



INTERIOR BOARD OF INDIAN APPEALS

Joel Leroy Henderson v. Portland Area Director, Bureau of Indian Affairs

16 IBIA 169 (07/14/1988)



# United States Department of the Interior

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

JOEL LEROY HENDERSON

v.

AREA DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-8-A

Decided July 14, 1988

Appeal from a decision of the Portland Area Director, Bureau of Indian Affairs, affirming the grant of a farming lease of Nez Perce Allotment No. 1564 to MAGCO, Inc.

Dismissed in part, reversed in part, and remanded.

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

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

2. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or any other party.

3. Indians: Leases and Permits: Farming and Grazing--Indians: Leases and Permits: Negotiated Leases

When the Bureau of Indian Affairs undertakes to assist landowners in negotiating a lease pursuant to 25 CFR 162.6, it must insure that the information it conveys to the landowners concerning lease offers is current and accurate.

APPEARANCES: Mary Linda Pearson, Esq., Lewiston, Idaho, for appellant; Michael E. Drais, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Joel LeRoy Henderson challenges a December 31, 1986, decision of the Area Director, Portland Area Office, Bureau of Indian Affairs (appellee; BIA), affirming the grant of a farming lease to MAGCO, Inc. (MAGCO) by the Acting Superintendent, Northern Idaho Agency (Superintendent; agency), BIA. For the reasons discussed below, the Board dismisses the appeal in part, reverses appellee's decision in part, and remands the case to appellee for further proceedings.

### Background

Nez Perce Allotment No. 1564, containing approximately 80 acres, is located in Lewis County, Idaho. Ownership of the allotment is shared by the Nez Perce Tribal Land Enterprise and 34 individuals. <sup>1/</sup> Appellant leased the allotment for the period January 1, 1981, through December 31, 1985. The lease provided for a rental of one-third gross of all crops or a guarantee of \$35 per acre for seeded crop lands.

In January 1985, appellant began seeking approvals from the individual owners for a new lease to begin January 1, 1986. He offered the same rental terms as applied to his existing lease, *i.e.*, one-third crop share with a \$35 per acre guarantee. He states that he obtained written and oral approvals from 13 individual owners representing approximately 38 percent of the ownership interest. He also sought approval from the Nez Perce Tribe (tribe). After learning that the tribe would not accept less than a \$40 guarantee, he notified the chairman of the tribal land committee, by handwritten note dated March 6, 1985, that he had "no problem with the guarantee if you want it to be \$40 or \$45." In September 1985, having received no response from the tribe, appellant attended a meeting of the tribal land committee at which his lease offer was discussed. At this meeting, the committee evidently agreed to recommend to the tribal executive committee that it approve a lease to appellant. However, by resolution adopted on September 20, 1985, the tribal executive committee approved a lease to MAGCO for one-third crop share with a \$42.50 guarantee.

On November 18, 1985, appellant wrote to the Superintendent asking why a lease had not been drafted. Later, he met with BIA personnel and learned that MAGCO had made an offer to lease the allotment.

At a meeting held on December 23 and 26, 1985, the tribal executive committee voted to hold the lease in abeyance until the majority of the owners of the allotment could be contacted and indicate which lessee they preferred. On April 3, 1986, the agency realty officer wrote to the owners, stating:

The lease on this property has expired December 12, 1985 and was leased by [appellant].

[Appellant] and MAGCO expressed an interest to the landowners in leasing the property. [Appellant's] offer is 1/3 crop share with \$30.00 guarantee per acre for five years and MAGCO's offer is 1/3 crop share with \$42.50 guarantee per acre for five years.

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<sup>1/</sup> The lease executed in 1986, which is the subject of this appeal, shows the tribal land enterprise owning a 34 percent interest, an account identified as "14X7462 A/R Dep. Pro. of Lab., Nez Perce Indians, Idaho", with respect to which the tribe evidently has leasing authority, holding a 5 percent interest, and the remaining 61 percent interest shared by 34 individuals.

Neither of the parties received a 51 percent majority from the individual landowners within the 90 day period; [2/] therefore, you need to make a decision as to who will be leasing NP [Allotment No.] 1564.

The letter enclosed a form to be filled out and returned by the owners. The form stated:

I wish to withdraw my acceptance of \_\_\_\_\_  
(Lessor) [sic]  
to lease Nez Perce Allotment \_\_\_\_\_ and to accept  
the offer of \_\_\_\_\_.

The record shows that thirteen owners, representing approximately 48 percent of the ownership interest, returned the form; all thirteen indicated they wanted the allotment to be leased to MAGCO rather than appellant.

On April 7, 1986, appellant contacted the agency realty officer and objected to her description of his offer in the April 3 letter. The realty officer responded by letter dated April 10, 1986, stating:

Just a brief letter with regards to your telephone call on April 7, 1986, concerning your lease proposal on Nez Perce Allotment 1564; wherein you stated your offer was 1/3 cropshare with a \$45.00 per acre cash guarantee. You stated that I had made an error in my letter to the landowners wherein I said your offer was 1/3 cropshare with a \$30.00 per acre cash guarantee.

I called the Nez Perce Land Commission office for copies of your letters to Mr. Melvin Joy and Mr. David Holt in which you stated that you had written to them with the offer of a \$45.00 per acre cash guarantee.

They do not have any letters on file to attest to this so I will not be retracting my letter to the landowners.

\_\_\_\_\_  
2/ 25 U.S.C. § 380 (1982) provides:

"Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservations within which the lands are located \* \* \* 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."

25 CFR 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."

On April 22, 1986, appellant furnished BIA with a copy of his March 6, 1985, note to the then chairman of the tribal land committee regarding his offer of a \$40-45 guarantee and a note from the former chairman of the committee confirming that appellant had submitted the offer to him.

In a letter to appellant dated May 7, 1986, the realty officer stated:

This is to notify you that you were not awarded the lease on Nez Perce Allotment 1564. It was awarded to MAGCO, INC., for a period of one year.

Negotiations for a new lease can be initiated after December 31, 1986 with the landowners. Forms will be available with the Nez Perce Leasing office.

On May 12, 1986, an attorney representing appellant wrote to the realty officer, stating that appellant intended to continue farming the property. On May 21, 1986, the Superintendent wrote to appellant notifying him that he was in trespass.

On August 20, 1986, the Superintendent granted and approved a lease to MAGCO. The Superintendent's signature for the grant of lease stated that it was "for and on behalf of all landowners per CFR Title 25 162.2(a)(4). [O]wners did not agree on a lease within 90 days." <sup>3/</sup> The lease was for a 5-year term beginning January 1, 1986, and ending December 31, 1990. The realty officer transmitted a copy of the lease to MAGCO but, as far as the record shows, did not formally notify appellant.

After learning that MAGCO had been granted a 5-year lease, <sup>4/</sup> appellant appealed to appellee. Appellant's "amended notice of appeal" <sup>5/</sup> and appeal, dated October 10, 1986, were received by appellee on October 14, 1986. Appellant sought damages, rescission of the lease to MAGCO, and an opportunity to bid on the lease by sealed bid.

Appellee construed the October 10 appeal as an untimely appeal from the May 7 letter notifying appellant that he had not been awarded the lease. <sup>6/</sup> However, appellee went on to consider the merits of the appeal after

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<sup>3/</sup> The Superintendent purported to grant the lease for the tribe as well as the individual owners under authority of 25 CFR 162.2(a)(4). 25 CFR 162.2 does not authorize Superintendents to grant leases on behalf of tribes under any circumstances. The Board is unaware of any such authority.

<sup>4/</sup> Appellant states that appellant's attorney was verbally informed by the realty officer on Oct. 7, 1986, that MAGCO had been granted a 5-year lease.

<sup>5/</sup> No notice of appeal predating the Oct. 10 notice is included in the administrative record, and the record does not reflect that such a document was filed. Appellee's decision indicates that the Oct. 10 notice was the first document filed.

<sup>6/</sup> 25 CFR 2.10 provides in relevant part:

"(a) A notice of appeal shall be in writing and filed in the office of the official who made the decision that the appellant wishes to appeal.

concluding that appellant's attorney's May 12 letter might be treated as a notice of appeal.

In response to appellant's argument that the realty officer had incorrectly described his lease offer in her April 3 letter to the owners, appellee stated that the realty officer had attempted to confirm that appellant had submitted a higher offer to the tribe, had been unsuccessful in that attempt, and so had correctly declined to change her letter to reflect an offer of a \$45 cash guarantee by appellant.

In response to appellant's argument that BIA erred in failing to use a sealed bid procedure pursuant to 25 CFR 162.7, appellee found that such a procedure was not required because 25 CFR 162.6 authorizes negotiation of leases. <sup>7/</sup>

Appellee's decision continued:

Once [appellant's] lease expired in 1985, all of his rights to the property terminated. The Bureau of Indian Affairs is the approving authority for leases on this property and we have no uncontradicted evidence that the Bureau issued [appellant] an approved lease for 1986. You allege that the Realty Officer orally informed [appellant] that he would get the lease for 1986.

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fn. 6 (continued)

\* \* \* The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant, \* \* \*

"(b) No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed."

Appellee concluded that appellant received the decision no later than May 12, the date of his attorney's letter concerning the decision.

<sup>7/</sup> 25 CFR 162.7 provides:

"Except as otherwise provided in this part, prior to granting a lease or permit as authorized under § 162.2 the Secretary shall advertise the land for lease. Advertisements will call for sealed bids and will not offer preference rights."

25 CFR 162.6 provides:

"(a) Leases of individually owned land or tribal land may be negotiated by those owners or their representatives who may execute leases pursuant to § 162.3 [providing for grants of leases by owners or their representatives under certain conditions].

"(b) Where the owners of a majority interest, or their representatives, who may grant leases under § 162.3, have negotiated a lease satisfactory to the Secretary he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases under § 162.2 (a) (1), (2), (3), and (5).

"(c) Where the Secretary may grant leases under § 162.2 he may negotiate leases when in his judgment the fair annual rental can thus be obtained."

However, the Realty Officer maintains that she never told him that. Therefore, when [appellant] chose to plant a crop without Bureau approval, he assumed the risk that the lease would not be granted to him.

Finally, appellee noted that appellant had failed to serve copies of his appeal on the landowners or MAGCO.

Appellee affirmed the grant of lease to MAGCO, finding that individual owners representing 48 percent of the ownership interest, and the tribe, with a 34 percent interest, favored MAGCO.

Appellant filed a timely appeal with the Washington, D.C., office of BIA. By memorandum of November 19, 1987, the Acting Assistant Secretary--Indian Affairs transferred the appeal to the Board pursuant to 25 CFR 2.19(a)(2). 8/

#### Discussion and Conclusions

On appeal to the Board, appellant argues that the agency realty officer, tribal officials, and the tribal attorney orally advised him that he would be awarded the lease and that, based upon those assurances, he prepared and seeded the ground. He also argues that the realty officer misrepresented his lease offer to the owners. Further, he argues that BIA failed to advertise the lease and to call for sealed bids as it was required to do by 25 CFR 162.7, and that the Superintendent lacked the authority to grant the lease pursuant to 25 CFR 162.2.

Appellant claims a loss of \$10,313.15, for which he seeks damages, plus interest, attorney fees and costs. He also seeks to have the lease to MAGCO rescinded and to be awarded a 5-year lease. In the alternative, he seeks additional damages equivalent to the value of one-third of the crop from Allotment No. 1564 for the next 5 years.

Appellee moves to dismiss the appeal on the grounds that appellant's appeal to appellee was untimely. In the alternative, he seeks summary judgment. Appellee argues that appellant had no right to farm Allotment No. 1564 once his lease expired, the preparation and seeding he undertook after the expiration of his lease was done in trespass, and appellant is, as a matter of law, barred from recovering damages or costs resulting from the trespass. Appellee also argues that BIA's approval of the lease to MAGCO

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8/ 25 CFR 2.19(a) provides:

“Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

“(1) Render a written decision on the appeal, or

“(2) Refer the appeal to the Board of Indian Appeals for decision.”

was proper on the record before it and that the Superintendent properly exercised his approval authority under 25 CFR Part 162. Finally appellee argues that the Board does not have jurisdiction to award damages to appellant; he concedes that the Board has jurisdiction to effect a remedy in the nature of rescission of the lease to MAGCO but argues that such a remedy is not appropriate in this case.

The Board first considers appellee's jurisdictional arguments.

[1] Appellee argues that this appeal must be dismissed because appellant's appeal to appellee was untimely. Appellee, however, did not dismiss the appeal as untimely when it was before him for decision. Instead, appellee treated appellant's attorney's May 12, 1986, letter as a notice of appeal from the realty officer's May 7 letter.

The May 12 letter, addressed to the realty officer, states in full:

[Appellant] has consulted me regarding your letter of May 7, 1986.

As [appellant] describes the situation, you told him that he had the lease for the year 1986. Based on this approval, [appellant] plowed, cultivated and seeded the land. He also has applied to participate in the U.S. Government farm programs.

This letter is to advise you that [appellant] intends to farm the ground and in the event you attempt to prevent him from so doing, he will hold you responsible for all of the damages he incurs.

This letter does not demonstrate an intent to appeal the May 7 letter but rather an apparent intent to defy it. The record contains no other document that could be construed as a timely notice of appeal from that letter. The Board finds, therefore, that appellant did not file a timely notice of appeal from the May 7 letter.

25 CFR 2.10(b) deprived appellee of jurisdiction over appellant's October 10 notice of appeal insofar as it was an attempt to appeal the May 7 letter. See Hamlin v. Portland Area Director, 9 IBIA 16, 18 (1981). See also Tanana Chiefs' Conference v. Juneau Area Director, 14 IBIA 87, 89-90 (1986); Parsons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 79, 81-82 (1986). Since the May 7 letter informed appellant that MAGCO had been awarded a lease for 1 year, *i.e.*, 1986, and appellant did not file a timely notice of appeal from that letter, this appeal must be dismissed insofar as it concerns MAGCO's lease for 1986.

The Superintendent made a second decision concerning the lease on August 20, 1986, when he granted a 5-year lease to MAGCO. By this action, he altered the terms of the May 7 letter, which had stated that a 1-year lease would be granted. Although appellant's notice of appeal to appellee did not specifically state that he intended to appeal this second decision, it is apparent from his arguments that he intended to appeal the August 20 decision as well as, or instead of, the May 7 decision.

Appellant was not given written notice of the August 20 decision. <sup>9/</sup> He states that his attorney became aware of it on October 7. In the absence of any evidence to the contrary, appellant's statement concerning the date he received actual notice of the decision is taken as true. Therefore, his appeal of the August 20 decision was timely.

[2] Appellee correctly argues that the Board lacks authority to award damages in this appeal. The Board is not a court of general jurisdiction. It may exercise only that authority which has been delegated to it by the Secretary. 43 CFR 4.1, 4.330. The Board has not been delegated authority to award money damages against BIA or any other party. Gillette v. Aberdeen Area Director, 14 IBIA 187, 190 (1986); Lord, a.k.a. George v. Commissioner of Indian Affairs, 11 IBIA 51, 52-53 (1983).

[3] The Superintendent did not explain the reasons for his August 20, 1986, decision to grant a 5-year lease to MAGCO. However, the record contains a July 11, 1986, memorandum from the realty officer to the Superintendent recommending a 5-year lease because "the landowners have signed for the five years." The memorandum described the April 3, 1986, letter mailed to the owners. It also noted that appellant had been notified on May 7 that he had not been awarded the lease and that he had planted a crop without an approved lease.

The Board concludes that the Superintendent's decision was based, in part at least, on the advice in this memorandum and that he therefore relied to some extent on the results of the survey of the landowners conducted by the realty officer. Having reviewed the circumstances under which the survey was conducted, to the extent those circumstances can be derived from the administrative record, the Board finds that the survey was seriously flawed.

The realty officer evidently undertook to conduct the survey under authority of 25 CFR 162.6, either in the role of negotiator pursuant to §162.6(c) or in furtherance of negotiation by the owners pursuant to §162.6(a). In either case, having undertaken the survey, the realty officer had an obligation to insure that current and accurate information concerning the offers of the two lease applicants was conveyed to the owners. Thus, while it may earlier have been appellant's responsibility to inform the owners of his offer, as appellee argues, BIA took on that responsibility when it became actively involved in the negotiation process.

BIA did not require the lease applicants to submit formal offers prior to the survey. Neither, apparently, did it verify with the applicants that the information it was about to convey to the owners was accurate. It is

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<sup>9/</sup> Because the decision to grant a 5-year lease to MAGCO adversely affected appellant by depriving him of the opportunity to negotiate a lease for 1987 and following years, as had been promised by the May 7 letter, appellant was clearly entitled to written notice of the decision.

not clear from the record how or when BIA learned of MAGCO's offer, 10/ but that offer was evidently correctly described in the realty officer's letter to the owners. With regard to appellant's offer, however, the realty officer's letter relied on the offer appellant had made to the owners over a year earlier, and even then incorrectly described it by stating that the guarantee offered was \$30, rather than the \$35 appellant had actually offered. When informed by appellant that he had made a more recent higher offer to the tribe, the realty officer declined to correct her letter to the landowners, even though appellant submitted a copy of his offer to the tribe and a corroborating letter from the former chairman of the tribal land committee. 11/

It is apparent that the owners who responded to the survey did so on the basis of incorrect information. Although only one landowner stated his reason for choosing MAGCO, i.e., because it was the higher bidder, it is reasonable to assume that some or most of the landowners who responded to the survey chose MAGCO because of its apparent higher offer. Without accurate information concerning the lease offers, the owners lacked the ability to make an informed decision regarding the negotiation of their lease. Because the Superintendent relied on the results of this flawed survey in granting and approving the lease, his grant and approval must be rescinded with respect to the years 1987-1990, 12/ and this matter must be remanded to BIA for further proceedings.

Since, as far as the record shows, MAGCO has acted in good faith in entering the lease and in farming the allotment during 1987 and 1988, it should be allowed to continue on the property through the 1988 harvest under the same terms as are specified in the rescinded lease.

On remand, BIA should immediately initiate preparations for a lease to begin in 1989. Contrary to appellant's assertion that formal advertising procedures must be followed, the applicable regulations provide that the lease may be negotiated. 25 CFR 162.6, 162.7. However, if BIA becomes involved in the negotiation process, it must insure that it obtains current offers from the lease applicants and that it acts only upon current and accurate information.

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10/ The record contains an Apr. 4, 1986, letter from MAGCO to one of the landowners stating that MAGCO had submitted a proposal to the agency in Aug. 1985. However, no copy of the proposal appears in the record.

11/ In light of the time that had passed since appellant had made his offer to the owners, and the fact that appellant had since been made aware, by BIA personnel, that MAGCO was also interested in the lease, BIA should have realized that appellant might have been willing to make a higher offer, even though it was not aware that he had in fact made such an offer.

12/ As discussed above, appellant did not timely appeal the initial decision to grant a 1-year lease to MAGCO. Therefore, the Superintendent's grant and approval are final with respect to the first year of the lease, 1986.

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 insofar as it concerns lease year 1986. The Portland Area Director's December 31, 1986, decision is reversed insofar as it concerns lease years 1987-1990, and this case is remanded to the Area Director for further proceedings in accordance with this opinion.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

\_\_\_\_\_  
//original signed

Kathryn A. Lynn  
Chief Administrative Judge