



INTERIOR BOARD OF INDIAN APPEALS

Gary H. Carlsen v. Acting Portland Area Director, Bureau of Indian Affairs

20 IBIA 281 (09/30/1991)



United States Department of the Interior

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

GARY H. CARLSEN

v.

ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-63-A

Decided September 30, 1991

Appeal from an assessment of damages under a farming lease.

Affirmed.

1. Indians: Leases and Permits: Farming and Grazing--Indians: Leases and Permits: Violation/Breach: Damages

Where a lease of Indian land provides for damages for noncompliance, damages may be assessed for a negligent act of noncompliance as well as an intentional one.

APPEARANCES: Appellant, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Gary H. Carlsen seeks review of a February 8, 1991, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing damages in the amount of \$690.62 for a fire on land under lease to appellant. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is lessee under irrigated farming lease No. 89-13 on the Fort Hall Reservation, Idaho. The lease is a renewal lease, with a term of 10 years, beginning January 1, 1990, and ending December 31, 1999. It was approved on January 1, 1990, by the Superintendent, Fort Hall Agency, BIA, and covers 14 allotments, containing a total of 306 acres.

On September 15, 1990, a fire started on the leased lands and burned approximately 55 acres. On September 17, 1990, the burned area was inspected by the agency Supervisory Soil Conservationist, who found that fire lines had been plowed around the burned area, in which grain stubble residue had burned.

On September 25, 1990, the Superintendent issued a decision finding appellant in violation of paragraph 4 of the "Plan of Conservation

Operations" incorporated into appellant's lease. 1/ He assessed damages in the amount of \$1,381.25 (55.25 acres at \$25 per acre).

Appellant appealed to the Area Director, contending that the fire was accidental. He stated: "It is believed the fire started from a discarded cigarette since one of the hired hands had been smoking when they started picking up the sprinkler line on field (4)" (Appellant's Notice of Appeal to the Area Director at 1). He contended that the fire lines had been plowed after the fire started, that the fire could not have been contained to a smaller area, and that a fire fighter from the Fort Hall Fire Department arrived about 15 minutes after the fire started and advised appellant concerning containment of the fire.

Agency personnel disputed appellant's contention that the fire was accidental. They also argued that appellant had failed to act diligently to contain it. 2/

In a decision issued on February 8, 1991, the Area Director stated:

There is no dispute about the fact that the field was burned without obtaining prior written permission. The question is whether the fire started accidentally and whether you were not prudent as to where you plowed the fire lines. We understand that it is not practical to go to the Agency once a fire starts and then ask for written permission to burn. We also know that in the heat of the fire, if a fireman comes to the scene, it is reasonable to assume that he has authority to make decisions as to where the fire lines should be placed. On the other hand you are responsible for the negligent actions of your employees while acting or performing actions in your employ. Since it is not clear that the fire was intentionally set or that the fire lines should have been located closer in to minimize the burn area, but it is determined that your employee was negligent, it is my decision to reduce the amount of damages set by half. You have

1/ Paragraph 4 provides: "RESIDUE MANAGEMENT The lessee agrees not to burn or permit to be burned, crop residue, meadow, or pasture without prior written permission from the Government. Damages for noncompliance is \$25.00 per acre."

2/ In a Dec. 18, 1990, memorandum transmitting appellant's appeal to the Area Director, the Superintendent stated: "There were no attempts made to confine the fire except at the allotment/lease boundaries. This situation not only indicates to us that [appellant] was unconcerned about confining the fire to the smallest possible area, but that he took advantage of it as well."

Further, the agency Soil Conservation Specialist stated to Area Office personnel that he believed the fire had been set because the entire area inside the fire lines had burned; a natural fire, he stated, tends to skip over areas (Admin. Rec. Item 3).

30 days from receipt of this letter to pay to the Fort Hall Agency Superintendent the amount of \$690.62 (55.25 acres x 12.50/acre).

(Area Director's Decision at 2-3).

Appellant's notice of appeal from this decision was received by the Board on March 11, 1991. No briefs were filed.

Discussion and Conclusions

Appellant addresses several of the statements made in the Area Director's decision concerning whether the fire was accidental, whether the fire lines were prudently placed, and whether appellant should have relied on advice from the fire fighter.

Although the Area Director discussed these matters, his decision was not based on findings concerning them but, rather, upon a conclusion that appellant's employee was negligent. Appellant responded to the finding of negligence as follows:

The decision also stated I am responsible for the negligent actions of my employees since I had previously indicated that the fire may have started from a discarded cigarette. While I understand this stated responsibility, the circumstances involved are somewhat unique. I have only one employee. He does not smoke. He has several brothers in the area who work for other farmers. When not involved with work for their respective employers, the brothers occasionally assist one another trading labor amongst themselves. This was the case on the afternoon in question.

(Notice of Appeal at 2-3). Appellant appears to be arguing that he should not be held responsible for a discarded cigarette if it was discarded by an individual who was not on his payroll. He does not dispute the Area Director's conclusion that an act of negligence occurred.

It was appellant who suggested, in his appeal to the Area Director, that the fire was started by a discarded cigarette. He has not subsequently put forth any other possible cause for the fire. Accordingly, the Board concludes that the fire was caused by a discarded cigarette.

From statements made by appellant, it appears that the smoker, whether or not a paid employee of appellant, was working on the leased lands with appellant's permission. In his appeal to the Area Director, appellant indicated that he himself was working on the leased lands at the time the fire started and was aware that his employee and one of his employee's brothers were also working there. Further, the above-quoted statement from appellant's notice of appeal indicates that he was aware of and accepted the practice of labor exchange among his employee and his employee's brothers. By permitting his employee's brothers to enter the leased lands and perform work thereon, appellant became responsible for their acts to the same extent he was responsible for the acts of his paid employee. Cf. 53 Am. Jur. 2d

Master and Servant § 412, 49 Am. Jur. 2d Landlord and Tenant § 925 (1970). The Board concludes that appellant bears the responsibility for acts of negligence committed by his paid employee's brothers. The Board further concludes that discarding an unextinguished cigarette was an act of negligence.

[1] The question remains whether damages may be assessed under appellant's lease for negligent, as opposed to intentional, burning of crop residue. The Board concludes that they may. Appellant had an affirmative duty under the lease to protect the leased lands and the environment, a duty which encompassed more than simply refraining from intentional violations of the lease. Where lease noncompliance is the result of the lessee's negligence, and the lease provides for damages, the lessee may appropriately be assessed damages.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Portland Area Director's February 8, 1991, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

3/ See, e.g., Special Lease Provision No. 11 of appellant's lease:

"Lessee shall comply with applicable air and water quality standards to conserve and protect the environment; and to avoid, minimize or correct hazards to the public health and safety. He shall also be required to provide adequate measures to avoid [word missing?] the environment within or without the leased premises that may result from or have been caused by operations conducted on the leased premises."

While burning crop residue apparently produces some benefits to the soil, both the agency and the Shoshone-Bannock Tribes have concluded that the detrimental effects of burning outweigh the beneficial ones. Hence the lease provision at issue in this appeal; the record indicates that this provision has been included in leases for at least 25 years. There is also some indication that burning of crop residue is prohibited by tribal law.