



INTERIOR BOARD OF INDIAN APPEALS

Cynthia Hamilton Midthun v. Acting Rocky Mountain Regional Director,
Bureau of Indian Affairs

48 IBIA 282 (02/17/2009)

Related Board case:
43 IBIA 258



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CYNTHIA HAMILTON MIDTHUN,)	Order Vacating Decision, Remanding,
Appellant,)	and Retaining Jurisdiction
)	
v.)	
)	
ACTING ROCKY MOUNTAIN)	Docket No. IBIA 07-62-A
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	February 17, 2009

This is an appeal by Cynthia Hamilton Midthun (Appellant), now deceased, from a December 7, 2006, decision of the Acting Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director’s decision responded to Appellant’s request for the release of her share of lease rental payments for 18.00 acres of accreted pastureland for Fort Peck Allotment No. 1388 (Allotment or Allotment 1388), in which Appellant holds an ownership interest. Leases for the Allotment segregated rental payments for 19.54 acres of “pastureland,” which were paid to the individual Indian landowners, from rental payments for 18.00 acres of “accreted pastureland,” which were deposited in the “Missouri River Accretion Account” (Accretion Account). Appellant contends that all rental payments deposited for the 18.00 acres of accreted pastureland are owed to the owners of the Allotment, and that BIA unnecessarily created the Accretion Account and improperly has denied her payment of her share.

The Regional Director’s decision was issued following the Board’s remand in *Midthun v. Rocky Mountain Regional Director*, 43 IBIA 258 (2006), in which the Board ordered BIA to issue a decision “specifically granting or denying Appellant’s request for immediate payment of her share of escrowed payments for Allotment 1388 from the Accretion Account.” *Id.* at 263. In its remand order, the Board directed the Regional Director, at a minimum, to

explain the legal and factual basis for BIA’s interpretation of the lease payment provisions relevant to the Accretion Account, the necessity of the Account, and the relevance of present-day surveys for determining amounts due to Appellant from the Account. The [Regional Director’s] decision [on

remand] should also respond to the arguments raised and requests for information submitted by Appellant during the course of this appeal, to the extent they are relevant to deciding her request for payment.

Id. at 264.

The Regional Director's December 7, 2006, response to Appellant stated that it was his "decision . . . to cause any funds due to [Appellant] to be paid to [Appellant]," and indicated that he had made a request to the Office of the Special Trustee - Office of Trust Funds Management to make disbursement of funds Appellant is owed, based on the available documentation. The Regional Director's decision did not provide any interpretation of the lease payment provisions, nor did it respond to Appellant's arguments that the landowners are entitled, under the leases, to all rental payments made for the 18.00 acres of accreted pastureland. Rather than provide any further explanation or documentation regarding the relevance and necessity of the Accretion Account, the Regional Director simply referenced an August 4, 2005, status report that had been provided to the Board prior to the Board's remand from Appellant's earlier appeal. The Regional Director's decision did not identify the amount that he concluded was owed to Appellant from the Accretion Account for the Allotment, but it is clear from the record that payment was made only for 7.96 accreted acres. Thus, it is also clear that the Regional Director denied Appellant's request to the extent that she demanded payment for her share of the escrowed payments based on 18.00 acres of accreted pastureland for the Allotment.

We now vacate and remand the Regional Director's decision because it falls short of complying with the Board's remand order and is not adequately supported by the record.¹ It was not sufficient for the Regional Director to simply state that his decision was to "cause any funds due" to Appellant to be paid to her. Rather, he should have identified the specific amounts that BIA had determined should be paid to Appellant, explained to her the specific factual and legal basis for that determination, and ensured that the determination and explanations were adequately supported by documentation in the record. The Regional Director's August 4, 2005, status report provided a general and still-incomplete explanation of the Accretion Account, and his December 7, 2006, decision failed to address Appellant's

¹ In his administrative record transmittal memorandum, the Regional Director requested that the Board dismiss this appeal, asserting Appellant had been "paid the rental values by the Office of the Special Trustee on December 14, 2006." Memorandum from Regional Director to Board, Jan. 23, 2007. Although the Board took that motion under advisement in an order dated February 27, 2007, we now deny the Regional Director's motion to dismiss.

leases with specificity or respond to her arguments. In particular, the record does not support the 7.96-acre figure used by BIA for calculating payments owed to Appellant, nor does the Regional Director reconcile BIA's use of that figure with the 18.00-acre figure recited in the lease.

In light of the protracted nature of this dispute, and the Regional Director's failure to issue a more detailed decision in response to the Board's remand instructions, the Board will retain jurisdiction over this appeal so that it may be resolved without additional unnecessary delay.

Background

Appellant owns a fractional interest in Allotment 1388, which consists of Lot 6, Sec. 1, T. 26 N., R. 46 E., Principal Meridian, Roosevelt County, Montana, on the Fort Peck Reservation along the Missouri River. As an owner, Appellant is entitled to her proportionate share of rental payments for leases on the Allotment. Appellant has provided copies of two leases for Allotment 1388, one for the period from January 1, 1981, to December 31, 1985 (Lease 4214), and a second for the period from January 1, 1987, to December 31, 1991 (Lease 7099-91).² Each lease identified the total acreage for Allotment 1388 as "37.54 acres, more or less," and also broke down the total acreage into

² These leases apparently were granted pursuant to 25 C.F.R. § 131.2 or § 131.3 (1981) (grants of leases by Secretary; grants of leases by Indian owners). Lease 4214 was consented to by all of the individual Indian landowners except for two owners who each held a 1/32 ownership interest. The Superintendent gave consent on behalf of one of these owners whose whereabouts were unknown. *See* 25 C.F.R. § 131.2(b) (1981). The record does not include any owner consent forms for Lease 7099-91. The authority cited next to the Superintendent's approval is 25 U.S.C. § 380, which authorizes the Superintendent to lease restricted allotments of deceased Indians

(2) when the heirs or devisees of such decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe. The proceeds derived from such leases shall be credited to the estates or other accounts of the individuals entitled thereto in accordance with their respective interests.

The leases identify Harvey Hamilton, Sr., as the original allottee of Allotment 1338; Appellant is one of his heirs.

19.54 acres of “pastureland” and 18.00 acres of “accreted pastureland.” Both leases had an attached “Ownership and Payment Schedule,” which provided that the rental due for 19.54 acres was to be divided among and distributed to the various individual landowners according to their fractional ownership interest, and that the lease payments for 18.00 acres of accreted pastureland were to be credited to an account identified as the Accretion Account. The leases do not explain or provide a basis for bifurcating the lease payments in this manner.

The landowner consent forms for Lease 4214 recited that the Allotment consisted of 19.54 acres, which is also the acreage for the Allotment listed on the BIA title and ownership records in the administrative record before the Board. The lease, however, recited that the Allotment consisted of and was being leased for a total of 37.54 acres and segregated the payments for 19.54 acres from the payments for 18.00 acres, but provided no explanation for why payments for the accreted acreage were to be deposited into the Accretion Account. Nor did the consent forms or the lease provide any directions for the eventual distribution of the payments deposited into the Accretion Account, e.g., payments to the Allotment owners, payments to owners of other unidentified allotments, refunds to the lessee, or some combination thereof.

The record before the Board indicates that Appellant may have first inquired about the purpose of the Accretion Account in a 1989 letter to the Fort Peck Agency. On April 10, 1990, the Superintendent responded that a survey was required “to properly provide a legal description and to identify ownership of the accreted lands.” Letter from Superintendent to Appellant, Apr. 10, 1990. The Superintendent indicated that the Bureau of Land Management (BLM) would conduct the survey as BIA funding became available, and that until this was accomplished “any lease rentals collected for accreted lands are maintained in an escrow account.” *Id.*

There was additional correspondence between Appellant and the Superintendent in 1999 after Appellant requested further clarification concerning the Accretion Account. In 2004, Appellant wrote to both the Superintendent and the Billings Field Solicitor requesting further information and clarification concerning the basis for holding rental payments in the Accretion Account. On August 26, 2004, the Superintendent informed Appellant that BIA had received a plat map from BLM for Allotment 1388 indicating that 7.96 acres had accreted to the Allotment. The Superintendent stated that BIA would need to submit a request to the Office of Trust Records for the expired lease files, and that BIA Realty staff would begin immediate research and would transfer the accretion rentals applicable to Allotment 1388 to the extent amounts were readily determinable from the statements of account. The Superintendent also stated that the 7.96 acres of accreted acreage “increases the total acreage from 19.54 to 27.5 acres,” that the “current lease [for

Allotment 1388] will be modified to include the additional acreage,” and that “[t]he inclusion of accreted acreage to the leases for [Allotment 1388] began in 1976.” The Superintendent’s letter did not address or explain the 18.00 acres of accreted pastureland recited in the leases for Allotment 1388. In a letter dated December 14, 2004, in response to further correspondence from Appellant, the Superintendent stated that BIA was “close to completing [its] research and determining what funds, if any, [Appellant] may be entitled to receive.” Letter from Superintendent to Appellant, Dec. 14, 2004. The letter also stated that BIA was waiting for a historical report on the 1981-1985 lease from the Office of the Special Trustee (OST). The Superintendent “apologize[d] again for the time it ha[d] taken to resolve this matter.” *Id.*

The matter was not resolved, however, and on January 20, January 30, and February 11, 2005, Appellant or her husband, at her direction, wrote to the Superintendent or the Regional Director. Appellant challenged the Superintendent’s December 14, 2004, letter, asserting that the Accretion Account had been erroneously established and that BIA had no basis for withholding from the landowners any portion of the payments that had been deposited in the Account for the 18.00 acres of accreted pastureland.³ In her January 30, 2005, letter, Appellant appealed to the Regional Director from the Superintendent’s December 14, 2004, response, arguing that the response “either directly or indirectly by implication denied my requests and my assertions.”

On February 17, 2005, Appellant wrote to the Regional Director, pursuant to 25 C.F.R. § 2.8, requesting that he take action on her January 30, 2005, appeal within 10 days or establish a date by when such action would be taken.⁴

³ In a letter to the Superintendent from Appellant’s husband, on her behalf, Appellant had argued that the landowners “were, AND ARE, entitled to receive their full rents WHEN collected, not decades later.” Letter from Elmer Midthun to Superintendent, Dec. 9, 2004.

⁴ 25 C.F.R. § 2.8(b) provides in relevant part:

The [BIA] official receiving a request [for action] as specified in [25 C.F.R. § 2.8(a)] must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. . . . If the official, within the 10-day period specified in [subsection 2.8(a)], neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official’s inaction shall be appealable to the next official in the process established in this part.

On March 1, 2005, the Regional Director responded. He stated that the Superintendent had neither denied nor ignored Appellant's request, but that the Superintendent's letter was intended to provide Appellant with an update of BIA's actions to resolve the underlying issue regarding rental payments for Allotment 1388. The Regional Director also stated that upon receipt of the accounting report from OST, the Superintendent would be able to respond to Appellant's concerns.

Appellant then appealed to the Board. Appellant acknowledged that the Regional Director had replied to her January 30, 2005 letter, but contended that the reply did not comply with the requirements of section 2.8 to take action on the merits of the issue. By orders dated June 21, 2005, and February 16, 2006, the Board requested status reports from the Regional Director, which the Board received on August 8, 2005, and April 5, 2006. Appellant filed responses to each status report filed by the Regional Director. By order dated August 25, 2006, the Board remanded the matter to the Regional Director with instructions to issue a decision on the merits, explain the decision, and respond to Appellant's arguments. *See Midthun*, 43 IBIA at 264. On December 7, 2006, the Regional Director issued his decision "to cause any funds due to [Appellant] to be paid to [Appellant]." As noted above, although not explicitly stated in the decision, other documents in the record make clear that the amount paid to Appellant and considered by BIA to be the "funds due" to her was based on the BLM survey's determination that 7.96 acres, not 18.00 acres, of pastureland had accreted to Allotment 1388. The Regional Director's decision does not address Appellant's argument that the landowners are entitled to the full amount of rental payments made for the 18.00 acres of accreted lands recited in the leases.

Discussion

Appellant appeals the Regional Director's decision, incorporating by reference the arguments made in her previous appeal. Specifically, she first contends that, as a matter of law, she is entitled to immediate payment of her share of escrowed funds based on what she asserts is the correct interpretation of her leases, i.e., that her leases provide for lump-sum annual rental payments for 18.00 acres of accreted land and that the entire amount of the rent paid for those 18.00 acres is owed to the landowners according to their fractional ownership interest in the Allotment.⁵ She supports her position that the rental payments

⁵ During the previous proceedings in this matter, the Board characterized its understanding of the parties' respective interpretations of Appellant's leases as follows:

The Board understands Appellant to interpret the leases as setting a single lump-sum annual rental amount for Allotment 1388, regardless of whether

(continued...)

should have been immediately paid and not placed in the Accretion Account by citing the last sentence of 25 U.S.C. § 380, which directs that proceeds derived from leases issued under that section be “credited to the estates or other accounts of the individuals entitled thereto in accordance with their respective interests.” Notice of Appeal at 1, Dec. 19, 2006. Second, Appellant argues that even if her leases are properly interpreted as providing for rent on a per-acre basis, the BLM survey does not determine the actual acreage of Allotment 1388 during the relevant time periods — the terms of each lease — and that the 18.00-acre figure recited in the leases must control.⁶

⁵(...continued)

the riparian lands subject to accretion or other natural forces increase or decrease in acreage. As such, Appellant contends that the varying acreage of riparian lands is not relevant to a determination of the amount of rent to which she is entitled. The Board understands BIA to interpret the rental rate provisions in the leases for Allotment 1388 as establishing a per-acre rental rate. Because the amount of acreage of the accreted lands subject to a lease may vary over time, BIA has undertaken an effort to determine the specific acreage of the accreted lands within Allotment 1388 during the relevant time periods, in order to calculate the allocation of the escrowed funds to the owners, on a per-acre-rental-rate basis.

Midthun v. Rocky Mountain Regional Director, Docket No. IBIA 05-66-A, Order at 3 n.1, Feb. 16, 2006. Appellant subsequently confirmed that the Board had accurately stated her position. The Regional Director has neither agreed nor disagreed with the Board’s characterization of BIA’s position.

⁶ In a supplemental brief dated March 15, 2007, Appellant attempts to expand her appeal to include the payment to herself and other co-owners of accrued withheld rentals for all lease contracts in which she was a co-owner, including those for allotments not specifically identified earlier. Since the Board’s review authority is limited to those issues raised before the BIA official, *see* 43 C.F.R. § 4.318, we will not address new arguments raised for the first time on appeal. Therefore, we reject Appellant’s request that we broaden the scope of her appeal to include leases and allotments not before us. However, we are mindful that Appellant may contend that she has additional leases that are governed by the same analysis. To the extent that the remand proceedings from this appeal, and any subsequent review by the Board, do not effectively resolve concerns regarding Appellant’s other leases, the unresolved matters may be presented separately to the Regional Director for a new decision, with appeal rights to the Board.

An Indian lease is a contract and the principles of contract construction apply to ascertain its meaning. *Hall-Houston Oil Co. v. Acting Western Regional Director*, 42 IBIA 227, 232 (2006); *Wessman v. Pacific Regional Director*, 41 IBIA 238, 247 (2005), and cases cited. The Board's task when construing or interpreting a contract is to determine and give effect to the intent of the parties. See 17A C.J.S. Contracts § 295a (1963). The starting point for discerning the intent of the parties is the language of the document itself. See *Swinomish Tribal Community and Shelter Bay Company v. Portland Area Director*, 30 IBIA 13, 22 (1996); *Pinoleville Indian Community v. Acting Sacramento Area Director*, 26 IBIA 292, 295 (1994); *Nevaco, Inc. v. Acting Phoenix Area Director*, 24 IBIA 157, 164 (1993). When the parties include language in a contract that is clear, complete, and unambiguous, that language will be given effect as expressing the complete intent of the parties, without resorting to extrinsic evidence. 17A C.J.S. Contracts § 294b(1). If language in a contract is ambiguous, however, the Board will look at extrinsic evidence, including the subsequent actions and performance of the parties, to discern the intent of the parties. See Restatement (Second) of Contracts § 202(4); see also 17A Am. Jur. 2d Contracts § 345 (2004). In determining whether a contract is ambiguous, the words of the contract must be given their natural and ordinary meaning; an ambiguity exists only where the terms of the contract are reasonably susceptible to more than one interpretation. *Id.* §§ 356, 331; 17A C.J.S. Contracts § 294b(2).

At first blush, the leases involved in this case appear to be unambiguous in that they provide for the leasing of 37.54 acres. Appellant certainly believes that this is the case and insists that the individual landowners are entitled to their fractional share of all the rental paid for the 37.54 acres. Closer scrutiny of the leases, however, inexorably leads us to conclude that the leases are, in fact, ambiguous as to the precise issue at the heart of this dispute, i.e., who is ultimately entitled to the monies that were paid into the Accretion Account. Several factors lead to this conclusion. First, although the leases recite that Allotment 1388 consists of 37.54 acres, and the only owners of the Allotment are the individual Indian landowners identified on the ownership and payment schedules, which arguably implies that those owners are entitled to all the rent collected for the Allotment, the leases also segregate the 19.54 acres of pastureland from the 18.00 acres of accreted pastureland, despite the fact that the per acre price is the same for both. The leases also explicitly state that the rental payments will be paid to the landowners in accordance with the attached ownership and payment schedules, and those schedules only provide that the payments for the 19.54 acres of pastureland go to the individual Indian landowners, while the rents for the 18.00 acres of accreted pastureland go into the Accretion Account. The schedules do not suggest that those individuals, even though they are owners of the Allotment, are entitled to the payments for the 18.00 accreted acres; rather, the ownership and payment schedules are simply silent and therefore ambiguous as to who ultimately will

be entitled to the Accretion Account deposits and in what amounts. Additionally, consistent with the schedules, the owner consent forms identify the Allotment as containing 19.54 acres and document the owners' consents to lease their interests in those 19.54 acres. Accordingly, we find that the leases sufficiently ambiguous to warrant resort to extrinsic evidence to determine the meaning of their terms.

Unfortunately, the extrinsic evidence currently found in the record is insufficient for us to conclusively determine whether Appellant is correct or whether BIA is correct as to who is entitled the rentals paid into the Accretion Account for the 18.00 acres of accreted pastureland. Although BIA says that the 18.00-acre figure was an estimate, *see* Memorandum from Regional Director to Board, Dec. 14, 2007, it does not cite to anything in the administrative record to support that assertion, nor has it provided any affidavit or declaration of someone with knowledge of how the 18.00-acre figure was derived. Appellant avers that the 18.00-acre figure was based on aerial surveys. *See* Letter from Appellant to Board at 2, ¶ 6, Aug. 19, 2005 (positing that the 18-acre calculation was derived from aerial photographs using a planimeter and was considered sufficiently accurate to issue lease advertisements and enter into lease instruments). But Appellant has not substantiated that assertion with any actual evidence. Nor are the two positions necessarily mutually exclusive since an 18.00-acre estimate may have been derived from aerial surveys, but still not be accurate or anything more than a rounded up (or down) number chosen for administrative convenience in the leasing process. The genesis of the Accretion Account and the rationale for its continued existence simply are not clear, based on the record before the Board. *See, e.g.* BIA letter to Appellant, July 20, 1999 (“This account was established some years ago, probably a result of *United States v. Holen*, No. CV-82-25-GF” (D. Mont. Judgment entered June 3, 1991)).

Although BIA ultimately paid Appellant based on the BLM survey of the accreted land existing in 2004, BIA initially stated that the survey's purpose was to provide a legal description and identify ownership of the accreted land. *See* Letter from Superintendent to Appellant, Apr. 10, 1990. BIA subsequently suggested that the purpose of survey was to determine accreted acreage, which could then be added to the title and ownership records — i.e., that only accretion, and no loss of acreage, occurred in the relevant time frame and that the survey and the Accretion Account allowed BIA to eventually catch up and pay out the amounts due to the owners, based on actual acreage that had accreted. *See* Letter from Superintendent to Appellant, Aug. 26, 2004. Regardless of the true purpose of the survey, the Regional Director's August 4, 2005, status report to the Board stated that the purpose of the Accretion Account was to ensure that Indian landowners were not overpaid or underpaid; however, the record contains no evidence even suggesting, much less establishing, that if the survey had revealed that more than 18.00 acres had accreted to the

Allotment, then the Accretion Account could have been used to provide additional compensation to landowners, above the amount set out in the lease itself (by presumably taking funds that had been paid into the Account from other leases where eventually BIA determined that the accreted lands were less than originally thought).⁷

Drawing bits and pieces from BIA's explanations, it is possible to come up with a plausible interpretation of the leases, based on extrinsic evidence, that when the two leases of Allotment 1388 were entered into, no determination had been made that the Allotment, in fact, included 18.00 acres of accreted pastureland, and that the parties to the lease understood that the rental payments to the Accretion Account were to allow rent to be collected and retained, pending a survey that could actually determine the accreted acreage, for which per-acre rental was due to the landowners, with the balance being refunded to the lessee. The evidence in the record, however, is not sufficient to support that interpretation of the leases, and the explanations of the purpose and function of the Accretion Account fall short of confirming that position. And there is contrary evidence which could support Appellant's position that the parties "deemed" the Allotment to include 18.00 acres of accreted pastureland, for which a lump sum rental payment was due and which Appellant contends necessarily must be owed to the landowners: the leases themselves explicitly state that they included 18.00 acres of accreted pastureland for a total acreage of 37.54 acres for Allotment 1388. The acreage recitation in the leases is not insignificant by any means, but the fact that payments were to be deposited into the Accretion Account rather than paid immediately to the owners, and the fact that the owner consent forms recited 19.54 acres as the size of the Allotment, at least raise the question of whether the acreage recitation in the leases, by itself, is sufficient to answer the precise question: who is *ultimately* entitled to some or all of the payments for 18.00 acres of accreted pastureland attributed to Allotment 1388 in the lease?

⁷ The Regional Director also suggested in the August 2005 status report that the amount of accreted acreage at the beginning of a 5-year lease might be different from the amount at the end of a 5-year lease. It is unclear whether, in order to fulfill the Account's purpose of ensuring that owners would not be either overpaid or underpaid, BIA interpreted the per acre rental provision of the leases as requiring the rental amount to be recalculated on an annual basis, and if so, how a survey conducted in 2004 would have evidentiary value in determining the actual acreage of the Allotment each year during the 5-year lease terms or even at the beginning or end of those lease terms. *See also* Memorandum from Regional Director to Board, at 1, Dec. 14, 2007 (acknowledging that the Missouri River changes course over time).

We therefore must conclude that the Regional Director's decision is not adequately explained and supported by the record, nor is the record sufficient for us to find that Appellant is correct that the owners are entitled to the full rental payments made for the 18.00 acres of accreted pastureland. Accordingly we vacate the Regional Director's decision and remand the matter to him for a supplemental or revised decision. Due to the amount of time this dispute has been pending, we expect the Regional Director to issue a decision within a reasonable time. *Cf.* 25 C.F.R. § 2.8(b), *quoted supra* note 4. We strongly urge the Regional Director to seek advice from the Solicitor's Office in implementing this decision. We will retain jurisdiction over this matter pending the Regional Director's issuance of a supplemental and revised decision to ensure that no further unwarranted delay in finally resolving this matter occurs. Objections to the Regional Director's supplemental and revised decision may be filed with the Board within 30 days of any interested party's receipt of that decision.

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 denies the Regional Director's motion to dismiss, vacates the Regional Director's decision, and remands the matter to BIA for supplementation and revision of the decision. We retain jurisdiction over the appeal pending issuance of the supplemental and revised decision.

I concur:

 // original signed
Sara B. Greenberg
Administrative Judge*

 // original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.