



## INTERIOR BOARD OF INDIAN APPEALS

Tom Flynn v. Acting Rocky Mountain Regional Director, Bureau of Indian Affairs

42 IBIA 206 (02/03/2006)



## 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

TOM FLYNN,	:	Order Affirming Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 04-87-A
ACTING ROCKY MOUNTAIN	:	
REGIONAL DIRECTOR, BUREAU	:	
OF INDIAN AFFAIRS,	:	
Appellee.	:	February 3, 2006

Tom Flynn (Appellant) appealed from a March 3, 2004 decision of the Acting Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), denying his request to have lease payments applied to the purchase of Fort Peck Allotment No. 1650-D. For the reasons stated below, the Board affirms the Regional Director's decision.

### Background

In September 1995, Appellant, as lessee, and Joe Day, as lessor, entered into a farm lease, Business Lease No. 0711, for Fort Peck Allotment No. 1650-D, described as the S1/2SE1/4, Section 20, T. 27 N., R. 46 E., Principal Meridian, Montana, containing 51.1 acres. <sup>1/</sup> The property, also known as "Thunderbird Ranch headquarters," included a number of buildings and other improvements. The lease was for a term of ten years,

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<sup>1/</sup> The lease was for a surface interest only. It appears from other documents in the record that Joe Day owned a 122/126 surface interest in Allotment 1650-D, and another individual, who was not a party to the lease, owned a 4/126 surface interest. Day also apparently owned a 1848/38808 undivided mineral interest in the allotment.

beginning September 15, 1995. The rent was \$650 per month, totaling \$7,800 annually. It is undisputed that this lease was approved by BIA. 2/

On September 19, 1995, Appellant and Joe Day, along with Emily Day (Joe's wife), Samuel McCracken (Joe's nephew), and Jodi McCracken (Samuel's wife) signed a document titled "Buy-Sell Agreement" for Thunderbird Ranch headquarters. The Buy-Sell Agreement identified Joe Day as the owner and stated that Joe would devise the property to Samuel McCracken in his will. It further provided that Samuel and Emily, identified as the "sellers," agreed to sell their interest to Appellant for \$125,000, with the proceeds to be divided between Samuel and Emily. The Agreement stated that Appellant "shall have until the expiration of the lease \* \* \* to complete the purchase." Buy-Sell Agreement ¶ 3. The Agreement was not signed by BIA and Appellant does not contend that BIA approved this agreement.

On October 9, 1995, Joe Day died. In his will, he devised all of his interest in Allotment 1650-D to Samuel McCracken.

On February 1, 1999, McCracken signed a BIA application for a negotiated sale of the property to Appellant. In reference to Lease No. 0711, the application noted that the land was leased for an annual rent of \$7,800. The application made no mention of the 1995 Buy-Sell Agreement. On April 13, 1999, the BIA Fort Peck Agency (Agency) received McCracken's application, and on May 25, 1999, the Agency ordered an appraisal to determine the fair market value of the surface and mineral estates in Allotment 1650-D.

According to an affidavit submitted by Appellant to the Board, on or about June 18, 1999, Appellant and McCracken met with the Agency Superintendent (Superintendent) and discussed the matter of the sale of the property. Appellant states that he and McCracken advised the Superintendent that "[they] wanted [their] negotiated sale to include a provision whereby the lease payments [Appellant] was making on the subject property from 1999 forward to be credited against the purchase price." Appellant's Affidavit ¶ 3. Appellant further states that the Superintendent "indicated his approval of [their] agreement," and to document the agreement provided Appellant and McCracken with a lease modification form that they completed and executed in the Superintendent's office. Id. ¶ 4. The modification, a copy of which is in the administrative record, stated that Appellant's payments for the lease "as of January 1st, 1999 to be credited towards

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2/ Only the first page of the lease is included in the record submitted to the Board — the signature page for the parties' consent and BIA's approval is missing — but no party has suggested that the lease was not properly approved by BIA.

purchase of land.” The lease modification did not reference the 1995 Buy-Sell Agreement or any other sales agreement between the parties. The bottom of the lease modification form, signed by Appellant and McCracken, includes a signature line for the Superintendent’s approval, but the Superintendent did not sign the modification.

On July 12, 2000, the Agency sent McCracken the results of the surface and mineral appraisals of Allotment 1650-D, with an enclosure stating the values of McCracken’s 122/126 surface interest and his 1848/38808 mineral interest. The transmittal letters stated:

We suggest that you contact [Appellant] and complete negotiations for a purchase price agreeable to Both of you. Such an amount must equal or exceed the fair market value referred to above.

On completion of your negotiations, please complete the attached statement indicating the purchase price agreed upon by Both of you.

The Agency provided McCracken with copies of two “Deed to Restricted Indian Land” forms to sign and return, one for McCracken’s 122/126 surface interest and another for his 1848/38808 mineral interest. BIA apparently had filled out the forms, except for the amount of consideration. <sup>3/</sup>

On March 5, 2001, McCracken sent a letter to Appellant, offering to sell him the property for \$80,000. McCracken stated that his offer was “based upon our initial offering price of \$125,000.00 several years ago less a credit of \$39,000 for lease payments made from October 1995 to October 2000 (\$7,800 per year for 5 years) and less a credit of \$6000.00 for other miscellaneous costs you have covered and inconveniences you have endured.” On May 30, 2001, McCracken again wrote to Appellant, reiterating this offer.

Appellant responded to McCracken on June 13, 2001, stating: “My offer is still \$70,000 without the minerals.” Appellant stated that after subtraction of \$7,800 for

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<sup>3/</sup> The record does not contain copies of the forms without the amount of consideration filled in, but as discussed below, it does contain copies of two deeds to the surface estate which are identical, except for the recitation of the consideration for the conveyance and the different dates on which they were executed by the McCrackens. Therefore, it seems likely that BIA may have assisted McCracken by filling out the deed forms, except for the amount of consideration, to be filled in upon agreement of the parties.

payments made through 2001, he would owe \$46,600. 4/ Appellant further stated that he did not “have the whole lump sum to buy it out right,” but that he “thought [they] agreed \$7,800 annual payment till it was paid off.” He observed that the lease would expire on September 14, 2004, and that he could pay \$650.00 per month until then. He proposed that McCracken “work with [him] to purchase for \$7,800 annual.”

On January 18, 2002, McCracken and his wife executed a “Deed to Restricted Indian Land” to Appellant for an undivided 122/126 interest to the surface rights in Allotment 1650-D. The deed recited the consideration for the property as “\$70,000, less lease payments from 1999, 2000, 2001.” The deed is not signed by BIA.

Several months later, on May 23, 2002, the McCrackens signed another “Deed to Restricted Indian Land” to Appellant for the 122/126 surface interest in Allotment 1650-D, and a second deed to Appellant for the 1848/38808 mineral interest. Each deed recites \$70,000 as the consideration, and neither provides for any credit toward the purchase price for the lease payments made by Appellant. Neither of these deeds is signed by BIA.

However, through an invoice dated July 15, 2002, BIA sent a bill to Appellant in the amount of \$70,000, plus a \$22.50 conveyance fee, for the sale to Appellant of McCracken’s surface and mineral interests in Allotment 1650-D. The invoice makes no reference to Appellant receiving any credit for previous lease payments.

On October 6, 2003, Appellant wrote to the Superintendent, stating that he “would like to pay off” the property, that “[t]he payments made from 1998, \$7,800 a year, would go to own the land,” and that “the difference [owed] as of 10-6-03 is \$38,800.00.” 5/

On November 7, 2003, the Superintendent responded to Appellant, stating that Appellant had “requested that previous lease rentals for business lease No. 711 be applied against the purchase price of the \* \* \* property.” The Superintendent characterized Appellant’s request as for a “Contract for Deed,” and stated that a contract for deed must be approved in advance, prior to any payments being made. The Superintendent concluded that because a contract for deed had not been approved, Appellant’s lease payments could not be applied toward the purchase price.

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4/ Appellant’s letter assumes a purchase price of \$70,000 and a credit for three years of lease payments [ $\$70,000 - (\$7,800 \times 3) = \$46,600$ ].

5/ This calculation assumes a \$70,000 purchase price and credit for four years of lease payments [ $\$70,000 - (\$7,800 \times 4) = \$38,800$ ].

Appellant appealed to the Regional Director. On March 3, 2004, the Regional Director affirmed the Superintendent's denial of Appellant's request to apply the lease payments to the purchase price. He determined that although the federal regulations authorize "deferred payment contracts," the applicable provision, 25 C.F.R. § 152.35, did not permit lease rental payments to be applied toward the purchase price of land.

Appellant appealed the Regional Director's decision to the Board. Only Appellant submitted a brief.

### Discussion

Appellant makes two arguments on appeal. First, Appellant contends that the parties "complied substantially" with the regulations governing deferred payment sales of Indian land, 25 C.F.R. § 152.35, because he and McCracken agreed to the land sale/purchase, they agreed that lease payments since 1999 would be applied toward the purchase price, as memorialized in the lease modification agreement, and McCracken executed a deed in favor of Appellant, which is being held by BIA pending payment of the balance of the purchase price. Second, Appellant argues that it would be inequitable not to credit his lease payments toward the purchase price of the property because he relied on the Superintendent's representations by continuing to make the lease payments and by making improvements on the property.

We begin with the language of the regulation applicable to deferred payment sales, 25 C.F.R. § 152.35, which provides in relevant part:

When the Indian owner and purchaser desire, a sale may be made or approved on the deferred payment plan. The terms of the sale will be incorporated in a memorandum of sale which shall constitute a contract for delivery of title upon payment in full of the amount of the agreed consideration. The deed executed by the grantor or grantors will be held by the Superintendent and will be delivered only upon full compliance with the terms of sale. \* \* \* The terms of the sale shall require that the purchaser pay not less than 10 percent of the purchase price in advance as required by the Act of June 25, 1920 (36 Stat. 855), as amended (25 U.S.C. 372); terms for the payment of the remaining installments plus interest shall be those acceptable to the Secretary and the Indian owner. \* \* \*

No sale of trust or restricted land is valid without the approval of the Secretary of the Interior or her delegate. See 25 C.F.R. §§ 152.17, 152.22. Deferred payment sales are no exception. Great Western Casinos, Inc. v. Acting Pacific Regional Director, 36 IBIA 115,

122 n.5 (2001). Therefore, the “memorandum of sale” referred to in section 152.35 must be approved by the Secretary or her delegate.

Appellant has produced no memorandum of sale — no sales contract executed by both parties and approved by the Superintendent that recites the purchase price for the property or states other terms of the sale, whether on a deferred payment basis or otherwise. Appellant does not contend that the Superintendent approved the 1995 Buy-Sell Agreement which, in any event, would not satisfy section 152.35 — e.g., it did not require Appellant to make a ten percent advance payment. Nor does it appear that Appellant is seeking to have that agreement enforced as a sales contract, which is perhaps understandable given the purchase price stated in that document.

Clearly, the June 1999 lease modification did not by its terms incorporate any pre-existing, approved contract for the sale of Allotment 1650-D. And the modification itself does not purport to be a sales contract, nor does it contain or even refer to an agreed-upon purchase price. At most, the 1999 lease modification may be construed as an agreement in principle between the parties about how they wished to structure a future sales transaction, should one be negotiated. Thus, whatever the Superintendent purportedly agreed to or led the parties to believe, his oral approval cannot be construed as an approval of a memorandum of sale or contract for the sale of the property.

In addition, the record contains no subsequent agreement executed by Appellant and McCracken that could be construed as a sales contract. Indeed, in 2001 — two years after the 1999 lease modification — the parties were still exchanging counter-offers on the purchase price, further illustrating that the parties themselves had not reached final agreement on the purchase price and terms for a sale, let alone submitted such an agreement to BIA for approval. 6/

The absence of any memorandum of sale or other sales contract executed by both parties and approved by BIA is fatal to Appellant’s argument that the parties substantially

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6/ The deeds executed by McCracken for the surface interest also show the unresolved nature of the negotiations. The one executed in January 2002 recites credit for three years of previous lease payments, but the one executed in May 2002 omits any credit for lease payments toward the consideration.

complied with 25 C.F.R. § 152.35, even assuming the regulation would permit the Board to apply such a doctrine. <sup>7/</sup>

Appellant also appears to be suggesting that BIA should be estopped from denying his request that lease payments be applied toward a purchase price because of representations made by the Superintendent. We disagree. Aside from the obvious hurdles to an estoppel argument, see, e.g., Thompson v. Acting Northwest Regional Director, 40 IBIA 216, 228 (2004) (it is “extremely difficult, if possible at all, to establish estoppel against the Government”), we do not think the Superintendent’s representations — even if accepted as they are characterized in Appellant’s affidavit — could be reasonably relied upon by Appellant to conclude that the parties “had done all [they] needed to do in order to document [their] agreement and that nothing further was necessary from the standpoint of BIA approval.” Appellant’s Affidavit ¶ 5.

The only clear “agreement” reflected in the lease modification and purportedly approved by the Superintendent had to do with whether Appellant would get credit for lease payments. Nothing in the lease modification or Appellant’s affidavit reflects an agreed-upon purchase price or other terms of the sale, including an advance payment and interest. Under these circumstances, it would not have been reasonable to conclude that the lease modification constituted a completed sales contract or that all of the requirements of 25 C.F.R. § 152.35 had been satisfied. Moreover, the lease modification form specifically included a signature line for the Superintendent to denote his approval, and it was not signed. This further undercuts any claim that Appellant could reasonably rely on that document and the Superintendent’s purported oral approval as sufficient to approve a completed sales agreement between the parties.

The Board has repeatedly held that individuals dealing with the government are presumed to have knowledge of duly promulgated regulations. See Billco Energy v. Acting Albuquerque Area Director, 35 IBIA 1, 7 (2000); Blackmore v. Billings Area Director, 30 IBIA 235, 239 (1997); DuBray v. Acting Aberdeen Area Director, 30 IBIA 64, 68 (1996). As a person seeking to purchase trust property on a deferred payment basis, Appellant was responsible for complying with the applicable regulations and was not

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<sup>7/</sup> Even if the parties had finalized a proper agreement for a deferred payment sale, including the ten percent advance payment requirement, there would have been obvious problems with purporting to “credit” previous lease payments. The lease payments were pre-existing obligations. With respect to those payments due before a sales agreement was finalized, giving them “credit” toward the purchase would raise a question whether McCracken was receiving fair market value consideration.

relieved of that responsibility by representations made by the Superintendent. See Blackmore, 30 IBIA at 239. If the Superintendent in fact gave erroneous advice, that still could not operate to grant Appellant rights not authorized by law or inconsistent with the regulations. Billco Energy, 35 IBIA at 7; see also G.H.G. v. Acting Rocky Mountain Regional Director, 39 IBIA 27, 30 (Superintendent's authority limited by the regulations).

Appellant's argument that we should reverse the Regional Director based on equitable considerations is similarly unavailing. Assuming the Board were to consider enforcement of the regulations "inequitable" in this case, we would lack authority to ignore them and grant Appellant the relief he requests. See Vitale v. Juneau Area Director, 36 IBIA 177, 183 (2001) (Board has not been delegated "equitable" authority which would allow it to ignore controlling regulations). And finally, to the extent Appellant suggests that a favorable result is required by the United States' trust obligation to him as an Indian, we respond that the BIA's trust duty in this case was to McCracken, the landowner, and not to Appellant as the prospective purchaser. See DuBray, 30 IBIA at 68 ("The Department owes a trust responsibility to the owner of trust land," which "includes ensuring that trust land is not conveyed in violation of relevant statutes and regulations"). Whatever trust obligations BIA may have toward him in other contexts, Appellant has not shown that BIA violated any trust duty to him 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 Board affirms the Regional Director's March 3, 2004 decision.

I concur:

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Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Katherine J. Barton  
Acting Administrative Judge