



INTERIOR BOARD OF INDIAN APPEALS

Claire P. Smith v. Acting Billings Area Director, Bureau of Indian Affairs

17 IBIA 231 (08/18/1989)

Reconsideration denied:

17 IBIA 285

Related Board cases:

19 IBIA 72

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United States Department of the Interior

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

CLAIRE P. SMITH

v.

ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-62-A

Decided August 18, 1989

Appeal from a decision of the Acting Billings Area Director, Bureau of Indian Affairs, finding Indian landowner's livestock in trespass on leased trust allotments in which she held interests.

Affirmed.

1. Indians: Leases and Permits: Generally

Under 25 U.S.C. § 415 (1982), any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

APPEARANCES: David F. Stufft, Esq., Cut Bank, Montana, for appellant; Richard Whitesell, Billings Area Director, Bureau of Indian Affairs, pro se; Rae V. Kalbfleisch, Esq., Shelby, Montana, for lessee Tim Kimmet.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Claire P. Smith seeks review of a June 10, 1988, decision of the Acting Billings Area Director, Bureau of Indian Affairs (BIA; appellee), finding her livestock in trespass on Indian trust allotments that were leased to Tim Kimmet (Kimmet). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Two leases are at issue in this appeal. ^{1/} Blackfeet Farm/Pasture Lease No. L-2643 was prepared on May 9, 1986, and approved by the Acting Blackfeet Agency Superintendent (Superintendent) on May 13, 1986. The

^{1/} Appellant states that only one lease, L-2734, is at issue. The Board finds no basis for such a finding.

lease, whose term runs from May 1, 1986, through December 30, 1990, covers 1,794.26 acres in Blackfeet Allotments 1664-B, 1708-A, 4083-A, and 5210. Appellant owns an undivided 2/3 interest in Allotment 5210, with the remaining 1/3 interest owned by the Estate of Raleigh Smith. It appears that appellant owns an undivided 1002/1008 interest in the other allotments, with the remaining interests owned by George H. Jake, Susan Jake, Ida Jake, Darryl Kipp, Mary K. Jake, and Josephine Jake.

Blackfeet Farm/Pasture Lease No. L-2734 was entered into on August 11, 1986, and approved by the Superintendent on November 3, 1986. The lease runs from January 1, 1986, through December 31, 1990, and covers 1,029.74 acres in Allotment 5319. This allotment is owned solely by appellant.

Kimmet is the lessee on both leases, under which he has the right to farm the properties leased. Both leases also provide for the grazing of livestock, each leases stating that the "[s]eason of use and stocking capacity must be approved by the Superintendent before stock are allowed on this lease."

Operations under the two leases have not progressed smoothly. Both appellant and Kimmet have spoken and/or written to BIA on several occasions detailing alleged violations of the leases. Although not totally clear, it appears from the record before the Board that the allegations against Kimmet have been resolved to BIA's satisfaction.

The present matter arose because of appellant's use of the leased property to graze her livestock. There are suggestions in the record that in at least one year appellant may have turned her livestock onto the leased property before Kimmet had completed his harvest, and that her use of the property exceeded the stocking capacity set by the Superintendent and interfered with Kimmet's performance of certain other obligations imposed upon him by the leases.

Appellant's use of the leased property resulted in a November 21, 1986, letter from the Superintendent stating that a stock count conducted by BIA employees revealed 139 head of cattle bearing appellant's brands on the properties. The Superintendent stated:

According to provision K in both of these leases the "season of use and stocking capacity must be approved by the Superintendent before stock are allowed on this lease." As Mr. Tim Kimmet, lessee, had not sought authorization nor has he given approval under terms of the BIA lease L-2643 and L-2734 for you to run your cattle upon said leases these stock are in trespass.

We request that you work out a mutually acceptable agreement with Mr. Kimmet for use of said leases to graze your cattle. You have three (3) days from receipt of this letter to remove the

trespass cattle or reach an agreement with Mr. Kimmet whereby he obtains authority from the Superintendent to graze this lease.

(Letter at 1). Appellant appealed this trespass determination, citing an April 15, 1986, lease signed by herself and Kimmet. 2/

The Superintendent responded to the notice of appeal by letter dated December 16, 1986, noting that BIA had not approved and did not recognize the April 15, 1986, lease. He indicated, however, that although both appellant and Kimmet had been requested to consider executing pasture authorizations which would allow appellant to graze her cattle on the leases, neither party had consented to such authorizations.

By letter dated January 16, 1987, the Superintendent stated that a sublease should be executed giving appellant the right to graze the leased properties. It does not appear that such a sublease was ever executed.

Instead, by letter dated September 25, 1987, appellant was informed that 1,384 head of her cattle were in trespass on the leases. The Superintendent then stated:.

According to provision 17.K of both leases L-2643 and L-2734, "Season of use and stocking capacity must be approved by the Superintendent before stock are allowed on these leases * * *." During the remaining years of these leases, 1988, 1989, and 1990, you must comply with this provision to effect a smoother transition from the farming of this land to the winter grazing.

Because approval from the Superintendent was not received before turning the livestock into these leases, the stock are in trespass.

(Letter at 1). Appellant appealed this notice of trespass, again citing the April 15, 1986, lease.

By letter dated June 10, 1988, appellee affirmed the Superintendent's decision. Appellee acknowledged that appellant claimed a right to use the leased properties based upon the April 15, 1986, lease, but stated that lease was not recognized by BIA. He furthermore indicated that the leases

2/ This document provides in section 4(g):

"(LESSOR'S RIGHT TO USE LAND FOR PURPOSE OF GRAZING LIVESTOCK) Notwithstanding anything contrary in this lease, it is hereby mutually agreed and understood that LESSOR shall have the specific right to use all of the above farm lands for herself or others for the purpose of grazing livestock for the period of time commencing the earlier of either the end of harvest or October 15th of any given year whichever comes first, and until April 1st of the following year."

approved by BIA did not reserve any grazing privileges to appellant and that her use of the properties was, therefore, in trespass. He stated that the leases were clear that in order for appellant to use the properties, she would have to contact the Superintendent as to when and how many cattle she could graze. He concluded: "The lease language is clear and you are expected and bound by law to honor the conditions and covenants of the leases" (Letter at 2).

Appellant appealed from this decision to the Washington, D.C., BIA office, where the appeal was pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. ^{3/} The appeal was transferred to the Board on May 16, 1989, for consideration under the new appeals procedures. By notice of docketing dated May 19, 1989, the Board established a briefing schedule. Briefs have been received from appellant, appellee, and Kimmet.

Discussion and Conclusions

The issue raised in this appeal is whether appellant has the right to graze her livestock on the leased properties. ^{4/} Appellant does not contest that in both 1986 and 1987 she turned her cattle onto the leased

^{3/} See 54 FR 6478 and 6483 (Feb. 10, 1989).

^{4/} In a supplemental response received by the Board on June 26, 1989, appellant contends that she has been denied due process and a fair and impartial hearing. This allegation is based on a May 10, 1988, memorandum from the Superintendent transmitting appellant's notice of appeal to appellee. Appellant contends that the Superintendent's "admission" that the trespass notice was issued after a meeting with Kimmet and his attorney shows that the Superintendent was trying to hide something from her and was being unfair to "his own Indian ward" (Supplemental Response at 2).

The Board fails to see BIA "work[ing] behind closed doors, in secret, and in a star chamber fashion" (*id.*) under these circumstances. BIA may have decided action needed to be taken because of this meeting, but it gave appellant a full opportunity to show that its decision was in error. This opportunity continued through the appeals process and culminated in review of BIA's actions by the Board, a quasi-judicial tribunal that, as part of the Office of the Secretary of the Interior, is totally separate from BIA. Martineau v. Billings Area Director, 16 IBIA 104 (1988).

As the Department stated at 54 FR 6484 (Feb. 10, 1989) in its recent revision of its appeal regulations:

"The Office of Hearings and Appeals was created as a separate office within the Office of the Secretary of the Interior in 1970 to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: 'Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs.' 40 FR 20819 (May 13, 1975)."

properties without approval from the Superintendent. Instead, she alleges that such use of her own property was authorized by the April 15, 1986, lease between herself and Kimmet. Appellee contends that because the April 15, 1986, lease was not approved by BIA, it is void, has no force or effect, and grants appellant no rights.

[1] Under 25 U.S.C. § 415(a) (1982), any lease of Indian trust or restricted land must be approved by the Secretary of the Interior or his authorized representative before it has any force and effect. ^{5/} Conversely, any lease of Indian trust or restricted land that is not approved by the Secretary or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

Appellant and Kimmet attempted to enter into a lease in early 1986. No one has disputed that this attempted lease related to land that was held in Indian trust status or that much of the property to be leased was not owned solely by appellant. ^{6/} In order to be effective, the lease between appellant and Kimmet had to be approved by BIA. BIA, for reasons not relevant to this decision, specifically declined to approve the April 15, 1986, lease. Instead, the two present leases were executed and approved later in 1986. The parties' total agreements relative to the use of the allotments are contained solely in the two leases approved by BIA.

Because the April 15, 1986, lease was not approved by BIA, that document is void ab initio and grants no rights whatsoever to anyone. Appellant's reliance on this document is totally misplaced. Under the two leases which were executed by appellant and Kimmet and approved by BIA, appellant did not reserve any right to graze her cattle on the leased properties. ^{7/} Her use of the leased properties for grazing purposes is, therefore, a violation of the leases.

^{5/} 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 public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary."

Regulations implementing this section are found in 25 CFR Part 162.

^{6/} Even though the interests owned by other persons are not large, BIA owes the same duty to these persons as to appellant.

^{7/} Although BIA prepares leases of Indian trust or restricted property on a standard form in order to ensure that all statutory and regulatory requirements are met, this fact does not preclude the parties from adding, deleting, or altering provisions as necessary to reflect their agreement, so long as the alterations are not contrary to law. In this case, the parties could have included a provision relating to appellant's use of the leased properties for grazing, but did not.

Appellant suggests that BIA has no authority to take any action against her because she is an Indian landowner. We first reiterate that appellant is not the sole owner of all of the leased properties. But even if she were the sole owner, BIA has authority to take action under these circumstances.

First, appellant's use of the leased properties in a way not authorized under the leases constitutes a partial unilateral cancellation of the leases to the extent that her use precludes Kimmet's exercise of the rights granted to him under the leases. As held by the Ninth Circuit Court of Appeals, cancellation of a lease of Indian trust or restricted property is governed by 25 CFR 162.14 and BIA cannot permit an Indian landowner to unilaterally cancel a lease of trust or restricted property. See Yavapai-Prescott Tribe of Indians v. Watt, 707 F.2d 1072 (9th Cir. 1983).

Second, BIA has been held to have fiduciary obligations for the management of Indian trust or restricted property pursuant to Federal statutory authority. See, e.g., United States v. Mitchell, 463 U.S. 206 (1983). While these properties are leased, BIA is responsible for ensuring that they are protected. In discharging that responsibility, BIA has taken action against Kimmet for violations of the leases. The terms of the present leases clearly anticipate that the Superintendent will be consulted before the leased properties are used for grazing purposes. The self-evident reason for this requirement, clearly suggested in the leases themselves, is so that the Superintendent can examine the condition of the properties following the harvest and determine whether and to what extent they can support winter grazing and still be in condition for a summer farm crop. Because the leases contained no reservation of a grazing right for appellant, BIA reasonably believed that any winter grazing would either be conducted or authorized by Kimmet under provisions 17.K of the leases. Appellant's unauthorized use of the leased properties prevents BIA from discharging its responsibility to her and to the other landowners and potentially exposes it to liability for any harm her actions may cause to the properties.

Accordingly, we conclude that BIA had the authority to take action concerning appellant's livestock trespass.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 10, 1988, decision of the Acting Billings Area Director is affirmed.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge