INTERIOR BOARD OF INDIAN APPEALS

Faith O'Connor v. Rocky Mountain Regional Director, Bureau of Indian Affairs

60 IBIA 73 (03/03/2015)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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FAITH O'CONNOR,	)	Order Reversing Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-135
ROCKY MOUNTAIN REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS	)	
Appellee.	)	March 3, 2015

Faith O'Connor (Appellant) appealed to the Board of Indian Appeals (Board) from a June 5, 2012, decision (Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the decision of BIA's Fort Peck Agency Superintendent (Superintendent) to collect $7,700 from Appellant's lease bond, for the cost of fence replacement, in connection with several farm pasture leases held by Appellant on the Fort Peck Indian Reservation, Lease Nos. 4490-2003 (Allotment No. 1777), 4491-2003 (Allotment No. 722), and 4492-2003 (Allotment No. 2260).[1]

We reject BIA's interpretation of the Lease as prohibiting Appellant from removing, prior to the expiration of the Lease, fencing that Appellant had installed on the Property. The Lease clearly provides that the fencing would "become" the property of the lessor, if such improvements were left on the Property, "upon" termination or expiration of the Lease, and thus Appellant was entitled to remove the fencing before the Lease's expiration. The Board therefore reverses the Regional Director's decision and orders BIA to return in full the money that it collected from Appellant's bond without any authority, without allowing Appellant to exhaust administrative remedies, and before the issuance of a final Departmental decision.

[1] As relevant to this appeal, each lease contains identical provisions, and for simplicity we refer to them collectively as the "Lease." We refer to the leased allotments collectively as the "Property."

Background

Appellant entered into each of the subject leases on September 24, 1998. *See* Leases (enclosed within Administrative Record (AR) Tab 22). Each lease was for 40 acres of pastureland for a term of 5 years, from January 1, 1999, to December 31, 2003. *Id.* at 1 (unnumbered). BIA approved the leases on February 5, 1999. *Id.* at 3 (unnumbered).

There was no fencing on the Property at the commencement of the Lease, and the installation of fencing by Appellant was neither a requirement of, nor part of the consideration for, the Lease. At some time during the Lease term Appellant constructed fencing, apparently for purposes of preventing her cattle from damaging crops on neighboring farm lands. Letter from Appellant to Regional Director, May 21, 2012, at 1 (AR Tab 5). Each lease contains an identical ¶ 10 governing improvements made to the leased premises during the course of the lease. Lease at 2 (unnumbered). Paragraph 10 states in full that "[u]nless otherwise provided herein it is understood and agreed that any buildings or other improvements placed upon the said land by the lessee *become the property of the lessor upon* termination or expiration of this lease." *Id.* (emphasis added).

Several months prior to the expiration of the Lease, in August 2003, BIA advertised the Property for rent on behalf of the landowners and solicited bids, and Appellant was outbid. Memorandum from Realty Specialist to Superintendent, July 22, 2004, at 1 (unnumbered) (BIA Timeline of Events) (AR Tab 20). On September 11, 2003, Appellant's husband telephoned BIA to inquire about removing the fencing, and BIA advised, citing 25 C.F.R. § 162.233, that Appellant would need to have the Lease modified to include "the 'fencing clause'" that provides "any fences placed on the premises by the lessee may[] be removed within 120 days after the expiration date of the lease." *Id.* (emphasis omitted). Instead of seeking the modification, Appellant's husband removed fencing from the Property prior to the expiration of the Lease. *Id.* The prospective lessee reported to BIA that fencing had been removed from the Property, and BIA concluded that the matter would not be actionable until the Lease had expired. *Id.* at 2 (unnumbered).

After the Lease expired, the Superintendent sent Appellant a letter on April 6, 2004, notifying her that she was in violation of Lease ¶ 10, which the Superintendent misquoted as providing that "any . . . improvements placed upon the premises by the lessee *remain with the trust property* upon expiration of this lease." Letter from Superintendent to Appellant (Notice of Violation (NOV)) (AR Tab 23) (emphasis added). The NOV advised Appellant that she would have 20 days to replace the fencing or "pay" $7,700 to BIA for the cost of doing so. *Id.* Appellant responded in writing to the NOV, however, her response was not timely received by the Superintendent. BIA Timeline of Events at 2 (unnumbered); Letter from Appellant, Apr. 19, 2004 (AR Tab 20). Without affording Appellant notice of its intent to do so and an opportunity to appeal, BIA collected money

from Appellant's lease bond, obtaining a check from the bond holder on May 19, 2004, in the amount of $7,700. BIA Timeline of Events at 2 (unnumbered). In the Superintendent's letter to the bond holder demanding payment from the bond, the Superintendent represented that Appellant had violated Lease ¶ 10, which the Superintendent again misquoted, as above. *Id.*, Attach. E (Letter from Superintendent to IDS Life Insurance Co., Apr. 27, 2004) (AR Tab 20).

Once Appellant received notice from the bond holder that BIA had collected payment, Appellant complained to the Regional Director, *inter alia*, that she had responded to the notice of violation, had not received a decision from the Superintendent, and had not been given a letter of intent to collect payment from the bond. *See* Letter from IDS Life Insurance Co. to Appellant, May 17, 2004 (AR Tab 20); Letter from Appellant to Regional Director, June 8, 2004 (AR Tab 21). The Regional Director concluded that Appellant failed to timely respond to the notice of violation but that the Superintendent erred by not providing Appellant notice of the decision to collect payment from the bond and an opportunity to appeal in accordance with 25 C.F.R. Part 2. Letter from Regional Director to Appellant, Sept. 22, 2004, at 2 (unnumbered) (AR Tab 15). The Regional Director remanded the matter to the Superintendent without clear instructions on how to proceed. *See id.*

The Superintendent then issued his decision, formally notifying Appellant that BIA had collected payment from the bond based on the purported violation of Lease ¶ 10—which the Superintendent again misquoted as above—and that, although Appellant had not been given prior notice of BIA's intent to make a claim against the bond and notice of her appeal rights, she could now appeal the decision to the Regional Director. Letter from Superintendent to Appellant, Sept. 28, 2004 (Superintendent's Decision) (AR Tab 14).

Appellant appealed to the Regional Director. Notice of Appeal to Regional Director, Oct. 26, 2004 (AR Tab 8). In her statement of reasons, Appellant contended that Lease ¶ 10 only addressed the ownership of any fencing left on the Property "upon the expiration of the lease," the Lease did not prohibit her from removing fencing during the Lease period, and the proposed Lease modification was unnecessary as it would have simply extended the period during which she could have removed fencing until 120 days after the Lease's expiration date. Statement of Reasons, Nov. 26, 2004 (AR Tab 10). Appellant also objected that the Superintendent collected payment from her bond before she was given an opportunity to appeal the decision. *Id.*

The Superintendent provided the Regional Director with a response to Appellant's statement of reasons and this time accurately quoted Lease ¶ 10. Memorandum from Superintendent to Regional Director, Dec. 9, 2004, at 1 (unnumbered) (AR Tab 11). But according to the Superintendent, ¶ 10 "is meant to convey ownership of any improvement

upon the [lessor] *unless* there is an agreement between the lessee and lessor that allows the lessee to remove the improvement(s) upon termination or expiration of the lease." *Id.* at 2 (unnumbered).

Appellant's appeal to the Regional Director languished, and a number of years later, Appellant appealed to the Board from inaction by the Regional Director. The Board dismissed Appellant's appeal for failure to follow the procedural requirements in 25 C.F.R. § 2.8 for first demanding action or a decision from a BIA official. *O'Connor v. Rocky Mountain Regional Director*, 55 IBIA 96 (2012). Several days prior to the Board's decision, Appellant submitted a § 2.8 demand to the Regional Director. *See* Letter from Appellant to Regional Director, May 21, 2012 (AR Tab 5).

On June 5, 2012, the Regional Director issued the Decision from which Appellant now appeals. Decision (AR Tab 3). Repeating verbatim the Superintendent's interpretation of the Lease, quoted above, the Regional Director concluded that Appellant misinterpreted the Lease and was without justification in removing the fencing. *Id.* at 2 (unnumbered). The Regional Director also suggested that Appellant should have had the Lease modified to incorporate "the fencing clause." *Id.* Although the Regional Director affirmed the Superintendent's decision on the merits, and advised Appellant that she could appeal the Decision to the Board, he also found that Appellant had not certified service of her notice of appeal and statement of reasons on interested parties, and stated that "this decision is final for the Department of the Interior." *Id.* at 3 (unnumbered).

Appellant filed with the Board a notice of appeal and a statement that she intended to rely on the arguments contained in her notice of appeal in lieu of filing an opening brief. The Regional Director filed no briefs in this matter.

Standard of Review

The Board reviews BIA's interpretations of lease provisions *de novo*. *See Dobbins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 87 (2014) (citing *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011)). In construing a lease, the Board considers whether the language is clear, complete, and unambiguous, and if so, the Board gives effect to the expressed intent of the lease. *Black Weasel v. Rocky Mountain Regional Director*, 59 IBIA 258, 261 (2014); *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 39 (2013).

Discussion

We first hold that to the extent the Regional Director apparently concluded that Appellant's appeal was untimely for failure to certify service on interested parties, the

Decision is in error. Service of an appeal on interested parties is not a jurisdictional prerequisite. *See Quaempts v. Acting Northwest Regional Director*, 42 IBIA 272, 281 (2006). Thus, to the extent the Regional Director believed that Appellant's appeal was untimely and that the Superintendent's decision had become final for the Department, he was incorrect.

On the merits, we agree with Appellant that the Lease allowed her to remove fencing from the Property prior to the expiration (or termination) of the Lease. Notice of Appeal, July 3, 2012, at 1-2. Paragraph 10 of the Lease provides that such improvements would "become" the property of the lessor "upon" termination or expiration of the Lease. Lease at 2 (unnumbered); *see also M&M Farms v. Portland Area Director*, 35 IBIA 197, 199, 201 (2000) (interpreting identical lease language, the Portland Area Director (now Pacific Regional Director) held that improvements became the property of the landowners at the expiration of the lease). The plain meaning of this provision is that ownership of improvements left on the land after the conclusion of the Lease would vest in the lessor, but that until the Lease expired (or was terminated), improvements to the land made by Appellant were her property, and could be removed by her.

We have consistently recognized that 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. *Black Weasel*, 59 IBIA at 263 (citing *Ewiiaapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director*, 56 IBIA 163, 167-68 (2013); *American Indian Land Development Corp. v. Sacramento Area Director*, 23 IBIA 208, 214 (1993); *Abbott v. Billings Area Director*, 20 IBIA 268, 275 (1991)). Under BIA's regulations in effect at the time the Lease became effective, "[i]mprovements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted." 25 C.F.R. § 162.9 (1998). We conclude that, consistent with the regulation, Lease ¶ 10 excepts the improvements at issue in this case, and provides that Appellant owned and could remove the fencing until expiration (or termination) of the Lease.

The regulation that BIA cited in its communications with Appellant, 25 C.F.R. § 162.233, became effective on March 23, 2001, after the Lease was approved by BIA. *See* 66 Fed. Reg. 7068, 7118 (Jan. 22, 2001). Section 162.233 provides that a lease "may specify who will own any improvements constructed by the tenant, during the lease term," and that the lease "must indicate" whether any such improvements will remain on the premises upon the expiration or termination of the lease. 25 C.F.R. § 162.233(a). Even if it were applicable to Appellant's Lease, BIA has identified nothing in § 162.233 that conflicts with Appellant's—and our—interpretation of Lease ¶ 10 as providing that Appellant owned the fencing, and was permitted to remove it, until the expiration (or termination) of the Lease. Moreover, the lease amendment that BIA proposed actually

would have granted Appellant 120 *additional* days, beyond the expiration of the Lease, to remove the fencing, and thus was unnecessary for Appellant's purposes.[2] Therefore, we reverse the Regional Director's decision.

Further, without belaboring BIA's procedural errors as it has to a certain degree recognized them, we note that BIA had no authority to collect payment from the bond. The Superintendent's decision never became effective because Appellant appealed to the Regional Director, and the Regional Director's decision similarly never became effective because Appellant appealed to the Board. *See* 25 C.F.R. § 2.6; 43 C.F.R. § 4.314. Thus, even apart from being mistaken on the merits, BIA had no basis or authority to collect on the bond. In light of our decision, BIA must now return the bond to Appellant in full.

Conclusion

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 reverses the Regional Director's June 5, 2012, decision, and orders that BIA return Appellant's $7,700 bond.

I concur:

// original signed	//original signed
Thomas A. Blaser	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge

[2] We note that, in addition to challenging the Decision, Appellant also raises questions concerning the interpretation of subsequent leases she entered into. Notice of Appeal at 1-2. The Board does not issue advisory opinions. *Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009), and cases cited therein. Appellant may wish to confer with BIA, the landowner(s), and independent legal counsel regarding the requirements of such other leases.