



INTERIOR BOARD OF INDIAN APPEALS

Lowell Felitz v. Portland Area Director, Bureau of Indian Affairs

34 IBIA 191 (12/07/1999)



# United States Department of the Interior

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

LOWELL FELITZ,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 99-20-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	December 7, 1999

Appellant Lowell Felitz seeks review of an October 22, 1998, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Appellant's agricultural Lease No. 1-1-8834-9599, covering Yakama Allotment Nos. 1635, 1635-C, and 1635-D. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

The lease at issue here was signed by Appellant and Brian Thobois on March 15, 1995, and was approved by BIA on August 23, 1995. The term of the lease is from March 1, 1995, through December 31, 1999. <sup>1/</sup> The lease authorized Appellant and Thobois to use the land for row crops, grazing, and a homesite.

The leased land is located within the Wapato Irrigation Project (Project). Provision 3 of the lease provides:

**OPERATION AND MAINTENANCE ASSESSMENTS.** — It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties occurring against the above-described land under irrigation, and will pay all charges assessed in connection with any other improvement project or district within which the lands may be located, pursuant to the existing or future orders or regulations of the Secretary [of the Interior].

On June 19, 1995, Appellant, Thobois, and the Project Administrator (Administrator) entered into a promissory note for a total of \$2,017.92, which was the 1995 O&M charge. The note had no interest and no penalties. Payment in full was due on or before August 31, 1995. This promissory note, like the additional promissory notes discussed below, did not

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<sup>1/</sup> It is therefore at least arguable that this appeal is moot because the lease which BIA is attempting to cancel will expire by its own terms on Dec. 31, 1999.

explicitly state that it was intended to cover the annual operation and maintenance (O&M) charges. However, the fact that this was the intention is not disputed. Each promissory note provided:

For value received the undersigned promises to pay to the order of U.S.D.I., Bureau of Indian Affairs, Wapato Irrigation Project, \* \* \* the sum of \* \* \* payable from date of advance until paid in full according to the attached repayment schedule.

\* \* \* \* \*

Upon default in the payment of any installment of principal or interest, or upon failure to timely pay any future [O&M] assessments by the Wapato Irrigation Project, then the entire indebtedness, at the option of the holder, may be declared to be due and payable. \* \* \* It is understood and agreed that this debt remains a first lien against land subject to all legal rights, including fore-closure, upon default. [2/]

On March 29, 1996, the Administrator notified Appellant and Thobois that they were in default on their 1995 promissory note. The Administrator stated:

[T]he entire indebtedness including interests, penalties, and other charges that accrued since the due date of the promissory note is immediately due and payable. [3/] Payment may be made to the [Project] no later than April 12, 1996. If full payment of the entire amount is not received by the [Project] by the above date, this matter will be forwarded to the Regional Solicitor, Pacific Northwest Region, for collection.

On April 18, 1996, Appellant made a payment of \$1,127. BIA credited this payment against a principal indebtedness in the amount of \$2,809.80, which is not the amount Appellant owed under the 1995 promissory note. 4/ Nothing in the record shows that Appellant's defaulted 1995 promissory note was referred to the Solicitor's Office for collection.

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2/ This second remedy appears to be addressed to waterusers who are also the landowners.

3/ As noted above, the 1995 promissory note did not include interest, penalties, or other charges.

4/ Based on this payment and a payment made on Jan. 22, 1998, which was credited against a bill due in 1994, it appears possible that Appellant already owed the Project money when this lease was approved.

The Jan. 22, 1998, payment is discussed further below.

Instead, on June 10, 1996, Appellant and the Administrator, now with the additional title of Superintendent, Yakama Agency (and hereafter referred to as the Superintendent), entered into a new promissory note for a total of \$4,104.94, including an unpaid balance from the 1995 note of \$2,017.92; the 1996 O&M charge of \$1,682.80; and interest, penalties, and other charges in the amount of \$404.22. Payment in full was due on or before September 30, 1996.

By letter of October 30, 1996, the Superintendent notified Appellant that he was in default on the 1996 promissory note. The letter stated that failure to make payment would result in the indebtedness being referred to the Solicitor's Office for collection. Appellant was given until November 12, 1996, in which to make payment in full.

On February 14, 1997, the Superintendent wrote to the Solicitor's Office asking that litigation be initiated against Appellant and Thobois for default on their promissory note. The record does not contain a response from the Solicitor's Office, or otherwise show that any action was taken on this request.

On May 14, 1997, two of the landowners wrote to the Superintendent with complaints about Appellant's actions on the leased land. The copy of this letter in the administrative record shows that it was resubmitted on October 30, 1997.

On July 2, 1997, Appellant made a payment in the amount of \$500. BIA credited this payment against the unpaid balance for 1995 in the total amount of \$2,372.81, which included \$2,017.92 in principal; \$114.13 in interest, calculated at 3 percent; \$228.26 in penalties, calculated at 6 percent; and \$12.50 in other charges. <sup>5/</sup> BIA applied Appellant's payment first to interest, penalties, and other charges. It applied the remainder of the payment against principal, reducing principal by \$145.11 and leaving a principal balance of \$1,872.81.

On July 21, 1997, Appellant made another payment. This payment, in the amount of \$1,300, was credited against the unpaid principal from 1995 of \$1,872.81, leaving a principal balance of \$572.81.

Also on July 21, 1997, the Superintendent entered into another promissory note with Appellant. This note was for a total of \$5,652,84, including an unpaid balance from 1995 of \$1,872.81; an unpaid balance from 1996 of \$1,682.80; the 1997 O&M charge of \$2,809.80;

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<sup>5/</sup> As noted above, the 1995 note did not provide for interest, penalties, and other charges. Neither did any of Appellant's promissory notes require interest payments at 3 percent.

The unpaid balance on the 1995 note was incorporated into the 1996 note. No explanation is provided in the record for why Appellant's payment--and others discussed below--was credited as if the 1995 note were still in existence, rather than being credited against the 1996, and subsequent, notes.

and interest, penalties, and other charges of \$1,087.43. Although this note showed a down-payment of \$1,800, there is no other indication in the record that a down-payment was made. Payment in full was due on or before December 31, 1997.

On August 14, 1997, Appellant made a payment in the amount of \$400. BIA credited this payment against the unpaid principal from 1995, leaving an outstanding balance of \$172.81.

By letter dated January 5, 1998, the Superintendent notified Appellant that he was in default on the 1997 note. The Superintendent gave Appellant 60 days in which to make full payment. The Superintendent stated that, if full payment was not received, the debt would be forwarded to the United States Treasury for collection. Nothing in the record indicates that the default was ever referred to Treasury.

On January 22, 1998, Appellant made a payment of \$200. The receipt for payment in the administrative record states that this payment was against a debt due on April 1, 1994, in the total amount of \$3,191.28. The Board is unable to equate this indebtedness with any of the promissory notes at issue in this appeal.

By letter of March 12, 1998, the Superintendent gave Appellant and Thobois 10 days in which to show why the lease should not be cancelled. The Superintendent listed three reasons for cancellation: "1. The violation of non-payment of lease rentals in the amount of \$2,700.00. 2. The default of your Promissory Note with the [Project] in the amount of \$6,365.41. [6/] 3. The allegations of subleasing the premises."

On March 19, 1998, Appellant responded to the Superintendent. He stated that the lease rentals had been paid and did not address the undefined "allegations of subleasing." In regard to the default on the promissory note, Appellant stated: "I made partial payments on the note, but not enough to pay the full amount. As of March 12, 1998 my balance is approximately \$5,180.08." Appellant continued: "This letter is to request extension of the note to November 13, 1998 to give me ample time to come up with the full amount. My new partner and I will pay the 1998 O&M bill in full."

Appellant made a payment of \$500 on March 30, 1998. Of this amount, BIA credited \$180.46 against the balance allegedly due in regard to 1995. This balance included \$172.81 in principal, and interest in the amount of \$2.55 (calculated at 3 percent) and penalties in the amount of \$5.10 (calculated at 6 percent). The remaining \$319.54 was credited against the

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6/ This is the amount of principal shown on the payment schedule for the 1997 promissory note. As mentioned above, the payment schedule shows a down-payment of \$1,800, receipt of which is not otherwise shown in the record. However, the 1997 promissory note was in the amount of \$5,652.84.

amount of the 1996 note (now including \$1,682.80 in principal; \$151.73 in interest; \$182.07 in penalties; and \$37.50 in other charges), leaving a balance due in regard to the 1996 note of \$1,734.56.

On April 27, 1998, the Superintendent entered into a promissory note with Manuel Deasis to cover the 1998 O&M charges for Appellant's lease. This note was for a total of \$3,049.37, including only the 1998 O&M charge of \$2,809.20 and interest, penalties, and other charges of \$240.17.

On April 28, 1998, the Superintendent cancelled the lease. 7/ Citing his March 12, 1998, letter, the Superintendent stated that Appellant and Thobois were in default on their promissory note in the total amount of \$4,885.87. This letter did not mention the other two grounds for lease cancellation set out in the March 12, 1998, letter.

Appellant responded to the Superintendent on May 11, 1998. He admitted that he had not paid the promissory note in full, but stated that he had made partial payments "to bring [the balance] down to \$4,885.87 \* \* \*. This reflects my good intention to resolve my arrears." Appellant asked to be allowed to remain on the lease.

Appellant's letter to the Superintendent was apparently forwarded to the Area Director as an appeal. On October 22, 1998, the Area Director upheld the cancellation of the lease.

Appellant appealed to the Board. Both Appellant and the Area Director filed briefs.

On October 12, 1999, the Board received a motion from the Area Director for an appeal bond or, alternatively, expedited consideration. In support of this motion, the Area Director states that Appellant failed to pay the lease rentals due in December 1998, arguing that he did not have to pay while this appeal was pending. The request for an appeal bond is denied. Expedited consideration is granted. 8/

In his decision, the Area Director refers to the Superintendent's March 12, 1998, show-cause letter, rather than to the April 28, 1998, cancellation letter. Although it appears that the Area Director primarily based his decision on Appellant's default on the promissory note, it is not clear how much his decision was influenced by each of the other reasons for cancellation

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7/ No explanation is provided in the record for why the Superintendent cancelled the lease one day after entering into a promissory note for the next year's O&M charges on the leased property.

8/ Although the Board has granted expedited consideration, it notes that the Area Director was, or should have been, aware long before October 1999 that Appellant had not paid the rent due in January 1999.

listed in the Superintendent's March 12, 1998, letter. Therefore, the Board discusses each of those reasons.

The Area Director acknowledges that Appellant paid the 1998 rent. Accordingly, the Board finds that the Area Director has accepted Appellant's cure of this violation and that the fact that the rental payment was late does not support lease cancellation.

The Area Director also mentions the "allegations of subleasing." He does not address the landowners' May 14, 1997, letter, 9/ but states that Deasis had no right to use the property leased to Appellant.

Very little information about Deasis' relationship with this property appears in the administrative record or in the Area Director's filings on appeal. At most the record shows that Appellant identified Deasis as his "new partner," and that BIA entered into a promissory note with Deasis for the 1998 O&M charges for the property leased to Appellant.

In his notice of appeal to the Board, Appellant denies subleasing the property, but states:

Mr. De Asis got flooded in his farm Allot # T902 and Allot # 3554 for two consecutive years. With the permission of [the Superintendent and several other BIA officials]. They have a meeting with Mr. De Asis and agreed upon transferring Mr. De Asis to this Property, Allot # 1635. He moved to this property last October of 1997. He started farming the property the start of 1998. He had paid the half of the lease rental for this year and signed a Promissory Note with the [Project] for the water.

Enclosed with this letter is a Modification form which was signed by me, Mr. Brian Thobois, and Mr. De Asis. This form was given to us by the BIA and had asked us to sign and get witnesses so we could cancel the name of Mr. Brian Thobois and add the name of Mr. Manuel De Asis as the co-lessee of this property.

Notice of Appeal at 2. Attached to the notice of appeal is a form headed "United States Department of the Interior Bureau of Indian Affairs Modification." A land description was typed onto the form. The form is signed by Appellant, Thobois, and Deasis, and is witnessed by six individuals. There is an empty space for the signature of "Lessor," and an uncompleted line for

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9/ Nothing in the administrative record shows that BIA investigated the allegations made in 1997, or provides any support for a conclusion that Appellant subleased the property at that time.

approval by the Superintendent. Nothing on this copy of the form shows that it was submitted to BIA.

Appellant's notice of appeal indicates that Deasis was using the property, but alleges that he was doing so with the approval of BIA. <sup>10/</sup> However, Appellant's statements do not show that he had subleased the property to Deasis. The Board concludes that the record does not support cancellation of the lease on the grounds that Appellant had illegally subleased the property.

The remaining reason for lease cancellation was Appellant's default on the promissory note. Appellant admits that he defaulted on the note, but asks for an additional extension of time to make payment.

The Area Director's decision voices concerns about the promissory notes which the Board shares. The Area Director notes that the 1998 promissory note covering the land leased to Appellant was signed by Deasis, and states at page 4 of his decision: "If Mr. Deasis is farming the property, he is doing it without authority since his name was never added to the lease. \* \* \* We do not know why the Wapato Irrigation Project would issue a Promissory Note to an individual who has no interest in the lease." Also on page 4, the Area Director comments: "It is surprising that the Agency did not take action earlier to cancel the lease for non-payment of the earlier O&M assessments which were not timely paid rather than issuing new notes."

As mentioned in the factual background discussion above, it appears possible that Appellant already owed the Project money when this lease was executed, thus suggesting that he might be a bad credit risk. Although it became clear very early in the history of this lease that Appellant was not making payments on his promissory notes, rather than declining to enter into new promissory notes, the Project continued to extend credit to him, resulting in a situation in which, according to an unsigned note in the administrative record, Appellant might have been forced into bankruptcy had BIA attempted to collect on the notes. Appellant alleged that the Project was not delivering the proper amount of water to the leased property, and that his inability to pay the O&M charges was directly related to the fact that he was not able to produce a crop without water. In fact, Appellant filed a tort claim on this allegation. However, BIA continued to extend Appellant credit, and continued not to carry through on its threats to start collection action.

However, the Board finds that despite its concerns about the handling of this matter, it must affirm the Area Director's decision. By failing to pay the promissory notes Appellant violated Provision 3 of his lease, and that violation is grounds for cancellation of the lease.

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<sup>10/</sup> The Area Director does not deny any of the statements made by Appellant concerning BIA's contacts with Deasis, although he had an opportunity to do so in his answer brief.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Portland Area Director's October 22, 1998, decision is affirmed. 11/

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge

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11/ This decision does not excuse Appellant's default on the 1997 promissory note. If BIA intends to attempt to collect on this indebtedness, however, it should first carefully verify the amount owed.