



INTERIOR BOARD OF INDIAN APPEALS

Dean W. Black Weasel v. Rocky Mountain Regional Director, Bureau of Indian Affairs

59 IBIA 258 (11/20/2014)



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

DEAN W. BLACK WEASEL,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-063
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	November 20, 2014

Dean W. Black Weasel (Appellant) appealed to the Board of Indian Appeals (Board), from a December 12, 2011, decision (Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed the September 15, 2011, decision by BIA’s Blackfeet Agency Superintendent (Superintendent) denying Appellant’s request for BIA to recognize an assignment of Lease No. 201-80250 (Lease) to him from the Blackfeet Indian Housing Authority (Housing Authority). The Superintendent denied the request on the ground that Appellant was required, but failed, to obtain consent from the individual Indian landowners of Blackfeet Allotment No. 985 Sparks Blackweasel (Allotment 985), to the assignment. The Regional Director upheld the Superintendent’s decision, finding that Appellant was required, under 25 U.S.C. § 2218(b)(1), to obtain the consent of landowners holding a majority of the undivided interests in Allotment 985.

Appellant argues that BIA must recognize the assignment because the Lease expressly authorizes the Housing Authority to make assignments of its leasehold interests without further approval by BIA or further consent by the landowners. But assuming that Appellant’s interpretation of the Lease is correct, the Lease conflicts with the regulations governing the Housing Authority’s assignment, as submitted by Appellant to BIA. The regulations allowed leases to contain terms authorizing certain assignments of *tribal* land without further approval or consent, but expressly required Secretarial approval and landowner consent for assignments of individually owned land such as Allotment 985. *See* 25 C.F.R. § 162.610(a) & (d) (2011). Although leases of trust land are contracts that may be tailored to the desires of the parties, and BIA is ordinarily bound by the terms of a lease it has approved, BIA is not bound by lease terms that conflict with its governing lease regulations. We therefore affirm the Decision not to approve the assignment under the

regulations applicable to Appellant's submission to BIA of the Housing Authority's assignment.

Background

On June 21, 1973, nine heirs of Sparks Blackweasel, as owners/lessors, and the Housing Authority, as lessee, entered into the Lease for an approximately .918-acre parcel of land on Allotment 985.¹ Lease, June 21, 1973 (AAR Tab 8).² The lease term is 25 years with an automatic renewal for another 25 years. *Id.* ¶ 3. The parties entered into the Lease to provide participants in the "Mutual Help Housing Project" with sites for housing financed by the U.S. Department of Housing and Urban Development.³ *Id.* ¶¶ 2, 5. As relevant to Appellant's contention that the Lease authorized the Housing Authority to assign the Lease to him without the further approval of BIA or the further consent of the landowners, paragraph 5 of the Lease provides that the Housing Authority is "hereby authorized to make subleases and assignments of its leasehold interests in connection with its development and operation of the Mutual-Help Housing Project." *Id.* ¶ 5. On July 31, 1974, the Superintendent approved the Lease. *Id.* at 3 (unnumbered).

The Housing Authority constructed a house on the leased property, and on March 20, 1986, the Housing Authority entered into a Mutual Help Occupancy Agreement (MHOA) with Appellant, allowing him to occupy the house. *See* Resolution 18-96, Jan. 22, 1996 (Resolution) (AAR Tab 17); Appellant's Brief in Support of Appeal (Br.) at 2. Following Appellant's satisfaction of his obligations under the MHOA, on May 1, 1996, the Housing Authority assigned to Appellant "all of its right, title, and interest" in the

¹ The leased property is located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 32 North, Range 12 West, Principal Meridian, Glacier County, Montana. Regional Director's Decision, Dec. 12, 2011 (Decision), at 1 (Amended Administrative Record (AAR) Tab 3). Appellant owns an undivided 65/1296 share (5%) of Allotment 985. *Id.* In a separate proceeding, the Board considered Appellant's appeal from BIA's denial of an application Appellant made to partition Allotment 985, which contains approximately 400 acres, so that Appellant would obtain sole ownership of the .918-acre parcel. *Black Weasel v. Acting Rocky Mountain Regional Director*, 51 IBIA 189 (2010) (remanding the partition application to the Regional Director for further review).

² While an incomplete copy of the Lease is located at AAR Tab 21, a complete copy of the Lease appears to be attached to Appellant's notice of appeal to the Regional Director at AAR Tab 8.

³ The Lease does not identify how many dwelling sites were anticipated. *See* Lease at 1 (unnumbered).

leasehold and the improvements on the leased property. Assignment, Release and Conveyance Agreement, May 1, 1996 (AAR Tab 14); Resolution at 1 (unnumbered).⁴

Several years later, in July 2011, Appellant requested that BIA recognize the Housing Authority's assignment of its leasehold interests to Appellant. Letter from Appellant to Superintendent, July 13, 2011, at 1-2 (unnumbered) (AAR Tab 10). The Superintendent declined to recognize the assignment. Superintendent's Decision, Sept. 15, 2011, at 1 (AAR Tab 9). Citing 25 C.F.R. § 162.610, the Superintendent concluded that in order for the assignment of the leasehold interests to be approved and the leasehold recorded in Appellant's name, the specific consent of all parties to the Lease, including the owners of Allotment 985, was required. *Id.*

When the Lease was approved, BIA's regulations governing leasing of Indian lands stated that "[e]xcept as [otherwise] provided . . . a sublease, *assignment*, amendment or encumbrance of any lease or permit issued under this part *may be made only with the approval of the Secretary and the written consent of all parties to such lease . . .*" 25 C.F.R. § 131.12(a) (1973) (emphases added). With respect to assignments of leases of tribal land, the regulations otherwise provided that "[w]ith the consent of the Secretary," certain leases of tribal land "may contain provisions . . . permitting the lessee to assign the lease without further consent or approval." *Id.* § 131.12(d). No similar exception is included for assignments of leases of individually owned land. Part 131 of 25 C.F.R. was subsequently redesignated, without substantive change, at 25 C.F.R. Part 162. *See* 47 Fed. Reg. 13326, 13327 (Mar. 30, 1982). And until new residential leasing regulations became effective on January 4, 2013, *see* 77 Fed. Reg. 72440 (Dec. 5, 2012), the language quoted above was not altered.⁵

Appellant appealed the Superintendent's decision to the Regional Director. The Regional Director affirmed the Superintendent's decision that the assignment could not be approved due to insufficient landowner consent. Decision at 2. Citing 25 U.S.C. § 2218(b)(1), the Regional Director suggested that BIA could not approve the assignment until Appellant obtained the consent of landowners holding a majority of the undivided

⁴ Neither Appellant nor BIA appear to take the position that the Housing Authority's assignment of the improvements (i.e., the house) to Appellant is subject to the approval of BIA or the consent of the landowners of Allotment 985. Therefore, our decision concerns only the assignment of the Housing Authority's leasehold interests to Appellant.

⁵ The new regulations governing assignments are codified at 25 C.F.R. §§ 162.349-.352. Under the new regulations, a lease document that was submitted but not approved before January 3, 2013 (the effective date of the regulations), is reviewed under the regulations in effect at the time of submission. 25 C.F.R. § 162.008(b)(1).

interests in Allotment 985. *Id.*; *see also* 25 U.S.C. § 2218(b) (providing applicable percentages for approval of leases or agreements).⁶

Appellant appealed the Decision to the Board. Appellant filed a brief in support of his appeal. The Regional Director did not submit a brief in this matter.

Discussion

I. Standard of Review

The Board reviews *de novo* questions of law, which include the interpretation of statutes and regulations as well as Indian lease terms. *Ewiiapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director*, 56 IBIA 163, 167 (2013). In construing lease terms, the Board considers whether the language used by the parties is clear, complete, and unambiguous, and if so, the Board gives effect to the expressed intent of that language, without considering extrinsic evidence of the parties' intent. *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 39 (2013). "At all times, the burden remains with [the appellant] to show error in BIA's decision." *Ewiiapaayp Band of Kumeyaay Indians*, 56 IBIA at 167.

II. Merits

Appellant argues that paragraph 5 of the Lease expressly allows the Housing Authority to assign the Lease to him without further approval or consent. Br. at 3-4; *see also* Notice of Appeal to Regional Director, Oct. 6, 2011, at 1-2 (AAR Tab 8). Appellant also argues that the Lease is a contract, was approved by BIA, and is binding on the parties and BIA. Br. at 5. According to Appellant, the Regional Director and the Superintendent each misapplied the law because there is "[n]o Federal regulatory provision . . . prohibiting the 'advance approval' of the assignment of home site leases to mutual help home owners who are also part owners of the underlying land constituting the home site lease." *Id.* We consider Appellant's arguments in turn and conclude that, dispositive for the appeal, Appellant errs in arguing that BIA's leasing regulations did not effectively prohibit the assignment without the further approval of BIA and the further consent of the landowners.

⁶ Appellant argues that the decisions of the Superintendent and the Regional Director "are in conflict" as to the degree of landowner consent that is required, Br. at 3, 6, but does not argue that, as between those decisions, the Regional Director's citation to 25 U.S.C. § 2218(b) as supplying the applicable percentage was incorrect. Therefore, and because it is undisputed that Appellant lacks the degree of landowner consent identified in either decision, we do not address Appellant's argument further.

Appellant argues that, in *Comanche Housing Authority v. Anadarko Area Director*, 22 IBIA 271 (1992), the Board construed a sublease and assignment provision identical to paragraph 5 of the Lease as constituting “advance consent of [t]he parties and the advance approval of the BIA.” Br. at 4 (quoting *Comanche Housing Authority*, 22 IBIA at 276).⁷ But even accepting that construction of the lease, *Comanche Housing Authority* is unlike this case in a key respect. There, the Board considered whether a tenant was entitled to be involved in lease cancellation proceedings based on the tenant’s MHOA with the lessee, when the MHOA had not been specifically approved by BIA or consented to by the parties to the lease. 22 IBIA at 275-76. The Board found that, because the MHOA granted to the tenant an interest in the leasehold less than that held by the lessee, the MHOA was a sublease rather than an assignment. *Id.* at 275. And, as a sublease, the MHOA did not require further approval or consent, because 25 C.F.R. § 162.12(b)⁸ provided that “[w]ith the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval.” See *Comanche Housing Authority*, 22 IBIA at 276. The Board concluded that, as a sublessee, the appellant was entitled to be involved in the lease cancellation proceedings. *Id.*

Here, Appellant seeks to have BIA recognize as valid the Housing Authority’s *assignment* in 1996 of its leasehold interests in Allotment 985, without obtaining the approval of BIA or the consents of the landowners of Allotment 985 to the particular assignment. But the applicable BIA regulations state that, *except as otherwise provided* in the rules, an assignment must be approved by BIA and consented to by all parties to the lease. 25 C.F.R. § 162.610(a). That requirement effectively operates as a prohibition against assignments without such consent and approval unless the regulations contain an exception. Section 162.610(d) is such an exception, but provides only that “leases of *tribal* land to individual members of the tribe or to tribal housing authorities may contain . . . provisions permitting the lessee to assign the lease without further consent or approval.” *Id.* § 162.610(d) (emphasis added). The Lease is for a parcel located on Allotment 985, which is individually owned land. The omission of individually owned land from the exception in

⁷ The full text of the sublease and assignment provision in both leases is as follows:

SUBLEASES AND ASSIGNMENTS. The primary purpose of this lease is to provide Participants in the Mutual-Help Housing Project with sites for housing. The Lessee is hereby authorized to make subleases and assignments of its leasehold interests in connection with its development and operation of the Mutual-Help Housing Project. During the term of any sublease, should the participant be or become an owner of the land it is hereby agreed that a merger of interest shall not occur.

Lease ¶ 5; *Comanche Housing Authority*, 22 IBIA at 275.

⁸ Section § 162.12(b) was subsequently redesignated at 25 C.F.R. § 162.610(b).

§ 162.610(d) means that the general requirements of consent and approval apply. *See* 29 Fed. Reg. 2541, 2541-42 (Feb. 18, 1964) (BIA stated in the preamble to the final rule creating the exception in § 162.610(d) that the rule change “deals with leases of *tribal* land for purposes of providing housing for Indians under Federal housing programs.”) (emphasis added). Thus, § 162.610(d) was inapplicable, and Appellant was required to obtain the approval of BIA and the consent of all parties to the Lease, pursuant to § 162.610(a).

Appellant next argues that a lease is a contract and BIA is bound by the terms of a lease that it has approved. Br. at 5. The Board has consistently recognized that parties may tailor a lease to reflect their wishes, BIA is bound by the terms of a lease it has approved, and neither BIA nor the Board may rewrite the provisions of an executed and approved lease, *provided* there is no conflict between the lease and the governing regulations. *See, e.g., Ewiiapaayp Band of Kumeyaay Indians*, 56 IBIA at 167-68; *American Indian Land Development Corp. v. Sacramento Area Director*, 23 IBIA 208, 214 (1993); *Abbott v. Billings Area Director*, 20 IBIA 268, 275 (1991). Where, as here, there is an “essential” or unavoidable conflict between a lease that BIA has approved and its regulations, BIA is not bound by the lease terms and must apply its regulations. *See Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director*, 21 IBIA 45, 48 (1991). Accordingly, the Board finds that Appellant has failed to demonstrate that the Regional Director erred in concluding that BIA could not recognize the Housing Authority’s assignment to Appellant, under the regulations applicable to his submission of the assignment to BIA in 2011.

As noted earlier, during the pendency of this appeal BIA revised its leasing regulations and included new provisions applicable to residential leases. The new regulations do not change the outcome of this appeal from the Decision. *See* 25 C.F.R. § 162.008(b)(1) (lease documents submitted and not approved before January 4, 2013, are reviewed under the regulations in effect at the time of submission). But we express no view on whether the Housing Authority’s assignment, if resubmitted, or a new assignment, would require BIA approval or landowner consent under the new regulations.

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 December 12, 2011, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge