



INTERIOR BOARD OF INDIAN APPEALS

Chris Thompson and Thompson Farms v. Acting Northwest Regional Director,
Bureau of Indian Affairs

40 IBIA 216 (01/28/2005)

Judicial review of this decision:

Affirmed as to Lease 94-169; reversed as to Lease 427, *Thompson v. U.S.*

Dep't. of Interior, No. CV 05-044-E-BLW, 2005 WL 2367537 (D. Idaho Sept. 27, 2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CHRIS THOMPSON and THOMPSON FARMS,	:	Order Affirming Decision
Appellants,	:	
	:	
v.	:	Docket No. IBIA 02-124-A
	:	
ACTING NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	January 28, 2005

Chris Thompson and Thompson Farms (collectively, Appellants) appeal from a May 3, 2002, decision of the Acting Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming the cancellation of Fort Hall Leases 427 and 94-169, under which Thompson Farms is the lessee by assignment and the Shoshone-Bannock Tribes of the Fort Hall Reservation (Tribe) is the lessor. For the reasons discussed below, the Board affirms the Regional Director’s decision.

Background

Lease 427 covers 2.07 acres of tribal land and authorizes use of the land for a “[p]otato storage building and appurtenant facilities including parking area.” Lease at 1. The lease was approved by the Superintendent, Fort Hall Agency, BIA (Superintendent; Agency), on October 5, 1966, for a term of 25 years beginning May 1, 1966, with an option in the lessee to renew for another term not to exceed 25 years. The original lessee was the Fort Hall Storage Company (FHSC).

According to Appellants, FHSC constructed three storage buildings on the property in the late 1960’s. On June 14, 1979, FHSC and Thompson Farms executed a document titled “AGREEMENT TO ASSIGN LEASE” in which FHSC agreed “to sell, assign, transfer and set over unto [Thompson Farms] all of the rights of [FHSC] as lessee under: [Lease 427], and in and to the premises therein described, together with all leasehold improvements situated upon the said premises and owned by [FHSC].” June 14, 1979, Agreement at 1. FHSC agreed to surrender possession of the leased premises on or before August 1, 1979, and Thompson Farms agreed to pay compensation to FHSC in installments, with the final installment due on August 1, 1989. On page 4, the agreement provided: “Upon full payment of the aforesaid

consideration, * * * [FHSC] agrees to execute and deliver to [Thompson Farms] a good and sufficient assignment of its rights as lessee under the said Lease No. 427, duly approved for transfer to [Thompson Farms] by the lessors therein named, or their duly authorized representatives.”

On November 7, 1979, FHSC executed an assignment of the lease to Thompson Farms, and Thompson Farms agreed to “to fulfill all obligations, conditions, and stipulations contained in said lease.” Assignment at 1. The Tribe consented to the assignment on October 9, 1979, and the Superintendent approved it on January 9, 1980.

Seven months later, on August 6, 1980, Thompson Farms and G-R Farms executed an agreement very similar to the June 14, 1979, agreement between FHSC and Thompson Farms, except that it concerned only part of the leased premises and bore a different title, *i.e.*, “AGREEMENT TO SELL POTATO[] STORAGE.” Under the agreement, Thompson Farms agreed “to sell, assign, transfer and set over unto [G-R Farms] all of the rights of [Thompson Farms] as lessee under: Part of [Lease 427], and in and to the premises therein described, together with all leasehold improvements situated upon the said premises and owned by [Thompson Farms].” Aug. 6, 1980, Agreement at 1. Thompson Farms agreed to surrender possession on or before August 1, 1980, and G-R Farms agreed to pay compensation to Thompson Farms in installments, with the final installment due on August 1, 1990. On page 4, the agreement provided:

Upon full payment of the aforesaid consideration, * * * [Thompson Farms] agrees to execute and deliver to [G-R Farms] a good and sufficient assignment of its right, namely One-third interest, under the said Lease No. 427, duly approved for transfer to [G-R Farms] by the lessors therein named, or their duly authorized representatives.

Thompson Farms did not execute a formal assignment or sublease to G-R Farms, and there is no indication that the Tribe ever consented to an assignment or sublease to G-R Farms. No assignment or sublease document was ever approved in writing by a BIA official.

According to Chris Thompson’s January 18, 2002, affidavit, he went to the Agency in May 1982 to discuss the use of the leased premises by G-R Farms with the then Superintendent, 1/ who “gave oral approval for the use by G-R Farms, subject only to the condition that G-R Farms comply with the lease terms.” Jan. 18, 2002, Thompson Affidavit

1/ This individual is hereafter referred to as the “former Superintendent.” A number of other individuals have served as Superintendent or Acting Superintendent during the course of the events described in this decision. The other individuals are all referred to simply as the “Superintendent.”

at 3. Thompson did not explain why he waited for nearly two years to seek the former Superintendent's approval.

On October 23, 1990, Thompson Farms notified the Tribe and the Agency of its intent to exercise its option to renew the lease for another term of 25 years.

On August 30, 1994, the Tribe and Thompson Farms entered into Lease 94-169, a business lease for 2.92 acres of tribal land adjacent to the land covered by Lease 427. Lease 94-169 was approved by the Superintendent on August 30, 1994, for a term of 22 years beginning January 1, 1994, for the purpose of "[t]ruck unloading area, equipment storage, and also as access to adjacent warehouse facilities."

On February 1, 1996, the Agency was visited by a tribal employee who expressed concern about subleasing. BIA employees discussed the possibility that subleasing was occurring but, as far as the record shows, did not pursue the matter.

On August 16, 2001, the Tribe's Business Council, acting upon the recommendation of the Tribal Land Use Commission, enacted a resolution approving the cancellation of Lease 427. The Business Council forwarded the resolution to the Superintendent on September 6, 2001.

The Agency conducted inspections of both Lease 427 and Lease 94-169. In a September 19, 2001, memorandum, the Agency Supervisory Soil Specialist reported that G-R Farms was using one of the three storage buildings on Lease 427 and that Thompson Farms was using the other two buildings. He also reported that both G-R Farms and Thompson Farms were using Lease 94-169 as an access road and for equipment staging and tare dirt storage. He recommended that both leases be cancelled for unauthorized subleasing.

On September 25, 2001, the Superintendent wrote to Chris Thompson, stating that the inspection had revealed subleasing of Leases 427 and 94-169 to G-R Farms. Further stating that such subleasing was a violation of the leases, she gave Thompson Farms ten days to show why its leases should not be cancelled.

Chris Thompson responded on October 1, 2001, stating:

I am not in violation of the lease agreement. I sought and received permission for [G-R Farms] to use one of the storage buildings. The permission was granted for an indefinite period of time as long as all terms and conditions of said leases are met, which they have been.

Permission for [G-R Farms] to use one of the buildings for potato storage was given to me, although the permission was not in writing, permission

was given by the [former S]uperintendent. I am not sure if you are aware of the granted permission, but there are several of your employees that are.

If you refer to item #18 in the original lease #427, you will read that subleasing is allowed as long as the Superintendent approves it. It does not state that it must be in writing. It states that it must be approved, which it was. Therefore, I am not in violation of any of the terms of the lease #427 and several of your employees are aware of this.

Chris Thompson discussed the matter with the Tribe's Business Council and made an offer which the Business Council rejected. On October 25, 2001, the Business Council enacted a resolution reaffirming its request for the cancellation of both leases.

On October 30, 2001, the Superintendent cancelled both leases.

Appellants appealed the cancellation to the Regional Director, who affirmed it on May 3, 2002. Appellants then appealed to the Board. In the hope that the parties could settle their dispute, as the Regional Director had suggested in his decision, the Board referred the matter to the Department's Office of Collaborative Action and Dispute Resolution. However, that Office concluded that settlement would not be possible and so returned the matter to the Board.

Briefs have been filed by Appellants and the Regional Director. The Tribe has not participated in this appeal. 2/

Discussion and Conclusions

Appellants contend that, in May 1982, the former Superintendent gave oral approval to the use of Lease 427 by G-R Farms; that the approval also applied to Lease 94-169; and that

2/ On Sept. 16, 2002, the Board received a filing from Appellants titled "Brief in Opposition to the Tribes' Request for Posting of Bond during Pendency of Appeal." The Board did not receive such a request from the Tribe and so advised the parties in an Oct. 9, 2002, order.

the approval was valid because written approval was not required. 3/ They also contend that BIA is estopped from cancelling either lease.

The Regional Director does not dispute Appellants' contention that the former Superintendent purported to give oral approval to the use of Lease 427 by G-R Farms. Accordingly, for purposes of this decision, the Board accepts as proven that the former Superintendent orally represented to Appellants in May 1982 that he was approving a sublease of Lease 427 to G-R Farms. 4/

Appellants may also be arguing that a document signed by the former Superintendent, apparently in April 1986, constituted written approval of a sublease of Lease 427 to G-R Farms. Appellants refer to the document both as written approval and as documentary proof that approval had been given earlier.

The document is titled "LANDLORD WAIVER" and states in its entirety:

The Bureau of Indian Affairs being the lessor of a certain BIA Lease #427 (legal description attached) does hereby waive any and all interest they may have in the leasehold improvements situated upon said leased ground and more particularly, consisting of one potato storage building, with equipment for ventilation.

3/ Perhaps in an attempt to avoid using the term "sublease," Appellants sometimes refer to the "use" of the leased premises by G-R Farms without further defining the use. At other times, however, they refer to the use by G-R Farms as a sublease. They explicitly identify the Aug. 6, 1980, agreement as the "sublease document," see, e.g., Appellants' Opening Brief at 10, and base some of their arguments on lease provisions governing subleases and assignments.

The Board finds that Appellants have acknowledged the use by G-R Farms to be use pursuant to a sublease. In any event, they have failed to suggest any "use," other than use pursuant to a sublease or assignment, that would justify the presence of G-R Farms on the leased premises.

4/ Provision 18 of Lease 427, quoted infra, 40 IBIA at 223, requires approval of a "sublease document." Although Appellants have characterized the Aug. 6, 1980, agreement as the "sublease document," they do not contend that they presented that document to the former Superintendent for approval. The record suggests that they did not. According to the Regional Director's decision, no copy of the agreement was found in the Agency's files when this dispute arose. Regional Director's May 3, 2002, Decision at 5 n.2. Nevertheless, for purposes of this decision, the Board will assume that the former Superintendent purported to approve the Aug. 6, 1980, agreement, and not merely a generic subleasing arrangement between Thompson Farms and G-R Farms.

Further more, the undersigned waives in favor of [Idaho Bank & Trust] all right to distrain or levy upon the above mentioned potato storage building for rent due from the lessee and authorizes the Bank to enter the premises for purposes of inspection, protection or collection of their security interest.

The document was signed by the former Superintendent on behalf of BIA, and a copy was placed in the Agency's file for Lease 427. 5/ The document is undated but shows receipt at the Agency on April 21, 1986.

Appellants contend that this document concerned a loan sought by G-R Farms and that, even though the document does not identify the borrower, the former Superintendent must have known that G-R Farms was the borrower because the person who sought approval of the document was a principal of G-R Farms, not a principal of Thompson Farms. Appellants reason: "Implicit in the [former] Superintendent's agreement to allow G-R Farms to encumber the potato storage building—risking foreclosure if G-R farms did not make good on the loan—is that the [former] Superintendent was aware of and had approved the use by G-R Farms." Appellants' Opening Brief at 9.

To the extent Appellants may be contending that this document constituted approval of a sublease per se, the Board rejects that contention. The document does not even purport to be an approval of a sublease. To the extent Appellants are contending simply that the document is proof of the former Superintendent's earlier oral approval, the Board need not consider the contention, because the Board has already accepted as proven that the former Superintendent purported to give oral approval to a sublease of Lease 427 to G-R Farms.

Appellants further contend that the former Superintendent's oral approval of a sublease of Lease 427 to G-R Farms in May 1982 and his signature on the "Landlord Waiver," apparently given in April 1986, constituted consent to a sublease of Lease 94-169. 6/ They acknowledge, however, that Lease 94-169 was not entered into until August 30, 1994. They offer no theory under which the two events upon which they rely, which occurred long before Lease 94-169 came into existence, could have constituted consent to a sublease of

5/ Despite the representation made in the document, BIA is not the lessor under Lease 427. Nothing before the Board shows that the true lessor, i.e., the Tribe, authorized the former Superintendent to sign this document on its behalf.

6/ Provision 15 of Lease 94-169 states:

"With the consent of the Secretary, this lease may be subleased in whole or in part but the sublessor shall in no way be relieved from any liability encumbered by the terms of the lease nor shall the supervisory authority of the Secretary be diminished. Sublessor will be held responsible for payments of all rentals, operation and maintenance charges, and other charges applicable under the lease."

Lease 94-169. The Board rejects Appellants' contention and finds that no BIA official ever gave consent to a sublease of Lease 94-169.

Next, Appellants argue that the former Superintendent's oral approval of a sublease of Lease 427 was valid because there was no requirement that his approval be in writing.

In 1966, when Lease 427 was entered into, the regulatory provision governing subleases was 25 C.F.R. § 131.12 (1966). 7/ 25 C.F.R. § 131.12(a) provided:

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties. [8/]

7/ All further references to 25 C.F.R. Part 131 are to the 1966 edition.

8/ The remainder of sec. 131.12 provided:

“(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

“(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument, must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold without the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

“(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.”

Lease 427 has two provisions concerning subleasing. Provision 4, a part of the standard printed lease form, states: “SUBLEASES AND ASSIGNMENTS.—Unless otherwise provided herein, a sublease, assignment or amendment of this lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties.” Provision 18, a typewritten addition to the standard form, states:

SUBLEASING.—Lessee will be granted permission to sublease or assign all or any part of the land in this lease to a third party provided said sublease document is approved by the Superintendent of the Fort Hall Agency and is not in any way inconsistent with the provisions of this contract.

Appellants contend that, as between provisions 4 and 18, provision 18 is controlling. The Board agrees. Provision 4 contemplates that other provisions concerning subleases might be included in the lease and indicates that any such additional provision would be controlling. As it happens, however, there are no distinctions between the two provisions that are material to this appeal.

The requirement for Secretarial approval is essentially the same in both lease provisions and the relevant regulation, 25 C.F.R. § 131.12(a). None of the three provisions explicitly states that approval must be in writing.

In his May 3, 2002, decision, the Regional Director stated:

[Lease 427] does not explicitly require that the Superintendent’s approval be in writing. However, it is standard practice to require written approval of leases and documents affecting the leases, such as subleases. Furthermore, the statute of frauds requires that real estate contracts over one year in duration must be in writing.

Regional Director’s May 3, 2002, Decision at 9.

Appellants contend that there is no proof in the record that BIA’s standard practice is to require written approval of subleases and that, even if there were, BIA’s standard practice would not be sufficient to overcome the “plain language of the lease[],” which, in their view, authorizes oral approval of a sublease. Appellants’ Opening Brief at 11.

Appellants also contend that no statute of frauds applies here because the agreement at issue, *i.e.*, the August 6, 1980, agreement between Thompson Farms and G-R Farms, is in writing; the approval requirement is a creature of the leases and BIA regulations, rather than state law; and, even if a statute of frauds applied, the doctrine of past performance would remove the relationship of Thompson Farms and G-R Farms from the statute of frauds.

In his answer brief, the Regional Director argues that, contrary to Appellants' assertion, there is proof in the record that BIA's standard practice is to require written approval of lease documents. He points to the document by which FHSC assigned Lease 427 to Thompson Farms.

The Regional Director also argues that "the reference to the statute of frauds in [his] decision is best understood as a reference to the standards by which business is conducted and the reasonable understandings of parties doing business." Regional Director's Answer Brief at 2. He continues: "[R]easonable business expectations about certain documents, and indeed their validity, often are premised on the documents being in writing. See, e.g., Idaho Code § 9-505. Given that BIA's approval is necessary to prevent the sublease to G-R farms from being a breach of the lease, it is not unreasonable to expect that its approval must be in writing." Id.

With respect to proof of BIA's standard practice, there are two documents in the record which qualify as such proof. The document most relevant here is the assignment referred to in the Regional Director's brief. That document has significance beyond the single transaction it records because it was prepared on a standard printed BIA form. The form is titled "ASSIGNMENT OF AGRICULTURAL OR BUSINESS LEASE," has a form number, and bears a printed provision for approval by a BIA official. The provision reads: "The foregoing assignment is hereby approved, effective _____, 19___. It is followed by a space for the signature of a BIA official. The Board finds that the inclusion of a printed approval provision on a printed BIA assignment form is evidence of a standard BIA practice to require written approval of assignments of leases. 9/

The record does not include a standard BIA sublease form. However, subleases and assignments are subject to the same regulatory provisions and the same standard lease provisions. Under these circumstances, there is no reason to believe that BIA would not follow the same standard practice, with respect to a requirement for approval in writing, for both kinds of transactions. Even so, BIA's standard practice in this regard, while instructive, is not enough to show that written approval was required in this case.

As far as "reasonable business expectations" are concerned, the Board agrees with the Regional Director that such expectations should have led Thompson Farms and/or G-R Farms to seek written approval of the sublease. Both parties evidently understood that the sublease required approval and, as reasonable business operators, should have wanted to ensure that

9/ The other document in the record is an Aug. 14, 1967, assignment of Lease 427 by FHSC to the Economic Development Administration as consideration for a loan. That document was not prepared on a standard BIA form. It was, however, approved in writing by a BIA official, in this case, the Acting Assistant Area Director (Economic Development), Portland Area Office, BIA, who gave his written approval on Aug. 15, 1967.

they had written proof of that approval. However, as is the case with BIA's standard practice, "reasonable business expectations" are not enough to show that written approval was required in this case.

More important is the proper interpretation of the sublease provisions in Lease 427 and the regulatory sublease provision in 25 C.F.R. § 131.12(a).

As noted above, Appellants contend that, because Lease 427 did not explicitly require written approval of subleases, it authorized oral approval. The essence of this argument is that the lease language is ambiguous. Even assuming that an ambiguity is present here, however, that ambiguity can be overcome by the interpretation given the lease language by the parties to the lease. See, e.g., Plains Marketing and Transportation, Inc. v. Acting Muskogee Area Director, 37 IBIA 73, 83 (2001); Plumage v. Billings Area Director, 19 IBIA 134, 140 (1991) (An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties).

In this case, the supposedly ambiguous lease language was subject to interpretation on two occasions prior to the events giving rise to this appeal—*i.e.*, on August 15, 1967, and January 9, 1980, when the two assignments discussed above were approved. On both occasions, the written approval of a BIA official was obtained. Plainly, the original lessee, FHSC, understood that written approval was required.

Thompson Farms was a party to the assignment approved on January 9, 1980, as well as to the June 14, 1979, agreement which preceded the assignment. Appellants were thus aware that FHSC had interpreted the lease language as requiring written approval. ^{10/} Chris Thompson signed the assignment form on behalf of Thompson Farms, agreeing "to fulfill all obligations, conditions, and stipulations contained in [Lease 427]." Thus, Appellants were not only aware of the interpretation of the lease language reflected in the assignment (*i.e.*, an interpretation requiring the written approval of a BIA official) but also agreed to abide by that interpretation.

^{10/} Appellants were also aware that, in seeking written approval of a formal assignment document, FHSC recognized that the June 14, 1979, agreement was not, in itself, an assignment.

As discussed above, Appellants characterize the Aug. 6, 1980, agreement between Thompson Farms and G-R Farms as the "sublease document," despite the fact that it is almost identical to the June 14, 1979, agreement between FHSC and Thompson Farms, which was not considered to be an assignment.

BIA sent a copy of the approved assignment to Chris Thompson on January 15, 1980. Therefore, Appellants had, or should have had, a copy of the assignment form in their files for reference.

Given the circumstances surrounding the assignment of Lease 427 to Thompson Farms, the Board finds that Appellants understood, or should have understood, that written approval of the assignment was required by the lease. Because the same provisions of the lease which govern assignments also govern subleases, no meaningful distinction can be drawn between assignments and subleases with respect to the nature of the approval requirement affecting them.

The Board holds that, to the extent Lease 427 may have been ambiguous as to the requirement that approval of a sublease be in writing, that ambiguity was overcome by the actions of FHSC and the actions of Appellants regarding the assignment of Lease 427.

The language of the relevant regulatory provision, 25 C.F.R. § 131.12(a), is similar to the lease language. Thus, if the lease language is considered ambiguous, the regulatory language might also be considered ambiguous. However, when subsec. 131.12(a) is read in the context of Part 131 as a whole, its meaning is clear. The first mention of Secretarial approval in 25 C.F.R. Part 131 appears in 25 C.F.R. § 131.5(a), which provides: “All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.” Thereafter, several references to Secretarial approval appear, none of which explicitly states that approval must be written. See, e.g., subsec. 131.5(e) (“Except with the approval of the Secretary, no lease shall provide for payment of rent in advance”); sec. 131.8 (Under certain circumstances, a rental “adjustment must be made with the written concurrence of the owners and the approval of the Secretary”); subsec. 131.12(c) (“The encumbrance instrument must be approved by the Secretary. * * * If the purchaser [under a sale or foreclosure] is a party other than the encumbrancer, approval by the Secretary of any assignment will be required”).

Under Appellants’ theory, these regulatory provisions, like the provision concerning subleases and assignments, would not require that the Secretary’s approval be in writing. It is easy to imagine, however, what havoc would ensue if the described actions could be taken without written proof of the required approval. What lessee, for instance, would agree to pay increased rent when a supposedly approved rental adjustment had not been approved in writing?

The most reasonable explanation for the absence of the words “written” or “in writing” in connection with the phrase “approval of (or by) the Secretary,” as that phrase appears throughout 25 C.F.R. Part 131, is simply that the phrase was meant to refer back to the original mention of the requirement in 25 C.F.R. § 131.5(a), where written approval is specified. If written approval of the lease itself is required, a reasonable person would expect

that, where a change in the terms of the lease requires approval, that approval must also be in writing.

The Board holds that, where the regulations in 25 C.F.R. Part 131 require the approval of the Secretary, they also require that approval be in writing.

Finally, Appellants contend that BIA is estopped from cancelling Lease 427 and Lease 94-169. 11/ They argue that the traditional elements of estoppel, as described in Jackson v. Portland Area Director, 35 IBIA 197 (2000), are present here. In Jackson, the Board stated that 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.

35 IBIA at 200. The Board found in Jackson that the traditional elements of estoppel were not present under the facts of that case.

Appellants argue that the first two elements are established here because (1) the former Superintendent orally approved the sublease to G-R Farms in May 1982 and signed the "Landlord Waiver" document in April 1986; (2) the Agency was aware in 1996 that there might be a sublease in place but took no action; (3) G-R Farms openly used the leasehold and the three potato storage buildings, which are directly across the street and plainly visible from the Agency; and (4) BIA continued to bill and collect rent from Thompson Farms. They argue that the third element is established because "Thompson Farms was unaware that the use by G-R Farms was or could be regarded by the BIA as not validly approved," Appellants' Opening Brief at 14, and that the fourth element is established because "Thompson Farms relied on the BIA's conduct to its injury." Id. at 15.

Given their inability to identify any purported approval of a sublease of Lease 94-169 by a BIA official, Appellants' estoppel argument fails entirely as to Lease 94-169. It is arguable that the first, second, and fourth elements of estoppel are present here with respect to Lease 427, but Appellants face a hurdle where the third element is concerned. They contend that they were unaware that oral approval might not be valid. However, for the reasons discussed above, they had, at the least, enough knowledge to question whether oral approval of the

11/ Appellants made this estoppel argument before the Regional Director but the Regional Director did not address it.

sublease was authorized by the lease and regulations. The Board finds that Appellants have not established that the third element is present with respect to Lease 427.

Appellants face a further hurdle in that they are seeking estoppel against the Federal Government. It is well established that “equitable estoppel will not lie against the Government as it lies against private litigants.” Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990). In that case, the Supreme Court acknowledged that it had, in earlier cases, suggested the possibility that “some type of ‘affirmative misconduct’ might give rise to estoppel against the Government.” Id. at 421. Even so, the Court noted that it had “reversed every finding of estoppel [it had] reviewed,” id. at 422, and sent a clear signal that litigants will continue to find it extremely difficult, if possible at all, to establish estoppel against the Government.

The Board’s cases in this area have followed the principles enunciated in Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), a case described in Office of Personnel Management as “the leading case in our modern line of estoppel decisions.” 496 U.S. at 420. See, e.g. Smith v. Billings Area Director, 34 IBIA 114, 117 (1999); Scott v. Acting Albuquerque Area Director, 29 IBIA 61, 69 (1996) (The Government is not bound by the unauthorized acts of its employees.).

In this case, the lease and the regulations required that approval of a sublease be in writing. Therefore, the former Superintendent acted without authority when he purported to give oral approval to a sublease of Lease 427. The former Superintendent’s unauthorized act cannot serve as the basis for estoppel in this case. Nor can any BIA action or lack of action be deemed “affirmative misconduct” so as to give rise to estoppel under Office of Personnel Management.

Appellants have not shown error in the Regional Director’s decision and have not established any basis for estoppel in this case.

Therefore, 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 May 3, 2002, decision is affirmed.

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge