



INTERIOR BOARD OF INDIAN APPEALS

Havasu Palms, Inc., Caroline Johnson, Luanne Paul King, L. A. Moffet, and Barbara Moffet
v. Western Regional Director, Bureau of Indian Affairs

40 IBIA 289 (04/11/2005)

Reconsideration denied:

41 IBIA 69



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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HAVASU PALMS, INC., CAROLINE : Order Affirming Decision
JOHNSON, LUANNE PAUL KING, :
L.A. MOFFET, and BARBARA :
MOFFET, :
Appellants, :
 : Docket No. IBIA 03-37-A
v. :
 :
WESTERN REGIONAL DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee. : April 11, 2005

Havasu Palms, Inc. (HPI), Caroline Johnson, Luanne Paul King, L. A. Moffet, and Barbara Moffet (collectively, Appellants) ^{1/} appeal from an October 8, 2002, decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to approve a Final Award made to Appellants by a panel of the American Arbitration Association (Arbitration Panel; AAA), in a dispute concerning a lease between HPI and the Chemehuevi Indian Tribe (Tribe). For the reasons discussed below, the Board affirms the Regional Director's decision.

Background

In 1984, HPI and the Tribe entered into Lease B-632-CR for approximately 98.2 acres of tribal land. HPI was authorized to use the land for a resort operation, including such facilities as a restaurant, motel, mobile home site, and boat docks. The lease was approved by the Superintendent, Colorado River Agency, BIA, on May 2, 1984. Article 3.A provided: "The term of this Lease shall be ten (10) years beginning on the date this Lease is approved by the Secretary, which date shall be the anniversary date of this Lease." Article 3.B gave HPI an option to extend the lease for an additional five years, an option which HPI exercised.

^{1/} The individual Appellants are members of the Board of Directors and the sole shareholders and owners of HPI. See Joint Pre-Trial Statement of Appellants and the Chemehuevi Indian Tribe before the American Arbitration Association, Feb. 14, 2002, at 4 (Ex. A to the Tribe's Brief).

Article 27, ARBITRATION, provided for arbitration “[w]henver during the term of this Lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this Lease” and gave the Secretary approval authority over arbitration decisions, stating that “the Secretary may be expected to accept any reasonable decisions reached by said arbitration board, but he cannot be legally bound by any decisions which might be in conflict with the interest of the Indians or the United States Government.” Article 27 is the focus of this appeal and is quoted in its entirety below, 40 IBIA at 296.

By letter of September 3, 1998, the Tribe advised HPI that it was going to solicit open bids for a new lease of the premises. HPI submitted a proposal. By letter of December 23, 1998, the Tribe advised HPI that it had rejected HPI’s bid and intended to negotiate a new lease with another entity. The Tribe and HPI disagreed as to the expiration date of the lease. The Tribe took the position that the lease expired on May 2, 1999. On May 5, 1999, the Tribe took possession of the premises pursuant to its Self-Help Eviction Ordinance. 2/

On March 15, 1999, Appellants filed a Demand for Arbitration with the AAA, naming as respondents the Tribe, the United States, the Secretary of the Interior, BIA, and the Bureau of Land Management. Appellants claimed that

[t]he conduct of Respondents in derogation of their long-standing promises, representations and commitments intended to induce [Appellants] to invest substantial money, time, and energy in developing and operating the project to the benefit of Respondents now places [Appellants] in the position of losing their entire investment of thirty years duration and the destruction of HPI as a going concern.

Attachment 1 to Appellants’ Demand for Arbitration at 4-5. As relief, Appellants requested that “Respondents * * * be estopped from denying, revoking or not fulfilling their promise and [that Appellants] * * * be given a judicial declaration of entitlement to a new long-term lease as promised” or that, in the alternative, Appellants “be given a Judgment * * * against all of the Respondents equal to the valuation of their investment and going concern business according to proof at trial, but estimated to be \$4,000,000.00.” Id. at 5. 3/

2/ The recitation of facts in this paragraph is based on the stipulation of facts by Appellants and the Tribe in their Joint Pre-Trial Statement, supra, at 7-8. The stipulation does not state when Appellants considered the lease to have expired. In proceedings before the Arbitration Panel, Appellants took the position that the lease expired on May 31, 1999. See Attachment 1 to Appellants’ Demand for Arbitration at 4; Appellants’ Arbitration Brief at 5.

3/ On Apr. 28, 1999, HPI filed suit against the Tribe and the United States in Federal district court. On June 7, 1999, the court dismissed the complaint against the Tribe for lack of subject matter jurisdiction upon finding that the Tribe had not waived its sovereign immunity from

On April 5, 1999, the Federal respondents moved to dismiss the Demand for Arbitration and, in the alternative, for summary judgment. On May 11, 1999, the Phoenix Field Solicitor wrote to the AAA, again taking the position that the claims of Appellants were not arbitrable under Article 27. Further, she took the position that the Secretary was not an appropriate party to the arbitration proceeding. Accordingly, she informed the AAA that the Federal respondents would not participate in arbitration.

The Tribe twice argued before the Arbitration Panel that the AAA lacked jurisdiction to proceed with the arbitration. The Arbitration Panel rejected the Tribe's jurisdictional challenges and held a hearing which began on February 25, 2002, and concluded on March 1, 2002. On April 18, 2002, the Arbitration Panel issued an Interim Award. It found that "the AAA has jurisdiction over this matter in accordance with the terms of the arbitration clause of the Lease." Interim Award at 2, para. I.2. On the merits, it stated:

[II.]3. The Panel found that the evidence was insufficient to establish a claim for constructive fraud, intentional or negligent misrepresentation, breach of promise to negotiate in good faith or promissory estoppel. Because of this, and for other reasons, the Panel found that [Appellants are] not entitled under any theory of law to recover damages for the loss of the value of the Havasu Palms Resort.

[II.]4. On the other hand, the Panel agreed that pursuant to [Article] 9 of the Lease, as a matter of fairness, equity and law, [Appellants are] entitled to recover the value of the removable personal property confiscated by the Tribe on or about May 5, 1999. [4/]

fn. 3 (continued)

suit in Federal court regarding the lease provisions. Havasu Palms, Inc. v. Chemehuevi Indian Tribe, No. ED CV 99-144-RT (C.D. Cal. June 7, 1999). The complaint was later dismissed without prejudice as to the United States.

In August 1999, the Tribe filed suit against HPI in Federal district court, contending that the AAA lacked jurisdiction over Appellants' Demand for Arbitration and seeking to enjoin the arbitration proceedings. On Oct. 16, 2000, the court denied the Tribe's motion for summary judgment. Chemehuevi Indian Tribe v. Havasu Palms, Inc., No. ED CV 99-333 RT (VAPx) (C.D. Cal. Oct. 16, 2000). See further discussion below, 40 IBIA at 297-98.

4/ This finding is not related to any specific claim included in Appellants' Demand for Arbitration. According to a May 14, 2002, letter from the Tribe's attorney to the Regional Director, the claim "was presented to the panel for the first time on the second to the last day of the hearing." Tribal Attorney's May 14, 2002, Letter at 3. Appellants do not dispute this statement.

Article 9 of the lease provided:

ACCORDINGLY, WE ENTER THIS INTERIM AWARD AS
FOLLOWS:

1. The Panel unanimously awards Havasu Palms the sum of \$125,230.00. Therefore, Respondent shall pay to [Appellants] the sum of One Hundred Twenty-Five Thousand Two Hundred Thirty dollars and Zero Cents (\$125,230.00).

2. [Appellants are] entitled to recover reasonable attorney fees and costs incurred in this proceeding. To that end, the Panel will reserve jurisdiction.
* * *

3. As part of costs, the Tribe shall pay the costs of the arbitration proceeding, including administrative expenses of the AAA and arbitrator fees. Such costs will be included in the final award, and to that end, the Panel will reserve jurisdiction.

Interim Award at 3-4.

On August 22, 2002, the Panel issued a Final Award, incorporating the Interim Award and requiring the Tribe to pay Appellants \$51,055 in attorney fees and \$32,282.41 “for costs incurred in this proceeding which includes party-appointed arbitrator compensation and expenses.” Final Award at 2. 5/

fn. 4 (continued)

“All improvements shall be built in accordance with the Uniform Building Code and all applicable Chemehuevi zoning and building ordinances. All buildings and improvements, excluding removable personal property and trade fixtures, on the leased property shall remain on said property after the termination of this Lease and thereupon become the property of the Lessor. The term ‘removable personal property’ as used in this Article shall not include fixtures or property which normally would be attached or affixed to the buildings, improvements or land in such a way that it would become a part of the realty regardless of whether such property is in fact attached or affixed * * * to the buildings, improvements or land.”

5/ One of the three panel members dissented, stating:

“The majority exceeded its arbitral authority in awarding [Appellants’] party arbitrator cost, attorney fees and [Appellants’] unsubstantiated ‘ordinary cost’ of arbitration. The clearly expressed contract language negotiated by the parties and contained in their Arbitration Clause requires that cost of arbitration be shared equally by the ‘Lessee and the Lessor.’ The majority’s Final Award exceeds the scope of its limited arbitral authority and is in direct conflict with the interests of the [Tribe].” Arbitrator Ames’ Dissent from Final Award.

Appellants submitted the Final Award to the Secretary on September 18, 2002, requesting that it be approved.

On October 8, 2002, the Regional Director issued a decision in the form of a letter to the AAA, stating that he had determined not to approve the Final Award. ^{6/} He first discussed the Secretary's role under Article 27 of the lease and her fiduciary duty toward the Tribe. He stated:

[T]he Secretary has a dual role in the evaluation of the effects of the Final Award on the Tribe's interests. First, she must weigh the effects of the Final Award against the requirement set forth in the express language in question. Second, she must weigh the effects of the Final Award under her general trust obligations and, while there may be some degree of overlap between these separate duties, those trust obligations are unique and carry with them certain canons of construction in the interpretation of the pertinent documents in this matter.

Regional Director's Decision at 2. He then explained why he believed the Arbitration Panel had exceeded its authority. He stated that Article 27 "was never intended to be a general or comprehensive arbitration clause for all controversial or disputed issues arising under the Lease [but] is clearly limited in scope and intended to relate only to those matters upon which the parties 'are unable to reach an **agreement as required by this Lease**'" (Emphasis added by the Regional Director). Id. at 2-3. He identified Articles 3.C and 7.D of the lease as two of the "very limited number of provisions that 'require agreement' as anticipated by [Article] 27." ^{7/} Id. at 3.

He continued:

The question of the jurisdiction of the [Arbitration Panel] is bound up with the issue of what constitutes an arbitrable issue under the Lease. As to those matters that do fall within the arbitrable matters under the Lease, the Tribe will be deemed to have waived its defense of sovereign immunity by

^{6/} The Regional Director's Oct. 8, 2002, letter states that the decision not to approve the Final Award was made by the Secretary. However, in response to an inquiry from the Board (which lacks jurisdiction over decisions issued or approved in writing by the Secretary), the Regional Director acknowledged that he was the deciding official and explained that he was acting under authority delegated by the Secretary.

^{7/} Article 7.D, concerning percentage rentals, specifically refers to arbitration, as does Article 46, FORCE MAJEURE, an article not mentioned by the Regional Director. Article 3.C, concerning rent during an extended term, is an article which "requires agreement." However, it sets out a specific dispute-resolving procedure which does not include arbitration.

agreeing to arbitration for those matters. C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma, 532 U.S. 411 (2001). However, as to those matters that fall outside the scope of arbitrable matters under the Lease, no tribunal—Federal or State—can exercise jurisdiction in the face of the Tribe’s ability to assert its defense of sovereign immunity. Kiowa Tribe of Oklahoma v. Manufacturing Technologies[, Inc.], 523 U.S. 751 (1998). This includes arbitration boards operating under the auspices and rules of the [AAA]. * * *

* * * Nowhere in the Lease did the Tribe expressly waive its defense of sovereign immunity for those issues not covered by the arbitration language of the Lease. * * * [T]he claim originally filed with the [AAA] and heard by the [Arbitration Panel] was not arbitrable under the clear language of the Lease; as to such claims the Tribe never waived its sovereign immunity; and where such sovereign immunity inheres no tribunal, including the [Arbitration Panel], may properly exercise jurisdiction to hear such claims or any other related claims arising under the same facts.

Id. at 3-4.

With respect to the Arbitration Panel’s award of costs, the Regional Director found that the order requiring the Tribe to pay \$32,282.41 was in clear violation of the provision in Article 27 that “[t]he costs of such arbitration board shall be shared equally by the Lessee and the Lessor.” Id. at 4. Further, he questioned whether the Tribe should be required to pay any of the costs given “the fact such arbitration should never have proceeded to begin with on the incontrovertible basis that the claim at issue was not covered by the language of [Article] 27.” Id. at 4-5.

With respect to the Arbitration Panel’s award of attorney fees, the Regional Director found that “it is sufficient for the Secretary’s purposes * * * to find that the arbitration should never have proceeded, and that any awards made in consequence of this arbitral process—whether for damages, costs, or fees—should similarly never have been made.” Id. at 5.

In the concluding portion of his decision, the Regional Director held:

[The] Final Award is in direct conflict with the interests of the Indians. This direct conflict can be best described as (1) a failure of the [Arbitration Panel] to comply with the clear facial language of [Article] 27 of the Lease as to what was and what was not an arbitrable issue; (2) the consequent failure of the [Arbitration Panel] to recognize its lack of subject matter jurisdiction and personal jurisdiction over the Tribe, which is evidenced by an absence of any rationale or discussion whatsoever in Paragraph I.2 [i.e., the Arbitration Panel’s jurisdictional finding] of the Interim Award (incorporated by the Final Award);

and (3) * * * the award of costs to [Appellants] in direct contradiction to the express language of [Article] 27 * * * . * * * [T]hese deficiencies evidence considerably more than simply an unfavorable decision against the Tribe's interests; rather, they constitute in the aggregation a fatal failure of jurisdiction and a substantial failure of due process that underlie this unfavorable decision.

Owing to these findings, all awards made pursuant to the Final Award, including the awards for damages and attorneys' fees, must be deemed to be void and unenforceable. * * * Furthermore, * * * pursuant to the Secretary's fiduciary or trust responsibility toward the trust assets of Indian tribes, such deficiencies in the [Arbitration Panel's] actions create risk and exposure to the Tribe's assets, and under these circumstances impel[] the Secretary to act affirmatively to protect those assets in furtherance of her trust responsibility.

Id. at 5-6.

On October 16, 2002, the Regional Director sent copies of his decision to Appellants and the Tribe and informed them of their right to appeal his decision to the Board.

Appellants appealed to the Board. Appellants, the Regional Director, and the Tribe filed briefs.

Jurisdiction

The Tribe argues that this Board lacks jurisdiction to review the Regional Director's October 8, 2002, decision because the decision was a discretionary one and the Board is precluded from reviewing discretionary BIA decisions under 43 C.F.R. § 4.330(b), which provides: "Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * Matters decided by [BIA] through exercise of its discretionary authority."

The Regional Director's decision was discretionary to the extent it made a determination concerning the best interest of the Indians. See, e.g., Cox v. Acting Muskogee Area Director, 35 IBIA 43, 46 (2000) (A BIA determination of what is in the best interest of an Indian beneficiary is a decision based on the exercise of discretionary authority). In reviewing a discretionary BIA decision, the Board may not substitute its judgment for BIA's. However, the Board has authority to review discretionary BIA decisions to the extent those decisions reach legal conclusions. E.g., Baker v. Muskogee Area Director, 19 IBIA 164, 168, 98 I.D. 5, 7 (1991); Simmons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243, 247 (1986). Further, the Board has authority to review discretionary BIA decisions to ensure that proper consideration was given to all legal prerequisites to the

exercise of discretion. E.g., Pawnee v. Acting Anadarko Area Director, 32 IBIA 273, 274 (1998); Blackhawk v. Billings Area Director, 24 IBIA 275, 282 (1993).

The Regional Director's October 8, 2002, decision, although ultimately discretionary, was based upon legal conclusions. The Board has authority to review his decision to the extent it reached legal conclusions and to the extent necessary to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Discussion and Conclusions

Central to this appeal is Article 27 of the lease between HPI and the Tribe, which provided:

Whenever during the term of this Lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this Lease, and it becomes necessary to submit a matter to arbitration for settlement, an arbitration board shall be established and be bound by the commercial arbitration rules of the [AAA]. Said arbitration board shall consist of three persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the two members. The decision of the majority of the members of the arbitration board so constituted shall be binding on the parties, subject to the approval of the Secretary. The costs of such arbitration board shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable decisions reached by said arbitration board, but he cannot be legally bound by any decisions which might be in conflict with the interest of the Indians or the United States Government.

In this decision, the Board addresses two questions concerning Article 27: (1) What is the scope of the Regional Director's review authority under this provision? and (2) to what extent does the provision make disputed issues subject to arbitration?

Appellants make a number of arguments, many of which are not relevant to Article 27 or to any conclusion reached by the Regional Director. They contend: (1) The matter of the AAA's jurisdiction was adjudicated in Chemehuevi Indian Tribe v. Havasu Palms, Inc., supra; 8/ (2) several court decisions have addressed the enforceability of arbitration provisions in tribal leases; (3) enforcement of arbitration provisions in Indian leases is consistent with Federal statutes and policy; (4) the Tribe lacks authority to adjudicate disputes arising on

8/ Appellants made this argument only in their statement of reasons. Although they did not pursue the argument in their briefs, the Board presumes that they did not intend to abandon it.

leased Indian land; (5) public policy favors broad application of arbitration provisions, even to non-parties; (6) ambiguities in the arbitration clause should be resolved in favor of Appellants; (7) the protections of the Indian Civil Rights Act, 25 U.S.C. § 1302, are available to non-Indians, and Appellants are entitled to compensation for unlawful taking of property under that statute; (8) some California laws are applicable to the lease; (9) the Tribe's Tort Claims Act does not apply to this dispute; (10) Appellants were deprived of due process when the Tribe applied its Self-Help Eviction Ordinance; (11) the Tribe is liable for damages for applying its Self-Help Eviction Ordinance; (12) the Tribe has been afforded due process; (13) the award of attorneys' fees was in accord with the lease and the rules of the AAA; (14) the award of attorneys' fees and costs was correct; and (15) compliance with the award is in the best interest of the Tribe.

Arguments 4, 7, 8, 9, 10, and 11 have no relevance to the Regional Director's October 8, 2002, decision and will not be considered.

In argument 1, Appellants contend that the Regional Director "lacks the power to overrule the District Court" in Chemehuevi Indian Tribe v. Havasu Palms, Inc. with respect to the AAA's jurisdiction. Appellants' Statement of Reasons at 3.

As stated above, 40 IBIA at 291 n.3, in October 2000, the district court denied the Tribe's motion for summary judgment, thus declining to declare, prior to the AAA proceeding, that the AAA lacked jurisdiction over the matter at issue. The court concluded that "[t]he Tribe and HPI clearly and explicitly agreed to be bound by the AAA rules regarding commercial arbitration and thereby agreed that the AAA would determine its own jurisdiction." Oct. 16, 2000, Order at 7. It further concluded that the "AAA must determine whether the Tribe's asserted claim of sovereign immunity from arbitration proceedings under the Lease deprives AAA of jurisdiction over HPI's demand for arbitration against the Tribe." Id.

The district court did not hold that the AAA had jurisdiction over Appellant's claim. Rather, in deciding "who should determine the AAA's jurisdiction—[the] court or the AAA," id. at 6—the court simply held that the AAA had authority to determine its own jurisdiction. This holding is entirely consistent with the AAA's Commercial Arbitration Rules 9/ and with the principle of black-letter law that a forum has the authority, in the first instance, to determine its own jurisdiction. E.g. Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); 20 AmJur 2d Courts § 60 (1995); 21 C.J.S. Courts §§ 88-90 (1990). Plainly, however, that principle

9/ The relevant rule provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." This rule appears as Rule R-8(a) in the undated edition of the AAA's Commercial Arbitration Rules provided by Appellants and as Rule R-7(a) in the July 1, 2003, edition currently available on the AAA's website.

does not preclude later review, by a proper reviewing authority, of the forum's jurisdictional determination. Id. Significantly, the court did not address the Regional Director's authority under Article 27. The Regional Director had clear authority under Article 27 to review the Arbitration Panel's decision. That review authority necessarily included the authority to review the Arbitration Panel's jurisdictional determination.

Arguments 2, 3, and 5 are somewhat related in that, in all three, Appellants contend that Federal policy, statutes, and case law favor arbitration and, specifically, favor enforcement of arbitration clauses in tribal contracts. In argument 2, Appellants cite a number of Federal and State cases, all of which pre-date C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe, supra. ^{10/} Appellants unaccountably do not cite C & L Enterprises, even though the Supreme Court there held that an arbitration clause in a tribal contract was judicially enforceable. As further discussed below, however, C & L Enterprises does not stand for the proposition that language such as that in Article 27 constitutes a waiver of tribal sovereign immunity with respect to claims like the ones made by Appellants. Nor do any of the cases cited by Appellant stand for that proposition.

In argument 3, Appellants contend that Federal statutory law and policy authorize inclusion of arbitration clauses in Indian leases. They rely specifically on 25 U.S.C. § 416a(c), which authorizes inclusion of binding arbitration provisions in leases and contracts affecting land within the Salt River Pima-Maricopa Indian Reservation. While this provision is interesting, it cannot be construed as a statement of policy as to all Indian tribes and reservations. However, as the Board has long recognized, the general Federal policy favoring arbitration, as expressed in Federal statutory law, applies to Indian leases. See, e.g., Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, 21 IBIA 45, 49-50 (1991); Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 198, 90 I.D. 243, 250-51 (1983). As discussed below, however, this Federal policy does not support a conclusion that language such as that in Article 27 constitutes a waiver of tribal sovereign immunity with respect to claims like the ones made by Appellants.

In argument 5, Appellants again argue that public policy favors arbitration. ^{11/} They contend, very broadly, that courts have enforced contractual arbitration provisions against

^{10/} Argument 2 is captioned "The Tribe has Waived its Sovereign Immunity to the Extent of Requiring it to Participate in the Arbitration of the Instant Disputes." Despite the caption, Appellants do not address the specifics of this case but, rather, simply list and briefly discuss a number of cases dealing with arbitration clauses in tribal contracts.

^{11/} Argument 5 is captioned "The Arbitration Agreement Between and Among the Several Parties Embraces the Claims made by [Appellants] Herein as to all Respondents." Although Appellants quote Article 27 as a part of this argument, they do not attempt to analyze Article 27 or any other provision of the lease. Instead they make only general contentions.

persons who were not parties to the contract and with respect to issues outside the contract. Appellants then cite a number of California cases without discussion. This appeal does not concern the enforcement of an arbitration provision against anyone other than the Tribe. As to issues outside the contract, Appellants presumably would like to persuade the Board that such issues may properly be addressed in an arbitration award. They fail to show, however, how any of the cases they cite support such a theory. 12/

In argument 6, Appellants contend that any ambiguity in Article 27, or elsewhere in the lease, must be resolved in their favor. They cite cases for the proposition that ambiguities in a contract are to be resolved against the drafter and suggest, but do not specifically allege, that the Tribe drafted the lease. Appellants' argument is only a theoretical one, because they do not point to any ambiguities in Article 27 or in any other provision of the lease. As discussed below, the Board concludes that neither Article 27 nor any other provision in the lease is ambiguous with respect to the issues subject to arbitration under the lease.

In argument 12, Appellants contend that the Tribe has been afforded due process because it had the opportunity to file, and did file, various motions and briefs before the Arbitration Panel; was afforded a five-day trial before the Arbitration Panel; and filed suit, but lost, in Federal court. Appellants object to the statement in the Regional Director's decision that the deficiencies in the Arbitration Panel's Final Award constituted "a substantial failure of due process." Regional Director's Decision at 5. In response to Appellants' contention, the Regional Director argues that "where a tribunal has no personal or subject matter jurisdiction *ab initio*, any requirement for a party to appear or any award made affecting the right or interests of that party constitutes a violation of that party's right to due process." Regional Director's Brief at 3. The question of whether the Tribe's due process rights were violated is dependent upon the question of whether the Arbitration Panel had jurisdiction to enter the Final Award against the Tribe. The question of the Arbitration Panel's jurisdiction is fundamental here and is addressed below.

Arguments 13 and 14 concern the Arbitration Panel's award of attorneys fees and costs. For the reasons discussed below, the Board does not address these arguments.

12/ One of the cases cited in argument 5 concerned a tribal contract. Smith v. Hopland Band of Pomo Indians, 115 Cal. Rptr. 455 (Cal. Ct. App. 2002). In that case, the California Court of Appeal rejected the contention of the Hopland Band that, because of limitations in tribal law, the Band did not effectively waive its sovereign immunity when it entered into a contract containing an arbitration clause.

No party contends in this case that tribal law has limited the Tribe's authority to waive its immunity. Appellant fails to show the relevance of the holding in Smith to this appeal.

In argument 15, Appellants contend that compliance with the Final Award is in the best interest of the Tribe because it will signal to the commercial community that it is safe, reasonable, and good business to engage in commercial relations with the Tribe. The Board does not address this argument because it finds that Appellants lack standing to raise the issue of the best interest of the Tribe. *See, e.g., Cox v. Acting Muskogee Area Director*, *supra*, 35 IBIA at 45, and cases cited therein.

In their reply brief, Appellants make what appears to be a new argument, *i.e.*, that the Arbitration Panel's award was reasonable. Ordinarily, the Board does not consider arguments made for the first time in a reply brief. *See, e.g., Quinault Indian Nation v. Portland Area Director*, 33 IBIA 6, 19 n.6 (1998); *Lopez v. Acting Aberdeen Area Director*, 29 IBIA 5, 10 (1995). In this case, however, the Board gives Appellants the benefit of the doubt and interprets this argument as an attempt to expand upon arguments they made in their opening brief. Even so interpreted, however, this argument fails. Appellants assert that if the "award to [Appellants] for money for property taken from them is not a 'reasonable award' then, under the Indian Law, no award can possibly, by any stretch of the imagination, or under any conceivable circumstances be considered 'reasonable.'" Appellants' Reply Brief at 3. Appellants fail to support this assertion with any discussion. Their bare assertion is not sufficient to show that the Arbitration Panel's award was reasonable.

Appellants' contention concerning the reasonableness of the Arbitration Panel's award is their only argument relating to the scope of the Secretary's review authority under Article 27. Although they make no viable argument concerning the Secretary's authority, it is nevertheless necessary to address that matter briefly.

Article 27 provides that the Arbitration Panel's decision "shall be binding on the parties, subject to the approval of the Secretary." It further provides that "the Secretary may be expected to accept any reasonable decisions reached by said arbitration board, but he cannot be legally bound by any decisions which might be in conflict with the interest of the Indians or the United States Government." In *Swinomish Tribal Community v. Portland Area Director*, 30 IBIA 13 (1996), the Board construed an arbitration provision which included language identical to the latter-quoted excerpt from Article 27. The Board there rejected the argument of the Swinomish Tribal Community that BIA's review was, in essence, *de novo*. *Id.* at 20-21. It also rejected the lessee's argument that BIA's review was limited to the same extent judicial review of arbitration decisions is limited under the Federal Arbitration Act. *Id.*; *see* 9 U.S.C. §§ 10 and 11. Guided by the language of the arbitration provision itself, the Board found that BIA's review authority had two components—review for reasonableness and review to determine whether the arbitration decision was in conflict with the interest of the Indians or the United States. 30 IBIA at 19-21. *See also id.* at 21-23 with respect to the scope of the "reasonableness" component.

In this case, the Regional Director did not attempt to analyze the Arbitration Panel's decision under the "reasonableness" component but instead based his decision entirely upon the "interest of the Indians" component. Appellants do not allege that the Regional Director's choice was error, and the Board sees no error. The Regional Director would have been hard put to examine the Arbitration Panel's reasoning given the lack of any analysis in the Panel's Interim Award and Final Award and the complete absence of a record. ^{13/} In any event, under the particular facts of this case, it seems likely that the Regional Director could have found the Arbitration Panel's decision unreasonable for the same reasons he found it to be in conflict with the interest of the Indians.

The Board finds that the Regional Director properly employed the "interest of the Indians" component in reviewing the Arbitration Panel's decision.

Next, the Board considers whether the Regional Director was correct in his interrelated conclusions that (1) the Tribe waived its sovereign immunity only with respect to the disputes made subject to arbitration by Article 27, (2) the parties did not agree to arbitrate the claims made by Appellants before the Arbitration Panel, and (3) the Arbitration Panel did not have jurisdiction to consider those claims.

There is no longer any doubt that a tribe may waive its sovereign immunity by agreeing to an arbitration provision in a contract. In C & L Enterprises, the Supreme Court noted that it had recently reaffirmed the doctrine of tribal sovereign immunity and quoted its holding in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991), that "to relinquish its immunity, a tribe's waiver must be 'clear.'" 532 U.S. at 418. As to the contract at issue in C & L Enterprises, however, the Court found that the Tribe had "waived,

^{13/} By contrast, the arbitration decision at issue in Swinomish Tribal Community included an extensive analysis. Further, the complete arbitration record was before the Portland Area Director and this Board. Thus, it was possible to review that arbitration decision for reasonableness.

While review by the Regional Director and the Board would clearly have been aided in this case if the Arbitration Panel had explained its reasoning, the AAA's Commercial Arbitration Rules do not require a "reasoned" award. See Rule R-42(b) (July 1, 2003 ed.): "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

The record in this case shows that the Regional Director attempted to obtain some of the arbitration documents from the AAA, which responded that the documents were available only to the arbitration parties. To the extent the Regional Director was hampered in his analysis by the absence of an arbitration record, Appellants have only themselves to blame. As they were the party seeking the Secretary's approval, it was incumbent upon them to provide the documents necessary for the review process.

with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.” Id. The Court explained: “The construction contract’s provision for arbitration and related prescriptions lead us to this conclusion. The arbitration clause requires resolution of all contract-related disputes between C & L and the Tribe by binding arbitration.” Id. at 418-19.

The contract dispute in C & L Enterprises arose when the Citizen Band Potawatomi Tribe decided not to proceed with a contract for the installation of a roof. The arbitration clause in the parties’ contract provided:

All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

Id. at 415 (Bracketed material supplied by the Court). This language is extremely broad and clearly covered the subject of the dispute in C & L Enterprises. Thus the Court had no need to consider the scope of a waiver of sovereign immunity under a more limited arbitration clause, such as that in Article 27. The Court’s continued insistence that a tribe’s waiver of sovereign immunity be clear, however, indicates that the Court would not find a broad waiver when the language of an arbitration clause indicates that a limited waiver was intended. The Board concludes that, under the Supreme Court’s decisions, the Tribe waived its sovereign immunity in Article 27 only insofar as it agreed to submit issues to arbitration.

With respect to arbitrable issues, the Supreme Court has stated that “arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

The Board’s cases are in accord with the Supreme Court’s statement. The Board has stated that, “[w]hen an arbitration clause is included in a lease, the use of arbitration is a matter of contract between the parties and will be enforced in accordance with the apparent intent of the parties.” American Indian Land Development Corp. v. Sacramento Area Director, 23 IBIA 208, 213 (1993). Where the Board has found that the parties to a lease have agreed to submit a particular dispute to arbitration, it has required that they proceed to arbitration prior to seeking action from BIA. See, e.g., Miller Exploration Co. v. Rocky Mountain Regional Director, 37 IBIA 114 (2002); Buena Vista Homes, Inc. v. Acting Pacific Regional Director, 36 IBIA 194, recon. denied, 36 IBIA 257 (2001); Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, supra. However, where the Board has found that the parties have not agreed to submit a particular dispute to arbitration, it as declined to require

arbitration. In American Indian Land Development Corp., the Board found that the lessee's breaches of a lease did not fall under the lease's arbitration clause. 14/

While Appellants make broad assertions about the arbitrability of the claims they presented to the Arbitration Panel, they do not support their assertions with any analysis of Article 27 or any other provision of the lease. Nor do they attempt to argue that the parties had a broader intent concerning arbitration than the intent reflected in the lease language. In any event, the language of the lease itself is the most reliable evidence of the parties' intent. Scott v. Acting Albuquerque Area Director, 29 IBIA 61, 69-70 (1996).

Article 27 called for arbitration "[w]henver during the term of this Lease the Lessee, the Lessor, and the Secretary are unable to reach an agreement as required by this Lease." The claims included in Appellant's Demand for Arbitration (quoted above, 40 IBIA at 290) were evidently construed by the Arbitration Panel as claims based on "constructive fraud, intentional or negligent misrepresentation, breach of promise to negotiate in good faith or promissory estoppel." Interim Award at 3, para. II.3. Claims of this nature do not relate to any agreement required by the lease. The Board concludes that the parties did not agree to arbitrate disputes arising from claims of constructive fraud, intentional or negligent misrepresentation, breach of promise to negotiate in good faith or promissory estoppel. Accordingly, the Board also concludes that the Tribe did not waive its sovereign immunity with respect to arbitration of such disputes.

The claim on which the Arbitration Panel made its award was not included in Appellants' Demand for Arbitration and is not before the Board in written form. 15/ However, the Arbitration Panel evidently construed it as a claim based on a taking of property. See Interim Award at 3, para. II.4 (Appellants are "entitled to recover the value of the removable personal property confiscated by the Tribe on or about May 5, 1999"). Even if the Tribe's action on May 5, 1999, was actually a confiscation and even if it occurred during

14/ The arbitration clause in American Indian Land Development Corp. had language similar to that in Article 27. The Board noted:

"In context, the arbitration clause appears designed to address those situations under which the parties must agree in order to proceed under the lease, such as approval of specific development plans. The clause does not appear to be intended to apply to those situations under which one party fails to perform a required, non-negotiable action, such as beginning construction, acquiring liability insurance, or posting a performance bond." 23 IBIA at 214.

15/ As noted above, 40 IBIA at 291 n.4, the claim was raised during the course of the hearings. No copy of the claim has been furnished to the Board.

the term of the lease, 16/ it still would not fall under the language of Article 27. While the Arbitration Panel relied on Article 9 (quoted above, 40 IBIA at 291-92 n. 4) to support its conclusion, nothing in Article 9 requires that the parties reach an agreement. The Board concludes that the parties did not agree to arbitrate disputes concerning the removal of personal property from the leased premises. Accordingly, it also concludes that the Tribe did not waive its sovereign immunity with respect to arbitration of such disputes.

The Arbitration Panel lacked subject matter jurisdiction over the claims submitted by Appellants because the parties did not agree to arbitrate those claims. It lacked personal jurisdiction over the Tribe because the Tribe did not waive its sovereign immunity as to those claims.

The Board finds it unnecessary to address specifically Appellants' arguments concerning the Arbitration Panel's award of costs and attorney fees. As the Arbitration Panel lacked jurisdiction over the dispute before it, its awards were void in their entirety.

The Board concludes that the Regional Director properly declined to approve the Arbitration Panel's award as not in the best interest of the Indians.

16/ The Tribe vigorously disputes the Arbitration Panel's conclusion that it confiscated HPI's property. It states: "The personal property belonging to HPI is, and has been since May 5, 1999, stored on the premises of the leased land and is, and has been, available to HPI to pick up at any time." Tribe's Brief at 6-7. See also id. at 14. Appellants do not respond to this in their reply brief.

As noted above, 40 IBIA at 290 and n.2, Appellant and the Tribe disagreed as to the expiration date of the lease. The Tribe's position that the lease expired on May 2, 1999, is consistent with the language of the lease. Although Appellants' position before the Arbitration Panel was that the lease expired on May 31, 1999, they have not explained how they supported their position before the Arbitration Panel and have made no attempt to support it before the Board.

It is not clear from the Arbitration Panel's award whether it reached a conclusion as to the expiration date of the lease.

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 Regional Director's October 8, 2002, decision is affirmed. 17/

I concur:

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

17/ Although the Regional Director's decision suggests that the Secretary's trust responsibility formed a separate basis (apart from Article 27) for review of the Arbitration Panel's award, the Board does not interpret his decision as holding that the trust responsibility would authorize the Secretary to disapprove an arbitration award in a case where the contract did not give the Secretary any authority to review an arbitration decision.