



INTERIOR BOARD OF INDIAN APPEALS

Randall Emm v. Western Regional Director, Bureau of Indian Affairs

50 IBIA 311 (11/06/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

RANDALL EMM,)	Order Affirming Decision, as Modified
Appellant,)	
)	
v.)	Docket No. IBIA 08-30-A
)	
WESTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	November 6, 2009

Randall Emm (Appellant) has appealed the October 23, 2007, decision of the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which reversed the Western Nevada Agency (WNA) Acting Superintendent's August 14, 2006, approval of Walker River Agricultural Lease No. 806 (Lease 806) covering various partitioned tracts within Walker River Allotment No. 35 (WR-35).¹ The Regional Director determined that the lease was invalid because there was no evidence either that the Indian landowners had consented to the lease or that WNA had provided the landowners with notice that BIA would grant a lease on their behalf unless they negotiated a lease within 3 months of the date of the notice. He therefore directed that Appellant be refunded the \$1,200 he had paid for the 2007 lease rental.

Appellant contends that the Regional Director improperly voided the lease because (1) the landowners did not appeal the lease issuance within 30 days of the Superintendent's approval of the lease as required by 25 C.F.R. § 2.9(a); (2) Appellant relied on the lease and its predecessor permit to expend time, labor, and money to perform his contractual obligations; (3) the landowners would be unjustly enriched if the lease is voided; and (4) the Director is bound by WNA's approval and cannot arbitrarily cancel the lease without the consent of all parties. Appellant seeks damages in the amount of \$20,752.86 to compensate for his initial investment costs and for his lost income for 2007, as well as an additional \$51,450 to cover lost income for the remaining years of the 5-year lease. He asks that BIA be required to reinstate the lease or, alternatively, that the landowners be declared

¹ Appellant is the lessee identified in the lease.

in breach of the lease agreement and that he be reimbursed for investment costs and income losses.

We find that the Regional Director correctly determined that the landowners never consented to the issuance of the lease. Appellant has neither alleged nor shown error in that determination. Nor has Appellant met his burden of showing that the landowners did not timely appeal the approval decision, that BIA should be estopped from voiding the lease, that the landowners would be unjustly enriched by the voiding of the lease, or that he has suffered or will suffer the damages he claims. Additionally, the lease, on its face, contains a serious inconsistency — the lease states that it contains 20 acres but the description of the leased premises includes only 10 acres — which at a minimum would preclude us from overturning the Regional Director’s decision and reinstating the Superintendent’s approval of the lease. We therefore affirm the Regional Director’s decision to void the lease. We modify the decision, however, (1) to eliminate its reliance on lack of notice under 25 C.F.R. § 162.209(b) as a basis for reversing the Superintendent’s approval of the lease and (2) to reflect that Appellant should be reimbursed not only for the rental he paid, but also for any other fees he paid in conjunction with the lease, such as operation and maintenance (O&M) fees.

Legal Background

With limited exception, a lease² is required before taking possession of Indian land. 25 C.F.R. § 162.104; *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 99 (2009); *Goodwin v. Pacific Regional Director*, 44 IBIA 25, 29 (2006). The regulations in 25 C.F.R. Subpart B, which govern agricultural leases,³ see 25 C.F.R. § 162.100(b), authorize adult Indian landowners to grant agricultural leases of their land subject to BIA approval, 25 C.F.R. § 162.207(b), and permit a lease negotiated by Indian landowners to cover more than one tract with appropriate consent, 25 C.F.R. § 162.105(a). The regulations also authorize BIA to grant an agricultural lease on behalf of the undetermined heirs and devisees of deceased Indian landowners. 25 C.F.R. § 162.207(a)(3).⁴ Fair annual rental of

² The regulations define a lease as “a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land, for a specified purpose and duration.” 25 C.F.R. § 162.101.

³ An agricultural lease is “a lease of agricultural land for farming and/or grazing purposes.” 25 C.F.R. § 162.101.

⁴ BIA may grant permits — which are defined at section 162.101 as “written agreement[s] between Indian landowners and the applicant for a permit, also referred to as a permittee,
(continued...)

Indian land, which must be determined before BIA grants or approves an agricultural lease, may be ascertained by competitive bidding, appraisal, or any other appropriate evaluation method. 25 C.F.R. § 162.211(a), (b).

Factual and Procedural Background

Allotment No. WR-35 encompasses at least 20 acres, including the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 22, T. 13 N., R. 28 E., Mount Diablo Base and Meridian (MDB&M), Mineral County, Nevada. The allotment is partitioned into at least six tracts, designated 35-B, 35-C, 35-D, 35-E, 35-F, and 35-G. Tracts 35-B, 35-F, and 35-G lie within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 22; tracts 35-C, 35-D, and 35-E fall within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 22.

On September 26, 2005, the WNA Superintendent approved a special use permit between Appellant and the six individual owners of Allotment Nos. WR 35-B through 35-G. Administrative Record (AR), Tab G. The stated purpose of the permit, the term of which ran from the date of approval to December 31, 2006, was “[t]o place 15.0 acres of Walker River Allotment WR-35 under a farm permit until a full lease can be put into place.” *Id.* The permit described the leased premises as “T. 13 N., R 28E., Sec. 22 NW4SE4NW4 and SW4NE4NW4 This land consists of a 20 acre parcel of which 15.0 acres are water righted.” *Id.* The rent provision of the permit indicated that the permittee would be using the permit to re-establish the alfalfa crop and thus that the permit would be an improvement permit “whereby rental is slightly reduced due to the high costs incurred by the permittee to establish the crop. No rental will be due for the remaining quarter of 2005. A rental amount of \$660.00 shall be paid for 2006.” *Id.* The permit was signed by all of the then-owners of the six affected tracts included in WR-35: Lucinda Benjamin (35-F); Reginald W. Reymus, now deceased (35-G); Vera R. Kochamp, now deceased (35-C); Angelina Reymus-Menz (35-E); Betty Reymus (35-B); and Vivian W. Reymus (35-D).

On August 14, 2006, before the expiration of the permit, the Acting Superintendent approved Lease 806 for a 5-year term beginning on January 1, 2007, and ending on December 30, 2011. AR, Tab F. The lease described the leased premises as “WR-35, NW4SE4NW4 T. 13 N., R. 28 E., Sec. 22 MDB&M Nevada[,] containing 20.0 acres,

⁴(...continued)

whereby the permittee is granted a revocable privilege to use Indian land . . . for a specified purpose” — covering agricultural land in the same manner as leases, but may also grant them without prior notice under certain circumstances. 25 C.F.R. § 162.210(a).

more or less, of which not to exceed 15.0 acres may be hayed.” *Id.* Although the lease stated that it included 20 acres, the land description identified only 10 acres, and omitted the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 22, which had been included in the permit. The lease established the rental amount as \$1,200 per annum.⁵ Section 3 of the lease also required the lessee to pay any O&M assessments accruing against leased lands under irrigation. None of the landowners signed the lease; rather, the lease included a note stating: “A permit was written in 2005 for the allotment while a lease was being prepared.[⁶] The landowners agreed to the permit with the condition that it would go under lease as soon as it could. This lease was approved by the Superintendent under 25 CFR 162.211(b)(1).” Appellant timely paid the rent for 2007, and BIA distributed \$200 to each of the owners of the three tracts described in the lease, i.e, Tracts 35-B, 35-F, and 35-G, which lie within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 22. *See* AR, Tab H.⁷

On April 27, 2007, Eric J. Reymus Kochamp Sr. (Eric), one of the eventual heirs of Vera R. Kochamp (Tract 35-C); Jason Edmund Reymus-Kochamp (Jason), the other eventual heir of Vera J. Kochamp; and Vivian Reymus Keats (Vivian) (Tract 35-D) sent BIA a letter requesting that BIA either void the lease or provide the landowners with the opportunity to renegotiate and sign the lease. AR, Tab C.⁸ They asserted that Eric and Jason had not received any payment under the lease;⁹ that none of the landowners had been notified of the lease, given copies of the lease agreement, or provided a chance to negotiate

⁵ BIA apparently calculated this annual rent based by multiplying \$80/acre (the middle of the \$70-90/acre rental range for WR-35) by the 15 acres allowed to be hayed. The record does not explain how BIA derived the \$70-\$90/acre rental range for WR-35.

⁶ According to BIA, delays in receiving requested appraisals seem to have prompted BIA to issue permits for some of its farm pasture leases pending receipt of an appraisal. *See, e.g.*, AR, Tab D (internal BIA e-mail from Curtis Millsap to Leah Burrows, May 17, 2007).

⁷ The Title Status Reports for these three tracts note that the lease contains incorrect acreage because it “CITES NWSNW AT 20.0 ACRES; RECORDS SHOW ONLY 10.00 ACRES FOR NWSNW.” *See* AR, Tab H.

⁸ The tracts owned by Eric and Jason and by Vivian were two of the three tracts omitted from the lease’s description.

⁹ Because Vera’s estate had not been probated at the time of the distribution of the 2007 lease payments, any payment for Vera’s allotment would have been paid to her estate. *See* AR, Tab H (title status report for Allotment No. WR 35-C).

lease terms; and that the landowners had neither signed nor consented to the lease.¹⁰ By letter dated August 9, 2007, Lucinda Benjamin (Tract 35-F) advised BIA that she and her mother Betty Reymus (Tract 35-B) had not been parties to the negotiation of the lease, nor had they been asked to verify and sign that document. AR, Tab B.¹¹ She noted, however, that, in an attempt to resolve the challenge to the lease, she, her mother, and Appellant had agreed that the lease for their tracts would terminate, by mutual consent, on December 31, 2007. BIA construed these two letters as a consolidated appeal to the Regional Director from the lease approval.

The Regional Director issued his decision, which was addressed to Appellant, on October 23, 2007. AR, Tab A. After reviewing the record, the Regional Director determined that the evidence was inadequate to demonstrate the existence of either the notice or consent necessary to support the approval of the lease. He noted that the landowners had stated in their letters that they had not consented to the lease, and he found nothing in the record justifying reliance on the permit consents to sustain approval of the lease. He further pointed out that the lease should have cited 25 C.F.R. § 162.209(b)(1), not 25 C.F.R. § 162.211 — which addresses rental determinations — as the authority pursuant to which the lease was granted. Since section 162.209(b)(1) allows BIA to issue leases on behalf of all the individual Indian landowners only when BIA has given the landowners written notice of its intent to grant the lease and the landowners are unable to agree to a lease during a 3-month negotiation period, and there was no indication in this case that the landowners were provided with the requisite written notice, the Regional Director concluded that section 162.209(b)(1) could not be used to support the approval of the lease. The Regional Director added that no other authority existed pursuant to which a lease could be issued without some level of owner consent, consent which was not present here.¹² Accordingly, the Regional Director determined “the lease to be invalid due to lack of owner consent or specific written notice that would have allowed the Agency to grant the lease without owner consent.” Decision at 2. He therefore reversed the Acting Superintendent’s decision to approve the lease and advised Appellant that Appellant would be refunded \$1,200 for the 2007 rental payment by funds deducted from the Walker River Fallowing Program water payment, which are being held in a special deposit account by BIA pending the outcome of any appeals.

¹⁰ Appellant was identified as a recipient of a copy of this letter.

¹¹ These two tracts were included in the lease description.

¹² Given these findings, the Regional Director saw no need to consider what effect, if any, the failure to obtain an appraisal had on the validity of the lease.

This appeal followed.¹³

Discussion

Standard of Proof

The Board exercises de novo review over questions of law. *Smartlowit*, 50 IBIA at 104; *State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director*, 49 IBIA 129, 141 (2009). In addition, we review de novo the sufficiency of evidence to support a BIA decision. *Smartlowit*, 50 IBIA at 104. An appellant bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Id.*; *State of South Dakota and County of Charles Mix*, 49 IBIA at 141.

Analysis

Appellant has not challenged the Regional Director's core finding that the landowners did not consent to the issuance of the lease. Thus he has not shown error in that factual determination, a determination which we find to be amply supported by the record.¹⁴

The landowners undeniably did not sign the lease; instead, the lease notes that the landowners consented to a permit for the tracts with the expectation that the tracts would subsequently be leased, in an apparent attempt to bootstrap lease consent onto permit consent. That permit consent, however, does not translate into an automatic consent to whatever lease might be developed for the tracts, especially since the land description, the

¹³ Although the parties attempted to settle this dispute, those negotiations proved unsuccessful, and the appeal is now ripe for review.

¹⁴ Appellant also has not challenged the Regional Director's determination that the landowners were not properly notified of WNA's intention to grant the lease if they were unable to agree to such a lease during a 3-month negotiation period. The regulation requiring that notice, 25 C.F.R. § 162.209(b), however, applies only to leases involving Indian landowners of a fractionated tract. By contrast, the lease at issue does not involve a single tract with fractionated ownership. Rather, the lease encompasses several individually-owned tracts, the interest in each of which was held either by a single landowner or the estate of a deceased landowner at the time of lease approval. We therefore modify the Regional Director's decision to eliminate its reliance on the lack of notice as a ground for reversing the Superintendent's decision to approve the lease.

specific terms, and the rental rate set out in the lease differ from those found in the permit. *Cf. Rathkamp v. Billings Area Director*, 21 IBIA 144, 149 (1992) (an Indian landowner can withdraw consent to a lease until the lease is actually approved by BIA). Absent landowner consent, BIA has no basis on which to approve a lease of individually-owned tracts. *See* 25 C.F.R. § 162.207(b).¹⁵ Since BIA has no authority to approve the lease, the Regional Director determined that the lease was invalid. *See Scott v. Acting Albuquerque Area Director*, 29 IBIA 61, 69, 70 (1996) (lease invalid when Superintendent acted outside the scope of his authority).¹⁶

Rather than challenging the Regional Director's conclusion that the landowners had not consented to the lease, Appellant argues instead that the Regional Director improperly voided the lease because (1) the landowners did not appeal the lease issuance within 30 days of the Superintendent's approval of the lease as required by 25 C.F.R. § 2.9(a); (2) Appellant relied on the lease and its predecessor permit to expend time, labor, and money to perform his contractual obligations; (3) the landowners would be unjustly enriched if the lease is voided; and (4) the Director is bound by WNA's approval and cannot arbitrarily cancel the lease without the consent of all parties. We find none of these arguments to be persuasive.

The critical flaw with Appellant's contention that the landowners did not appeal the lease within 30 days of the Superintendent's grant of the lease stems from the fact that the record contains no evidence of when, or even if, the four living landowners were notified that the Superintendent had approved the lease and advised of their right to appeal the decision. *See* 25 C.F.R. § 2.7(a), (c). Since, in accordance with 25 C.F.R. § 2.7(b), the time for filing an appeal does not begin to run until a party receives the requisite notice,

¹⁵ We note that at the time of lease approval, two of the original land owners, Reginald W. Reymus and Vera J. Kochamp, had died and their estates had not yet been probated. BIA therefore had the authority to grant the lease on their behalf. 25 C.F.R. § 162.209(a); *Gooday v. Southern Plains Regional Director*, 38 IBIA 166, 170 (2002). That authority, however, only affected two of the six tracts, neither of which is included in the land description recited in the lease. As to the three tracts encompassed within the land description, BIA had no authority to approve the lease.

¹⁶ Appellant has not argued that the lease is severable, with each tract treated as a separate lease, which arguably might validate leases issued for the two tracts originally owned by the deceased landowners. *See* n.15, *supra*. And it is clear from the arguments he does raise that he considers each tract to be an integral part of the lease as a whole.

Appellant has not shown that the landowners' appeals to the Regional Director were untimely.

Appellant's assertion that he relied on the lease and its predecessor permit to expend time, labor, and money to perform his contractual obligations raises the question of whether the Regional Director should be estopped from invalidating the lease. Estoppel is extremely difficult to establish against the Government, especially when the Government is acting as trustee for Indians, as it does when it takes action on leases of Indian trust lands. *Yakima Ridgerunners, Inc. v. Acting Northwest Regional Director*, 44 IBIA 72, 78 (2007), distinguished and clarified on other grounds in *Mize v. Northwest Regional Director*, 50 IBIA 61 (2009). Assuming that estoppel would lie against the Government when it acts as trustee for Indians, the party asserting the estoppel bears a heavy burden of demonstrating the presence of the traditional elements of estoppel: (1) whether BIA knew the true facts; (2) whether BIA either intended that its conduct be acted upon or acted in such a way that Appellant had a right to believe it was so intended; (3) whether Appellant was ignorant of the true facts; and (4) whether Appellant reasonably relied on BIA's conduct to his detriment. *Yakima Ridgerunners, Inc.*, 44 IBIA at 78-79; see *Quinault Indian Nation v. Northwest Regional Director*, 48 IBIA 186, 198 (2008), *aff'd sub nom. Anderson & Middleton Co. v. Salazar*, No. 09-CV-05033 RBL (W.D. Wash. Aug. 4, 2009). Additionally, not only must Appellant show affirmative misconduct by the Government, but the alleged estopping statement must be in writing and made by officials at a policy-making level. *Falcon Lake Properties v. Assistant Secretary - Indian Affairs*, 15 IBIA 286, 299 (1987). Furthermore, the Government is not bound by the unauthorized acts of its employees, nor can unauthorized acts by BIA employees or erroneous information furnished by them serve as the basis for conferring rights not authorized by law or for excusing the nonperformance of actions required by law to be performed. *Scott*, 29 IBIA at 69; *Falcon Lake Properties*, 15 IBIA at 299 n.14; see *Estate of Emory Dennis Juneau*, 7 IBIA 164, 168 (1979).

Appellant's estoppel argument fails. The Superintendent had no authority to grant the lease on behalf of the living original landowners, and the Regional Director therefore cannot be estopped by the Superintendent's unauthorized action. See *Thompson v. Acting Northwest Regional Director*, 40 IBIA 216, 228 (2005), *aff'd in part and rev'd in part*, *Thompson v. U.S. Dep't of the Interior*, No. CV 05-044-E-BLW (D. Idaho Sept. 27, 2005).

Appellant's claim that the Indian landowners would be unjustly enriched if the lease is voided also fails. He bases this claim on the alleged costs for various activities he undertook to improve the allotment preparatory to re-establishing an alfalfa crop on the land (\$8,670.36), as well as on the 2007 rent and O&M charges he paid for the lease

(\$1,348). He also notes that the tracts are participating in the Walker River Paiute Indian Tribe's (Tribe) fallowing program, pursuant to which the Tribe leases irrigated parcels from willing participants on a yearly basis for \$900/acre and sends the water that would have been used for irrigation to Walker Lake. He asserts that farming or use of the surface water in previous years is a prerequisite for participating in the program, and that none of the landowners would be eligible for the program were it not for his activities on the land in both 2006 and 2007. He therefore maintains that the lease must not be voided because to do so would unjustly enrich the landowners at his expense by denying him the ability to recoup his investment and enjoy the benefits of his labor.¹⁷

Appellant has not offered any support for his assertion that his activities were the catalyst for the tracts' inclusion in the Tribe's fallowing program. Nor has he disputed the Regional Director's contention on appeal that the activities Appellant claims were crucial to the lease's participation in the fallowing program took place under the permit, not the lease. *See* Regional Director Memorandum, July 25, 2008, at 2. Appellant thus has not met his burden of proof as to this allegation. In any event, even if the owners would be unjustly enriched, that unjust enrichment would not override BIA's failure to properly approve the lease or make that lease valid.

Appellant also avers that the Regional Director is bound by the Superintendent's approval decision. Appellant cites no authority for this averment, and none exists.¹⁸ The regulatory procedures governing appeals to the Regional Director from decisions of BIA agency officials clearly belie the claim that agency decisions are binding on the Regional Director. *See* 25 C.F.R. Part 2 and § 162.214(b). We therefore find no merit in any of

¹⁷ Although Appellant contends that the landowners breached the lease, he has not stated what actions of the owners constituted such a breach nor presented any evidence of a breach. In any event, since the lease was not properly granted in the first instance, it was void *ab initio* and therefore there was no valid lease for the landowners to breach. Accordingly, we reject his contention that such a breach occurred.

¹⁸ To the extent Appellant may be arguing that the lease is valid because 25 C.F.R. § 162.215 provides that a lease is effective on either the date of BIA approval or the date set out in the approved lease, he misunderstands the import of that regulation. There is a distinction between the effective date of the lease and the finality of the approval decision. Although BIA purported to approve the lease, effective January 1, 2007, that approval was not yet final because it was still subject to administrative review under 25 C.F.R. § 162.214(b), and possible reversal.

Appellant's challenges to the Regional Director's determination that the lease is void and affirm that determination.

Additionally, we note that lease, on its face, contains a serious inconsistency: Although the lease states that it contains 20 acres, the description of the leased premises, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 22., encompasses only 10 acres. *See Estate of Joseph Baumann*, 43 IBIA 127, 140 (2006) (specific description controls over estimated acreage). This defect alone would support the Regional Director's decision to set aside the Superintendent's approval of the lease and would, at a minimum, require additional consideration by the Superintendent, even if all the owners had given their consent.

Appellant's final argument focuses on the amount of compensation he is entitled to as a result of the voiding of the lease. The Regional Director awarded him \$1,200, the rental he had paid for 2007; he claims entitlement to a total of \$72,202.86 (\$7,890.36 for his initial investment costs plus \$12,862.50 for lost income for 2007 plus \$51,450.00 for lost income for the years 2008-2011, the remainder of the 5-year lease term). Setting aside the question of whether BIA or this Board has the authority to award compensation for the items identified by Appellant,¹⁹ we find that, except for the \$1200 lease rental payment and the \$148 O&M charges assessed for 2007, which the Regional Director acknowledges should be refunded, *see* Memorandum from Regional Director to the Board, July 25, 2008, at 1, Appellant has proffered no documentation supporting his claimed expenses. Nor has he shown that his purported lost income is anything more than speculative, especially given the tracts' participation in the fallowing program, which precludes him from cultivating some or all of the land and harvesting any crops that could produce income. And, as noted above, the claimed costs were incurred under the expired permit which adjusted the rental due in recognition of those expenses, not under the lease. Appellant therefore has not established that he is entitled to compensation for his initial investment costs or for lost income. Accordingly, we affirm the Regional Director's determination that Appellant is entitled to the return of the rental he paid for 2007; however, we modify the Regional Director's decision to clarify that Appellant is also entitled to compensation for the O&M fees he paid for 2007.

¹⁹ It is well established that the Board lacks the authority to award damages. *High Sierra Fellowship v. Western Regional Director*, 45 IBIA 197, 199 n.4 (2007).

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 Board affirms the Regional Director's decision, as modified herein.²⁰

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.

²⁰ In response to Appellant's appeal, Eric contends that Rule 60 of the Federal Rules of Civil Procedure mandates dismissal of the appeal because Appellant committed fraud. Because we have decided the merits of the appeal in the landowners' favor, the motion to dismiss is moot. In any event, the Federal Rules of Civil Procedure do not apply to Board proceedings. *Estate of Milward Wallace Ward*, 46 IBIA 5, 8 n.8 (2007).