTERIOR BOARD OF INDIAN APPEALS

Falcon Lake Properties v. Assistant Secretary - Indian Affairs

15 IBIA 286 (09/29/1987)



# United States Department of the Interior

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

FALCON LAKE PROPERTIES

v.

ASSISTANT SECRETARY--INDIAN AFFAIRS

IBIA 86-54-A

Decided September 29, 1987

Appeal from a decision of the Assistant Secretary--Indian Affairs setting aside a memorandum of clarification concerning lease PSL-149 of certain allotted lands on the Agua Caliente Indian Reservation.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary--Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

2. Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 is timely if the notice of appeal is filed within 30 days after appellant's receipt of the decision being appealed.

3. Indians: Leases and Permits: Amendments--Indians: Leases and Permits: Development Leases

Where a lease of Indian land requires the unanimous consent of the lessors for changes affecting the entitlement of lessors to rent, the Bureau of Indian Affairs may not approve a document purporting to effect such a change, which is signed only by a majority of the lessors.

4. Bureau of Indian Affairs: Administrative Appeals: Leases--Estoppel

The Bureau of Indian Affairs is not estopped from reversing an approval of a lease document given in error.

APPEARANCES: Jon A. Shoenberger, Esq., Palm Springs, California, and Patricia L. Brown, Esq., Washington, D.C. , for appellant; Barbara E. Karshmer, Esq., and George Forman, Esq., Berkeley, California, for appellee lessors.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Falcon Lake Properties challenges a May 21, 1986, decision of the Assistant Secretary--Indian Affairs in which he upheld a decision of the Area Director, Sacramento Area Office, Bureau of Indian Affairs (Area Director; BIA), to set aside a memorandum of clarification concerning lease PSL-149 between appellant and eight members of the Agua Caliente Band of Cahuilla Indians (lessors). 1/ For the reasons discussed below, the Board affirms that decision.

Background

Lease PSL-149, as amended, covers 450.5 acres of allotted land on the Agua Caliente Reservation in Palm Springs, California. The original lease, in which the lessee was appellant's predecessor-in-interest, Columbine Corporation, was approved by the Area Director on September 16, 1971. Five supplemental agreements were approved between 1976 and March 29, 1983, making various changes in the provisions of the original lease. Each of the supplemental agreements was signed, either in person or through their representatives, by all of the lessors. Pursuant to an extension of the lease term provided for in the fifth supplemental agreement, as conditionally approved, the lease will expire on September 14, 2061.

A memorandum of clarification concerning the lease was approved by the Director, Palm Springs Field Office, BIA (PSFO Director), on April 11, 1983. It was signed by six 2/ of the eight lessors.

The portions of the amended lease relevant to this appeal are Articles 4, 5, and 41. Article 4 provides:

Lessee shall use the leased premises for the following purposes:

A golf course, condominium units, mobile home parks, and necessary open spaces and dedicated land, initially, and

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1/ The lessors are Ruth Elaine Patencio, Belinda Segundo Short, Georgiana Ellen Rice Ward, Debrah Gonzales Purnel, Leonard Charles Bow, Lawrence Joseph Bow, Darlene Marie Diaz Ruiz, and Frances Diaz Edwards Cummings.

2/ All lessors except Patencio and Cummings.

eventually for such commercial and/or residential purposes, including, but not being limited to, condominium, apartments and high rises as might be feasible and/or desirable [sic]. If the Lessee uses the leased premises for any purpose not set forth above, such use shall constitute grounds for cancellation of the lease.

Article 5.A sets out certain guaranteed minimum annual rentals. Article 5.B provides in relevant part:

As additional rental over and above guaranteed minimum annual rentals, a sum equal to the amount by which minimum annual rentals are exceeded by the following percentages of gross receipts of businesses, as specified below, regardless of whether such businesses are operated by Lessee, sublessee, assignee or concessionaire:

1. [Concerns mobile home parks]
2. [Concerns the golf course and appurtenant facilities]

3. For the portion of the lease premises developed in condominium units or residential lots, 10% of the gross transfer fees charged by Lessee for approval of transfer of subleases; 20% of other gross receipts through the end of the lease; 25% of other gross receipts beginning in the eleventh year through the end of the fifteenth year of the lease; 30% of the other gross receipts from the beginning of the sixteenth year through the end of the twentieth year of the lease; and 35% of the other gross receipts from the beginning of the twenty-first year through the end of the fiftieth year; and 40% of the other gross receipts from the beginning of the fifty-first year through the end of the seventy-fourth year of this lease; and 50% of the other gross receipts thereafter through the end of the term of this lease. As used in this paragraph, the term "gross receipts" shall mean gross rentals received from subleases of ground to purchasers of condominium units, and shall not include any amounts received from sale of condominium units, or as transfer fees on transfers of subleases. As used in this paragraph "gross transfer fees" shall mean any money or other thing for value received by the Lessee as a fee for the approval of the transfer of a sublease from one sublessee to another or by any other consideration received by the Lessee for the execution of or the approval of a sublease covering an unimproved residential lot. Intercompany transactions and/or income received from condominium homeowners associations for services rendered by Lessee and/or associated companies shall not be subject to the percentage payments to Lessors under paragraph B of this lease.

4. If any part or parts of the property are used for purposes other than those set out above, the percentage rentals for

such uses shall be negotiated between the Lessors and Lessee, subject to the approval of the Secretary prior to the time such uses are commenced. In the event that said negotiations are unsuccessful, the matter of the percentage rentals for other uses shall be submitted to arbitration for settlement in accordance with the provisions of Article 28, ARBITRATION.

Article 41 provides:

Whenever in this lease it is provided that the Lessor may exercise any rights or discretions or make any determinations, consents or approvals, except changes in guaranteed minimum rentals, percentage rentals, participation of the parties in rentals, term or surrender of the lease, and the leased land is in multiple ownership, the action of those Lessors holding the majority of interest in the ownership of the leased premises shall constitute the action of all the Lessors for the purpose of this lease and any extension thereof. In addition, the Lessor agrees that they [sic] will not unreasonably withhold any consents or approvals reasonably requested by Lessee.

The memorandum of clarification provides in relevant part:

2. The Lessee proposes to develop a 162 unit condominium project on Tract 18708. A Canadian investment group proposes to market and sell those condominium units to Canadian citizens under a plan whereby the purchasers would "pool their units" in a rental pool and operate the units along with related recreational facilities and a bar and restaurant as a hotel. Each individual condominium would be owned by an individual purchaser. They would enter into agreements which would allow them to jointly, as a property owners association, contract with a managing agency to operate the facility on their behalf as a rental and hotel facility.

3. As a matter of clarification and interpretation of Lease PSL-149, the Lessors and the Lessee agree that notwithstanding the potential for operating said condominium project on Tract 18708 as a rental or hotel facility, the only rental chargeable to said condominium units to be subleased from the Lessee hereunder would be the applicable ground rent charged in said subleases. There would be no percentage rents chargeable against either the rental of the condominium units nor [sic] percentage rents chargeable against the food and beverage receipts on any restaurant facility operated on the premises of Tract 18708.

4. In clarification of paragraph number 5 of Supplemental Agreement No. 4 to Lease PSL-149, as amended, as a result of Lessee constructing units on Tract 18708, the Lessee shall pay the Lessors an additional \$149,000.00 on or before December 31,

1988 representing the \$1,000.00 per unit provided in the Lease, as amended. [3/]

\* \* \* \* \*

6. This Memorandum of Clarification is executed by those Lessors holding a majority of interest in the ownership of the leased premises pursuant to Article 41 of Lease PSL-149, as amended.

Following the April 11, 1983, approval of the memorandum of clarification by the PSFO Director, appellant began construction of its project, which is known as Royce Resort. Although construction was started in late April 1983, appellant apparently did not submit its final plans to BIA until July 12, 1983. Declaration of James J. Rothschild, Jr., appellant's vice-president, at 11.

By letter of July 11, 1983, lessors Short, Patencio, Ward, Ruiz and Cummings wrote to the PSFO Director, 4/ stating that the nature of the development project had been misrepresented to them and that they had been told the project would not actually be a hotel although it was to be called a hotel for purposes of providing the Canadian investors with tax benefits under Canadian law. Since it now appeared that the project would be a full-scale hotel, the five lessors stated that those 5/ of the five who had signed the memorandum of clarification were rescinding their approval. They requested that the PSFO Director rescind his approval. They further requested that he issue a stop work order, on the grounds that the construction plans had not been submitted to or approved by BIA. By letter of July 27, 1983, to the PSFO Director, appellant denied having made misrepresentations and offered to meet with lessors and their attorney to discuss the matter.

A meeting between appellant's representatives and some of the lessors took place on September 20, 1983, at the office of the PSFO Director. There, lessors' attorney raised the issue of whether the memorandum of clarification required unanimous consent of the lessors, rather than the majority consent obtained, and the issue of whether appellant had breached the lease by beginning construction without obtaining approval of its construction plans. The PSFO Director apparently stated he would have to obtain a legal

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3/ Paragraph 5 of Supplemental Agreement 4 provides:

"In addition to the sums paid pursuant to paragraph 2 above, to the extent that Lessee builds more than 1,112 condominium units, Lessee will pay Lessor \$1,000.00 for each such unit constructed and sold over and above 1,112 units. If Lessee builds less than 1,112 total units on the leased premises, the amounts required to be paid pursuant to paragraph 2 above shall be retained by Lessor."

Paragraph 2 specified actual amounts for rentals payable under Article 5.C of the lease.

4/ Lessor Purnel later joined in the letter.

5/ Lessors Short, Ward, and Ruiz.

opinion. By letter of September 22, lessors' attorney formally requested that the PSFO Director obtain a legal opinion from the Solicitor's Office on the two issues.

It appears that the PSFO Director did not seek such an opinion. Instead, by letter of November 21, 1983, he wrote to lessors' attorney, stating in full:

In response to your request during your visit to this office on November 15, 1983 we have again reviewed your letter dated September 22, 1983. It is our opinion that a Memorandum of Clarification is not an amendment to a lease and therefore is not subject to the procedural requirements of an amendment. Accordingly, we feel no further action is required.

If you do not agree with this decision you have the right to appeal under 25 CFR Part 2.

Six of the eight lessors 6/ appealed to the Area Director, contending that the memorandum of clarification required the unanimous consent of the lessors and that the lessors were entitled to rescind their consent to the memorandum.

On December 28, 1984, following briefing by lessors and appellant, the Area Director held that the memorandum of clarification was an amendment to Article 5.B of the lease and that it was in violation of Article 41 because it waived percentage rentals and accordingly required the unanimous consent of the lessors. He therefore reversed the PSFO Director's approval and set aside the memorandum of clarification.

Appellant appealed to the Washington office of BIA. On May 21, 1986, the Assistant Secretary--Indian Affairs upheld the Area Director's decision. The Assistant Secretary's decision gave the parties a right of appeal to this Board.

Appellant's notice of appeal was received by the Board on July 18, 1986. The appeal was docketed on October 27, 1986, following receipt of the administrative record. On November 3, 1986, the Board received a request for an evidentiary hearing from appellant. The Board allowed other parties to respond to appellants' request. Five lessors (appellee lessors) 7/ filed a memorandum in opposition. On December 9, 1986, the Board denied appellant's request but stated it would refer the case for a hearing if it found it to be necessary after the case was fully submitted. Therefore, a briefing schedule was set. Appellant and appellee lessors filed briefs.

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6/ All lessors except Ruiz and Leonard Bow.

7/ Appellee lessors' filings before the Board have been filed on behalf of lessors Patencio, Purnel, Cummings, Ward, and Lawrence Bow. By declaration dated March 20, 1987, lessor Ward stated that she had withdrawn from the appeal.

### Jurisdiction

[1] The Board does not have general review authority over the decisions of the Assistant Secretary--Indian Affairs. E.g. Willie v. Commissioner of Indian Affairs, 10 IBIA 135, 138-139 (1982). It can, however, review those decisions of the Assistant Secretary that are specifically referred to it by the Secretary or the Assistant Secretary, or in which a right of appeal to the Board is given in the decision itself. 43 CFR 4.330(a)(2); Garrett v. Assistant Secretary for Indian Affairs, 13 IBIA 8, 11; 91 I.D. 262, 264 (1984). In this case, appellee's decision letter concludes with the following sentence: "Because this decision is based on an interpretation of law, it will become final for the Department 60 days from receipt thereof unless an appeal is filed with the Interior Board of Indian Appeals in the manner prescribed in Department Hearings and Appeals Procedures in 43 CFR Part 4, subpart D." Board jurisdiction in this case is, therefore, based upon the right of appeal given to appellant in appellee's decision.

### Discussion and Conclusions

On appeal to the Board, appellant contends (1) the Area Director lacked jurisdiction over lessors' appeal because it was an untimely attempt to appeal the April 11, 1983, approval of the memorandum of clarification, (2) the memorandum of clarification was valid with the approval of a majority of the lessors, and (3) BIA is estopped from reversing its approval of the memorandum of clarification. Appellant also repeats its request for an evidentiary hearing.

[2] For the first time in the several proceedings in this matter, appellant argues that appellee lessors' appeal to the Area Director was untimely. It argues that appellee lessors were not entitled to appeal from the PSFO Director's November 21, 1983, decision not to rescind his approval, but only from his April 11, 1983, approval. To hold otherwise, appellant contends, would undermine the finality of BIA decisions concerning contractual matters.

Appellee lessors argue that they were not informed of a right to appeal until the PSFO Director's November 21 decision gave them the right, and that their appeal from that decision was timely.

The Board has consistently held that it will not consider issues and arguments raised for the first time on appeal. See, e.g., Estate of Ella Dautobi, 15 IBIA 111 (1987); Burns v. Anadarko Area Director, 11 IBIA 133 (1983). An exception to this general rule has been recognized when jurisdiction is the issue being raised. See, e.g., Estate of James Wermy Pekah, 11 IBIA 237 (1983). <sup>8/</sup> The Board will consider appellant's argument concerning the timeliness of the original notice of appeal.

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<sup>8/</sup> The Board notes without deciding that this exception arguably should not be applied in the present case. The jurisdictional defect alleged here, untimely filing of a notice of appeal to an Area Director, if properly

Appellant contends that any notice of appeal concerning the memorandum of clarification had to be filed within 30 days after appellee lessors' receipt of the approved memorandum. Assuming arguendo that there were persons aggrieved by the approval of the memorandum so as to have standing to file an appeal, appellant's argument overlooks one fundamental fact: the PSFO Director's November 21, 1983, letter to appellee lessors specifically included notification of a right to appeal that decision. Appellee lessors filed a timely notice of appeal from that decision letter. Although perhaps appellant could have argued that the right to appeal was improperly given in that letter, it has no basis for arguing that appellee lessors' original notice of appeal was untimely.

[3] Appellant next contends that the memorandum of clarification was valid with the approval of a majority of the lessors. It argues that the Royce Resort project is a condominium within the meaning of the lease, for which a rental is established in Article 5.B.3, and therefore that the memorandum of clarification did not change the rental so as to invoke the provision of Article 41 requiring unanimous consent of the lessors for "changes in guaranteed minimum rentals, percentage rentals, participation of the parties in rentals, term, or surrender of the lease." Appellant states that the project is a condominium in law and fact because:

- (1) Each unit owner receives a legal interest in a condominium;
- (2) Each unit owner individually finances his unit;
- (3) The design of each unit is residential;
- (4) The development is validly formed under the laws of California as a condominium project \* \* \*;
- (5) Each condominium owner is a member of a validly formed homeowners' association for Tract 18708;
- (6) The use of the unit is contributed to a rental pool; and
- (7) The operation of the food and beverage service at the reception facility is an accommodation for users of the premises.

(Appellant's Brief at 25). Appellant concedes, however, that the project "has some aspects similar to a hotel operation." (Id.)

Appellant requests an evidentiary hearing on this point, stating:

The primary issue in this case is whether the project in dispute is a condominium development and therefore not subject

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fn. 8 (continued)

raised below, could have been cured by a decision of the Assistant Secretary in accordance with 25 CFR 1.2, which provides in relevant part:

"Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians."

Appellant's failure to raise this argument below precluded any consideration of this question.

to percentage rents. This is a mixed question of fact and law that cannot be fairly decided without hearing from the people who developed the project as to what they did, why they did it, how they did it and how the project was presented to both the Bureau and the Lessors. The plans that were presented to the Bureau for the project should be reviewed. The project itself should be reviewed in the context of other condominium projects and the various ways condominium projects in general have come to be marketed and administered in recent years.

(Appellant's Brief at 3-4). 9/

Appellee lessors contend that the project is a business for which they are entitled to receive percentage rentals under Article 5.B.4, because it is not a use specifically provided for under the lease. Therefore, the memorandum of clarification constituted a waiver of lessors' right to Article 5.B.4 percentage rentals and was accordingly subject to the unanimous consent provision of Article 41. Appellee lessors argue that, regardless of the form of ownership, the project has, since its inception, been marketed, advertised and operated as a hotel.

There is no dispute that the project is in legal form a condominium. There is also no dispute that it is operated as a hotel business with a restaurant, bar and meeting rooms. Despite all the argumentation offered during the course of this appeal, the issues here are relatively narrow: (1) is the Royce Resort project a "condominium" as that term is used in Article 5.B.3 of the lease, and therefore subject to the rental provisions of that paragraph, or is it a new use, for which rentals are required to be negotiated under Article 5.B.4, and (2) if it is a new use, is the unanimous consent of the lessors required to establish the rental?

Examining first appellant's request for an evidentiary hearing, the Board notes that the only factual inquiry arguably relevant to the issues raised in this appeal would be an inquiry into the understanding of the parties as to the scope of the term "condominium" in Article 5.B.3 at the time they signed the lease in 1971, or at the time they signed any of the supplemental agreements in which the term was used. However, the facts already in the record are sufficient to demonstrate at least that there was no clear understanding among the parties that the term could include a project to be operated as a hotel, and that lessors could therefore be excluded from participation in percentage rentals from a hotel business and related operations. Appellant's own statements concerning its actions in seeking the memorandum of clarification evidence its uncertainty as to the understanding of the parties on this point. Appellant states that the development "poses the prospect of controversy concerning the interpretation of certain provisions in the Lease. Therefore, to keep Lessors informed and to preclude

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9/ Appellant also contends that an evidentiary hearing is necessary to determine whether it misrepresented the development project to the lessors.

after-the-fact-disputes, [appellant] sought to obtain an agreement on interpretation before any commitment was made to the project" (Appellant's Brief at 25). The consistent opposition to the project by the two lessors who refused to sign the memorandum of clarification, and the participation of other lessors in the present appeal, further demonstrate the lack of a meeting of the minds on this point. The Board does not believe that a further inquiry into the parties' understanding of the term "condominium" as used in Article 5.B.3 of the lease would shed any more light on the matter and therefore finds that an evidentiary hearing on this point is unwarranted.

Further, because the issue of the scope of the term "condominium" as used in Article 5.B.3 is properly resolved by interpretation of the lease, the matters appellant seeks to address in an evidentiary hearing, principally appellant's intent in developing the project and whether it misrepresented the project to BIA and lessors, are not relevant. Nor are they relevant to any other issue in the appeal. Appellant's request for an evidentiary hearing is therefore denied.

Substantively, appellant argues that the unanimous consent provision of Article 41 does not apply to the memorandum of clarification because the memorandum merely constitutes a recognition that the use here is a "condominium" use and does not change percentage rentals. The unanimous consent provision, appellant contends, applies only where a percentage rental has already been set forth in the lease and is sought to be altered. Appellant also argues that the unanimous consent provision of Article 41 does not apply where a new use of the property is to be made. Therefore, if the Royce Resort project is considered to be a hotel, it is not subject to Article 41 but only to Article 5.B.4, which provides for negotiation of percentage rentals, followed by arbitration if negotiation is unsuccessful. Appellant contends that rentals were successfully negotiated when agreement was reached with a majority of the lessors because Article 5.B.4 does not require unanimous consent (Appellant's Brief at 26-28). Therefore, appellant concludes, the memorandum of clarification is valid without unanimous consent regardless of whether the project is considered a condominium use or a hotel use.

The first question to be decided is whether the Royce Resort is a "condominium" use within the meaning of Article 5.B.3 or a new use falling under Article 5.B.4. Article 5.B.3 establishes rentals for "that portion of the leased premises developed in condominium units or residential lots." The specified rentals are percentages of transfer fees for the transfer of subleases and percentages of ground rent. "Intercompany transactions" and "income received from condominium homeowners associations" are excluded from the percentage rental provisions. Other kinds of income are excluded from specific provisions of the paragraph. See Article 5.B.3, quoted in full above.

The conjunction of the terms "condominium units" and "residential lots" in this paragraph, and the manner of calculating rentals based on transfer fees and ground rents, imply that residential condominiums, rather than condominiums used for hotel business purposes, were contemplated by this section. Further, the paragraph contains neither a specific exclusion

of business income from income subject to percentage rentals nor any provision for the division of this kind of income between lessors and lessee. Given the several specific references to various kinds of income included in this paragraph, it is reasonable to expect that business income, such as gross receipts from a hotel business, would have been referred to in some manner if condominiums used for hotel or other business purposes had been intended to come within the paragraph.

The implications of this paragraph that it is not intended to apply to condominiums used for hotel business purposes are strengthened when it is compared to Articles 5.B.1 and 5.B.2, which provide for percentage rentals from gross receipts of mobile home parks and the golf course and its appurtenant facilities. <sup>10/</sup> The clubhouse, dining room, bar and snack facilities appurtenant to the golf course are analogous to the restaurant and bar facilities appurtenant to the Royce Resort project. In both Articles 5.B.1 and 5.B.2, percentage rentals are based on the gross receipts of the businesses, unlike the rentals for condominiums in Article 5.B.3.

The language of the lease indicates that the parties did not intend to include condominiums used for hotel business purposes within the provisions of Article 5.B.3. Given the consistent refusal of two lessors to sign the memorandum of clarification, it is apparent that the parties to the lease have not concurred in an interpretation of Article 5.B.3 expanding upon the meaning conveyed by the lease language. It is therefore not appropriate to consider such an interpretation here. See 3 A. Corbin, Corbin on Contracts § 558 at 254-55 (1960) (where one party to a contract seeks to advance a “practical” interpretation of the contract, the other party must have concurred in that interpretation in order to be bound by it).

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<sup>10/</sup> Articles 5.B.1 and 5.B.2 provide for percentage rentals over and above guaranteed minimum rentals as follows:

“1. For mobile home parks, 7% of the gross receipts from each individual mobile home park unit shall be paid to Lessor from the date of recordation of a Notice of Completion of such unit through the end of the third year there after, and 10% of the gross receipts of said unit shall be paid to Lessor from the beginning of the fourth year of operation of said unit through the end of the eleventh year, and thereafter, 15% of the gross receipts of such unit shall be paid to Lessors through the end of the term of this lease.

“2. For the golf course and appurtenant facilities including the clubhouse, dining room, bar and snack facilities, there shall be no percentage rental payable during the first four years of the lease, but beginning with the fifth year of the lease, percentages as follows:

“a. 5% of the gross receipts from the bar, dining room, snack facilities and all other food services, through the end of the term of this lease.

“b. 5% of the gross receipts from golf club initiation fees and all other golf course and club operations through the end of the tenth year of the lease, and 10% of such gross receipts beginning with the eleventh year of the lease and continuing through the end of the term of the lease.”

Therefore, there being no provision in the lease for rentals for this kind of condominium, the Royce Resort project was subject to the rental negotiation provisions of Article 5.B.4. The question thus becomes whether the establishment of rentals for new uses is subject to the unanimous consent of the lessors.

Appellant bases its argument that rentals for new uses do not require unanimous consent on its reading of Article 41 as requiring unanimous consent only when the issue involves "(1) changes in guaranteed minimum rentals; (2) changes in percentage rentals; (3) changes in participation of the parties in rentals; (4) changes in the term of the Lease; or (5) surrender of the Lease" (Appellant's Brief at 26). Thus, appellant contends that because establishing a new rental is not a "change" in a rental, the unanimous consent provision does not apply.

The Board rejects this narrow construction of the lease language. Article 41 requires unanimous consent in situations involving "participation of the parties in rentals." This provision therefore requires unanimous consent of the lessors in order to establish the participation of the parties in the rentals for a new use under Article 5.B.4. 11/

For these reasons, the Board concludes that the memorandum of clarification required the unanimous consent of the lessors. 12/

[4] Appellant's final argument is that BIA is estopped from reversing its approval of the memorandum of clarification. Appellant argues that it relied on a statement made by the PSFO Director that the memorandum of clarification was valid with the approval of a majority of the lessors. It states that it would not have gone forward with the project without that assurance.

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11/ The Board's belief that the establishment of rental participation under Article 5.B.4 must be unanimous is strengthened by the fact that unanimous consent was required to establish the initial rentals under Article 5.B.1, 5.B.2, and 5.B.3.

12/ Furthermore, even if the memorandum did not require unanimous consent for the reasons already discussed, its provision establishing an additional rental payment of \$149,000 clearly qualifies as a "change in guaranteed minimum rentals." Paragraph 4 of the memorandum of clarification establishes a payment of \$149,000 for additional units to be constructed on the leased property, purportedly "[i]n clarification of paragraph number 5 of Supplemental Agreement 4 to Lease PSL-149." As noted infra, Supplement 4 modified Article 5.C of the lease, concerning rental payments. Supplement 4 was considered subject to the unanimous consent provision. The payment established in the memorandum of clarification is clearly different from that required under Supplement 4.

Appellant has argued that its agreement to pay \$149,000 to lessors inured to their benefit. This is not the question. The change in rentals was subject to the unanimous consent of the lessors regardless of whether the change was beneficial or detrimental to them.

Appellee lessors argue that, because BIA is an agency of the Federal Government and acting as trustee for the Indian lessors, it cannot be estopped. Even if it could be estopped, appellee lessors contend, the elements required for estoppel are not present in this case.

Although it has not been definitively settled whether there are any circumstances in which the Government may be estopped, it is clear that one who seeks to estop the Government must at least demonstrate that the traditional elements of estoppel are present. It is also clear that such a person bears a heavier burden than one who seeks to estop a private party. Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984); id. at 68 (Rehnquist, J., concurring).

The traditional elements of estoppel are:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Morris v. Andrus, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, 444 U.S. 863 (1979).

In this case, these elements are not present. Appellant has not demonstrated that the PSFO Director was aware of facts of which appellant was not aware. Appellant prepared the memorandum of clarification. The question of its validity involved an interpretation of appellant's lease, with which appellant was, or should have been, at least as familiar as the PSFO Director. Further, although appellant's brief attributes the interpretation at issue to the PSFO Director, it appears from the declaration of appellant's vice-president, who was a party to the discussions with the PSFO Director, that, to the extent any such interpretation was made, it was a mutually agreed-upon interpretation. <sup>13/</sup> Therefore, appellant has not satisfied the traditional elements of estoppel.

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<sup>13/</sup> The declaration of James J. Rothschild, Jr., states at page 10:

"[The PSFO Director] suggested that we prepare a document which would set forth the understanding of the parties regarding the nature of the project and how it was to be treated under the lease so that there would no [sic] later misunderstanding or disagreement. He stated that this procedure had been used on prior occasions when ambiguities had arisen regarding the application of a lease to a specific activity. This led to the preparation of the Memorandum of Clarification Re Lease PSL-149 \* \* \*. Since none of us believed we were changing the lease or its rental provisions in any way, we did not believe it was necessary to go through all of the formalities involved in preparing and having approved a Supplemental Agreement."

Furthermore, the courts have developed additional elements which must be satisfied in cases where the Government is sought to be estopped. The requirement for a showing of "affirmative misconduct" by the Government is well established. INS v. Miranda, 459 U.S. 14 (1982); United States v. River Coal Co., 748 F.2d 1103, 1108 (6th Cir. 1984); United States v. Ruby Co., 588 F.2d 697, 703-704 (9th Cir. 1978) (affirmative misrepresentation or affirmative concealment of material fact is required); Native Americans for Community Action v. Deputy Assistant Secretary-Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983). Appellant has made no showing of affirmative misconduct.

It has also been held that in order for estoppel to apply against the Government, the alleged estopping statements must be in writing and must be made by officials at a policy-making level. United States v. Huebner, 752 F.2d 1235, 1244 (7th Cir. 1985). Here, appellant relies on an oral statement allegedly made by the PSFO Director. 14/

Finally, it has been held that estoppel will not run against the Government when it acts as trustee for Indians. New Mexico v. Aamodt, 537 F.2d 1102, 1110 (10th Cir. 1976); cert. denied, 429 U.S. 1121 (1977); United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957). BIA acts as trustee for Indians when it acts on leases of allotted land, as it did here. 25 U.S.C. § 415. Cf. United States v. Mitchell, 463 U.S. 206 (1983).

For these reasons, the Board concludes that BIA is not estopped from reversing the PSFO Director's approval of the memorandum of clarification.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 21, 1986, decision of the Assistant Secretary--Indian Affairs is affirmed.

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//original signed  
Anita Vogt  
Acting Chief Administrative Judge

I concur:

\_\_\_\_\_  
//original signed  
Kathryn A. Lynn  
Administrative Judge

14/ The Board has also specifically held that the Government is not estopped by actions of its agents that are contrary to law. See, e.g., Estate of Joseph Willessi, 8 IBIA 295, 301 n.5; 88 I.D. 561, 564 n.5 (1981), aff'd, Williams v. Watt, No. C81-700R (W.D. Wash. Oct. 17, 1983), rev'd on other grounds, 742 F.2d 549 (9th Cir. 1984), cert. denied sub nom. Elvrum v. Williams, 471 U.S. 1015 (1985); Estate of Lucinda Shelton Joe, 5 IBIA 20 (1976).