



INTERIOR BOARD OF INDIAN APPEALS

Charles D. Plumage v. Billings Area Director, Bureau of Indian Affairs

19 IBIA 134 (01/08/1991)



United States Department of the Interior

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

CHARLES D. PLUMAGE

v.

BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-59-A

Decided January 8, 1991

Appeal from a decision declining to cancel Fort Belknap Lease No. 70, Document No. 204-9698.23/A.

Affirmed.

1. Contracts: Generally--Indians: Contracts: Generally--Indians: Leases and Permits: Generally

An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract.

2. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals lacks jurisdiction to consider an argument that a homesite lease violated regulations of the Department of Housing and Urban Development.

3. Contracts: Construction and Operation: Third Persons--Indians: Contracts: Generally--Indians: Leases and Permits: Generally--Indians: Leases and Permits: Assignments--Indians: Leases and Permits: Subleases

The creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

4. Indians: Leases and Permits: Cancellation or Revocation--Indians: Leases and Permits: Violation/Breach: Generally

Unless there is a determination that a breach cannot be cured within a reasonable period of time or the lessee has already been given an opportunity to cure a breach and has failed to do so, leases subject to 25 CFR Part 162 cannot be cancelled without providing the lessee a reasonable opportunity to cure a breach.

APPEARANCES: Charles D. Plumage, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Charles D. Plumage seeks review of a February 2, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (BIA; Area Director), declining to cancel Fort Belknap Lease No. 70, Document No. 204-9698.23/A. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On September 21, 1977, Joseph Plumage and the Fort Belknap Housing Authority entered into Lease No. 70, covering a portion of sec. 5, T. 31 N., R. 23 E., Principal Meridian, Blaine County, Montana. The lease stated that it was for the purpose of providing a septic tank and drainfield for the homesite of Rosella Birdtail, in connection with a public housing project. The lease was approved by the Superintendent, Fort Belknap Agency, BIA (Superintendent), on October 20, 1977. The lease ran for 25 years, with an annual rental of \$24. It further provided that the lessee would fence the property and keep it clean from debris.

Appellant apparently acquired his interest in this property through the estate of his mother, Frances Eve Plumage. By order dated November 6, 1986, Administrative Law Judge Keith L. Burrowes approved Frances Plumage's last will and testament. Under that will, appellant received interests in several properties in sec. 5, T. 31 N., R. 23 E. The property descriptions in Judge Burrowes' order and in the lease at issue here are inadequate to allow a determination as to the exact nature of appellant's interest in the property covered by the lease. Such a determination is unnecessary, however, because any interest is sufficient to give appellant standing. The Area Director has not disputed that appellant owns an interest in the property covered by the lease.

By letter dated January 10, 1989, appellant wrote the Superintendent, inquiring into the status of the lease and asking for an accounting. In response to the inquiry, the Superintendent reviewed the records concerning the lease and inspected the property. By letter dated January 20, 1989, he informed Birdtail that it appeared she was delinquent in the payment of \$111 in rent, and had not fenced the property. Accordingly, he gave her 10 days in which to provide information showing she had made the rental payments for which he had no record and requested that she fence the property as soon as the weather would permit.

On July 14, 1989, appellant asked the Superintendent to cancel the lease for noncompliance because of the delinquent rent and the failure to fence. Appellant stated that he was willing to renegotiate the lease, but did not believe the Superintendent had authority to approve the lease as it had originally been written. Through a series of letters between appellant and the Superintendent extending through September 15, 1989, appellant sought to have the lease cancelled. Appellant raised issues concerning the authority of the Superintendent to sign the lease, the reason why Birdtail was making the rental payments when the Fort Belknap Housing Authority was the lessee, the amount of delinquent rent, BIA's acceptance of payments

from Birdtail for delinquent rent when he had instructed BIA not to accept any further monies relating to this lease, and the reason why the lease was not in compliance with the 2-1/2-acre requirement for homesites.

The Superintendent responded that there were no grounds for lease cancellation. He stated that he believed Birdtail was making the rental payments because the lease was for her benefit; although Birdtail told him she had sometimes made payments directly to appellant's parents rather than through BIA, she had been informed that BIA could not credit her with any such payments she could not prove; and he had authority to approve the lease. He further indicated that appellant's desire to renegotiate the lease had been discussed with the Fort Belknap Housing Authority, which was also looking into the possibility of connecting Birdtail's sewer line to the main sewer line. After further communications, on November 16, 1989, the Superintendent repeated that he found no grounds for cancellation of the lease and informed appellant of his right to appeal the decision.

Appellant filed an appeal with the Area Director, who on February 2, 1990, affirmed the Superintendent's decision, stating:

Pursuant to your correspondence submitted with your appeal, we understand you offered the following arguments and reasons as to why you believe the lease should be cancelled:

1. The rental payments were being collected from Mrs. Rosella Birdtail, rather than the Fort Belknap Housing Authority.

Comment: The fact that the rental payment was being collected from Mrs. Birdtail versus the Fort Belknap Housing Authority does not give cause to cancel the lease. In all likelihood, if the Bureau insisted that the Fort Belknap Housing Authority make the payment, they would simply make Mrs. Birdtail pay them, then they would pay the Bureau of Indian Affairs (BIA). The point is the rentals have all been paid and the lease is current.

2. The fencing stipulation was not complied with until after your letter of July 14, 1989.

Comment: In accordance with 25 CFR 162.14 a lessee is provided the opportunity to show cause why a lease should not be cancelled for a violation of the lease term. The agency, in this case, took action to correct this violation and as we understand the fence is now in place.

3. Because Mrs. Birdtail was making the payments it could be construed that this was an assignment of the lease, in violation of paragraph 5 of the lease which deals with assignments.

Comment: In paragraph 5 of the subject lease an assignment requires the prior written consent of the lessor or Secretary of the Interior. There is no evidence of an assignment of this

lease. It is likely Mrs. Birdtail has been making the rental payments, as the purpose of this lease is to provide her with a septic tank and a drainfield for her homesite.

4. That since the "Bill for Collection" issued by the agency was incorrect in that it was sent to Mrs. Birdtail, rather than the Fort Belknap Housing Authority, and that it should include penalty and interest, the lease should be cancelled.

Comment: The Fort Belknap Agency is being directed to calculate any interest due or penalty due as a result of late rental payments on this lease, and to proceed with collecting those funds. We understand the principal has already been collected.

5. You argue that the lease should be cancelled because it is more properly a business lease and if it is a homesite lease, Mrs. Birdtail's house is on a scattered site and a scattered site requires 2 1/2 acres.

Comment: This property is leased for the purpose of locating a septic tank and a drainfield for the homesite of Mrs. Birdtail. Mrs. Birdtail's homesite is not on this property, therefore, it is likely that neither the BIA or HUD [Department of Housing and Urban Development] considered this a homesite lease subject to an acreage limitation.

6. You argue that there exists a "Breach of Trust Responsibility" due to improper and untimely administration of the lease in violation of the leasing regulations in 25 CFR and, therefore, the lease should be cancelled.

Comment: As mentioned above, 25 CFR 162.14 allows the Secretary to advise a lessee of a lease violation and gives the Secretary the authority to allow a lessee to take corrective actions to cure the breach. In this case, all contract provisions have been complied with including the construction of the fence and all past due rentals have been paid.

7. You state that the form used (Form 5-6404, Revised March 1976) is unconscionable and does not properly protect your interest.

Comment: We have no comment on this allegation, except to say this form is, in our opinion, adequate for this type of lease. It provides all standard type protection that most lease contracts do including terms, considerations, violations of lease, termination conditions, etc.

8. You request that since the rental rate is confusing and allegedly conflicting the lease should be cancelled.

Comment: On the face of the lease it states the following: "Lessee will pay \$24.00 per year for the next 25 years. Payment

will be due on October 1st of each year." We noted in the document submitted by the agency that Mrs. Birdtail had paid \$24.00 per year on this lease for a number of years and she states that in the past she had paid Mr. Joe Plumage and Mrs. Frances Plumage directly. Therefore, despite the language at the bottom of the lease where it states "rate of one dollar (24.00) for each 25 year term," both the payor and payee were of the understanding the rental was to be \$24.00 per year.

* * * * *

After considering the merits of each of your reasons and arguments as to why this lease should be cancelled, we find none of them of sufficient reason to cancel this lease. As we understand, the lease is currently in good standing with no existing violations.

Therefore, your appeal is denied and the Superintendent's decision to not cancel this lease is upheld.

The Board received appellant's notice of appeal from this decision on March 2, 1990. Only appellant filed a brief on appeal.

Discussion and Conclusions

The administrative record indicates that this lease was entered into in connection with a HUD housing project on the Fort Belknap Reservation. It further appears that eligibility to participate in this program was subject to regulations in 24 CFR Part 805 (1977), which took effect on March 9, 1976. 1/ See 41 FR 10151.

Appellant indicates that to be eligible for housing under this project, an applicant with what was termed a "scattered site," 2/ was required to have a minimum of 2-1/2 acres. This requirement did not appear in the regulations, which stated at 24 CFR 805.216(j)(2) (1977) (41 FR at 10163) that no individual homesite "shall exceed one acre unless HUD approves the use of a larger site for acceptable reasons, such as compliance with local law or to meet sanitary design requirements." The Board assumes, based upon BIA's references to an acreage requirement and other undisputed statements made by appellant, that a larger site was determined necessary at least in some instances at Fort Belknap for sanitary design reasons.

Appellant suggests that Birdtail's home was constructed as part of this housing project, but was located on less than 2-1/2 acres. Appellant alleges that the original intention was to connect Birdtail's home to

1/ HUD's Indian housing regulations were revised in 1979, 44 FR 64212 (Nov. 6, 1979) and, in 1984, were redesignated as 24 CFR Part 905, 49 FR 6714 (Feb. 23, 1984), where they are presently found.

2/ 24 CFR 805.216(i)(1) (1977) (41 FR at 10163) defined "scattered sites" as those in which "individual homesites are not contiguous."

the main sewer system, but differences in elevation made this impossible. Appellant contends that Birdtail's house was ready for occupancy when the project was nearing completion and under a time deadline. He alleges that because of the elevation problems, Joseph Plumage was approached about leasing part of his property for a septic tank and drainfield for Birdtail. The record does not contain any corroborating evidence on these matters, probably because they were not considered relevant to the lease. Appellant contends, however, that because of the time pressures and the fact that Birdtail's house was almost completed, the lease was hastily, sloppily, and incorrectly written.

Appellant raises several arguments on appeal, some of which are contradictory. Although appellant asks that the lease be cancelled, most of his arguments actually seek a determination that the lease was invalid when it was executed. These arguments are apparently made because when appellant acquired his interest in this property it was subject to a pre-existing lease which he did not like.

Appellant argues that the lease should be cancelled because of numerous problems that appear on its face, including: (1) in a typewritten section of the form lease, the rental payment is indicated to be \$24 per year, while standard paragraph 4 provides for "rent at the rate of one dollar (\$1.00) for each 25 year term." The "\$1.00" is crossed out and "24.00" is written above it, leaving an ambiguity as to the actual rental amount; (2) standard paragraphs 5 and 6, dealing with assignments and subleases, respectively, are contradictory, with paragraph 6 being unconscionable in allowing the Fort Belknap Housing Authority to sublease without the consent of the owner or the Secretary of the Interior; and (3) the lease form itself is for the purpose of leasing property for actual homesite purposes, and therefore the lease is invalid because Birdtail did not have 2-1/2 acres for her homesite.

For purposes of this discussion, the Board will assume that appellant can raise issues relating to the lease execution that were not raised by his predecessor-in-interest when the lease was entered into. ^{3/} The Board acknowledges that there are several problems with the lease as written. These problems probably arose because the lease form was being used for a purpose for which it was not developed. The form indicates that it was intended for the actual leasing of a homesite. ^{4/} The question that must be addressed, however, is whether any problems that do exist are sufficient to invalidate the lease, which does provide the required information for a valid contract, was properly entered into by the parties, and was approved by the Superintendent.

^{3/} See Sweeney v. Acting Anadarko Area Director, 19 IBIA 101, 104-05 (1990) ("The provisions of the contract were not negated by appellant's belated disagreement with them, when they were accepted by his predecessor-in-interest and assigned to him without change. Cf. Merrill v. Portland Area Director, 19 IBIA 81, 85 n.4 (1990)").

^{4/} In all probability this form was used, without much thought, because it was the form being used for the housing project and the leasing of this property was for a purpose incidental to the housing project.

[1] The rental rate is clearly stated in the typed addition to the lease. The possibly ambiguous reference in paragraph 4 resulted from an incomplete attempt to adapt its language to the specifics of this lease. The Board holds that the rental amount is not ambiguous. Even if there had been an ambiguity, the problem was overcome by the actual performance of the lessor in accepting rental payments and of Birdtail in making those payments. An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract. See, e.g., Small v. Commissioner of Indian Affairs, 8 IBIA 18, 22 (1980). Cf. United States v. Bowan, 8 IBIA 218, 225-26, 88 I.D. 261, 265-66 (1981) (concerning the contemporaneous interpretation of a statute). The lease is not rendered invalid by the cited problem with the statement of the rental amount.

The Board disagrees with appellant's contentions that paragraphs 5 and 6 are contradictory and that paragraph 6 unconscionably allows the Fort Belknap Housing Authority to sublease its interest without consent. Even if the paragraphs were contradictory, that fact would be irrelevant to this appeal, based upon the discussion concerning third-party beneficiaries, infra.

Appellant also alleges that because the lease is on a homesite lease form, it is a homesite lease. He concludes that the lease is invalid because, as a scattered site, 2-1/2 acres were required for Birdtail's homesite. This argument asks the Board to hold that the HUD acreage requirements were not met.

[2] Again assuming that he has standing and can file a timely appeal from a decision made under the HUD housing project in 1977 which was not appealed by his predecessor-in-interest, appellant asks the Board to hold the lease invalid because of an alleged violation of the procedures implementing the project. The regulations for the project required a procedure for resolving grievances. 24 CFR 805.303 (1977) (41 FR at 10167) provides in pertinent part:

Each IHA [Indian Housing Authority] shall adopt and promulgate grievance procedures which are appropriate to local circumstances, provided that such procedures shall afford all tenants and homebuyers a fair and reasonable opportunity to have their grievances heard and considered by IHA officials, and shall comply with the Indian Civil Rights Act. A copy of the grievance procedures shall be posted prominently in the IHA office, and shall be provided to a tenant or homebuyer upon request.

The Board lacks jurisdiction to consider appellant's argument. HUD's regulations provide for an appeal/grievance procedure. Any attack on a determination made under the HUD project must be made in accordance with the HUD appeal procedures, not in a collateral proceeding before the Department of the Interior. The Board lacks jurisdiction to review a decision made by a HUD official under HUD regulations. See 43 CFR 4.1 for a statement of the Board's jurisdiction.

Appellant has not raised grounds for invalidating the lease because of the cited errors on its face.

Appellant next argues that the lease is invalid because Birdtail was making and was expected to make the rental payments. Appellant contends that the lessee is the Fort Belknap Housing Authority and thus it was improper to require Birdtail to make rental payments. Appellant argues that this incorrect determination of the lessee constitutes grounds for lease cancellation because either the lease was assigned without the owner's consent in violation of paragraph 5, was subleased under paragraph 6 which is inconsistent with paragraph 5 and an unconscionable abridgement of the owner's rights, or is merely invalid.

This lease was entered into by Joseph Plumage and the Fort Belknap Housing Authority for the expressed purpose of providing a septic tank and drainfield for Birdtail. It was properly approved by the Superintendent. The record and the BIA decisions in this case show that although BIA understands the lease was entered into for Birdtail's benefit, it does not know the proper legal terminology for this situation. Consequently, while stumbling over words, BIA indicates that if the Fort Belknap Housing Authority were billed for the rent, that agency would merely collect the money from Birdtail.

[3] The proper legal term for Birdtail is "third-party beneficiary." A third-party beneficiary is a person for whose benefit a lease or contract is made by two or more other persons. See, e.g., Intermountain Health Care, Inc. v. Board of County Commissioners of Blaine County, Idaho, 688 P.2d 260, 263, 107 Idaho 248 (Idaho Ct. App. 1984); Lonsdale v. Chesterfield, 573 P.2d 822, 825, 19 Wash. App. 27 (Wash. Ct. App. 1978). Here, the Fort Belknap Housing Authority entered into a lease with Joseph Plumage in order to provide a benefit, sanitary facilities, to Birdtail. This purpose was expressly stated in the lease. The express creation of a third-party beneficiary under a lease does not constitute an assignment or sublease and does not otherwise render the lease invalid.

Once it is determined that the lease was not improperly assigned or subleased, appellant's interest in the identity of the payor ends. Any questions concerning the relationship between the Fort Belknap Housing Authority and Birdtail are between those persons so long as the lessor is not harmed. Appellant has not been harmed by Birdtail's payment of the rent.

Appellant next contends that this was not a lease for a homesite, as stated in the lease, but rather one for business purposes. Thus he argues that the lease should be cancelled because of the failure to make all rental payments and to fence the property.

[4] Paragraph 11 of the lease specifically incorporates 25 CFR Part 131, now Part 162, into the lease. Part 162 provides general requirements for business leases of trust or restricted lands. Cancellation of leases is governed by 25 CFR 162.14, which provides in relevant part:

Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

Appellant contends that the lease should be cancelled because of the lessee's failure to make all required rental payments and to fence the property. Upon being informed of appellant's concerns regarding the lease, the Superintendent inspected both the agency records and the property. He determined that there was no record of certain rental payments and the fence had not been constructed. He notified Birdtail of these deficiencies, and gave her 10 days in which to show cause why the lease should not be cancelled. During that time, Birdtail informed the Superintendent that she had made many payments directly to Joseph and/or Frances Plumage. The Superintendent informed Birdtail that BIA could not credit her for any such direct payments she could not prove. Even though she apparently believed she had made all payments, Birdtail agreed to and subsequently paid all rentals for which she could not provide proof. ^{5/} The fence was constructed in a manner the Superintendent determined to be timely.

Appellant objects that any opportunity was given to cure these apparent breaches. The regulations, however, require that an opportunity to cure be given. As the Board has previously stated, "[s]ection 162.14 contemplate that leases of Indian lands will not be cancelled because of breaches that may readily be cured." Franks v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 13 IBIA 231, 234 (1985). See also Mast v. Aberdeen Area Director, 19 IBIA 96, 99 (1990). BIA properly granted an opportunity to cure, and properly determined that the lease was in good standing when cure was timely effected. See, e.g., Day v. Navajo Area Director, 12 IBIA 8, 13 (1983). ^{6/}

Appellant also argues that the lease should be found invalid and renegotiated because there are no provisions for periodic rental rate reviews or for rehabilitation of the property should any damage be caused by its use.

^{5/} Appellant speculates that Birdtail's motive for making such payments was that she knew they had not been made. The Board could also speculate that desire to remain on amicable terms with a new neighbor might be a strong motivation.

^{6/} An exception to this rule arises when BIA properly determines that the breach cannot be cured within a reasonable period of time or when the lessee has already been given an opportunity to cure the breach and has failed to do so. See, e.g., Mast, supra, and cases cited therein. Neither situation exists here.

Under 25 CFR 162.8, "[e]xcept for those leases authorized by § 162.5(b)(1) * * *, unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved." Section 162.5(b)(1) provides that "[a]n adult Indian owner of trust or restricted land may lease his land for * * * public purposes to * * * agencies of the * * * local government at a nominal rental." These sections can be read to permit Joseph Plumage, an adult Indian, to lease his property to the Fort Belknap Housing Authority for the public purpose of providing a septic tank and drainfield to Birdtail, without the periodic review generally required under section 162.8.

Appellant's request that the lease be cancelled because it might cause damage to the property is purely speculative. Appellant has cited no example of damage caused by Birdtail's use of the property. Should damage occur in the future, BIA would then be required to take action to protect the property. The lease is not subject to cancellation because of a contingency that might occur in the future.

Finally, appellant raises a generalized argument that BIA has breached its responsibilities by failing, apparently, to take action on its own concerning the problems appellant raised. Appellant has cited no instance in which either Joseph or Frances Plumage raised problems with the lease to BIA. When appellant brought possible problems to the Superintendent's attention, the Superintendent responded immediately and the problems were corrected. BIA fulfilled its responsibilities here.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 2, 1990, decision of the Billings Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge