



INTERIOR BOARD OF INDIAN APPEALS

Swinomish Tribal Community and Shelter Bay Company v. Portland Area Director,
Bureau of Indian Affairs

30 IBIA 13 (09/23/1996)

Reconsideration denied:
30 IBIA 89

Request for Secretarial review denied on April 1, 1997



United States Department of the Interior

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

SWINOMISH TRIBAL COMMUNITY
and
SHELTER BAY COMPANY

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-136-A, 95-143-A

Decided September 23, 1996

Appeals from a decision concerning a rental adjustment for a lease of Indian land on the Swinomish Reservation.

Reversed and remanded.

1. Indians: Leases and Permits: Arbitration

The scope of an arbitration provision in a lease of Indian land, including the scope of review of the arbitration decision by the Secretary of the Interior, depends upon the intent of the parties to the lease.

2. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Arbitration--Indians: Leases and Permits: Rental Rates

Where a lease of Indian land provides for arbitration to resolve a rental adjustment dispute and authorizes the Secretary of the Interior to review the arbitration decision for "reasonableness," the Secretary's task is to determine whether the arbitration decision is supported by law and substantial evidence.

3. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Arbitration--Indians: Leases and Permits: Rental Rates

Where the rent under a lease of Indian land has been adjusted in accordance with the terms of the lease, and the adjustment is reasonable, the adjustment does not conflict with the interests of the Indian landowners or the United States.

APPEARANCES: Sharon Haensly, Esq., and Allan E. Olson, Esq., LaConner, Washington, for appellant Swinomish Tribal Community; Peter L. Buck, Esq., and Amy L. Kosterlitz, Esq., Seattle, Washington, for appellant Shelter Bay Company; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; James P. Walsh, Esq., Washington, D.C., for intervenors Shelter Bay Community, Inc., and Raymond R. and Georgia G. Powers.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Swinomish Tribal Community (Tribe) and Shelter Bay Company (Shelter Bay) seek review of a June 2, 1995, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a rental adjustment for Leases 5020 and 5086 on the Swinomish Reservation. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him with directions to take the steps described below.

Background

Leases 5020 and 5086 are development leases covering approximately 400 acres of tribal and individually owned trust land on the Swinomish Reservation. Lease 5020 was approved by the Acting Area Director on August 16, 1968. A "Supplement and Amendment" to Lease 5020 was approved by an Assistant Area Director on April 22, 1969. Lease 5086 was approved by the Acting Area Director on July 31, 1969. The term of Lease 5020, as stated in amended Article 3, is 75 years beginning July 1, 1969. The term of Lease 5086, as stated in Article 3 of that lease, is 74 years beginning July 1, 1970.

Under the leases, Shelter Bay developed the property for residential and recreational use. The development now includes 866 residential lots, a marina, a golf course, and other recreational amenities. Pursuant to Article 14 of the leases, Shelter Bay entered into subleases for the 866 residential lots.

Under Article 4 of each lease, the rental was to remain unchanged for the first 24 years of the lease. 1/ Article 6 of each lease provides:

The guaranteed minimum annual rental during this lease term, as extended, [2/] shall be subject to review and adjustment by the Secretary at the end of the 24th lease year, and thereafter, at ten-year intervals. Such reviews shall give consideration to the economic conditions at the time and to land values, based on the then existing utilization authorized by Articles 7 and 9, but specifically will not consider any improvements made, placed, erected or constructed upon or to the land by the Lessee or sublessees, or the contributive value thereof to the real estate, whether such improvements are required by this lease contract

1/ Under lease 5020, the guaranteed minimum annual rental for the first 24 years was \$20,250 and, under lease 5086, it was \$7,060. In addition to the guaranteed minimums, each lease provided for rental payments of 3-1/2 percent of gross receipts from commercial operations on the leased property.

2/ The phrase "as extended" does not appear in Lease 5086.

or not. The market rental thus determined shall be the product of seven percent (7%) of the appraised fair market value of fee title to the premises herein demised, based on unimproved land values as above stated.

Ninety days prior to the time specified for aforesaid review a professional contract real estate appraiser-evaluator whose qualifications are acceptable to both parties hereto will be selected to make the appraisal within forty-five days from his selection. If the parties are unable or fail to agree on an appraiser-evaluator at the time indicated above, or, if agreeing, disagree on the findings of the appraiser-evaluator so selected, then this matter shall proceed to arbitration as provided in Article 25. The findings of the selected appraiser-evaluator when approved by the Lessee, Lessor and the Secretary, or finding of arbitration pursuant to Article 25, shall establish the annual rental to be paid by Lessee for the ensuing period, provided, however, that such rental shall not be less than \$28,880.00 [for Lease 5020; \$10,546.00 for Lease 5086]; * * *. The cost of the appraiser-evaluator shall be shared equally by the Lessor and the Lessee.

Article 25 of each lease provides:

Whenever during the term of this lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this lease, and it becomes necessary to submit a matter to arbitration for settlement, an Arbitration Board shall be established. Said Arbitration Board shall consist of three persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the other two members. If the two members selected by Lessee and Lessor are unable to agree upon a third member within twenty (20) days after selection of the second member has been made, the senior judge of the Federal District Court for the District wherein the leased premises are located shall select the third member. The costs of such Arbitration Board shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said Arbitration Board, but he cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government.

Early in 1993, in preparation for the first rental adjustment, the Tribe and Shelter Bay hired the appraisal firm of Shorette & Riely (Shorette) to prepare an appraisal in accordance with Article 6 of the leases. The appraisal was to cover the land included in both leases. ^{3/} Shorette found

^{3/} The two leases have been treated as a unit, and the Board hereafter discusses them as such.

the fair market value of fee title based on unimproved land values to be \$11,250,000 as of May 5, 1993. Based upon this valuation, annual rental would be \$787,000.

Shelter Bay disagreed with Shorett's conclusions and invoked the arbitration procedures of Article 25. Shelter Bay also arranged for two other appraisals of the property to be prepared, one by John F. Boucher and one by Bruce C. Allen. Boucher appraised the property at \$1,457,000, and Allen appraised it at \$2,000,000.

The parties chose a three-person Arbitration Board in accordance with the provisions of Article 25. At the request of the Tribe, the Arbitration Board bifurcated the proceedings so that issues concerning interpretation of the leases could be resolved prior to preparation of testimony concerning the appraisals. Hearings concerning interpretation of the leases were held on January 17 and 18, 1994. On January 21, 1994, the Arbitration Board issued an order interpreting the leases. ^{4/}

^{4/} The order stated:

"[T]he panel finds, concludes and orders as follows:

"The phrase 'land values, based on the then existing utilization authorized by Articles 7 and 9' as used in the second sentence of Article 6, Rental Adjustment, means that consideration during rental reviews shall be given to values for no land other than that which is used or is suitable for uses of the same kind as the actual utilization of the leased land at the time of the review (for example, residential community with related amenities in 1993) recognizing that such utilization must be authorized by the language and procedures of Articles 7 and 9. In essence, this constitutes designation of the highest and best use for valuation purposes. Of course, if the general development plan were changed and approved at some future time to include commercial, industrial or other non-residential uses, values for land devoted to or zoned for those uses would then be appropriate for use in the rental reviews.

"The parties clearly intended that dredging and filling work to be done by the Lessee would be an 'improvement' to the leased land within the plain, ordinary meaning of that term, as it is used in the second sentence of Article 6, just as roads, utilities, the clubhouse and the sublessees' houses would be improvements, and hence the 'contributive value' to the real estate of dredging and filling shall specifically not be considered in the rental reviews.

"The parties contemplated the costs of the development work to be done by the Lessee in the early years of the leases in accordance with then current permitting requirements and other conditions. However, they neither anticipated nor contemplated the vast changes that have since occurred in subdivision, environmental and other laws, regulations and procedures applicable to a development such as Shelter Bay, or the cost of complying with them if the project were developed at a later time. It is no surprise that the leases are silent on the appropriateness, in pursuing the Land Residual or Subdivision approach to valuation, of deductions from lot values for costs such as permitting, mitigation, litigation and other matters. In light of this, in the current or any future rental reviews

On May 23, 24, and 25, 1994, the Arbitration Board held hearings to take evidence concerning the appraisals. Prior to these hearings, all three appraisers had revised their appraisals. As revised, the three appraisals valued the property at \$10,000,000 (Shorett); \$2,368,000 (Boucher); and \$3,000,000 (Allen).

On June 10, 1994, the Arbitration Board issued its Final Order, which stated in part: "The majority of the Panel finds and concludes that the credible expert testimony supports fixing the fair market value of the fee title of the leased premises at \$3,000,000.00 as of the 24th year of the lease period. Consequently, the annual market rental of 7% of the appraised fair market value is \$210,000.00" (Final Order at 1). One panel member dissented. In his view, the property should be valued at \$4,026,678 (Final Order at 11).

On June 28, 1994, Shelter Bay submitted the arbitration results to BIA, stating that it believed the dispute concerning the rental adjustment was concluded but that the Tribe believed BIA had the authority to review the Arbitration Board's order. By letter of July 18, 1994, the Area Director informed the parties that he believed BIA had an obligation under Article 25 of the lease to review the arbitration decision in order to determine whether it was reasonable and whether it was in conflict with the interests of the Indian lessors or the United States. He therefore established a procedure for review. Under that procedure, the parties were given an opportunity to submit comments concerning the arbitration decision and the scope of BIA's review authority. The Tribe submitted extensive comments, contending, inter alia, that BIA must "independently determine the rental adjustment because the arbitration board's decision is so clearly in conflict with the interests of the Indian owners or the United States" (Tribe's Aug. 19, 1994, Comments at 13). Shelter Bay also submitted extensive comments. It contended, inter alia, that BIA was required to give deference to the arbitration decision.

fn. 4 (continued)

pursuant to the leases, using professionally recognized valuation principles is entirely acceptable, but it shall be inappropriate for the parties or appraisers to use valuation methods or extraordinary development costs related to changes in laws and regulations in a manner that renders the tidelands or any other significant portion of the property valueless or undevelopable.

"The parties contemplated that the rental stream from sublessees of the Lessee would be structured to provide security and protection for the Lessor in the event of the inability or unwillingness of the Lessee to make rental payments. The parties included provisions in the leases regarding the Secretary's approval of the sublease master form and initial and periodic review of sublease rental schedules. There is no evidence or language in the leases to suggest that the parties contemplated or intended that the result of future rental reviews would be adjustment of annual rentals payable by the Lessee to the Lessor to a level above that of the adjusted sublease rental stream."

The Area Director issued his decision on June 2, 1995. He described his approach thus: "In order to determine whether the Arbitration Board's decision was reasonable, I directed my Area Chief Appraiser to review the appraisals received by the Arbitration Board to determine if the analysis by the arbitrators was thorough and took into consideration all aspects of the appraisal process" (Area Director's Decision at 2-3).

The Area Director summarized the Area Chief Appraiser's analysis of each of the three appraisals. His decision concluded:

My Chief Appraiser believes that the Development Method utilized by two of the appraisers contains too many estimates to be considered reliable. Any error or change in assumption can result in a dramatic difference in valuation. Therefore, the arbitrators' reliance on the development approach, especially as utilized in the Allen appraisal, is considered unreasonable. Typically, the sales comparison approach of valuation is the most reliable methodology for determining the value of vacant land. The three appraisers have provided information about virtually any sale that could be remotely compared to the subject property. Of the three reports, the Shorett and Riely report provides the best analysis of sales data. However, Shorett may have overstated the value of the wetland area in that report since he applied the \$25,000 per acre valuation to the full 400 acres. * * * My appraiser believes that reasonable value for the subject property, based on the Shorett valuation analysis, is \$25,000 per acre for 300 acres, or \$7,500,000. The lease requires that a 7% rate of return be applied to the Fair Market Value to arrive at the rental value. Applying that rate to what we conclude is the fair market value would result in a rental of \$525,000 per year.

Notwithstanding this conclusion, we think that the rental adjustment is also subject to the Arbitration Board's conclusion that the adjusted rent cannot exceed the income from the subleases. * * * All of the arbitrators concurred that the lease did not intend for the rent to the landowners to exceed the sublease income. We do not believe this to be an unreasonable interpretation of the lease. We understand that the income from the subleases at Shelter Bay currently is \$303,127.50. Therefore, it is my decision that we cannot charge more than the rental income stream received by Shelter Bay. The rent due from Shelter Bay shall be the income stream of the subleases or \$525,000.00, whichever is less.

(Area Director's Decision at 4-5).

Both the Tribe and Shelter Bay appealed to the Board from this decision. Shelter Bay Community, Inc., as representative of the class of sublessees, and Raymond R. and Georgia G. Powers, as named individual sublessees (collectively, the Community), were permitted to intervene in order to present the position of the sublessees as interested parties. Briefs were filed by the Tribe, Shelter Bay, the Area Director, and the Community.

On January 23, 1996, the Board issued an order placing the Area Director's decision into partial effect. The decision required Shelter Bay to make immediate payment of rent in the amount of \$210,000 (the amount which appeared to be undisputed) for the years 1993, 1994, and 1995, and to pay 1996 rent in that amount when it became due. ^{5/} The Board reserved until this time the question of whether interest was due on these payments or on any further amount found to be due.

Discussion and Conclusions

The Area Director correctly observes that this case begins where Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, 21 IBIA 45 (1991), left off. Pittsburg & Midway was an appeal from a BIA Area Director's decision declining to submit a lease dispute to arbitration on the grounds that the mandatory arbitration provision of the lease was a nullity. The Board reversed the Area Director's decision, holding that, under most circumstances, a lease provision mandating the use of arbitration (rather than simply permitting its use) will be enforced by the Board. In support of its conclusion, the Board discussed, *inter alia*, the Federal policy favoring arbitration, as well as earlier Board and Federal court decisions applying that policy to Indian leases.

Here, as evident from the above recitation of facts, the disputed issue was submitted to arbitration in accordance with the leases. The focus of this appeal is upon the next step, *i.e.*, BIA's review of the decision of the Arbitration Board.

There is no doubt in this case that BIA is authorized to review arbitration decisions made under the leases. This is evident from the final sentence of Article 25, which states: "It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said Arbitration Board, but he cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government." However, while BIA clearly has some review authority, the extent of that authority is not beyond dispute and, in fact, is the subject of vigorous debate in this appeal.

Shelter Bay contends that BIA has very limited review authority. In summary, its argument is that the Tribe, Shelter Bay, and BIA agreed, at the time the leases were executed, that the Arbitration Board's decision would be final; that a "mutual agreement on finality is fundamental to any

^{5/} By letter of Feb. 2, 1996, Shelter Bay informed the Board that payment for the years 1993, 1994, and 1995 had been made on Jan. 31, 1996. According to the calculations attached to its letter, Shelter Bay had earlier made partial payments for the 3 years and, on Jan. 31, 1996, made a payment totalling \$393,267.18.

In making the payment ordered by the Board, Shelter Bay reserved the right to argue that the adjusted rent should be less than \$210,000 per year.

arbitration clause or agreement" (Shelter Bay's Opening Brief at 25); that "[t]he finality for which the parties bargain when they agree to arbitrate is possible only if the scope of subsequent review is extremely limited" (Id. at 26); and that BIA's authority must therefore be construed in light of the judicial review provisions of the Federal Arbitration Act, 9 U.S.C. §§ 10, 11 (1994), 6/ and decisions of the Federal courts concerning reviewability of arbitration decisions.

The Tribe argues for a much broader role for BIA. It contends that "[t]he parties agreed that the Secretary would determine the rental adjustment after the parties had tried arbitration" and that "[t]he leases in no way diminish the Secretary's duty or authority to independently ensure compliance with master lease rental adjustment provisions and federal regulations, and to determine the adjusted rental value" (Tribe's Answer Brief at 25). In the Tribe's view, the appraisal proceedings called for in the second paragraph of Article 6 are intended "to assist the Secretary in his review, and * * * to develop the factual basis for the appraisal in a

6/ 9 U.S.C. § 10(a) (1994) provides:

"In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration))

"(1) Where the award was procured by corruption, fraud, or undue means.

"(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

"(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

9 U.S.C. § 11 (1994) provides:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration))

"(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

neutral manner" (Tribe's Answer Brief at 24). In earlier stages of these proceedings, the Tribe characterized the Secretary review of an arbitration decision as de novo review. E.g., Tribe's August 19, 1994, Letter to the Area Director, which states at page 18: "The BIA should resist the temptation to restrict its review of [the] rental adjustment to the 'reasonableness' of the arbitration process and written record. Rather, [BIA's] trust responsibility requires it to conduct an independent de novo review and appraisal of land values."

The Area Director contends that the basis upon which BIA must review the arbitration decision was set out in the leases and that this basis was "reasonability, or conflict with the interests of the Indians or the Federal Government)) without any special deference" (Area Director's Answer Brief at 9).

At the outset, the Board rejects the Tribe's characterization of the rental adjustment process under Articles 6 and 25 as one in which the Secretary has totally independent authority to adjust the rental and so, presumably, may choose to disregard the arbitration results entirely if he sees fit. It is true, as the Tribe points out, that the first sentence of Article 6 states that the rental is subject to review and adjustment by the Secretary. However, the remainder of Article 6 and all of Article 25 describe the manner in which the Secretary is to review and adjust the rent. These provisions make it clear that, in a case which has proceeded to arbitration, the "finding of arbitration pursuant to Article 25 shall establish the annual rental." Thus, the parties agreed that, subject to the provisions of Article 25, including the Secretarial review described therein, the arbitration decision would control the rental adjustment.

The focus thus returns to the final sentence of Article 25: "It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said Arbitration Board, but he cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government." The standard of review described in this sentence is, for the most part, the standard described in the Area Director's brief, i.e., "reasonability, or conflict with the interests of the Indians or the Federal Government")) minus, however, the Area Director's final phrase, "without any special deference." The question of whether deference is required and, if so, to what extent, is a pivotal question in this appeal.

The Board finds that, under Article 25, BIA may review an arbitration decision for reasonableness and to determine whether it is in conflict with the interests of the Indians or the United States.

In this case, the Area Director based his decision entirely upon the "reasonableness" standard and made no finding concerning whether or not the arbitration decision was in conflict with the interests of the Indians or the United States. Therefore, the next step here is to determine what the reasonableness standard means in the context of Article 25.

In Shelter Bay's view, BIA may find an arbitration decision unreasonable only "because it is made in 'manifest disregard' of the law or because it meets the narrow statutory criteria [in the Federal Arbitration Act] for vacation or modification of arbitration awards" (Shelter Bay's Opening Brief at 28). Thus, Shelter Bay would equate BIA's review under the "reasonableness" standard with the review which would be available to the parties in Federal court under the Federal Arbitration Act.

The Area Director contends that, had it been the parties' intent to so limit BIA review, there would have been no need to provide for review by the Secretary because the parties could simply have enforced the arbitration provision under the Federal Arbitration Act (Area Director's Brief at 8).

[1] The scope of an arbitration provision, including questions of reviewability, depends upon the intent of the parties who agreed to the provision. E.g., First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1923-24 (1995). As it was put by one Federal court, "Agreements to arbitrate are essentially creatures of contract. * * * The courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." Goldberg v. Bear, Stearns & Co., Inc., 912 F.2d 1418, 1419-20 (11th Cir. 1990).

The best evidence of the parties' intent in this case is, of course, the language of the leases themselves. Also relevant are the circumstances surrounding execution of the leases. E.g., Van Ness Townhouses v. Mar Industries Corp., 862 F.2d 754, 757 (9th Cir. 1988); Pinoleville Indian Community v. Acting Sacramento Area Director, 26 IBIA 292, 295-96 (1994).

In 1968 and 1969, when these leases were executed, the Federal Arbitration Act had long been in existence. ^{7/} The Federal courts had addressed the limitations on judicial review of arbitration decisions. ^{8/} Thus, there was existing law which the parties to the leases could have referenced or incorporated, had they intended Secretarial review to be conducted in accordance with that law. Or, as the Area Director contends, the parties could have omitted Secretarial review entirely and let the matter proceed directly to court. Yet, in drafting the leases at issue here, the parties provided for Secretarial review for reasonableness, choosing a term which connotes a different, broader, standard than the existing Federal standards for judicial review of arbitration decisions. It seems highly unlikely that the parties would have chosen this term to describe the narrow review advocated here by Shelter Bay. The Board finds that the parties, in providing for BIA review on reasonableness grounds,

^{7/} Title 9 of the United States Code, concerning arbitration, was enacted into positive law in 1947. Act of July 30, 1947, 61 Stat. 669. Its provisions actually derived from earlier law, i.e., the Act of Feb. 12, 1925, 43 Stat. 883.

^{8/} E.g., Wilko v. Swan, 346 U.S. 427 (1953), overruled on grounds not relevant here, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

did not intend to limit BIA review to the standards in the Federal Arbitration Act and/or those applied by the Federal courts.

[2] If review for reasonableness is not as narrow as Shelter Bay advocates, however, it is also not the de novo review advocated by the Tribe. The Board has long applied a "reasonableness" standard in its review of rental adjustments made by BIA. In Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 184-85, 94 I.D. 172, 175 (1987), the Board stated:

The Board has a well-established standard of review in cases concerning adjustments in rental rates for leases of Indian lands. It has held that its role in such cases is to determine whether the adjustment is reasonable; that is, whether it is supported by law and substantial evidence. If it is reasonable, the Board will not substitute its judgment for BIA's. * * *

The rental adjustment cases concern the determination of "fair annual rental" or "fair annual return." * * * Such determinations require the exercise of judgment. Reasonable people, and experts, may differ in their calculation of "fair rental value."

See also Gossett v. Portland Area Director, 28 IBIA 72, 74 (1995); Strain v. Portland Area Director, 23 IBIA 113, 117-18 (1992).

It is perhaps arguable that the Board's definition of a "reasonable" decision for purposes of Board review of BIA rental adjustments)) i.e., a decision supported by law and substantial evidence)) should not be applied to BIA's review of the arbitration decision in this case. However, no party has suggested a better definition. Moreover, for purposes of continuity and certainty in BIA and Board decision-making, there is a clear benefit to be gained by defining the term "reasonable" the same way in all cases where rental adjustment decisions are reviewed for reasonableness, whether that review is undertaken by the Board or by BIA.

Therefore, the Board applies its established definition here and so finds that BIA's task in reviewing the Arbitration Board's decision for reasonableness was to determine whether that decision was supported by law and substantial evidence.

Shelter Bay contends, and the Tribe agrees, that BIA failed to review the entire arbitration record and instead based its decision only on the appraisals. E.g., Shelter Bay's Opening Brief at 31, Tribe's Answer Brief at 36. Indeed, the Area Director's decision indicates that this was the case. 9/ The appraisals, however, constituted only a part of the extensive

9/ As noted above, the Area Director stated:

"In order to determine whether the Arbitration Board's decision was reasonable, I directed my Area Chief Appraiser to review the appraisals received by the Arbitration Board to determine if the analysis by the

record which was before the Arbitration Board, a record which included transcripts of five days of hearings, over 100 exhibits accepted into evidence, and numerous pleadings filed by the parties.

In order to determine whether the Arbitration Board's decision was supported by law and substantial evidence, the Area Director was required to review the entire record which was before the Arbitration Board. Thus it was error for the Area Director to conclude that the Arbitration Board's decision was unreasonable based upon, apparently, only a partial review of the record.

Ordinarily, upon reaching such a conclusion, the Board would vacate the Area Director's decision and remand the matter to him for a new decision following his review of the entire record. However, in light of the length of time this matter has been pending, and the voluminous record which has accumulated, the Board is reluctant to prolong the delay by remanding the case to the Area Director for further proceedings. The Board has considerable experience in applying the standard of review it finds applicable here. Further, the entire arbitration record is before the Board in this appeal. Therefore, pursuant to its authority in 43 CFR 4.318, 10/ the Board undertakes to review the arbitration decision.

As indicated above, there was a split in the Arbitration Board. The majority found most persuasive the evidence supporting valuation of the property at \$3,000,000. The dissenting member valued the property at \$4,026,678. All three panel members, however, accepted the validity of the development approach for purposes of the matter before it. 11/ The majority also relied in part on the sales comparison approach but found that "only three of the land sales transactions cited by the three appraisers are truly comparable to the Shelter Bay property" (Final Order at 3). The dissenting member rejected the sales comparison approach entirely, stating that "[n]one of the supposed comparables are very similar to Shelter Bay," that "none of the appraisers satisfactorily explained how he adjusted a supposed comparable for [certain] factors," and that, "[b]ecause no truly comparable sales were found the sales analysis cannot correlate with any valuation result" (Final Order at 11).

fn. 9 (continued)

arbitrators was thorough and took into consideration all aspects of the appraisal process" (Area Director's Decision at 2-3).

Nothing in the Area Director's decision indicates that he reviewed anything in the record other than the appraisals.

10/ 43 CFR 4.318 provides: "[E]xcept as specifically limited in this part or in Title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

11/ The difference of opinion between the majority and the dissent concerned the proper amount of certain project costs for purposes of analysis under the development approach. The dissenting member believed that the majority had accepted excessive project costs, and his calculation of fair market value took into account a reduction of certain of these costs.

The majority further explained its conclusions thus:

The Panel majority found the evidence presented by Bruce Allen and Jeff Layton to be more persuasive than that provided by Larry Shorett and Lee Johnson, [12/] where there were differences. Allen's reliance upon experts to identify relevant items for inclusion in the analysis, and to estimate the quantities and costs related to such items, yielded much more complete and reliable results than taking necessarily sketchy original construction and development information and then trending the costs of such work over a 25-year period. Layton was very thorough and current in his quantity and cost estimating, where Johnson was more offhand and relied upon recollections of unit prices from as early as January, 1987. He testified that he had been semi-retired for the past three years.

Allen testified that, in revising his appraisal, he was guided by the Panel's January Order in reducing permitting costs by \$2,021,000, but that totally eliminating today's permitting costs would be inconsistent with using today's lot values in the same analysis and that, even though Shelter Bay is situated on trust land, substantial permits such as those for the sewage treatment plant still would be necessary. Even Shorett & Riely's appraisal, at p. 53, allocates \$229,000 of the \$1,000,000 cost estimate to "preliminary planning, permits and associated fees."

The Panel majority is unwilling to revise the results of the expert's land residual valuation method through selective alteration of costs. The appraisal results and testimony of both Allen and Shorett establish the sensitivity of the analysis to a broad range of cost, revenue and timing estimates, and assumptions about inflation, the discount rate and other factors. It is clear from the record that mathematical precision is secondary to exercise of sound judgment by an experienced and qualified analyst, and that correlation with the results of comparable land sales analysis will lead to a better result than reliance upon either method alone. Allen's written work and testimony indicate that his analysis and conclusions were carefully prepared and thoughtfully balanced. And he expressly stated a higher degree of comfort with a range of value of \$2,400,000 to \$3,000,000 than with the higher number alone.

The Panel majority finds that only three of the land sales transactions cited by the three appraisers are truly comparable to the Shelter Bay property, and they show strong support for a \$3,000,000 valuation of the property (400 acres at \$7,000 to

12/ Jeff Layton testified in support of the Allen appraisal. Lee Johnson testified in support of the Shorett appraisal.

\$7,500 per acre). Allen applied this per acre value to only the 300 acres of upland in arriving at his earlier opinion of total value at \$2,000,000, but this should be corrected in light of the Panel's January Order regarding the actual utilization of the entire property. Many of the transactions relied upon in the Shorett appraisal for values at and above \$25,000 per acre were either options or uncompleted sales, and most of them involved special purchaser motivation and commercial or mixed commercial and high density residential land use. The sales found by Allen and Boucher at the \$5,000 to \$5,400 per acre level were generally not water related or even water view property, and would have to be adjusted up for that reason. There are no sales transactions at \$10,000 per acre to correlate with the \$4,000,000 valuation level found by [the dissenting panel member] as a result of utilizing the land residual approach with reduced costs.

(Final Order at 3-4).

On its face, this explanation provides clear support for the arbitration decision. The arbitrators stated their reasons for giving more credence to some parts of the evidence than to other parts, explained the basis for their disagreement with the dissenting member's analysis and, impliedly at least, stated their reason for placing primary emphasis upon the development approach rather than the sales comparison approach.

Contrary to the Area Director's conclusion, the fact that the arbitrators accepted and relied upon the development approach does not render their decision unreasonable. The development approach is an accepted appraisal methodology, 13/ and there is no requirement in the leases that only the sales comparison methodology, or any other methodology, be employed.

In Gossett v. Portland Area Director, *supra*, the Board considered a contention that BIA was required to employ a certain appraisal methodology in adjusting the appellants' rentals. The Board rejected that contention, stating that none of its previous decisions had required BIA to employ any particular methodology. "Instead," the Board continued, "in recognizing that the determination of fair annual rental involves the exercise of

13/ The development approach is defined at page 25 of Interagency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisitions (1992) as "a method of appraising undeveloped acreage having a highest and best use for subdivision into lots that consists of estimating a final sale price for the total number of lots into which the property could best be divided and then deducting for all costs of development, including the developer's desired profit. The remaining sum, the 'residual,' is said to represent the raw land value."

This approach is also known as the land residual approach, developer's residual approach, and subdivision approach. Id. at n.63.

judgment, the Board has, implicitly if not explicitly, acknowledged that the exercise of judgment includes the choice of methodology to be used in determining fair annual rental." 28 IBIA at 77.

Although the sales comparison methodology is preferred if comparable sales exist, Federal courts have accepted the development approach for purposes of valuation in Federal condemnation cases. E.g., United States v. 100 Acres of Land, 468 F.2d 1261 (9th Cir. 1972), cert. denied, 414 U.S. 822 and 864 (1973). It appears that the courts consider the development approach more reliable where actual development has commenced than where the property is still undeveloped. E.g., United States v. 99.66 Acres of Land, 970 F.2d 651, 655-57 (9th Cir. 1992). See also J.D. Eaton, Real Estate Valuation in Litigation 202, 211 (American Institute of Real Estate Appraisers, 1982) (Eaton): "With a more developed site, of course, there is a stronger case for determining a highest and best use for subdivision purposes and for using the development approach to value"; "As a general rule, it can be said that as a tract of land physically and legally progresses from a state of raw acreage to a completed subdivision, the development approach also progresses from inadmissibility to admissibility." Under these principles, the completed Shelter Bay development clearly appears to have been an appropriate candidate for appraisal by the development approach.

Eaton also indicates that, even where comparable sales are available and should therefore be preferred, the development approach may "be used to support the indicated value of the property developed using comparable sales." Id. at 202. He continues: "The process used in the development approach can often give the appraiser greater insight into the relative comparability of the sale property." Id. at 202-03. The Arbitration Board majority gave greater consideration to the development approach than to the sales comparison approach. However, in light of its rejection of all but three of the sales considered by the appraisers, the majority's election to place primary emphasis on the development approach cannot be deemed unreasonable. Indeed, had the majority chosen to base its conclusion upon the sales comparison approach, when it considered such a small number of sales truly comparable, its conclusion might well have been subject to attack as unreasonable.

Further, the fact that the Arbitration Board majority rejected most of the sales considered by the appraisers does not, in itself, render the arbitration decision unreasonable. As the record shows, there were considerable differences of opinion among the various players as to the comparability of the sales considered by the appraisers. The Arbitration Board majority explained its reasons for rejecting these sales. The Board finds its explanation reasonable.

The Board has reviewed the entire record in this case. It finds ample support for the decision of the Arbitration Board. Under the "reasonableness" standard of review, it does not matter whether the Board would reach the same conclusion if it were in the position of the Arbitration Board.

The Board finds that the Arbitration Board's decision is supported by law and substantial evidence and is therefore reasonable. ^{14/}

[3] As noted above, the Area Director did not reach the issue of whether the Arbitration Board decision was "in conflict with the interests of the Indians or the United States Government." Because the Tribe raised that issue before the Area Director (See Tribe's Aug. 19, 1994, Comments at 13) and because, as discussed above, the Board is reluctant to delay resolution of this matter by remanding the case to the Area Director for further proceedings, the Board undertakes to address the issue here.

The Tribe contended before the Area Director that the Arbitration Board's "determination does not represent the fair market value of the Indian owners' trust land or the proper rental adjustment and therefore conflicts with the interests of the Swinomish landowners and the federal government." Id. at 17. Clearly, the Tribe disagreed with the Arbitration Board's determination of fair market value. However, as the Board has found, that determination was reasonable. Thus, the question is whether the Arbitration Board's determination of fair market value, although reasonable, may yet be in conflict with the interests of the Indian landowners or the United States.

Under leases 5020 and 5086, the Indian landowners are entitled to receive rental based upon fair market value. In this case, fair market value was determined in accordance with the terms of the leases and has been found reasonable. The Indian landowners will receive the rental they are entitled to receive under their leases. Accordingly, the Board finds no conflict between the Arbitration Board decision and the interests of the Indian landowners or the United States.

One final question remains to be addressed. That is the question of whether Shelter Bay owes interest on the rentals it paid on January 31, 1996, pursuant to the Board's January 23, 1996, order.

Article 4.B of the leases provides:

Rental unpaid thirty (30) days after the due date shall bear interest at eight percent (8%) per annum from the date it becomes due until paid, but this provision shall not be construed to relieve the Lessee from any default in making any rental payment at the time and in the manner herein specified. The rents called for herein shall be paid without prior notice or demand.

^{14/} It appears likely that the arbitration proceedings in this case were more formal than is the norm for arbitration. The Board is aware that transcripts of arbitration proceedings and written arbitration decisions as extensive as the one in this case may not always be available for BIA to review.

However, where a lease of Indian land calls for arbitration and for BIA review of the arbitration decision for reasonableness, it is the responsibility of the parties to the lease to ensure the creation of a record sufficient to permit BIA review.

Shelter Bay contends that this interest provision does not pertain to rental adjustments pursuant to Article 6 and that "[n]owhere does the Lease indicate that interest is due on payments held in abeyance due to a legitimate dispute regarding the rental amount due" (Shelter Bay's Response to BIA Request and Tribal Motion for Payment of Rent and Bond at 8). Shelter Bay characterizes the interest provision as a penalty and contends that it should not be required to pay a penalty for a delay that was, in Shelter Bay's view, primarily the fault of the Tribe and BIA. Shelter Bay further contends that Washington State case law concerning damages is analogous to the situation here and that "[t]he common law in the state of Washington is that damages must be liquidated or determinable without discretion before interest may be awarded." Id. at 10-11.

The Tribe contends that Article 4.B requires the payment of interest in this case and that, even if it does not, the Board has the discretion to order the payment of interest and should do so because the equities weigh in favor of the Indian landowners. In the Tribe's view, it is Shelter Bay which bears primary responsibility for the delay in resolving this dispute.

The Area Director contends that "the only way to avoid application of [the interest provision in Article 4.B] to the adjusted rental is to construe the rent as 'not due' at the end of the 24th year" and that "[n]othing in the lease suggests that the adjusted rent is not due until this dispute is resolved" (Area Director's Reply Re Undisputed Rent and Bond at 3-4). The Area Director also contends that the interest provision is not a penalty but is intended to ensure that the landowners do not suffer from a delayed receipt of rental. Further, he contends, because Shelter Bay had the use of the unpaid rentals during the pendency of this dispute, it would reap a windfall, and the landowners would not receive adequate compensation, unless interest is required. Finally, the Area Director agrees with Shelter Bay that the Washington State courts do not award interest on unliquidated damage judgments. He contends, however, that this is not a damage judgment but a contractual obligation and that Washington State courts have awarded interest in cases where determination of the amount of a contractual obligation has been delayed.

On its face, Article 4.B appears to apply here. Neither Article 4.B nor Article 6 indicates that the interest provision is not intended to apply in the case of a rental adjustment dispute, even where the dispute is as extended as this one has been. Further, there is no explicit statement in the lease that the interest provision is intended to be a penalty. The Board considers it likely that the interest provision has dual purposes)) to encourage prompt payment of rentals by Shelter Bay and to compensate the landowners for delays in receiving rentals. In any event, whatever its purpose, Article 4.B is a part of the contract between the parties.

In Aghjayan v. Acting Portland Area Director, 29 IBIA 128, 133 (1996), the Board rejected a lessee's contention that he should not be required to pay interest at the 18 percent rate specified in his lease. Although the lessee offered to pay interest at the rate then charged by banks, the Board rejected his contention and offer, noting that they were based upon the

faulty premise that he was simply borrowing money from the landowners. The Board found that the lessee's failure to pay rent had deprived the landowners of money which they had a right to receive under the lease and that they were therefore entitled to be compensated at the rate of interest specified in the lease.

Shelter Bay contends that one of the landowners in this case, *i.e.*, the Tribe, shares the blame with BIA for the delays in resolution of this matter. Shelter Bay and the Tribe trade accusations on this point. The record shows that there were delays in proceedings at various points and that, while either or both of the parties might be seen as the cause of some of the delays, each might also be seen as simply acting to protect its interests. The Tribe cannot be blamed for any delay which may have been the fault of BIA; and the individual landowners, who did not participate in any of the proceedings, clearly cannot be blamed for any of the delays. Therefore, assuming *arguendo* that the leases could be interpreted as allowing Shelter Bay relief from the interest requirement when delays in rental payments are the fault of the Indian lessors, the Board finds that the delays in this case cannot be deemed the fault of the Indian lessors.

The Board finds that, under Article 4.B of the leases, Shelter Bay must pay interest on the amounts of the 1993, 1994, and 1995 adjusted rentals which were unpaid 30 days after the due dates and further finds that interest is due for the periods between the due dates and January 31, 1996, when payment was made.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's June 2, 1995, decision is reversed. This matter is remanded to him with instructions (1) to approve the rental adjustment for Leases 5020 and 5086 in accordance with the June 10, 1994, Final Order of the Arbitration Board and (2) to calculate the amount of interest owed by Shelter Bay and bill Shelter Bay therefor. 15/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

15/ The Board finds it unnecessary to reach the question of whether the adjusted rent must be limited to the "income stream" from the subleases.