



INTERIOR BOARD OF INDIAN APPEALS

Kearny Street Real Estate Co., L.P. v. Sacramento Area Director,
Bureau of Indian Affairs

28 IBIA 4 (05/16/1995)



United States Department of the Interior

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

KEARNY STREET REAL ESTATE COMPANY, L. P.

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-131-A

Decided May 16, 1995

Appeal from a decision concerning the status of a sublease under a lease of allotted land on the Agua Caliente Reservation.

Reversed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally

In appeals arising under 25 CFR Part 2, interested parties are entitled to respond to an appellant's argument by filing an answer under 25 CFR 2.11. Therefore, a Bureau of Indian Affairs Area Director may not issue decision in an appeal prior to expiration of the time for filing answers in sec. 2.11.

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

The construction of leases of Indian land is a matter of Federal law, as developed in decisions of the Federal courts and the Board of Indian Appeals. Where there are no Federal cases on point, state law may furnish a convenient source for the general law of contracts to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources.

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

A lease of Indian land should be strictly construed to avoid a forfeiture. However, when the terms of the lease clearly provide for forfeiture, the forfeiture may be enforced.

4. Bureau of Indian Affairs: Generally--Indians: Contracts:
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. Where such a lease clearly provides for the forfeiture of certain rights, the Bureau lacks authority to grant relief from forfeiture over the objection of a party to the lease and/or a party for whose benefit the forfeiture provision was included in the lease.

APPEARANCES: Betty M. Shumener, Esq., and Bruce W. Fraser, Esq., Los Angeles, California, for appellant; W. Curt Ealy, Esq., and Emily Perri Hemphill, Esq., Palm Springs, California, for C.V. Partners.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kearny Street Real Estate Company, L.P., seeks review of a May 26, 1994, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the status of a sublease under Lease PSL-263 (the lease). For the reasons discussed below, the Board reverses the Area Director's decision.

Background

Allotment 95 on the Agua Caliente Reservation is held in trust by the United States for the benefit of Marlene Rice Chapparosa. It contains 40 acres, more or less, and is described as the NW¼, NW¼, sec. 22, T. 4 S., R. 5 E., San Bernardino Base and Meridian, Riverside County, California. On December 15, 1978, the Area Director approved a lease of the allotment for a term of 65 years, to commence upon the exercise of an option described in Article 50 of the lease. The optionees were John H. Lake, John H. Oberle, Clarence A. Brechlin, Paul G. Payne, and William C. Ealy. On June 16, 1986, the optionees exercised their option, causing the lease to commence as of July 14, 1986. Through a series of assignments approved in 1986 and 1988 by the Director, Palm Springs Field Office, BIA (PSFO Director), the lease was assigned to C.V. Partners, a California general partnership, which is the present lessee.

Four supplemental agreements were approved between 1980 and 1984. On March 22, 1990, the PSFO Director approved Supplemental Agreement 5, which amended and restated the lease in its entirety. On the same date, he approved a sublease, covering approximately 9.72 acres, between C.V. Partners and Cathedral Village Associates (CVA), a California limited partnership. 1/

In June 1990, CVA sought a loan in the amount of \$7,750,000 for the purpose of developing approximately 91,000 square feet of retail space on

1/ The sublease is either Sublease C-2 or Sublease C-3. Both numbers are shown in the record.

the subleased property. The lender was Security Pacific National Bank, which subsequently became by merger, the Bank of America National Trust and Savings Association (bank). The PSFO Director approved a construction trust deed for the loan on July 16, 1990. Both Chapparosa and C.V. Partners executed a document entitled "Landlord Consent," in which they consented to the encumbrance. This document was also approved by the PSFO Director on July 16, 1990.

The loan matured on February 1, 1992. CVA was unable to obtain replacement financing, and the bank foreclosed on the loan. Upon foreclosure, BA Properties, Inc., purchased the sublease for \$6,400,500. A trustee's deed was issued on January 28, 1993. On June 30, 1993, BA Properties, Inc., assigned its interest in the sublease to appellant. C.V. Partners consented to the assignment on June 28, 1993, and the PSFO Director approved it on June 30, 1993.

At some time prior to August 12, 1993, appellant's representatives met with the PSFO Director concerning the sublease. At that meeting, they expressed the view that the foreclosure had terminated the leasehold interest of C.V. Partners in that portion of the lease which was subject to the sublease. The PSFO Director requested that appellant present its position in writing to the Field Solicitor, Palm Springs. Appellant did so in a submission dated August 12, 1993. C.V. Partners submitted a response on September 9, 1993, and appellant submitted a reply on January 6, 1994.

The Field Solicitor issued an opinion on February 10, 1994, in which he agreed with the position taken by appellant. On February 17, 1994, the PSFO Director rendered a decision adopting the views of the Field Solicitor. 2/

C.V. Partners appealed to the Area Director, who reversed the PSFO Director's decision on May 26, 1994.

Appellant then filed a notice of appeal with the Board. Briefs were filed by appellant and C.V. Partners. In addition to the standard briefs allowed under the Board's regulations, both parties filed supplemental briefs in accordance with permission granted by the Board.

Procedural Issues

[1] As a preliminary matter, the Board addresses a contention made by appellant in its notice of appeal. Appellant there contends, inter alia, that the Area Director failed to take appellant's answer brief into consideration when he issued his decision.

The record shows that appellant's answer brief was received at the Area Office on May 26, 1994, the date on which the Area Director issued

2/ Appellant submitted a proposed sublease to the PSFO Director for approval on Mar. 9, 1994. The PSFO Director reviewed the proposal and provided a number of comments in a letter dated Mar. 29, 1994.

his decision. Further, as appellant notes, the decision indicates that the Area Director considered only the administrative record and the filings made by C.V. Partners. Because the decision makes no mention of appellant's answer, it is not clear whether the Area Director found the answer untimely or whether he unintentionally issued a premature decision.

The Board has previously stated that an Area Director should not issue a decision in an appeal prior to the expiration of the time allowed for filing answers in 25 CFR 2.11. E.g., Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992); Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1 (1992). The reason for this rule is obvious. Interested parties are entitled under BIA's appeal regulations to file answers responding to the arguments made in an appellant's notice of appeal and statement of reasons. However, if a premature decision is issued, the interested parties are deprived of their right to present their positions.

It appears unlikely that appellant's answer was untimely. The Area Director received C.V. Partners' statement of reasons on April 25, 1994. Under 25 CFR 2.11, appellant was allowed 30 days from its receipt of C.V. Partners' statement of reasons in which to file its answer. Under 25 CFR 2.13(a)(2), a document filed by mail is deemed filed on the date it is postmarked. Therefore, the Area Director should have allowed for time in the mail before concluding, if that is what he did, that appellant would not file an answer or that its answer would be untimely.

In this case, the parties have had ample opportunity to present their positions to the Board. Therefore, the Board concludes that any procedural error committed by the Area Director has been cured in these proceedings. It therefore proceeds to the merits of this matter.

Discussion and Conclusions

The focus of this dispute is Article 24 of the lease, titled "Encumbrance," which appears in Addendum 6 to the lease. The article deals comprehensively with the encumbrance of interests under the lease and with defaults under encumbrances. Of particular concern here is Article 24.D, which provides:

Default by Sublessee. Upon default by any sublessee, under any of the terms of an approved encumbrance on a sublease, the encumbrancer shall furnish the sublessor copies of any Notice or [sic] Default sent sublessee, and encumbrancer may exercise any rights provided in such encumbrance, provided that before any sale of the subleasehold, whether under power of sale or foreclosure, the encumbrancer shall give to the sublessor notice of the same character and duration as is required to be given to sublessee by either or both such encumbrance or the laws of the State of California.

If such Notice of Default shall be given and any default shall continue, Lessee prior to sale of the subleasehold, under power of sale or foreclosure, shall have the right to correct

such default and initiate action under the sublease to terminate such sublease provided that upon exercise of such option and until such sublease is terminated, Lessee shall pay to the encumbrancer the balance of encumbrance less the aggregate of accelerated payments of principal that would have been thereafter due had such payments not been accelerated by reason of the default of the sublessee and within thirty days after termination of such sublease either (1) pay the balance of encumbrance or (2) execute to the encumbrancer a new promissory note for the balance of encumbrance, payable upon the same terms and conditions as originally provided by the approved encumbrance, such note being secured by a new encumbrance approved by the Secretary on the leased property upon which the approved encumbrance is a lien and deliver to the encumbrancer a policy of title insurance in the amount of the balance of the encumbrance issued by a reputable title insurance company and insuring that the new encumbrance is a first encumbrance on such property, subject only to this lease, current taxes and to conditions, restrictions and reservations of record at the time of recording the approved encumbrance, and subject, further, to any agreements for utility lines entered into by Lessee and rights of way lawfully granted by the Secretary, in connection with the development of such property pursuant to this lease.

Failure of the Lessee to cure any default on any encumbrance upon a sublease prior to the completion of foreclosure proceedings shall extinguish forever the rights of the Lessee as to the real property which is the subject matter of the sublease, in which event the Lessor of this lease shall succeed to the rights of the sublessor in such sublease, the acquirer of the interest of the sublessee shall succeed to the rights and obligations of the sublessee, and the sublease shall thereby become a fractional lease, with rent thereafter computed as set out in Paragraph F, Rental, of this Article.

The PSFO Director found, and appellant here contends, that this provision, particularly the third paragraph (paragraph 3), is clear and unambiguous--failure of C.V. Partners to cure CVA's default prior to foreclosure resulted in C.V. Partners' loss of its interest in that part of its lease which was subject to CVA's sublease. Under the PSFO Director's decision, appellant would now be entitled to a direct lease covering the property subject to the sublease.

In reversing the PSFO Director's decision, the Area Director found that, under the second paragraph of Article 24.D (paragraph 2), C.V. Partners' right to cure CVA's default was an option, rather than an obligation, and that, "[s]ince the option to cure the sublessee's default was never exercised, [paragraph 3] does not apply" (Area Director's Decision at 5). The Area Director also found that appellant was not entitled to a new lease because it was not the "acquirer of the interest of the sublessee" within the meaning of paragraph 3. That term applied, the Area Director concluded, only to the foreclosure sublessee, *i.e.*, BA Properties, Inc., and not to appellant, which acquired the lease 5 months after the fore-

closure. Id. at 6. Finally, the Area Director found that, "[s]ince [the PSFO Director] approved the Assignment of Sublease on June 30, 1993, and acknowledged C.V. Partners as the Sublessor to the Sublease, his approval of this Assignment of Sublease signified his acceptance of C.V. Partners as the Sublessor to the Sublease." Id.

Appellant challenges, among other things, the Area Director's statement that paragraph 3 did not come into play in this case. Appellant contends:

Had C.V. Partners exercised the cure option in [paragraph 2], the defaults would have been cured, there would have been no foreclosure and the Sublease would have been terminated. [Paragraph 3] contemplates the exact opposite -- failure to cure, completion of foreclosure, the relation of the parties under the surviving Sublease, and the conversion of the Sublease into a fractional Master Lease.

(Appellant's Opening Brief at 13).

In its answer brief, C.V. Partners presents an analysis which it contends supports the Area Director's statement. It argues that if it had terminated the sublease in accordance with its right under paragraph 2, "the encumbrancer's security in that Subleasehold Estate would have been destroyed, leaving the encumbrancer without the full benefit of its bargained for security" (C.V. Partners' Answer Brief at 12). It continues:

Under these circumstances then, if the sublessor [i.e., C.V. Partners] fails, within 30 days after the termination of the Sublease, to either pay off the encumbrance or execute a new note to the encumbrancer * * *, the encumbrancer is left with a defaulted loan that is no longer supported by the bargained for security since the action of the Sublessor, in connection with exercising the option to cure, terminated the Subleasehold Estate.

[Paragraph 3] was therefore included in the Lease to prevent the encumbrancer's loss of its security which would obviously occur under such a scenario. In essence, [paragraph 3] substitutes the leasehold estate as security in favor of the encumbrancer, in place of the Subleasehold Estate which provided the original security, but which was lost due to the Sublessor's exercise of its option to cure and its termination [of] the Sublease.

If the Sublessor never chooses to exercise its option to cure, it never terminates the Sublease. With the Sublease still in place then, the lender is free to, and in this case did, sell the Subleasehold Estate via Trustee's sale. * * * In short, the Subleasehold Estate that the encumbrancer originally bargained for as security remains in place, and upon the Trustee's Sale, the encumbrancer receives the full benefit of its bargain.

Id. at 12-13.

C.V. Partners' interpretation of paragraph 3 has some appeal, because it ostensibly protects the rights of an encumbrancer while avoiding a forfeiture by the lessee/sublessor in the case of a default by its sublessee. There is a serious difficulty with this interpretation, however. It is at odds with the language of the provision itself.

Had the parties intended paragraph 3 to have the meaning now ascribed to it by C.V. Partners, they could easily have drafted it to communicate that meaning. They did not do so. Instead they stated, in no uncertain terms, that "[f]ailure of the Lessee to cure any default on any encumbrance upon a sublease prior to the completion of foreclosure proceedings shall extinguish forever the rights of the Lessee as to the real property which is the subject matter of the sublease." (Emphasis added.) There is no suggestion in this language that the application of paragraph 3 was to be restricted to subleases which had been terminated. The Board agrees with the PSFO Director's conclusion that the language is clear and unambiguous. It finds that the language of paragraph 3 supports a conclusion that C.V. Partners' interest in the real property covered by the sublease was extinguished when it failed to cure CVA's default.

C.V. Partners contends, however, that this construction of paragraph 3 is in conflict with paragraph 2 of Article 24.D, as well as with Article 30. It contends further the construction conflicts with a provision of the sublease, i.e., Sublease Article 24.A.

Under paragraph 2 of Article 24.D, C.V. Partners is given the right to cure a default by its sublessee. C.V. Partners contends that, because it had only an option, but no obligation, to cure its sublessee's default, it cannot be penalized for choosing not to exercise its option. In support of this contention, it cites cases to the effect that an option is not binding on the optionee and imposes no liability on him.

The Board agrees that one who holds an option ordinarily has no obligation to exercise that option and thus incurs no liability in not exercising it. In this case, however, when paragraphs 2 and 3 are read together, as they must be, it becomes clear that normal expectations concerning options have been modified. Under this lease, there are consequences to a lessee which does not exercise the option in paragraph 2; and those consequences are spelled out in paragraph 3. The Board agrees with C.V. Partners' contention that it had no contractual obligation to exercise the option; thus it did not breach the lease by failing to do so. But the fact that it had no contractual obligation to exercise its option does not relieve it of the contractually established consequences of its choice not to exercise it.

As it happens, a more typical option, the kind that C.V. Partners seems to have in mind, is illustrated by Article 24.C of the lease, concerning default by the lessee. Article 24.C has two paragraphs, analogous to the first two paragraphs of Article 24.D. The second paragraph gives the lessor the right to cure a breach by the lessee. However, Article 24.C contains no third paragraph and no provision comparable to paragraph 3 of Article 24.D. This lack is, of course, understandable in light of the lease's prohibition against jeopardizing the lessor's interest in her trust land. See note 3, infra. The contrast between Article 24.C and Article

24.D clearly supports the conclusion that, in the case of Article 24.D, something more than an ordinary option was intended.

The Board finds that Article 24.D, read as a whole, supports the conclusion that C.V. Partners' interest in the real property covered by sublease was extinguished when it failed to cure CVA's default.

C.V. Partners next contends that this construction of Article 24.D is in direct contradiction of Article 30 of the lease, which sets out procedures to be followed "[i]n the event of default by Lessee in any the covenants or conditions of this lease" (Article 30.A). Under Article 30, a lessee which defaults under the lease is entitled to be provided with notice and an opportunity to cure its default.

Article 30 concerns default by the lessee under the lease. As discussed above, and as C.V. Partners argues here, it had no obligation under the lease to cure CVA's default under the encumbrance. Thus, C.V. Partners did not default under the lease. Its argument here suggests that it believes the Article 30 procedures for default under the lease are also applicable to defaults under an encumbrance. Clearly, however, these are two different animals. The procedures for default under an encumbrance are those set out in Article 24.

The Board rejects C.V. Partners' contention that Article 30 conflicts with the construction of Article 24.D adopted by the PSFO Director. Accordingly, the Board finds that C.V. Partners has not shown any conflict between Article 24.D, as construed by the PSFO Director, and any other provisions in the lease.

C.V. Partners next contends that the PSFO Director's construction of Article 24.D conflicts with the sublease in that it requires that Sublease Article 24.A be ignored. Sublease Article 24.A provides:

Consent to Sublease. This lease, a fractional part of this lease, any sublease authorized hereunder, or any right to or interest in this lease or any of the improvements on the leased premises may be encumbered for the purpose of borrowing capital for the development and improvement of the leased premises with the written approval of the Secretary, which approval shall not be unreasonably withheld, provided that no such encumbrance shall be valid without said approval, and provided further that the encumbrance is confined to the leasehold interest of Lessee or sublessee and does not jeopardize in any way the Lessor's interest in the land. Lessee and/or sublessee agree to furnish as requested any financial statements or analyses pertinent to the encumbrance that the Secretary may deem necessary to justify the amount and terms of said encumbrance. [3/ Emphasis added.]

3/ This provision is identical to Article 24.A of the lease. Clearly, the underscored language, as it appears in Article 24.A of the lease, was intended to protect the Indian lessor's interest in her trust land.

The sublease identifies C.V. Partners as the lessor and CVA as the lessee. See sublease at page 1. C.V. Partners contends that, because it is the lessor under the sublease, its interests were protected by Article 24.A of the sublease when CVA placed an encumbrance on the subleasehold estate.

In essence C.V. Partners contends that it is protected by a provision in the sublease from consequences which are spelled out in the lease. This contention posits a conflict between Article 24.D of the lease and Article 24.A of the sublease. 4/

Article 20.A of the lease provides in part:

No * * * sublease shall be valid or binding without [the consent of the Lessor and approval of the Secretary and sureties], and then only upon the condition that sublessee has agreed in writing that in the event of conflict between the provisions of this lease and of said sublease, the provisions of this lease shall govern. No sublease shall release the Lessee from any obligation under this lease or substitute the sublessee for the Lessee hereunder.

It is clear, in light of Article 20.A, that the provisions of Article 24.D of the lease prevail over those of Article 24.A of the sublease. 5/

C.V. Partners has not demonstrated that any provision in either the lease or the sublease modifies the effect of the language in Article 24.D, paragraph 3, of the lease. The Board therefore finds that the Area Director's first conclusion--that paragraph 3 does not apply in this case--must be rejected.

The Area Director's second conclusion was that appellant is not entitled to a new lease because it did not receive its interest until 5 months

4/ C.V. Partners contends that there is no conflict and thus Article 24.A of the sublease may be given full effect, if C.V. Partners' interpretation of Article 24.D of the lease is accepted--that is, if paragraph 3 is viewed as applicable only in cases where C.V. Partners has terminated a sublease but has subsequently failed to cure its sublessee's breach.

The Board has already rejected this interpretation.

5/ Article 50 of the sublease also addresses conflicts between the lease and the sublease. It provides:

"This lease [i.e., the sublease] is subject to the terms and provisions of the Master Lease and any conflict or inconsistency between this lease and the terms of the Master Lease shall be governed by this lease. A copy of the Master Lease is deemed incorporated herein by reference as though set forth in full."

The Board confesses puzzlement as to the intent of the first sentence of this provision, which clearly appears to suffer from an internal inconsistency. To the extent it might have been intended to negate the effect of Article 20.A of the master lease, it would appear to be ineffective in light of the clear term of Article 20.A.

after the foreclosure and was therefore not the acquirer of the interest of the sublessee" under paragraph 3. ^{6/} In a related finding, the Area Director concluded that an option to obtain a new lease must be exercised prior to the completion of foreclosure proceedings.

These conclusions appear to be based upon a misunderstanding of paragraph 3. There is no requirement in that paragraph that any action be taken by an acquirer, or assignee of an acquirer, in order to put the "fractional lease" provisions into effect. There is certainly no requirement that any such action be taken prior to the completion of foreclosure proceedings. Indeed, it is hard to imagine how this could be done. The language of paragraph 3 indicates that a sublease automatically becomes a fractional lease upon the lessee's failure to cure its sublessee's default. Further, the language makes it clear that the action required to be taken "prior to the completion of foreclosure proceedings" is the lessee's action to effect a cure, not an acquisition by an acquirer.

Thus, the fact that appellant did not obtain its assignment until 5 months after the foreclosure is of no consequence here. Under paragraph 3, the interest presently held by appellant became a fractional lease upon foreclosure. It was therefore a fractional lease at the time it was assigned to appellant. The Board finds that the Area Director's second conclusion must be rejected.

The Area Director's third conclusion was that, "[s]ince [the PSFO Director] approved the Assignment of Sublease on June 30, 1993 and acknowledged C.V. Partners as the Sublessor to the Sublease, his approval of this Assignment of Sublease signified his acceptance of C.V. Partners as the Sublessor to the Sublease" (Area Director's Decision at 6). This conclusion appears to be based on a theory of estoppel.

The PSFO Director's June 30, 1993, approval of the assignment referred to the interest being assigned as a sublease, although it made no specific mention of C.V. Partners as lessee. The fact that the interest was termed a sublease in the approval document, however, is not persuasive evidence that the PSFO Director intended, by signing the document, to determine the matter at issue here. Rather, it appears that he simply intended to approve the assignment of the interest. Even if the PSFO Director did intend his approval to constitute an interpretation of the lease on the point at issue here, he was not precluded from changing his interpretation

^{6/} Article 24.B(4) provides:

"An 'acquirer' for purposes of this Article shall mean an encumbrancer who acquires the interest of the Lessee and/or sublessee by foreclosure or assignment in lieu of foreclosure. If the leasehold or fractional part thereof is acquired by a party and/or parties other than the encumbrancer, assignment of the leasehold will be subject to approval by the Secretary and said party and/or parties will be bound by all the term of this lease, or of the sublease, whichever interest is acquired and will assume all the obligations of the Lessee or sublessee, as the case may be."

as long as he fully and clearly explained the change. Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169 (1993), and cases cited therein. The PSFO Director's February 17, 1994, decision included a discussion of the reasons for his decision and was also supported by a detailed legal opinion from the Field Solicitor. The Board finds that the PSFO Director's June 30, 1993, approval of the assignment did not estop him from reaching the conclusion expressed in his February 17, 1994, decision. Therefore, the Board rejects the Area Director's third conclusion.

Based upon the above discussion, the Board rejects the Area Director's construction of Article 24.D and adopts the PSFO Director's construction.

This does not conclude the matter however. C.V. Partners contends that this construction of Article 24.D results in a forfeiture to C.V. Partners. It contends that legal and equitable principles require that it be granted relief from forfeiture. Citing certain provisions of California statutory law concerning forfeitures, it asserts that these provisions are controlling.

In its briefs before the Board, C.V. Partners does not cite any authority for the proposition that California law governs here. However, before BIA it contended that 28 U.S.C. 1652 (1988) 7/ requires the application of State law to this dispute.

28 U.S.C. § 1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This provision does not have the effect ascribed to it by C.V. Partners. For one thing, neither BIA nor this Board is a court of the United States. More importantly, as discussed below, Federal law controls here. 28 U.S.C. § 1652 clearly states that it applies only in cases where Federal law does not control.

[2] The lease at issue here is governed by a Federal statute, 25 U.S.C. § 415, and Federal regulations promulgated thereunder, 25 CFR Part 162. The United States Court of Appeals for the Ninth Circuit has held that the Federal statutes and regulations governing the leasing of Indian lands constitute a comprehensive regulatory scheme which preempts the application of state and local laws. Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987).

The Board has also addressed this point. In Naegele Outdoor Advertising Co., supra, it rejected a contention that California law controlled the determination of whether certain agreements constituted leases of Indian lands. The Board there stated:

7/ All further references to the United States Code are to the 1988 edition.

[T]he construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law. Federal contract law is governed by principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); United States v. Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980).

Walch Logging Co., Inc. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 98, 90 I.D. 88, 95 (1983). Humboldt Fir further instructs that "[i]n the absence of federal cases on point, state statutory and decisional law may furnish a convenient source for the general law of contracts to the extent that it does not conflict with the Federal interest in develop and protecting the use of Indian resources" 426 F. Supp. at 297 (emphasis added).

* * * * *

The decisions of this Board are part of the Federal law relating to contracts involving the use of Indian trust land.

24 IBIA at 177. 8/ Although the Board has previously considered, and rejected, contentions that cancellations of leases of Indian land constituted forfeitures, 9/ it has never considered the question of whether a provision like paragraph 3 constitutes a forfeiture or, whether, if it is a forfeiture, relief may be granted to the lessee. The parties have not cited any Federal cases on these points, and the Board is not aware of any. Therefore, the Board looks to general contract law for guidance.

[3] It is black letter law that forfeitures of rights under contracts are disfavored and that contracts are strictly construed in order to avoid them where possible. E.g., 17A Am. Jur. 2d Contracts § 564 (1991); Bornholdt v. Southern Pacific Co., 327 F.2d 18, 20 (9th Cir. 1964). As C.V. Partners contends, California law recognizes this principle. E.g., Cal. Civil Code § 1442: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

However, it is also established that "[t]he law permits a person to make a contract which will result in a forfeiture; and when it is clear

8/ The parties to a lease of Indian land may, of course, agree to incorporate certain aspects of state law into the contract. It is not uncommon, for instance, for a lease of Indian land to incorporate the notice provisions of state law for certain purposes. See, e.g., the first paragraph of Article 24.D, quoted supra. In such a case, state law is applied as a matter of contract.

9/ See Franks v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231 (1985), and cases cited therein.

from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture" 17A Am. Jur. 2d Contracts § 563 (1991). See also, e.g., Kassuba v. Realty Income Trust, 562 F.2d 511 (7th Cir. 1977). California law also recognizes this principle, as is apparent from a case cited by C.V. Partners in its submission to the Field Solicitor, i.e., Superior Motels, Inc. v. Rinn Motor Hotels, Inc., 195 Cal. App. 3d 1032, 241 Cal. Rptr. 487 (Cal. Ct. App. 1987). The Field Solicitor relied upon this decision, among other authorities, to support his February 10, 1994, opinion.

In its brief before the Board, C.V. Partners relies principally upon two California statutory provisions, Cal. Civil Code § 3275 and Cal. Code of Civil Procedure § 1179, for its argument that it should be relieved from forfeiture. ^{10/} In Superior Motels, the California Court of Appeal considered these two statutory provisions but held that the defendant sublessees were not entitled to relief from forfeiture caused by a lease assignee's breach of an anti-receivership provision in the original lease, even though the sublessees had committed no breach and, in fact, had complied scrupulously with their obligations under the sublease. The court expressed sympathy for the plight of the sublessees, noting that they had "been commanded to surrender their well-run and profitable business, * * * not because of any fault of their own, but solely because of a contractual breach by an entity they could not control." 195 Cal. App. 3d at 1065, 241 Cal. Rptr. at 504-05. The court noted, however, that there were also equities favoring the original lessee, who had "invoked he protection of a contractual provision intended for this very eventuality" and whose "conduct was commercially reasonable and contractually justifiable." 195 Cal. App. 3d at 1065, 241 Cal. Rptr. at 505. Ultimately, the Court of Appeal found that the forfeiture provision could be enforced against the sublessees. ^{11/}

The Board finds that the principles of general contract law discussed above are appropriately applied in this case. It further finds that, even

^{10/} Cal. Civil Code § 3275 provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Cal. Code of Civil Procedure § 1179 provides:

"The Court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the Court."

^{11/} In theory at least, C.V. Partners was in a better position under its lease than were the sublessees in Superior Motels, who had absolutely no control over the breach which caused their loss. Under its lease, C.V. Partners has an opportunity to avert a loss to itself. It contends, however, that in reality it could not exercise its option because of the poor condition of the real estate financing market at the time. E.g., C.V. Partners' Sept. 9, 1993, Submission to Field Solicitor at 5; Apr. 21, 1994, Declaration of W. Curt Ealy at 2-6.

when paragraph 3 is strictly construed, the result is the same as that discussed above. The clear and unambiguous language of the provision leaves no room for doubt that paragraph 3 calls for forfeiture by a lessee which fails to cure its sublessee's default.

The next question is whether C.V. Partners may be relieved from forfeiture under a theory similar to that embodied in Cal. Civil Code § 3275 and Cal. Code of Civil Procedure § 1179. In Superior Motels, the California Court of Appeal observed that "[b]oth of these statutes vest near plenary discretion in the trial court." 195 Cal. App. 3d at 1064, 241 Cal. Rptr. at 504. If the Board were to find that the exercise of similar discretion is appropriate in this case, it would remand this matter to the Area Director because, if discretion is to be exercised, it must be exercised by BIA and not this Board. ^{12/} See, e.g., 43 CFR 4.330(b)(2).

[4] BIA exercises discretion in deciding whether or not to approve a lease of Indian land. E.g., Blackhawk v. Billings Area Director, 24 IBIA 275 (1993). However, once a lease has been approved, the parties acquire legal rights under it, and a BIA decision concerning the lease must thereafter be based upon the law and the terms of the lease itself. E.g., Racquet Drive Estates, Inc. v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983). The Board has consistently held that BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. E.g., American Indian Land Development Corp. v. Sacramento Area Director, 23 IBIA 208 (1993); Abbot v. Billings Area Director, 20 IBIA 268 (1991).

The Board is not aware of any Federal statute or regulation which vests BIA with the kind of discretionary authority that Cal. Civil Code § 3275 and Cal. Code of Civil Procedure § 1179 vest in the California courts. Lacking this kind of authority, BIA also lacks the discretion necessary to grant C.V. Partners relief from the terms of the lease in this case. ^{13/}

C.V. Partners next argues that appellant has waived its right to seek a direct lease, and/or is estopped from doing so, because it acquired C.V. Partners' consent to appellant's assignment from BA Properties, Inc., without disclosing its intent to seek the ouster of C.V. Partners. C.V. Partners contends that it was misled by appellant into consenting to the assignment, as a result of which it was injured.

With regard to waiver, C.V. Partners contends that, because appellant did not expressly reserve its right to seek a direct lease when it sought

^{12/} It is apparent that the Area Director's May 26, 1994, decision was not based on the exercise of such discretion but upon his construction of the lease terms and a theory of estoppel.

^{13/} This is not to say, of course, that BIA is required to enforce a forfeiture provision in a case where all parties, including the Indian lessor and the encumbrancer or its successor in interest, agree that it should not be enforced. Such an agreement between the parties would have the effect of a modification of the lease.

C.V. Partners' consent to the assignment, it has waived that right. Appellant counters that C.V. Partners could have required such a waiver as a condition for granting consent, but failed to do so. Under the circumstances here, in the absence of an express waiver by appellant, the Board declines to find that appellant waived its right to seek a direct lease.

With regard to estoppel, C.V. Partners correctly describes the four elements which must be present in order for the doctrine to apply: (1) The party to be estopped must know the facts; (2) it must intend that its conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) it must rely on the former's conduct to its injury. See, e.g., Falcon Lake Properties v. Assistant Secretary-Indian Affairs, 15 IBIA 286, 298 (1987). In this case, C.V. Partners has not shown that all four elements are present. As a party to the lease, C.V. Partners was aware of the provisions of Article 24.D. Further, it was not C.V. Partners' act of consenting to the assignment that effected a forfeiture. Rather, the forfeiture was automatic by the terms of Article 24.D. Therefore, even if C.V. Partners relied upon appellant's conduct when it consented to the assignment, it did not suffer injury as a result of that reliance. The Board rejects C.V. Partners' estoppel argument.

Next, C.V. Partners contends that its right to equal protection is violated by BIA's enforcement of paragraph 3, because other leases on the Agua Caliente Reservation have provisions similar to this provision and, although there have been foreclosures against sublessees under those leases, the acquirers of the sublessees' interests have simply stepped into the shoes of the sublessees, rather than become lessees under fractional leases.

In his February 10, 1994, opinion, the Field Solicitor stated:

[A] review of the BIA's files leads me to the conclusion that this is a case of "first impression" or alternatively, it has been ignored inadvertently by the BIA, local attorneys and the Lessee(s). This latter opinion is founded upon my review of various subleases in which there was a foreclosure and the Master Lessee is still serving in its original capacity, rather than the new sublessee succeeding to the rights of the "former" Lessee with the creation of a fractional lease.

(Field Solicitor's Opinion at 3). Nothing in the administrative record or in C.V. Partners' filings describes the circumstances of the earlier foreclosures. It appears from the Field Solicitor's statement that the acquirers under the earlier foreclosures, for whatever reasons, did not seek to enforce the forfeiture provision. The fact that they did not do so, however, does not mean that appellant's different decision in this case, or BIA's recognition of that decision, violates C.V. Partners' right to equal protection.

To the extent C.V. Partners may be contending that BIA has an affirmative duty to enforce the contract rights of lessees and/or acquirers vis-a-vis each other, the Board rejects that contention. BIA acts as trustee for

the Indian lessor, e.g., Candelaria v. Sacramento Area Director, 27 IBIA 137 (1995), and thus has an affirmative duty to enforce her rights. As to the rights of the other parties vis-a-vis each other, BIA is no more than an adjudicator, and acts in this capacity only where necessary to the administration of the lease.

The rights of the Indian lessor have been given little or no attention in this appeal. This is undoubtedly because, although it is a part of the contract between Chapparosa and C.V. Partners, Article 24 deals primarily with the relationship between C.V. Partners and potential encumbrancers. The Board understands that Article 24.D, paragraph 3, was included in the lease at the behest of local lenders. 14/ Clearly, the availability of financing is critical to the success of development leases such as this one. Thus, the inclusion of a provision which is necessary to attract financing benefits all parties to the lease, including the Indian lessor. The Board concludes that, under these circumstances, it is in the interest of the Indian lessor to enforce the provisions of paragraph 3.

For the reasons discussed above, the Board finds that the Area Director's decision in this matter is in error. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's May 26, 1994, decision is reversed. 15/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

14/ See Field Solicitor's Feb. 10, 1994, opinion at 3. When Article 24 is read in its entirety, it is apparent that many of its provisions were intended to accommodate the interests of potential lenders. For example, Article 24.R provides: "It is agreed that the encumbrancer shall not be liable to said Lessee and/or sublessee for any adverse effect which any provisions required by the encumbrancer may have upon said Lessee and/or sublessee." This provision suggests, at the least, that the parties to the lease were aware that C.V. Partners could suffer adverse effects from provisions such as Article 24.D, paragraph 3.

15/ Arguments raised by the parties but not addressed in this decision have been considered and rejected.