



INTERIOR BOARD OF INDIAN APPEALS

Downtown Properties, Inc. v. Sacramento Area Director, Bureau of Indian Affairs

8 IBIA 248 (03/23/1981)

Judicial review of this case:

Summary judgment for Secretary, *Downtown Properties, Inc. v. Andrus*,
Civil No. 81-0835-N (S.D. Calif. Apr. 10, 1984)



United States Department of the Interior

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

DOWNTOWN PROPERTIES, INC.,	:	Docket No. IBIA 80-34-A (Supp.)
Appellant	:	
v.	:	
	:	
AREA DIRECTOR, SACRAMENTO	:	Order Dismissing Appeal
AREA OFFICE, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	February 23, 1981

ORDER

By order dated November 6, 1980, modifying an earlier Board action of September 10, 1980, appellant lessee of Indian trust lands was ordered to post a performance bond not later than November 21, 1980, pending a hearing on the lessee's appeal from agency decision to cancel its lease. Failure to post the required bond resulted in an order to show cause issued December 22, 1980, requiring appellant to show why its appeal should not be dismissed.

Appellant declined to file the required bond, but on January 21, 1981, filed a "Response" to the orders of the Board requiring the performance bond. The "Response" disputes the utility of a bond in this matter. It is undisputed that appellant breached the terms of its lease with the Indian owners of the leased land by failure to develop the leased land according to the terms of the lease. Appellant continues in possession of the leased lands in question, despite an apparent failure to pay rents since 1979. 1/ Further, appellant argues that it is unreasonable to require a bond to insure performance because the Indian property owners are now barred from either cancellation or collection of damages for loss of income by an election made by agency administrators of the lease which resulted in a forbearance to cancel the lease immediately when breach occurred. 2/ Appellant also argues

1/ This circumstance cannot be ignored by the agency in its administration of leased lands for Indian owners. For a discussion of the duties imposed by statute upon the Department, see Coomes v Adkinson, 414 F. Supp. 975, 991-93 (D.S.D. 1976).

2/ This argument--that Bureau of Indian Affairs administration of trust lands for Indian beneficiaries can operate here to estop the owners from demanding contract remedies expressly made available to them under the terms of the lease--is discussed in detail in Mark Small v. Commissioner of Indian Affairs, 8 IBIA 18, 24 (1980). As

that action taken to cancel the lease by the appellee agency amounts to "eviction" and releases appellant from any obligation under the lease, rendering the furnishing of a bond unnecessary.

These arguments advanced by appellant do not explain its failure to provide the bond ordered pursuant to the provisions of 43 CFR 4.354. 3/ The arguments advanced by appellant to explain its failure to furnish bond are without merit. 4/

The performance bond contemplated by Departmental regulation and ordered by this Board in orders dated September 10 and November 6, 1980, not having been furnished, and no reason appearing for the failure by appellant to comply with the order to show cause dated December 22, 1980, the appeal must be dismissed and the relief sought by appellant denied.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 2, 1979, decision by the Sacramento Area Director to cancel appellant's lease No. PSL-142 is affirmed. This decision is final for the Department.

//original signed

Franklin D. Arness
Administrative Judge

I concur:

//original signed

Wm. Philip Horton
Chief Administrative Judge

fn. 2 (continued)

pointed out in Small, at 8 IBIA 23 (1980), forbearance to immediately elect the most drastic remedy available does not, in most agency business circumstances, result in waiver by Indian owners of contract remedies expressly provided by the lease agreement.

3/ See: 43 CFR Part 4, as amended, 43 CFR 4.332, 46 FR 7337 (Jan. 23, 1981). The amended rule retains without change the provision enabling the Board to require bond in appropriate cases to protect Indian owners of leased lands.

4/ Appellant argues the amount of the bond is unreasonably high. The bond requirement established by the Board's order of Sept. 10, 1980, merely sets a maximum liability to be insured against; there is no requirement of the bond ordered that would subject the appellant to any greater liability than could be factually established at an appropriate hearing before a competent tribunal. See Order, Sept. 10, 1980.