



INTERIOR BOARD OF INDIAN APPEALS

Claire P. Smith, et al. v. Billings Area Director, Bureau of Indian Affairs

34 IBIA 114 (09/17/1999)



United States Department of the Interior

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

CLAIRE P. SMITH and	:	Order Affirming Decision and Remanding
BILLIETTE BROOKS,	:	Matter for Penalty Assessment
Appellants	:	
	:	
v.	:	
	:	Docket No. IBIA 98-80-A
BILLINGS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	September 17, 1999

Appellants Claire P. Smith and Billiette Brooks seek review of a February 9, 1998, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning an alleged violation of the cropping pattern required on leases Appellants held on the Blackfeet Indian Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's holding that Appellants violated their leases, and remands this matter to him for the assessment of an appropriate penalty.

Twelve leases are involved in this appeal. Appellant Smith held leases L-6382, L-7880, L-7881, L-7882, and L-8069. Appellant Brooks held leases L-6459, L-6460, L-7785, L-8003, L-8071, L-8165, and L-8237.

On August 23, 1996, a field inspection conducted by Blackfeet Agency personnel on Allotment 1705, which was covered by Lease L-8071, revealed that the allotment was not cropped in a strip pattern. A further inspection revealed that none of the adjoining allotments were cropped in a strip pattern.

The Superintendent, Blackfeet Agency, BIA (Superintendent), found that the cropping pattern was not in compliance with Land Use Provision No. 17, Part C, of the lease agreements, which requires a strip cropping pattern. On September 4 and 5, 1996, the Superintendent sent out 10-day show-cause letters to Appellants in regard to each lease. Each letter stated that it had been determined from an inspection that Appellants were in violation of Land Use Provision No. 17, Part C.

Robert Smith, husband of Appellant Smith and father of Appellant Brooks, responded to the show-cause letters on October 10, 1996. Smith stated that the alteration of the cropping pattern had been approved under the Blackfeet Tribe's Indian Self-Determination Act (ISDA) contract by an employee of the contractor.

The administrative record contains a March 17, 1997, letter from the Superintendent to Appellant Brooks (but with a salutation to Appellant Smith). The Superintendent stated that Appellant Brooks had violated the cropping pattern, and that he was assessing her “the rental rate for each recropped acre.” Mar. 17, 1997, Letter at 1. He continued: “The allowable penalty is still be[ing] considered, and a decision of whether to also assess the \$50.00 per acre penalty will be made at a later date.” Id. The Superintendent did not inform Appellant Brooks of her right to appeal from his decision. Although there is no copy of a similar letter to Appellant Smith in the record, Appellant Smith’s statements during the course of this appeal indicate that she received such a letter.

By letter dated March 19, 1997, and addressed to Robert Smith, an employee of the ISDA contractor stated that he had authorized recropping the leases. He continued:

The practice has been, in the past, to allow me to approve conservation modifications to Farm/Pasture leases by the BIA. The practice has been that conservation modifications have been allowed at no charge to the operator. But, should an operator decide to alter their cropping practice, the rental rates were increased. The logic being that a conservation practice provides an improvement to the land.

On March 21, 1997, Appellants responded to the Superintendent’s letters. They stated that they contacted the Agency Natural Resources Officer (NRO) about modifying the cropping pattern and were referred to the ISDA contractor, who approved the modification. They contended that there had been no violations because the modifications were properly approved.

On August 7, 1997, the Superintendent wrote to Appellants. He stated:

During the 1996 growing season you were provided with a conservation alternative to continuous crop your farm leases due to the high moisture levels of that year. This conservation alternative even though recommended was not approved by the [Superintendent]. There are other conservation measures that can be used. You did alter your cropping practice and therefore the present rental rate is being assessed for the total number of acres recropped (continuous cropped) during the 1996 growing season. All cropping practices that deviate from your current conservation plan must be reviewed and either approved or disapproved by the Superintendent * * *. Deviations from the lease contract are treated as contract violations and the appropriate fines/ penalties will be assessed for the leased acres involved.

Aug. 7, 1997, Decision at 1. The Superintendent assessed Appellant Smith \$14,082.60 and Appellant Brooks \$49,785.72, and notified them of their right to appeal to the Area Director.

Appellants appealed to the Area Director. At that time, they stated they had first contacted the Superintendent about modifying the leases, and that the Superintendent had referred them to the NRO, who in turn referred them to the ISDA contractor. They argued that the modification had been approved in accordance with Agency practice by the ISDA contractor and, therefore, there were no violations.

On February 9, 1998, the Area Director affirmed the determination that Appellants had violated the leases. However, he did not determine the amount of the penalties, instead requiring the Superintendent to provide him with information concerning the assessment of \$12 per acre.

Appellants appealed to the Board. On appeal, they raise the same argument as they did before the Area Director.

It is an elementary proposition of Indian law that leases of trust land cannot be modified without BIA approval. See, e.g., Craig McGriff Exploration, Inc. v. Acting Anadarko Area Director, 22 IBIA 265, 268-69 (1992), and cases cited therein. Appellants apparently do not dispute this legal principle, but instead contend that authority to modify the leases at issue here was delegated to the ISDA contractor both in the ISDA contract and through the established custom and practice at the Blackfeet Agency.

A copy of the relevant ISDA contract is included in the administrative record. The Board has carefully reviewed the contract terms. It finds nothing in the contract which even suggests that the ISDA contractor is authorized to approve modifications of leases. At most, the contract authorizes the contractor to monitor leases. The Board holds that the ISDA contract did not grant the contractor authority to modify the leases at issue here.

Regardless of whether the ISDA contract actually authorized the contractor to modify leases, Appellants contend that they followed the Blackfeet Agency's established custom and practice. They state that the Agency deferred to the ISDA contractor in lease modifications, and that the contractor would orally approve a modification and follow that approval with a memorandum to BIA. They further assert that the Superintendent did not provide a written lease modification. This contention is supported by the March 19, 1997, letter from the ISDA contractor which was quoted above. There does not appear to be any dispute, however, that, in regard to these leases, the contractor did not provide a memorandum to BIA.

Appellants also assert that, around the same time, other lessees followed the same procedure and received oral approval of modifications of their leases from the ISDA contractor. Appellants acknowledge that the other lessees were also cited for lease violations, but argue that so many people would not have followed the same procedure, and open themselves to potential liability, had that procedure not been the accepted practice. Appellants do not provide any documentary support for this assertion.

Assuming for the purposes of this decision only that Appellants have correctly described the practice at the Blackfeet Agency, the practice violated the terms of the ISDA contract. ^{1/} It is well established, however, that the Federal government is not bound by the unauthorized or ultra vires actions of its employees. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Scott v. Acting Albuquerque Area Director, 29 IBIA 61, 69 (1996), and cases cited therein.

The Board finds that Appellants' leases were not properly modified and that the failure to abide by the cropping pattern established in those leases therefore constituted a violation of the leases.

Because the Area Director did not assess a penalty based on the violation in the decision under review here, the question of the proper amount of any penalty is not before the Board. This case will therefore be remanded to the Area Director for the assessment of an appropriate penalty.

In considering this issue, the Area Director is referred to Leases L-6382, L-6459, and L-6460, in which Land Use Provision No. 17, Part C, establishes a rate of \$8 per acre for violations of the cropping pattern, not \$50 per acre as in the remaining leases. Nothing in the administrative record shows that these three leases were modified to increase the penalty to \$50 per acre. Therefore, unless the Area Director can show that Leases L-6382, L-6459, and L-6460 were properly modified to increase the penalty to \$50 per acre, he cannot assess a penalty in that amount as to these leases.

The Area Director should also determine whether or not the practice at the Blackfeet Agency at the time relevant to this appeal was to defer to the ISDA contractor in approving modifications of leases. If this was the practice, he should determine what, if any, effect that fact should have on a penalty assessment. In any event, he should ensure that the Agency properly follows the provisions of any current or future ISDA contract.

^{1/} It may also have violated 25 U.S.C. § 450j(g), which states: "Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individual." Cf. Skokomish Indian Tribe v. Portland Area Director, 31 IBIA 156, 168 (1997):

"This case illustrates a problem inherent in the dual responsibilities and obligations placed on the Department of the Interior. On one hand, the Department is a trustee responsible for ensuring that Indian trust resources are protected and preserved. On the other hand, the Department is obligated to respect, encourage, and assist tribal sovereignty and self-determination through, inter alia, the ISDA contracting process.

"Congress addressed the dichotomy between the two roles it has assigned to the Department in the proviso now found in 25 U.S.C. § 450j(g)."

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's February 9, 1998, decision is affirmed and this matter is remanded to him for assessment of an appropriate penalty.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge