



INTERIOR BOARD OF INDIAN APPEALS

Thomas A. (Tom) Dailey v. Acting Billings Area Director, Bureau of Indian Affairs

22 IBIA 205 (08/07/1992)

Related Board cases:

19 IBIA 271A

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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

TOM DAILEY, : Order Affirming Decision
Appellant :
 :
v. :
 :
BILLINGS AREA DIRECTOR, : Docket No. IBIA 92-113-A
BUREAU OF INDIAN AFFAIRS, :
Appellee : August 7, 1992

Appellant Tom Dailey seeks review of a September 19, 1991, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Lease Nos. 0-7547, 0-7548, and 0-7549, covering Crow Allotment Nos. 740, 1436, 1437, 1515, 1529, 1530, 1531, 1532, 2656, 3028, and 3029. These allotments are owned equally by appellant and his brothers and sisters: Leonard L. Dailey, Jr.; Clyde W. Dailey; Rita Campbell; and Twila Meachem (appellees). These individuals inherited their interests in the allotments.

The allotments were advertised for lease by the Crow Agency (Agency) on March 9, 1988. Appellant was awarded the three 5-year leases noted above by claiming "owner's use" and meeting the high bid received.

In January 1990, appellant sought to have the leases cancelled and new leases issued, at a lower rental rate. The Agency readvertised the allotments without cancelling appellant's existing leases. The bids received were lower than the rent appellant was obligated to pay under the 1988 leases. Rent was due on the leases on September 1, 1990. Apparently based upon the lower bids, appellant did not pay the full rental due.

By decision dated February 11, 1991, the Area Director upheld the Superintendent's cancellation of appellant's leases for failure to pay rent. In addition, the Area Director remanded the matter to the Superintendent and directed him to assess damages against appellant. Although appellant sought to appeal this decision to the Board, the appeal was dismissed because it was not timely filed. Dailey v. Acting Billings Area Director, 19 IBIA 271 (1991). The Board's dismissal of the appeal resulted in the Area Director's decision being the final Departmental decision.

By letter dated April 2, 1991, the Superintendent notified appellant and appellees of the action he was taking in response to the Area Director's remand. His letter states:

This is to notify you that since there are five landowners and you are all considered Competent Crow Indians and in accordance with the Code of Federal Regulations, Title 25, 162.15(a), it has been determined that [the allotments] are considered competent status and the landowners will have to negotiate their own leases without the approval of the Agency Superintendent.

Appellees appealed this letter to the Area Director, who issued the decision presently under appeal. That decision states:

The superintendent's decision was to declare your interests in [the allotments] as competent status, thus removing lease activity from the direct control of [BIA]. * * *

* * * * *

There are two main points to consider in reviewing the superintendent's decision. First, he has decided to address the lease cancellation issue from the previous appeal by declaring the tracts under competent status. Secondly, he has decided individuals who are not enrolled with the Crow Tribe, but have vested interests in Crow lands, are considered competent Indians pursuant to the [Act of June 4, 1920, 41 Stat. 751, as amended].

The first issue was a directive from my decision of February 11, 1991. The leases cancelled were office leases under the jurisdiction of the superintendent. As I stated in the February decision, “. . . The superintendent is directed to take action regarding an assessment of damages against [appellant]. The other landowners or lessors had an expectation to receive a given amount for their respective trust interest in these lands. That expectation is enforceable as a contract was approved which bound the lessee to pay a set exact amount in annual payments . . .”

A declaration that the leases are under competent status is not retroactive and does not absolve the superintendent from responsibility to ensure compensation to the landowners for an approved lease.

The second issue is, basically, who is considered a competent Indian. * * *

* * * * *

It is my decision to once again direct the Superintendent, Crow Agency, to resolve the lease cancellation issue as instructed in my February 11, 1991, decision letter. The superintendent's decision to declare the tracts competent status is void because it does not satisfy the first and primary issue: enforcement of lease

compensation. Until all lease discrepancies and problems are resolved in this matter, the leases shall remain under the direct supervision and approval authority of the BIA and shall not be declared competent status.

The Board received appellant's appeal from this decision on January 16, 1992. In its predocketing notice, the Board noted that appellant alleged he had not received the Area Director's decision until "just before Christmas, 1991."

Both the Area Director and appellees contend that this appeal should be dismissed as being untimely filed. Although it seems highly improbable that appellant did not receive notice of the decision earlier, especially in view of the actions the Area Director took to ensure delivery to appellant after the initial notice sent to him by certified mail was not accepted, there is no proof that appellant received the decision earlier than he states. Under the circumstances of this case, the Board declines to dismiss the appeal as being untimely filed.

In appeals arising under 25 CFR Part 2, as this one does, the appellant bears the burden of proving that the Area Director's decision was erroneous or not supported by substantial evidence. See Ames v. Acting Billings Area Director, 20 IBIA 246, 247 (1991), and cases cited therein.

Appellant filed neither an opening nor a reply brief. ^{1/} Accordingly, all of his arguments are set forth in his notice of appeal. The notice of appeal states at page 2: "[Appellant] has no alternative but to appeal [the September 19, 1991, decision] that he owes any damage assessment because, pursuant to BIA policy, the 1988 lease should have been replaced by the 1990 lease." None of the arguments raised in appellant's notice of appeal concern the September 19, 1991, decision presently on appeal. Instead, his arguments are exclusively against the Area Director's February 11, 1991, decision cancelling the leases. The February 11 decision is final for the Department. Appellant will not be permitted to bring a collateral attack against that decision in the present proceeding. Because appellant has not raised any arguments against the September 19, 1991, decision, he has failed to sustain his burden of proving error.

^{1/} On May 20, 1992, the Board received a letter from appellant contending that the Area Director's answer brief "misstated numerous facts that do not need to be addressed for the following fact; I am currently and have been for the duration of this matter represented by legal counsel and he was not given service in this matter." The Area Director's Apr. 28, 1992, brief shows service on appellant's counsel at his address of record, as well as on appellant personally.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Billings Area Director's September 19, 1991, decision is affirmed. 2/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

2/ The Board notes that the Area Director's Sept. 19 decision was, at least in part, his directive to a subordinate employee to follow through on instructions given to that employee. To the extent that the decision involved a matter that was also appealable under 25 CFR Part 2, the Board has reviewed it. This decision should not, however, be construed as a Board determination that it has general authority to review instructions given by a BIA official to a subordinate official over whom he or she has supervisory authority and responsibility.