



INTERIOR BOARD OF INDIAN APPEALS

Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director,  
Bureau of Indian Affairs

24 IBIA 169 (08/31/1993)



# United States Department of the Interior

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

NAEGELE OUTDOOR ADVERTISING CO.

v.

ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-211-A

Decided August 31, 1993

Appeal from the finding that two agreements relating to outdoor advertising signs were null and void.

Affirmed as modified.

1. Indians: Contracts: Generally--Indians: Lands: Generally--Indians: Leases and Permits: Generally

The determination of the nature of an agreement relating to the use of Indian trust land is a question of Federal law. It is appropriate to apply state contract law to this determination only when there are no Federal cases on point, and then only so far as state law does not conflict with the Federal interest in protecting the use of Indian resources. The decisions of the Board of Indian Appeals are part of the Federal law relating to contracts involving the use of trust land.

2. Indians: Leases and Permits: Generally

An agreement which is, in essence, a lease of Indian trust land, although not so termed, is invalid unless approved by the Secretary of the Interior. Lacking approval, it grants no rights to either party.

3. Administrative Authority: Generally--Bureau of Indian Affairs: Generally--Indians: Generally--Statutory Construction: Administrative Construction

In order to correct prior error, an official of the Bureau of Indian Affairs may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

4. Estoppel--Indians: Generally

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury.

APPEARANCES: Michael D. Harris, Esq., and Robert W. Hargreaves, Esq., Rancho Mirage, California, for appellant; Daniel G. Shillito, Esq., Field Solicitor, U.S. Department of the Interior, Palm Springs, California, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Naegele Outdoor Advertising Company seeks review of a June 10, 1992, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that two agreements relating to five outdoor advertising structures (billboards) were null and void. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

Background

Diana and Lucille Bow (jointly referred to as "Bow") are sisters and members of the Agua Caliente Band of Cahuilla Indians. They jointly own property which is held in trust for them by the United States and which is located on the Agua Caliente Reservation.

On January 13, 1979, and January 16, 1981, appellant entered into two agreements with Diana. 1/ Neither agreement was submitted to BIA for approval. The agreements are identical in all material respects. Both agreements provide:

Diana Bow, a member of the Agua Caliente Indian Tribe (hereinafter referred to as OWNER), and [appellant] (hereinafter referred to as COMPANY), \* \* \* enter into the following agreement for exclusive rights of outdoor advertising on property owned by OWNER on the Agua Caliente Reservation. OWNER desires to construct, manage and maintain [billboards on her property] which

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1/ Lucille did not sign the agreements. The administrative record indicates that she was a minor when they were executed.

land is within the boundaries of the Agua Caliente Indian Reservation \* \* \*. OWNER desires to create an income-generating outdoor advertising business. COMPANY desires to have advertisements of its choice displayed upon the [billboards] owned by the OWNER along [Interstate 10 and Ramon Road].

1. The parties to this contract contemplate the construction of [a total of five billboards] in Section(s) 4 & 14, Township 4S, Range 5E, Parcel 30-E. [2/] \* \* \* The [billboards] will be supported by only one pole whose base at ground level will measure approximately twenty-four (24) inches in diameter. \* \* \*

2. The [billboards] will be placed in a location approved by OWNER and COMPANY.

3. The [billboards] described above shall be constructed by COMPANY, acting as the contractor for OWNER \* \* \*. Upon the execution of this agreement, COMPANY shall pay to the OWNER the following monthly sums at the times described below:

\* \* \* \* \*

4. OWNER hereby grants to COMPANY permission to enter and cross his lands in order to erect, place, construct or remove the above-described [billboards] pursuant to the terms of this contract. Use of this land during ingress and egress and during any said operations shall be done so as to least disturb the existing uses of the land and avoid any damage to existing structures, fences and vegetation. COMPANY shall be liable for any damage done by its employees on the aforementioned land during the course of this contract.

\* \* \* \* \*

6. At all times during the life of this contract COMPANY shall carry full liability insurance for any damages that may result from the construction, operation, maintenance and use of the [billboards]. Said insurance shall protect both OWNER and COMPANY from any liability arising from the operation of this enterprise.

7. This contract is entered into for a term of twenty (20) years. [3/]

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2/ The 1979 agreement provides for the construction of three billboards in secs. 4 and 14, along Interstate 10 and Ramon Road; the 1981 agreement provides for two additional billboards in sec. 14, along Ramon Road.

3/ Based upon this paragraph, the 1979 agreement will expire by its own terms in 1998, and the 1981 agreement in 2000.

\* \* \* \* \*

10. COMPANY agrees to allow the [billboards] to be moved or relocated and to pay the costs for said move or relocation if at any time during the life of this contract OWNER needs to move or relocate said [billboards] so as to facilitate or allow any other development or use of its land. If the movement or relocation of [billboards] becomes necessary during the life of this contract, the [billboards] in question will be moved to a location that is agreeable to both OWNER and to COMPANY.

11. It is agreed by and between the parties to this contract that at the termination of this contract, COMPANY shall buy the [billboards] from OWNER for One Dollar (\$1.00) and COMPANY shall remove said [billboards] within fifteen (15) days after the termination of this agreement, unless OWNER has negotiated a new contract with COMPANY.

\* \* \* \* \*

13. At the termination of this contract, or upon the removal or relocation of the [billboards], COMPANY agrees to remove the entirety of the [billboards] including the foundation(s) thereof and to return the land to the same condition as existed prior to the installation of the [billboards].

\* \* \* \* \*

16. It is understood and agreed by and between the parties to this contract the OWNER does not waive any rights which he enjoys as a member of a sovereign and federally-recognized Indian Tribe under the laws of the United States.

By letters dated October 7 and 25, 1991, the Director, Palm Springs Field Office, BIA (Office Director), wrote appellant stating that because the agreements had not been approved by BIA, they were in violation of 25 U.S.C. § 81 (1988). 4/ The Office Director declared that the agreements were null and void, ordered appellant to cease and desist further

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4/ All further references to the United States Code are to the 1988 edition. Section 81 provides:

“No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands \* \* \* unless such contract or agreement be executed and approved as follows:

\* \* \* \* \*

business, and prohibited appellant from removing any and all structures. By letters dated February 27 and April 16, 1992, the Office Director served appellant with a "final notice" that the agreements were null and void. These letters added that appellant was also in violation of 25 U.S.C. §§ 415 and 177. 5/

Appellant appealed the February 27 and April 16, 1992, decisions to the Area Director. By letter dated June 10, 1992, the Area Director affirmed the February 27, 1992, decision, although finding that the only statute violated was 25 U.S.C. § 415. 6/ The Area Director's decision states at pages 4-5:

The controversy over management contracts, what they are, and whether they require approval by the Secretary arose primarily as a result of tribes' efforts to introduce high stakes bingo on their reservations. Many tribes wanted to engage in such gaming but lacked the economic wherewithal to construct the facility and in many cases lacked the technical expertise to operate the facility once built. As a consequence, non-Indian operators approached tribes and offered to build, finance and operate the gaming facilities. The document chosen to bind the parties was a management

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fn. 4 (continued)

"Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

\* \* \* \* \*

"All contracts or agreements made in violation of this section shall be null and void \* \* \*."

5/ Section 415(a) provides:

"Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for \* \* \* business purposes \* \* \*. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject."

Section 177 provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereon, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

6/ The Area Director concluded that section 81 applied only to tribes and individual Indians who were not citizens of the United States, *see, e.g., Quinault Allottees Association and Individual Allottees v. United States*, 453 F.2d 1272, 1276 n.3 (Ct. Cl. 1972), and that section 177 applied only to tribes. He, therefore, found that neither statute applied to Bow.

contract. Few of these contracts were submitted to the Secretary for approval. Ostensibly, the primary reason the contracts were not submitted was because the gaming managers believed such contracts were not subject to approval pursuant to section 415 because they were not leases and not subject to section 81 because they did not purport to provide services "relative to [Indian] lands." The courts did not agree.

The federal courts recognized the longstanding federal policy to regulate Indian land transactions and that section 81 is one of the tools to ensure that Indians did not enter into improvident or unconscionable contracts. A.K. Management Co. v. San Manuel Band, 789 F.2d 785 (9th Cir. 1986). Based on this policy, the courts have determined where a contract grants exclusive rights to build and control a facility on Indian land and where an agreement is inextricably tied to Indian land, government consent to the transaction is required. Id.; United States Ex. Rel. Shakopee [Mdewakanton Sioux Community] v. Pan American [Management Co.], 616 F. Supp. 1200 (D.C. Minn. 1985); Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985). \* \* \*

The general policy arguments made in relation to section 81 are equally applicable to section 415. Section 415 is intended to protect the Indians from making improvident alienations of their land. The question is whether the "permit" at issue in this matter falls within the protection afforded by section 415. We think it does. The permit grants to the appellant the "exclusive rights of outdoor advertising on property owned by OWNER on the Agua Caliente Reservation." Exhibit 1, page 1. It is clear from the language of the permit that the owner is contributing no money in furtherance of the alleged business venture, is contributing no management and, in reality, does not own the structures since the appellant can buy them for one dollar. The owner is receiving monthly payments for the use of her land. The permit appears to be no more than a transparent attempt to secure a right to use and occupy Indian land under the guise of a management agreement. Where a transaction falls within the spirit of a statute enacted for the safeguard of Indians, that transaction is subject to that statute. Green v. Menominee Tribe of Indians, 233 U.S. 558 (1914). We believe the transaction contemplated by the permit is within the letter and spirit of section 415 and, accordingly, requires approval by the Secretary.

Appellant appealed this decision to the Board. <sup>7/</sup> Both appellant and the Area Director filed briefs.

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<sup>7/</sup> Appellant's opening brief states that the Area Director has not issued a decision regarding its appeal from the Office Director's Apr. 16, 1992, decision. In his memorandum transmitting the administrative record to the Board, the Area Director stated:

Discussion and Conclusions

The Board will first address appellant's last argument. Appellant contends that the Area Director's decision was based at least in part on documents that had not been made available to appellant. It argues that this violates 25 CFR 2.21, 8/ objects that the consideration of documents not available to it violates its due process rights, and demands that the matter be remanded to the Area Director to provide appellant with the opportunity to argue this case to the Area Director with knowledge of the full record. The documents to which appellant objects are listed in footnote 23 of appellant's opening brief. The documents are interoffice memoranda and communications between BIA and Bow that were listed in the table of contents to the record prepared by the Area Director, and sent to appellant with its copy of the Board's August 25, 1992, notice of docketing.

All but two of the documents to which appellant objects predate the Office Director's decisions and would necessarily have been a part of the record on appeal before the Area Director. The two documents which postdate the Office Director's decisions are simply transmittal memoranda, insufficient to trigger the notification requirement of 25 CFR 2.21. The Board finds no violation of this section.

It appears likely that appellant's real objection is that the Area Director used these documents without providing copies to it. Appellant

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fn. 7 (continued)

"The Acting Area Director's decision upon the first appeal [Office Director's Feb. 27, 1992, letter] was made on June 10th, but it inadvertently did not address the second decision made by the [Office Director on Apr. 16, 1992]. Both appeals are on the same subject, involve the same allotment, and the same landowners. Therefore, we are requesting that said appeals be consolidated now before the Board."

The Board believes it to be a safe assumption that the Area Director would issue the same decision in regard to the Apr. 16, 1992, letter as he did in regard to the Feb. 27, 1992, letter. Therefore, for the purposes of this decision, the Board will treat the Area Director's June 10, 1992, decision as if it had addressed both of the Office Director's decisions.

8/ Section 2.21(b) provides:

"When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided. The deciding official shall include in the record copies of documents or a description of the information used in arriving at the decision. Except where disclosure of the actual documents used may be prohibited by law, copies of the information shall be made available to the parties upon request and at their expense."

has cited no regulation, and the Board is aware of none, under which a BIA deciding official is either required to provide parties with copies of all documents in its possession prior to rendering a decision, or prohibited from considering communications generated within the agency and not addressed to all parties. There is no indication in the record, and appellant has not argued, that it requested and was denied the opportunity to review the contents of the administrative record while this matter was pending before the Area Director. The Board concludes that the Area Director did not commit reversible error by considering the documents to which appellant objects. See French v. Aberdeen Area Director, 22 IBIA 211 (1992).

Furthermore, although appellant was alerted to the existence of these documents by its receipt of the table of contents to the record provided to it by the Board, appellant did not request copies of the documents. The table of contents is provided to the parties for the specific purpose of informing them of the documents upon which the Board will base its decision. However, it is the responsibility of each party to request copies of any documents it might not have. The failure of a party to request copies of documents it knows to exist does not render a decision based upon those documents violative of the party's due process rights. French, supra. 9/ Appellant's demand that this matter be remanded to the Area Director is denied.

Substantively, appellant argues on appeal, as it has throughout this proceeding, that because the agreements are not "leases" of land, there is no statutory or regulatory authority for requiring that they be approved by BIA. Appellant contends variously that the agreements are "management" or "personal services" contracts or "agency" agreements, and do not require approval.

Citing California and Federal court cases, appellant contends that the determination of whether the agreements are leases is governed by state law:

The Permit in the instant case is \* \* \* neither called a lease, nor does it grant any possessory rights over the Bow land, much less an exclusive right against the Bow [sic]. The location of the subject billboard is jointly selected by Bow and [appellant], and Bow may require [appellant], at [appellant's] cost, to move the sign "so as the facilitate or allow any other development or use of its land." Bow is, in fact, in possession of the signs and parcel on which the signs are located at all times. The Permit, then, is not a lease requiring approval of the Secretary under 25 U.S.C. section 415.

(Opening Brief at 9).

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9/ Furthermore, even if it were to hold otherwise, the Board has not relied upon the documents cited by appellant.

None of the cases cited by appellant involve Indian trust lands. The Board has previously noted that

[t]he construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law. Federal contract law is governed by principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); United States v. Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980).

Walch Logging Co., Inc. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 98, 90 I.D. 88, 95 (1983). Humboldt Fir further instructs that "[i]n the absence of federal cases on point, state statutory and decisional law may furnish a convenient source for the general law of contracts to the extent that it does not conflict with the Federal interest in developing and protecting the use of Indian resources" 426 F. Supp. at 297 (emphasis added).

[1] Although the agreements at issue here were not approved by the Secretary, the issue is whether they should have been. The Board concludes that the question of whether the agreements required approval; *i.e.*, whether they were leases within the meaning of 25 U.S.C. § 415; is also a question of Federal law, and that it is appropriate to apply state law in reaching this decision only when there are no Federal cases on point, and then only so far as state law does not "conflict with the Federal interest in protecting the use of Indian resources."

The decisions of this Board are part of the Federal law relating to contracts involving the use of Indian trust land. The Board has case law relating to determinations of the nature of agreements entered into for the use of Indian trust or restricted lands. *See, e.g., State of Utah v. Navajo Area Director*, 21 IBIA 282, 99 I.D. 39 (1992) (holding that an agreement for the development of tribal oil and gas resources was a non-lease developmental agreement under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108); Citation Oil & Gas, Ltd. v. Acting Billings Area Director, 21 IBIA 75 (1991) (holding that an agreement allowing the disposal of salt water into a well on trust land was a lease of that land). To the extent that appellant cites state law in the belief that Federal law either does not apply or does not exist, the Board rejects its argument. Franks v. Acting Deputy Assistant Secretary -Indian Affairs (Operations), 13 IBIA 231, 235 (1985) ("In arguing the application of California law, however, appellant overlooks the existence of Federal law on the issues raised").

After carefully reviewing the agreements to identify the rights and responsibilities of the parties, the Board concludes that they are leases in all but name. Bow contributed nothing to the venture except land, and received nothing except rent. Appellant was responsible for all aspects

of the construction, development, and management of the business, including acquiring electricity and providing liability insurance. Appellant's use of the property was exclusive against all competitors. The provisions allowing Bow to use the property for other purposes and to ask that the billboards be relocated (thus providing a basis for appellant's argument that its use of the property was not exclusive as to Bow), appear to be directly related to the fact that billboards require only a small amount of land that can be easily seen from the highway and therefore many locations on the property could suit appellant's purposes equally well. Although the agreements recite that Bow wants to develop an outdoor advertising business on her property and that she owns the billboards, it is clear that the life of her "business" is coterminous with that of the agreements, because when the agreements expire appellant has an irrevocable right to buy the billboards for the less than nominal amount of \$1. The agreements do not recognize any right in Bow to cease operating the business before their expiration. The only conclusion that can be reached from the agreements is that they allow appellant the exclusive right to use Bow's property for its own purposes for a period of time in exchange for rental payments. Whatever such an agreement may be called by the parties, it is a lease within both the letter and spirit of section 415. 10/

In Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 n.16 (1968), the Supreme Court quoted Jerome H. Remick Co. v. American Automobile Accessories Co., 5 F.2d 411 (6th Cir. 1925) to the effect that "[w]hile statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries." Although both courts were specifically addressing the development of new technologies, the Board finds that the agreements at issue here are "new inventions" in the law that should not be allowed to frustrate Congressional intent as set forth in section 415. 11/

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10/ With its opening brief, appellant submitted a copy of a form "permit" for outdoor advertising structures that is apparently presently being used by the Palm Springs Field Office to allow the erection and operation of billboards on the Agua Caliente Reservation. The copy submitted is between appellant and another Agua Caliente tribal member. Appellant notes that paragraph 11 of that permit provides: "It is the understanding of both parties hereto that this Permit is not a lease of real property, but is a Permit to carry out the provisions herein." Appellant contends that this permit demonstrates that BIA does not believe that agreements such as the ones at issue in this appeal are "leases."

Assuming that this is a standard form permit now used by the Palm Springs Field Office, the Board notes that paragraph 22 requires Secretarial approval and concludes that the permit represents a determination that agreements such as the ones at issue here are leases in the absence of a written document making them something less.

11/ Cf. Reindeer Herders Association v. Juneau Area Director, 23 IBIA 28, 67, 99 I.D. 219, 240 (1992), quoting 2B N. Singer, Sutherland on Statutory Construction, § 54.05 (5th ed. 1992):

[2] The Board concludes that the agreements at issue in this appeal are leases within the meaning of 25 U.S.C. § 415 and are, therefore, subject to approval. The fact that they were not approved rendered them invalid and granted no rights to any party. Citation, supra; Bulletproofing, Inc. v. Acting Phoenix Area Director, 20 IBIA 179 (1991) ; Smith v. Acting Billings Area Director, 17 IBIA 231 (1989). 12/

Appellant contends that BIA has changed its position regarding whether management or personal services contracts or agency agreements require approval by BIA. Because the Board has concluded that the agreements are leases within the meaning of section 415, it will treat this contention as also arguing that BIA has changed its position as to whether the agreements are leases.

Appellant argues that the agreements were executed with the knowledge, and perhaps support, of BIA, and that BIA approved an easement across Bow's property so that Southern California Edison Company could supply electricity to the billboards. Although appellant specifically raises an estoppel argument, discussed infra, it appears to make a separate argument that BIA lacks authority to change its interpretation of a statute it is charged with enforcing.

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fn. 11 (continued)

“Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the circumstances giving rise to the legislation. If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application. In the words of the First Circuit Court of Appeals [in Johnson v. United States, 163 F. 30 (1st Cir. 1908)], ‘it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.’”

12/ In United States ex rel. Buxbom v. Naegele, 739 F.2d 473 (9th Cir. 1984), a competitor of appellant's sought to invalidate an “agency” agreement between appellant and the Morongo Band of Mission Indians on the grounds that the agreement had not been approved by BIA as was required by 25 U.S.C. §§ 81 and 415. The agreement allowed the construction of billboards on land owned in trust by the Band. Under the agreement the Band paid appellant \$60,000 to construct the billboards; appellant paid the Band \$60,000 for the privilege of being the Band's agent in the management of the billboards; and appellant paid the Band an additional \$250,000, representing advance payment of ten annual fees of \$25,000 each. During the course of judicial consideration of the case, BIA approved the agreement under 25 U.S.C. § 415. Because the agreement had been retroactively approved, the court found it unnecessary to “consider whether the agreement between the band and [appellant] is a lease subject to section 415 or a contract subject to section 81. The effect of the BIA's approval is the same in either event.” 739 F.2d at 474.

Although the court did not reach the question of whether the “agency” agreement was a lease under section 415, it is clear that BIA considered it to be one, since that was the section under which it approved the agreement.

BIA's historical position with regard to tribal gaming management contracts was that this type of contract did not require approval under section 81. This position is fully documented in the numerous Federal court cases concerning these contracts. <sup>13/</sup> For purposes of this decision the Board will assume that BIA's position was also that agreements in the nature of management contracts with individual Indians were not leases and did not require approval under section 415. It is clear that BIA's present position is that approval is required.

[3] The question raised is whether BIA is prohibited from changing its interpretation of the law. The Board has addressed this question on several occasions. As stated in Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992):

It is settled law that an administrative agency can change its interpretation of law to correct prior error. Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978); FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970); McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974); Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63, 67 n.10 (1990); Kiowa, Comanche & Apache Intertribal Land Use Committee v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 207, 214 (1986). The Director therefore had the authority and the responsibility to correct any prior erroneous administrative interpretation of the statute. However, because persons dealing with a Federal agency are entitled to rely on prior administrative interpretations, any change in the agency's position must be fully and clearly explained in order to show that the change is not arbitrary or capricious. Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981).

See also Montana v. Blackfeet Tribe, 471 U.S. 759, 768 n.7 (1985). The Area Director had authority to correct a prior, erroneous administrative interpretation of the statute as long as he clearly set forth the reason for the change in order to show that the change was not arbitrary or capricious.

The reason given for the change of interpretation here was that BIA's prior interpretation of section 81, to the effect that management contracts did not require approval, had been soundly rejected by the Federal courts. When the Area Director had occasion to review a similar agreement entered into with an individual Indian, he found no significant difference between

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<sup>13/</sup> As the Area Director noted, "[i]n numerous cases involving section 81, the BIA gave assurances to the parties that approval was not required. These assurances were of no value when the federal courts subsequently determined the BIA's position was incorrect" (June 10, 1992, decision at 5-6).

sections 81 and 415 to justify the continued position that a similar agreement with an individual Indian was not a lease subject to section 415. The Area Director has clearly set forth the reason for his change in position. The change cannot be considered either arbitrary or capricious, but rather an enlightened attempt to apply a statutory interpretation mandated by the Federal courts to an analogous situation. The Board finds that the Area Director was not prevented from changing the administrative interpretation of section 415.

[4] Appellant also contends that the Department should be estopped from holding the agreements null and void. The Board has discussed estoppel against the Government on several occasions. In Falcon Lake Properties v. Assistant Secretary - Indian Affairs, 15 IBIA 286, 298 (1987), the Board stated:

Although it has not been definitively established 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).

See also Bradshaw v. Acting Muskogee Area Director, 18 IBIA 339, 343-44 (1990).

Appellant asserts that BIA should be estopped because it

knew that [appellant] intended to enter into an advertising management contract with Bow and that [appellant] would make large expenditures in reliance on that permit. The BIA knew all of the facts on which it would later argue that such permits should have been approved under section 415. [Appellant] was unaware that the BIA would take the position that such permits require approval under section 415; and finally, [appellant] relied on the permit

in expending large amounts of money to construct, manage and maintain the [billboards]. Hence, the United States is estopped at this late date from rescinding the permit.

(Opening Brief at 12).

The Board disagrees with appellant's argument, which it finds is answered by the court's decision in United States ex rel. Shakopee Mdewakanton Sioux Community, 616 F. Supp. at 1210:

The agency did not know at the time the [management] contracts were executed whether the language of section 81 would be interpreted to include such agreements. Thus, it, as well as the other parties, was unaware of facts essential to any claim of estoppel. No facts were concealed or known by the agency that were unknown to the plaintiffs. Furthermore, at no time did the agency represent that either [management] agreement was in the best interest of the [landowner] or that it would be approved if presented to the Secretary for review. \* \* \*

At the time of the negotiations [plaintiff] was aware of [the statute] and of the agency's practice not to review [management] agreements. It chose to proceed with the management agreement and to obtain the agency's tacit approval of any such agreement. To the extent the plaintiffs relied on the agency's current interpretation of the statute, it assumed the risk that that interpretation was in error.

Likewise, at the time the agreements at issue here were executed, BIA did not know that section 81 would be construed to require approval of management contracts, and had therefore not yet considered the question of whether the language of section 415 should also be construed to cover such agreements. Appellant has not established even the first of the traditional elements of estoppel. The Board rejects appellant's argument that BIA should be estopped from applying its new interpretation of section 415.

Appellant's final argument is that if the agreements are found to be null and void, it should either be allowed to remove the billboards or be compensated for them. The Area Director did not address this issue in his decision or answer brief. The Board could, therefore, remand this question to the Area Director for his initial consideration. See, e.g., Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1 (1992); Nix v. Acting Sacramento Area Director, 18 IBIA 387 (1990); Muskrat v. Acting Albuquerque Area Director, 12 IBIA 128 (1984). However, because this issue raises a question of law which could again be appealed and which the Board might still have to address, the Board believes that a remand would constitute a waste of judicial resources and would only unnecessarily delay ultimate resolution of this appeal. Therefore, the Board will address the argument.

Without citing any authority, the Office Director's decision states simply that "[t]he existing structures are now the property of the Indian landowners and you are prohibited from entering and/or removing any structures from the land." It is possible that the Office Director was relying on "the common law rule that a trespasser who builds on another's land dedicates his structure to the land's owner." Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1444 (9th Cir. 1987). In discussing this issue, the Board will assume that the Office Director was attempting to follow this rule.

Appellant contends that Etalook and other cases have established that state anti-forfeiture statutes should be applied even against the United States acting as a trustee for Indian landowners when improvements are placed on trust property by a person acting in good faith. Appellant argues:

[Appellant] in the instant case is the classic good-faith improver of property. Bow did not merely stand by as the billboard improvements were being made, but actually was a party to the contract and has received compensation under its terms since its execution in 1979. The then-local director of the BIA admits that he had no policies or procedures at the time to require or establish standards for his review and approval of the Permit. To now deny [appellant] the right to remove its improvements, or to be compensated for their value, would result in the unjust enrichment of Bow in contravention of basic state statutory as well as common law equitable principles, applied in California and federal courts to private parties, Indians and the government.

(Opening Brief at 16-17). Appellant contends that it should be allowed to remove the billboards because it placed them on Bow's property in the reasonable belief that it was legally entitled to do so. Appellant further argues that the fact that the forfeiture is being sanctioned by BIA would result in an unconstitutional taking of its property without just compensation.

California statutory and decisional law concerning forfeitures has been argued to the Board on numerous prior occasions, usually in the context of a cancellation for breach of a lease covering Agua Caliente trust land. The Board has never found these arguments persuasive in that context. Here, however, BIA did not cancel a lease for breach, but rather found that agreements that were not previously interpreted to be leases actually were leases.

Although Etalook supports appellant's position, appellant overstates the case in suggesting that the court merely applied state law. The existence of a state anti-forfeiture statute was only one of several factors the court considered in determining whether Etalook was entitled to the value of improvements placed on her property by the Alyeska Pipeline Co.

The court also considered that Alyeska had the power of eminent domain, placed the improvements on Etalook's property in a good-faith belief that it had title to the property, and immediately sought to compensate Etalook when it learned that Etalook had title. It also considered the equitable rule that a landowner should not be compensated when she stood by silently, knowing that a trespasser was improving her property under a belief that had the right to do so. The court concluded that "Etalook would be enriched unjustly if she were allowed to retain the benefits resulting when Alyeska improved the property in reliance upon an unenforceable contract." 831 F.2d at 1445. The court did not rely solely on the existence of a state anti-forfeiture statute, but instead examined the entire situation between the parties to determine a fair and just result under the circumstances of that particular case. The Board will do the same.

Appellant has a long history of involvement with outdoor advertising on Indian trust property. <sup>14/</sup> It appears that appellant has been searching for a means of contracting with Indian tribes and individual Indians that would not be subject to BIA approval. It is unlikely that appellant's diligent search was motivated by anything more than a desire to be able to contract with Indian tribes and individuals without BIA "interference." Nevertheless, under the circumstances of this case, the record indicates that at the time these particular agreements were executed, not only appellant, but also Bow and BIA, believed that appellant's search had finally been successful, and that the agreements entered into were legal contracts not subject to BIA approval. Again under the circumstances of this case, the Board finds that appellant reasonably believed it was acting lawfully in placing the billboards on Bow's property, and that all parties were therefore acting under a mistake of law.

25 CFR 162.9 provides that "[i]mprovements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted." The regulation is instructive in showing that the ownership of improvements can be a matter of contract between the parties.

Because the agreements here are void, they "grant[] no rights to any party." Citation, 21 IBIA at 83. However, as is the regulation, they are instructive, this time as to the parties' intentions with regard to removal of the billboards. The agreements demonstrate that the parties anticipated that appellant would "purchase" the billboards for \$1 at the expiration of the agreements, and would remove them and restore the property to its original condition.

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<sup>14/</sup> See, e.g., Buxbom, *supra*; People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co. of California, Inc. and Desert Outdoor Advertising, Inc. v. Naegele Outdoor Advertising Co. of California, Inc., 698 P.2d 150, 38 Cal.3d 509, 213 Cal. Rptr. 247 (1985), cert. denied, 475 U.S. 1045 (1986); Morongo Band of Mission Indians v. Sacramento Area Director, 7 IBIA 299, 86 I.D. 680 (1979).

