



INTERIOR BOARD OF INDIAN APPEALS

Vivian Chicharello v. Southern Plains Regional Director, Bureau of Indian Affairs

39 IBIA 195 (11/21/2003)

Related Board case:  
37 IBIA 1



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

VIVIAN CHICHARELLO, : Order Affirming Decision  
Appellant :  
 :  
v. :  
 : Docket No. IBIA 02-146-A  
SOUTHERN PLAINS REGIONAL :  
DIRECTOR, BUREAU OF INDIAN :  
AFFAIRS, :  
Appellee : November 21, 2003

Appellant Vivian Chicharello seeks review of a June 25, 2002, decision issued by the Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an amendment to a residential lease under which Appellant is the lessee. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Appellant's lease covers a one-acre tract within Navajo Allotment SF 020169 1/ and was approved on September 1, 1981, by the Superintendent, Eastern Navajo Agency, BIA, for a term of 25 years, with an automatic renewal for an additional 25 years.

On February 28, 2000, the Acting Navajo Regional Director, BIA (Navajo Regional Director), approved an amendment to the lease. The amendment extended the lease term through February 27, 2050, and stated that its purpose was to enable Appellant to obtain a leasehold mortgage. As authority, the amendment cited 25 U.S.C. § 4211(b). 2/

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1/ The allotment number is variously described in the administrative record as SF 020169 and 220169. For purposes of this decision, the Board uses SF 020169, which is the allotment number shown on Appellant's residential lease.

2/ 25 U.S.C. § 4211 provides:

“(a) Authority to lease

“Notwithstanding any other provision of law, any trust or restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, subject to the approval of the affected Indian tribe and the Secretary of the Interior, for housing development and residential purposes.

“(b) Term

“Each lease pursuant to subsection (a) of this section shall be for a term not exceeding 50 years.”

By memorandum dated October 23, 2000, the Deputy Commissioner of Indian Affairs delegated authority to the Southern Plains Regional Director to “exercise the authority of the Secretary to approve, modify, or disapprove any and all realty transactions that affect any allotment within the Navajo Region in which the Navajo Regional Director has an ownership interest.” The Navajo Regional Director is a co-owner in Navajo Allotment SF 020169. Therefore, pursuant to the Deputy Commissioner’s delegation of authority, this matter was transferred to the Southern Plains Regional Director.

After reviewing the administrative record, on November 6, 2000, the Regional Director concluded that the February 28, 2000, lease amendment “was not properly executed and agreed to by all parties in ownership and was approved without proper authority and is therefore invalid and of no force or effect.” Nov. 6, 2000, Decision at 2. He held that Appellant’s original lease remained in effect and would expire on August 31, 2031.

Appellant appealed this decision to the Board. In his answer brief, the Regional Director requested that the matter be remanded to him so that he could reconsider his decision. No party objected to the request. The Board vacated the Regional Director’s November 6, 2000, decision and remanded the matter to him. 37 IBIA 1.

The present appeal is from the Regional Director’s June 25, 2002, decision on remand. In that decision, the Regional Director found that because Allotment SF 020169 was located outside the boundaries of the Navajo Reservation and in the State of New Mexico, the term of the lease could be up to ninety-nine years under 25 U.S.C. § 415. <sup>3/</sup> He therefore held that the lease amendment was not invalid because it created a lease term of sixty-nine years. Appellant has not appealed from this holding.

The Regional Director next addressed the question of whether the lease amendment was properly processed and approved. He found that Mary Ortiz, who owned a 1/3 undivided interest in the allotment, did not sign the lease amendment. He further found that the amendment was signed on her behalf with the statement that her “signature could not be obtained,

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<sup>3/</sup> Section 415(a) states in pertinent part:

“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 \* \* \* residential \* \* \* purposes \* \* \*. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, \* \* \* which may be for a term of not to exceed ninety-nine years \* \* \*. [A]ll leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior.”

pursuant to 25 CFR 162.2(a)(4).” 4/ However, citing Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1 (1992), 5/ the Regional Director found that there was no evidence in the record that the owners of Allotment SF 020169 had been given a three-month opportunity to negotiate an amendment to Appellant’s lease, as provided in 25 C.F.R. § 162.2(a)(4) (2000). The Regional Director discussed two other methods under which the amendment could have been approved without Ortiz’ consent. Although noting that there were logistical problems with both methods, he found that neither method had been used. Based on these findings, the Regional Director held:

Extending the term of a lease is a major action which significantly affects the rights of the landowners. Such an action requires the consent of the adult owners and the Secretary must exercise diligent care of how such an action is executed. Our trust responsibility is to the landowners, who are the lessors. It is my decision that the 2000 Amendment was not properly executed and was approved without proper authority and is therefore not valid and of no force or effect. The original residential lease stands in operation, no terms changed or modified by this decision. The lease will expire as originally provided, August 31, 2031.

June 25, 2002, Decision at 3.

Appellant appealed from this decision, providing a statement of her reasons for appeal in her notice of appeal. She opted not to file an opening brief. Answer briefs were filed by the Regional Director and Ortiz. Appellant did not file a reply brief.

Appellant’s primary argument is that the Regional Director’s decision is not consistent with the “long-standing policy and procedure of the Navajo Area BIA.” Notice of Appeal at 3. She contends that the policy of the Navajo Regional Office does not require that an allotment

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4/ When the lease amendment was approved, section 162.2, Grants of Leases by Secretary, provided:

“(a) The Secretary [of the Interior] may grant leases on individually owned land on behalf of:

\* \* \* \* \*

“(4) The heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees.”

Compare 25 C.F.R. § 162.601(a)(4) (2003).

5/ Affirmed, Pipes, Inc. v. United States, No. 92-C-373-B (N.D. Okla. Dec. 4, 1992).

owner obtain a residential lease to live on her own allotment, and asks the Board to obtain information from the Navajo Regional Office about this policy. Appellant buttresses this argument with contentions that the Regional Director's decision is arbitrary, discriminates against her, and denies her due process and equal protection because it does not follow the policy of the Navajo Regional Office.

If the Navajo Regional Office has in any way violated applicable leasing statutes and/or regulations, that fact does not give Appellant a right to have those statutes and/or regulations violated on her behalf. Once legal error has been discovered, due process and equal protection do not prevent the government from correcting that error. The question therefore is not what the policy of the Navajo Regional Office has been in regard to residential leases, but is rather whether the amendment to Appellant's lease was properly approved. 6/

Appellant contends that although the Regional Director requested the remand in order to comply with the three-month period in which the landowners could negotiate a lease amendment, he did not do so. The Board does not know why the Regional Director did not establish a period for negotiating a lease, although it may have been because the Board did not state the beginning date for any such period, as the Regional Director requested. 7/ However, the fact that the Regional Director did not provide the three-month opportunity to negotiate a lease does not mean that Appellant prevails in her appeal. Again, the question is whether the lease amendment was properly approved.

Apart from her discrimination, due process, and equal protection arguments--which the Board rejects--Appellant does not seriously challenge the Regional Director's legal conclusion that the lease amendment was not properly approved. The Board finds that Appellant has not

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6/ Because it is unnecessary to this decision, the Board makes no finding regarding the policy and practice of the Navajo Regional Office in regard to residential leases.

Appellant asserts that there are others living on Allotment SF 020169 without residential leases. If this is the case, Appellant's remedy, as a co-owner of the allotment, is not to have her own lease amendment approved in violation of the applicable statutes and/or regulations, but rather to seek action from BIA to remove those persons from the allotment or to obtain proper leases. Appellant suggests that such action would not be forthcoming because of conflicts of interest and family ties. The Deputy Commissioner took action here to ensure that BIA decisions were not tainted by conflicts of interest. The Board declines to assume that similar action would not be taken in the future, if it were necessary.

7/ The Board, apparently mistakenly, believed that it was evident that the period would begin with notification to the other co-owners by BIA that Appellant had requested an amendment to her lease.

carried her burden of proving error in the Regional Director's decision. The Regional Director's June 25, 2002, decision is therefore affirmed. 8/

Based on this holding, as stated by the Regional Director, Appellant's lease remains in effect as it was approved in 1981.

If Appellant wishes to continue to seek an amendment to her existing lease, BIA must consider her request under the current statutes and regulations governing leasing of allotments in joint ownership. Those statutes include, to the extent applicable, the Indian Land Consolidation Act Amendments of 2000, Pub. Law No. 106-462; and the American Indian Agricultural Resources Management Act of December 3, 1993, 107 Stat. 2011, 25 U.S.C. §§ 3701 et seq., as amended on November 2, 1994, 108 Stat. 4572. Other statutes might also apply. Furthermore, BIA must address Appellant's request under the current regulations in 25 C.F.R. Part 162. If the co-owners of Allotment SF 020169 do not agree on an amendment to Appellant's lease, BIA must consider all of the limitations on its authority to grant leases before determining whether it can grant a lease here on behalf of a non-consenting co-owner.

BIA is reminded that, unless there is an owner's use policy in effect covering the allotment at issue, or there is agreement among the owners, the fact that a person wanting to use an allotment holds an undivided interest in the allotment does not allow that person to use the allotment without compensating the other undivided interest holders. See cases cited in footnote 8 above. In this regard, the co-owners might wish to pursue the possibility of resolving their disagreement over use of this allotment through mediation or some other form of alternative dispute resolution. The Board has found that individuals can be quite creative in the ways they resolve disagreements when given the opportunity.

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8/ As discussed below, BIA must consider any future request from Appellant to amend her lease under statutes and regulations that may differ from those under which the amendment was initially considered. Because of this, the Board finds that an extended discussion of the Regional Director's decision in this opinion is not necessary or appropriate.

The Board notes, however, that Peace Pipes remains good law. Furthermore, in decisions regarding the leasing of jointly owned allotments, BIA's trust responsibility is to the landowners, not to the lessee, even though the lessee may be Indian and a co-owner. See Smith v. Acting Anadarko Area Director, 34 IBIA 283 (2000); Racquet Club Properties, Inc. v. Acting Sacramento Area Director, 25 IBIA 251 (1994); Gullickson v. Aberdeen Area Director, 24 IBIA 247 (1993); Moses v. Acting Portland Area Director, 24 IBIA 233 (1993).

Appellant argues that making only her comply with these requirements is unfair. As already mentioned, the Board does not make a finding as to the prior policy and practice of the Navajo Regional Office. As to the future, the Board declines to assume that any BIA office would not follow a Board decision setting out legal requirements.

As an alternative, the co-owners of Allotment SF 020169 might also wish to consider the possibility of partitioning their undivided interests in the allotment, so that each of them owns the full interest in a portion of the allotment. Partitioning might provide a permanent solution to some of the problems which appear to have arisen here because of disagreements among the co-owners.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's June 25, 2002, decision is affirmed. 9/

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// original signed  
Kathryn A. Lynn  
Administrative Judge

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// original signed  
Kathleen R. Supernaw  
Acting Administrative Judge

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9/ Other arguments not specifically addressed were considered and rejected.