



INTERIOR BOARD OF INDIAN APPEALS

Nevaco, Inc., and Pyramid Lake Paiute Tribe of Indians
v. Acting Phoenix Area Director, Bureau of Indian Affairs

24 IBIA 157 (08/31/1993)



United States Department of the Interior

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

NEVACO, INC.
and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-215-A, 92-217-A

Decided August 31, 1993

Appeal from the cancellation of a business lease.

Affirmed in part; modified in part; and reversed in part.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Generally

Inclusion of a copy of 25 CFR Part 2 with a decision issued by a Bureau of Indian Affairs Superintendent, although an excellent practice, does not replace the written statement of appeal rights that is required under 25 CFR 2.7(c).

2. Bureau of Indian Affairs: Generally--Indians: Leases and Permits: Generally

The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Specifically, the parties can agree to extend the period established in 25 CFR 162.14 during which a breach of a lease can be cured.

3. Contracts: Construction and Operation: Generally--Indians: Contracts: Generally--Indians: Leases and Permits: Generally

The starting point for understanding a contract is the language of the document.

4. Indians: Leases and Permits: Generally

The lessee of trust or restricted property is responsible for ensuring that actions taken under the lease are properly approved.

APPEARANCES: Cleveland B. Crudginton, its President, for Nevaco, Inc.; Robert S. Pelcyger, Esq., and S. Stephen Bowling, Esq., Boulder, Colorado, for the Pyramid Lake Paiute Tribe of Indians; Kathleen A. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Nevaco, Inc. (Nevaco), and the Pyramid Lake Paiute Tribe of Indians (Tribe) each seek review of a July 30, 1992, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Business Lease B-96 (lease) between Nevaco and the Tribe. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the cancellation of the lease, but modifies the Area Director's decision in part, and reverses it in part.

Background

The Tribe and Nevaco entered into the lease at issue here on July 18, 1968. The lease was approved by BIA on July 19, 1968. 1/ The lease covered approximately 15 acres of tribal land in Washoe County, Nevada. As modified, the initial term of the lease was 30 years, with an option to renew for an additional 25 years. Article 5 sets forth the purpose of the lease: “[Nevaco] shall develop, use, and operate the leased premises for business, commercial or industrial purposes or any combination thereof including facilities necessary or incidental thereto, but more specifically being a printing concern.”

Nevaco constructed a building on a portion of the leased premises and began operating a printing plant. After Nevaco failed to pay the 1989 and 1990 rent, on February 25, 1991, the Superintendent, Western Nevada Agency, BIA (Superintendent), required Nevaco to show cause why the lease should not be cancelled “for non-payment and failure to maintain.” Without further explanation of the nature of the alleged violations, the letter then quoted Articles 5 and 11 of the lease. 2/

1/ The lease was apparently modified several times with BIA approval. The modifications, which are handwritten on the typed lease, are frequently illegible. Although in his brief, the Area Director gives dates for some of the modifications, there are no documents in the administrative record evidencing the reasons for the modifications or clearly showing that each modification was approved by BIA.

2/ Article 11 deals with construction, maintenance, repair, and alteration. It provides:
"All improvements placed on the leased premises shall be constructed in a good and workmanlike manner and in compliance with applicable laws and building codes. All parts of buildings exposed to perimeter properties shall present a pleasant appearance. [Nevaco] or sublessee shall have the right at any time during the term of this lease to make limited alterations

Nevaco responded by letter apparently incorrectly dated February 6, 1991, acknowledging receipt of the Superintendent's letter and stating: "Be advised that it is the intent of Nevaco, Inc. to meet all of the responsibilities under their lease." Nevaco sent an additional response on April 10, 1991:

We believe it is the clear intention of the lease to allow Nevaco to utilize the premises for any legitimate business, commercial or industrial purpose or any combination thereof. * * * By the terms of the lease Nevaco's right to exist and pursue its business endeavors on the premises are clearly protected.

At the present time Nevaco has ceased operating its printing concern at the subject premises as the location is not economically viable for that purpose, at this time. Nevaco does however, intend to continue utilizing the premises for a legitimate business purpose. Nevaco, Inc. has entered into a joint venture known as Nevaco Joint Venture with another company to carry on a soil research business at the leased premises.

Arrangements were made with the Tribe to pay all back rentals. It appears that all rental payments were brought current.

On April 24, 1991, the Superintendent informed Nevaco that its lease was being cancelled (April 1991 decision). The letter indicated that on April 4, 1991, BIA employees visited the property and learned that Nevaco had vacated the premises and that a company called Nevada Bio was preparing to move in. The Superintendent stated that the lease required the approval of subleases, and no sublease to Nevada Bio had been approved. The Superintendent further asserted that alterations, remodeling, and repairs in excess of \$50,000 were in the process of being made without the prior written consent of the Tribe and the Secretary, and that no copies of Nevaco's insurance papers had been received. Nevaco was informed that Nevada Bio was to vacate the premises by May 15, 1991. The letter concluded with the statement: "You have the right to appeal this decision under the provisions of 25 CFR, Part 2, a copy is enclosed."

By letter dated May 7, 1991, Nevaco requested that the Superintendent reconsider the decision to cancel the lease. Nevaco objected that the sublease did not require approval because it was for a term not exceeding

fn. 2 (continued)

or additions and any repair to any improvement on or placed upon the premises; no alteration, addition or remodeling of improvements involving an expenditure in excess of FIFTY THOUSAND DOLLARS (\$50,000), or removal or demolition of improvements shall take place without prior written consent of the [Tribe] and the Secretary. [Nevaco] or sublessee shall, at all times during the term of this lease and at [Nevaco's] sole cost and expense, maintain the premises and all improvements thereon in good order and repair * * *."

5 years; 3/ the alterations, remodeling, and repairs would not approach the \$50,000 limitation specified in the lease; and the insurance papers had inadvertently not been submitted to BIA by Nevaco's insurance company, but were being sent as an enclosure to the letter. Nevaco stated that it had cured all alleged breaches within the cure period provided in the lease, and therefore there was no basis for cancellation. 4/ The letter stated: "Further, we do not feel that the right of appeal as referenced in your letter is an appropriate remedy as it presumes that there is a colorable right to terminate thereby shifting the burden of undertaking the expense of an appeal to Nevaco, Inc."

By letter of September 17, 1991, the Superintendent informed Nevaco that because it "failed to timely appeal [the April 24, 1991,] decision, it is considered final for the [BIA] and the Department of the Interior." Nevaco apparently filed an appeal from this decision on October 15, 1991, and the Tribe filed a brief. The record does not contain a decision in this appeal.

On October 8, 1991, the Tribe filed a petition in Tribal court seeking Nevaco's eviction. Nevaco filed a special appearance in that proceeding, seeking to quash the petition. However, on November 21, 1991, the Tribal Court ordered Nevaco's eviction, requiring Nevaco to vacate the premises on or before December 6, 1991. On December 12, 1991, the Tribal Court issued an order of execution, authorizing the BIA police to enter and take control of the premises on behalf of the Tribe. On or before January 22, 1992, the Tribal Chairman and a BIA police officer visited the leased property and padlocked the building.

On November 22, 1991, the Superintendent notified Nevaco of another violation of the lease. Asserting that on April 5, 1985, Nevaco encumbered the property through a Deed of Trust without submitting the encumbrance for

3/ Article 17 of the lease provides:

"[Nevaco] shall not sublease, assign or transfer this lease or any right to or interest in this lease or any of the improvements on the leased premises, without the prior written approval of the [Tribe], the Secretary and sureties and no such sublease, assignment or transfer shall be valid or binding without such approval * * *."

Article 1, section C, defines "[s]ublease as * * * a lease with a term exceeding five years executed between [Nevaco] and a sublessee."

4/ Article 28 of the lease specifies what actions can be taken

"[s]hould [Nevaco] default in any payment of monies or fail to post bond * * *, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the [Tribe] or the Secretary to [Nevaco], during which 30-day period [Nevaco] shall have the privilege of curing such default, or should [Nevaco] breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the [Tribe] or the Secretary to [Nevaco], during which 60-day period [Nevaco] shall have the privilege of curing such breach * * *."

approval and without using the proceeds of the encumbrance for the development and improvement of the leased property, 5/ the Superintendent required Nevaco, to either propose a cure for or satisfactorily explain the alleged violation. The letter indicated that the alleged violation was grounds for lease cancellation.

By letter dated January 21, 1992, Nevaco replied that the encumbrance had been reconveyed to Nevaco, and therefore the breach had been cured. It appears that the reconveyance occurred on January 10, 1992.

On March 6, 1992, the Superintendent notified Nevaco that the lease was cancelled because Nevaco had ceased operating a printing business, had a poor payment record, had entered into an unapproved sublease, had encumbered the property without approval and used the proceeds of the encumbrance for purposes other than the improvement and development of the leased property, and had failed to maintain the property. Nevaco appealed this decision to the Area Director.

The Area Director affirmed the Superintendent's decision in part and reversed it in part on July 30, 1992. The Area Director held that the April 1991 decision never became final because the Superintendent failed to inform Nevaco of its appeal rights as is required by 25 CFR 2.7(b); the delinquent rentals had been paid; the sublease did not require approval; the Tribe's eviction and lockout of Nevaco may have excused the failure to maintain the property; the lease required the continued operation of a printing concern; Nevaco had largely admitted that the premises had not been maintained in good order and repair; and the unapproved encumbrance of the property and the use of the funds received under the encumbrance for a purpose other than the development and improvement of the leased property constituted an incurable breach.

Both Nevaco and the Tribe appealed from this decision. The appeals were consolidated on October 6, 1992. Briefs have been filed by Nevaco, the Tribe, and the Area Director.

5/ Article 20 of the lease provides:

"This lease, or any right to or interest in this lease or any of the improvements on the leased premises may not be encumbered without the written approval of the [Tribe], the Secretary, and sureties, and no such encumbrance shall be valid without said approval.

"An encumbrance may be made for the purpose of borrowing capital for the development and improvement of the leased premises provided the encumbrance is confined to the leasehold interest of [Nevaco] or the subleasehold interest of a sublessee and shall not jeopardize in any way [the Tribe's] interest in the land. [Nevaco] agrees to furnish as requested any financial statements or analyses pertinent to the encumbrance that [the Tribe] or Secretary may deem necessary to justify the amount, purpose and terms of said encumbrance."

Discussion and Conclusions

The Board will first address the Tribe's argument that the April 1991 decision was final for the Department. The present appeals would be rendered moot if this argument were accepted. BIA's appeal regulations were amended in 1989. Present 25 CFR 2.7 was added at that time. It provides:

(a) The [BIA] official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), [6/] shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

BIA's previous appeal regulations did not require BIA officials to inform parties of their appeal rights. Instead, parties dealing with BIA were presumed to know the regulations. See, e.g., Cahoon v. Portland Area Director, 17 IBIA 187 (1989). The amended regulations specifically place the burden on BIA to inform parties of the right to appeal a decision which is not final for the Department. BIA deciding officials are now required to inform parties of the identity of the official to whom their decision can be appealed and the 30-day time limitation on the filing of an appeal. The Board has accepted numerous appeals that would otherwise have been untimely when the deciding official failed to include the information required by 25 CFR 2.7(c). See, e.g., Chippewa Cree Tribe of the Rocky Boy's Reservation v. Acting Billings Area Director, 23 IBIA 129 (1992); Reindeer Herders Association v. Juneau Area Director, 23 IBIA 28, 47 n.17, 99 I.D. 219, 229 n.17 (1992) (In holding that it would consider arguments made by a party who did not file a separate notice of appeal, the Board noted that the party "became aware of the Area Director's decision at the time he was served with appellant's notice of appeal to the Board, even if he was not aware of it earlier. Under 25 CFR 2.7, however, an aggrieved person's right to appeal continues until proper notice is given by the BIA deciding official." (Emphasis added.)).

6/ Section 2.6(c) provides:

"Decisions made by the Assistant Secretary - Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision."

[1] The Tribe attempts to avoid section 2.7(c) by arguing that a copy of 25 CFR Part 2 was enclosed with the April 1991 decision, and that Nevaco had notice of its right to appeal because it argued that such a right was not an appropriate remedy. The Board declines the invitation to construe section 2.7(c) as narrowly as the Tribe wishes. The section was included in the amended regulations for the specific purpose of ensuring that persons dealing with BIA were informed of their right to appeal decisions within the Department. A conscious decision was made to place on BIA the burden of informing those persons of the right to appeal. Inclusion of a copy of 25 CFR Part 2 with a Superintendent's decision, although an excellent practice, does not take the place of the specific written statement required by section 2.7(c). Accordingly, the Board affirms the Area Director's determination that the April 1991 decision never became a final Departmental decision because it did not properly inform Nevaco of its right to appeal. 7/

The Tribe also contends that the Area Director's conclusion that the April 1991 decision was not final failed to give due deference to the Tribal Court orders relying upon the finality of the decision. Departmental regulations provide that Nevaco's right to appeal continued until Nevaco was properly advised of its appeal rights. Although unfortunate under these circumstances, the fact that the Tribal Court relied on the supposed finality of the April 1991 decision does not give that decision more effect than it has under Departmental regulations. The Area Director did not fail to give due deference to the Tribal Court decisions.

The Tribe's third argument for the finality of the April 1991 decision is that BIA could not reverse itself without providing notice to all interested parties. At the latest, the parties were put on notice that there might be a problem with the April 1991 decision when the Superintendent issued a decision on March 6, 1992, which did not rely on the finality of the April 1991 decision. 9/ The Tribe and Nevaco were both notified of that decision. The parties were clearly informed of the Area Director's determination that the April 1991 decision had never become final in his July 30, 1992, decision. Again, this decision was sent to both the Tribe and Nevaco. The parties had the opportunity to address this issue on appeal. The Board concludes that all interested parties were notified that the April 1991 decision was not considered final.

7/ The Board, however, does not accept Nevaco's contention that a right of appeal is not "an appropriate remedy" because it places the expense of an appeal on Nevaco. The right of appeal is a fundamental aspect of the American judicial system. Furthermore, there is no more "expense" in an appeal to the Area Director than in a request that the Superintendent reconsider.

8/ The Superintendent's Nov. 22, 1991, show-cause notice to Nevaco indicated that the lease would be cancelled based on the unapproved encumbrance. This notice was issued after the Superintendent informed Nevaco on Sept. 17, 1991, that the cancellation was final. The Nov. 22, 1991, notice, which is inconsistent with a conclusion that the lease had already been cancelled, should have raised a question concerning the finality of the April 1991 decision.

[2] In his February 25 and November 22, 1991, letters to Nevaco, the Superintendent stated that Nevaco had 10 days in which to explain or cure the alleged breaches. This period is based on 25 CFR 162.14. Article 28 of the lease, however, provides a 30-day period in which to cure the failure to pay monies or to post bond and a 60-day period in which to cure any other breach. The Board has previously held that BIA is bound by the terms of leases it has approved so long as those terms are not in conflict with the governing regulations. In enforcing a similar extended cure provision in American Indian Land Development Corp. v. Sacramento Area Director, 23 IBIA 208, 215 (1993), the Board stated that "[i]n the absence of a specific provision in a lease, the 10-day period established in 25 CFR 162.14 is applied. * * * However, no regulation prevents the parties from changing the length of the notification and cure period to meet their specific needs." BIA erred in indicating that Nevaco had only 10 days in which to cure breaches of the lease. Under the circumstances of this case, however, that error is harmless because the 10-day period was not strictly enforced against Nevaco, which responded to each notice within 60 days.

The first 8 pages of Nevaco's opening brief are devoted to background information concerning both the execution of the lease and more current events. The Tribe argues that these unsubstantiated factual assertions, which were raised for the first time on appeal, should not be considered. The Board has held that it is not required to consider arguments or issues raised for the first time on appeal. See, e.g., All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 212 (1992), and cases cited therein. Here, however, this rule need not be applied because the Board finds that extrinsic evidence is not necessary to an understanding of the lease.

[3] Most of the disagreements between Nevaco and the Tribe arise from their differing interpretations of the lease. The starting point for understanding any contract is the language of the document itself. See, e.g., 17A Am. Jur. 2d Contracts § 337 (1991). Consequently, the Board has very carefully reviewed the entire lease, including some of its modified and deleted provisions, in order to ascertain the intentions of the parties and to understand the lease as a coherent expression of those intentions.

The lease as originally written contemplated that the entire 14 acres leased to Nevaco would be developed for commercial, industrial, or other business purposes, probably as an industrial park, with Nevaco as the first tenant. ^{9/} Although it is not clear from the lease whether Nevaco, the

^{9/} As originally written, Article 9 of the lease provided:

"Within 180 days from the effective date of this lease, [Nevaco] shall submit to the [Tribe] and the Secretary for approval, a general plan and architects design for the development of the entire leased premises, together with a phased program, by specific area, of the developments included as a part of the general plan."

Article 10 originally required development of the property to be completed within 10 years.

Tribe, or a combination of both were to be responsible for obtaining additional tenants, it is possible that Nevaco was only responsible for ensuring the development of improvements appropriate for other tenants. At some point, the parties' intention changed and the lease was modified to provide that Nevaco was responsible only for the construction of the building it occupied. ^{10/}

The definition of "sublease" supports this interpretation of the parties' intent. "Sublease" for purposes of this lease was clearly defined to mean only those subleases with a term exceeding 5 years. The Board disagrees with the Tribe's contention that subleases required approval regardless of their term, and concludes that Nevaco was allowed to enter into subleases with terms of less than 5 years without approval. This authority to enter into short-term subleases would probably facilitate the acquisition of new tenants.

The Board reviews the Area Director's decision with this general overview of the lease in mind. The first ground upon which the Area Director upheld lease cancellation was that the lease required Nevaco to operate a printing business. The Tribe argues that the property was leased for use as a printing concern and that Nevaco's failure to operate a printing concern, or operation of any other business, constituted a breach of the lease. Nevaco contends that the reference to a printing concern in Article 5 merely described the type of business in which it was engaged at the time of the execution of the lease, and explained the unusual basis for the rental rate adjustment in Article 7, discussed *infra*. It contends that Article 5 allows it to engage in any lawful business.

The Board believes that the parties intended that Nevaco would operate at least a printing concern on the property, and that other businesses would be developed as additional tenants were located. The question is whether Nevaco's operation of a printing concern was a material part of the lease such that Nevaco's failure to maintain such a business constituted a breach of the lease. The Board concludes that it was.

Article 5 explicitly states that Nevaco, as lessee, would develop, use, and operate the leased premises as a printing concern. Article 7 provides that "[a]ny adjustment of [Nevaco's] rent shall be based on the current publishers contracted price per hundred weight of newsprint paper." In distinction, Article 7 states that rental rate adjustments for subleases longer than 5 years shall be "on terms acceptable to the [Tribe] and the Secretary." Basing Nevaco's rental rate adjustments on the cost of paper would have no meaning absent Nevaco's operation of a printing concern. The lease as a whole is written so that Nevaco's operation of a printing concern is presupposed. At the very least, the lease required modification to provide for a different method for rental rate adjustments when Nevaco ceased operating a printing concern. When the Tribe learned that Nevaco was

^{10/} It is impossible to determine from the record when Article 9 was modified.

no longer using the premises for a printing business, Nevaco had already obtained a sublessee which was in a different business, and indicated that it had no intention of resuming a printing concern on the leased premises. Nevaco did not request modification of the lease to provide for a different method of rental rate adjustment, but rather stated that it could utilize the property in any way it wished.

The Board holds that under the lease Nevaco was required to operate a printing plant on the leased premises. Nevaco's closure of its printing operation, coupled with its statement that it would not resume the operation and actions inconsistent with re-establishing a printing business, constituted a breach of the lease which Nevaco did not cure. The Area Director's decision as to this ground for lease cancellation is affirmed.

The Area Director also found that Nevaco's encumbrance of the property and use of the funds derived from that encumbrance for a purpose other than the improvement of the leased premises was a breach of the lease which could not be cured. The Tribe agrees. While Nevaco does not dispute the facts, it contends that the lease does not provide for an "incurable" breach and that this breach was timely cured.

Article 20 of the lease clearly provides that Nevaco could not encumber the lease or any right to or interest in the lease without the approval of the Tribe, the Secretary, and the sureties. Nevaco encumbered the lease on April 5, 1985, and submitted the encumbrance to the Tribal Chairman, who signed an Agreement Regarding Encumbrance of Leasehold Interest on April 17, 1985. Nevaco does not allege that it submitted either the encumbrance or the agreement to BIA or the sureties.

[4] Nevaco contends that its submission of the encumbrance to the Tribal Chairman discharged its duty, and that the responsibility for not providing the encumbrance to BIA rests with the Tribe. The Board disagrees. Nevaco, as lessee, was responsible for ensuring that any actions it took under the lease were properly approved. The lease clearly provided that encumbrances required the approval of BIA and the sureties as well as the Tribe. Nothing in the lease provides that duties under it are discharged by submission to or consultation with only one party, of the lessee's choice. Nevaco's failure to obtain BIA approval of the encumbrance constituted a violation of the lease.

The question remains as to whether Nevaco timely cured the breach. Nevaco presented evidence that the encumbrance was removed within 60 days from its receipt of the Superintendent's November 22, 1991, show-cause notice. It appears that the most appropriate cure would have been to obtain approval of the encumbrance. Nevertheless, under the circumstances of this case, the Board concludes that Nevaco cured the breach by removing the encumbrance. Therefore, the Area Director's conclusion to the contrary is reversed.

There is, however, a second question relating to the encumbrance; i.e., whether the use of the funds derived from it for a purpose other than the

development and improvement of the leased premises violated Article 20 of the lease. Article 20 provides that “[a]n encumbrance may be made for the purpose of borrowing capital for the development and improvement of the leased premises.” The issue presented is whether this specified use of funds derived from an encumbrance of the lease is exclusive, or merely a statement of one possible use.

The Board concludes that the parties intended that funds derived from an encumbrance of the lease would be used for the development and improvement of the leased premises. The lease was clearly originally intended to be a development lease. It provided for initial improvements to be made through an Economic Development Agency loan. The lease provides no basis for a conclusion that the parties intended that Nevaco could encumber the lease for its own independent purposes.

Nevaco's improper use of the funds derived from the encumbrance of the lease was a separate breach. The Area Director concluded that the breach was "incurable." The Board disagrees with this aspect of the Area Director's decision. Although not clear from the decision, it is possible that the Area Director considered this breach to be "incurable" because of the amount of time that had passed since the encumbrance was made. The issue, however, is the amount of time that has passed since the lessee was notified of the breach. 11/ Once advised of its breaches concerning the encumbrance, Nevaco removed the encumbrance within the lease's cure period, thus, as discussed above, curing the breach resulting from failure to obtain approval. It is at least arguable that Nevaco could have cured the breach resulting from its improper use of funds derived from the encumbrance by investing, or making commitments to invest, the total amount of those funds into the development and improvement of the leased premises within the cure period. Nevaco did not, however, make any attempt to cure this aspect of its breach. Accordingly, the Board affirms the Area Director's decision that the improper use of the funds derived from the encumbrance was a breach for which the lease could be cancelled, but modifies it by removing the statement that the breach was "incurable."

The Tribe contends that Nevaco failed to maintain the leased property, and disagrees with the Area Director's determination that the Tribe's actions in padlocking the building arguably excused Nevaco's failure to maintain the property. The Tribe argues that the property was not maintained prior to its padlocking of the building, and that it padlocked the building in order to prevent further deterioration because the building was abandoned and open to the elements. Failure to maintain the property includes both cleanup of the grounds, maintenance of the building structure, and perhaps the improper storage of chemicals on the property. 12/

11/ This fact points out the necessity for both BIA and a tribe to be vigilant in their policing of leases, especially as to those breaches that are not readily discoverable, e.g., an encumbrance cannot be seen in a physical inspection of the leased premises.

12/ By letter of Mar. 2, 1992, the Superintendent notified the Tribe that several chemicals had been discovered on the leased premises. The Superintendent stated that it was not known whether the chemicals were hazardous,

Nevaco disputes that it failed to maintain the property. The Board finds that whether or not the property was properly maintained before the Tribe padlocked the building is a factual question that cannot be decided on the present record. It also finds that because the lease was properly cancelled for other reasons, there is no need to refer this matter for an evidentiary hearing on the question of maintenance.

In summary, the Board concludes that Nevaco breached the lease by ceasing to operate a printing concern and by using funds derived from an encumbrance of the leasehold for a purpose other than the development and improvement of the leased premises. The Board further concludes that all other alleged breaches of the lease were either not breaches, were timely cured, or cannot be determined on the basis of the present record. The two uncured breaches are sufficient in themselves to support lease cancellation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the cancellation of Nevaco's lease is affirmed. The Area Director's decision is, however, modified by deletion of the statement that the breach resulting from improper use of the funds derived from the encumbrance was incurable and reversed to the extent it concluded that the breach resulting from failure to obtain approval of the encumbrance had not been cured.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

fn. 12 (continued)
but he would contact the Indian Health Service and possibly the Environmental Protection Agency to determine what needed to be done. The Board expresses no opinion concerning the storage of chemicals on the property.